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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1946

FROM OCTOBER 7, 1946 THROUGH FEBRUARY 3, 1947

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JUSTICES
OF THE
SUPREME COURT
DURING THE TIME OF THESE REPORTS.

FRED M. VINSON, CHIEF JUSTICE.[1]
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.
HAROLD H. BURTON, ASSOCIATE JUSTICE.

RETIRED [2]

CHARLES EVANS HUGHES, CHIEF JUSTICE.

TOM C. CLARK, ATTORNEY GENERAL.
J. HOWARD McGRATH, SOLICITOR GENERAL.[3]
CHARLES ELMORE CROPLEY, CLERK.
THOMAS ENNALLS WAGGAMAN, MARSHAL.

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[1] The Honorable Fred M. Vinson of Kentucky, Secretary of the Treasury, was nominated by President Truman on June 6, 1946, to be Chief Justice of the United States; the nomination was confirmed by the Senate on June 20, 1946; he was commissioned on June 21, 1946, took the oaths of office at the White House on June 24, 1946, and entered immediately upon the performance of the duties of the office. See *post*, p. v.

[2] Associate Justice James Clark McReynolds, retired, died on August 24, 1946. See *post*, p. VII.

[3] The Honorable J. Howard McGrath, Solicitor General, resigned effective at the close of business on October 7, 1946. During the vacancy in the office, the duties of the Solicitor General were performed, at the direction of the Attorney General, by the Honorable George T. Washington, Assistant Solicitor General, who signed government briefs and appeared as "Acting Solicitor General."

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, Harold H. Burton, Associate Justice.

For the Fourth Circuit, Fred M. Vinson, 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, Fred M. Vinson, Chief Justice.

October 14, 1946.

(For next previous allotment, see 328 U. S. p. iv.)

APPOINTMENT OF MR. CHIEF JUSTICE VINSON.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 7, 1946.

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, MR. JUSTICE JACKSON, MR. JUSTICE RUTLEDGE, and MR. JUSTICE BURTON.

MR. JUSTICE BLACK said:

The President, with the advice and consent of the Senate, has appointed Fred M. Vinson, of Kentucky, to be Chief Justice of the United States. He has presented his commission which will be filed, together with his oaths which he has previously taken in the forms prescribed by law.

The commission of MR. CHIEF JUSTICE VINSON is in the words and figures following, viz:

HARRY S. TRUMAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Fred M. Vinson, of Kentucky I have nominated, and, by and with the advice and consent of the Senate, do appoint him Chief

Justice of the United States and do authorize and empower him to execute and fulfil the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Fred M. Vinson, during his good behavior.

IN TESTIMONY WHEREOF, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington this twenty-first day of June, in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the United States of America the one hundred and seventieth.

HARRY S. TRUMAN

By the President:

TOM C. CLARK

Attorney General.

DEATH OF MR. JUSTICE McREYNOLDS.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 7, 1946.

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, MR. JUSTICE JACKSON, MR. JUSTICE RUTLEDGE, and MR. JUSTICE BURTON.

The CHIEF JUSTICE said:

I announce with profound regret the death on August 24, 1946, of James Clark McReynolds, a retired Associate Justice of this Court.

Justice McReynolds was an Assistant Attorney General of the United States from 1903 to 1907 under appointment of President Theodore Roosevelt. He served as Attorney General of the United States from March 1913 to August 1914 under appointment of President Woodrow Wilson. Then he was appointed an Associate Justice of the Supreme Court by President Woodrow Wilson, serving until his retirement, February 1, 1941.

He was an active member of this Court for twenty-seven years. He was a vigorous, capable, determined, and forthright member. His death brought to a close a distinguished career and a life of devotion to duty. At an appropriate time, the Court will receive the resolutions of the Bar in tribute to his memory.

RETIREMENT OF PRINTER.

SUPREME COURT OF THE UNITED STATES.

MONDAY, DECEMBER 23, 1946.

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, MR. JUSTICE JACKSON, MR. JUSTICE RUTLEDGE, AND MR. JUSTICE BURTON.

The CHIEF JUSTICE said:

For seventy-five years the opinions of this Court have been printed by Pearson's Printing Office. Mr. Clarence E. Bright entered that establishment in his youth nearly fifty-six years ago. Later he acquired ownership of the business which he continuously has managed for over forty years in a manner of helpfulness far beyond contractual obligation.

For more than a half-century Mr. Bright has served the Court with complete fidelity, bringing to his important and confidential work the advantages of unique skill and ability. At times the demands, both in volume of the work and for speed in dispatching it, exceeded what might be expected or required of a much larger establishment. But under the greatest pressures his resources invariably were equal to what was asked. He met these pressures not only with extraordinary efficiency but always with patience and courtesy. What is equally remarkable, not once in his long service was there suggestion that by carelessness or otherwise the large confidence imposed in him had not been strictly observed. His name belongs in the roll of those who have given themselves through long

years to the service of the Court with absolute devotion to its interests.

The Court desires to record its appreciation of Mr. Bright's efficiency and loyalty and to acknowledge the effective contribution of his aid in its work. We trust that in his retirement from active service he will find renewed vigor of health and the abiding satisfaction which comes from the consciousness of arduous duties performed to the complete satisfaction of those he served so well.

The Clerk is directed to record these remarks and to transmit a copy thereof to Mr. Bright.

TABLE OF CASES REPORTED

727731 O—47——2

727731 O—47—3

727731 O—47——4

TABLE OF CASES
Cited in Opinions

TABLE OF STATUTES

Cited in Opinions

(A) STATUTES OF THE UNITED STATES.

(B) STATUTES OF THE STATES AND TERRITORIES.

(C) TREATIES.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1946.

HALLIBURTON OIL WELL CEMENTING CO. *v.* WALKER ET AL., DOING BUSINESS AS DEPTHOGRAPH CO.

ON REHEARING.

No. 24. Reargued October 23, 24, 1946.—Decided November 18, 1946.

1. Walker Patent No. 2,156,519 for an improvement over a past patent designed to measure the distance from the top of an oil well to the fluid surface of the oil, *held* invalid for failure of the claims to make the "full, clear, concise, and exact" description of the alleged invention required by R. S. § 4888, 35 U. S. C. § 33. Pp. 11–14.
2. A claim which describes the most crucial element in a "new" combination in terms of what it will do rather than in terms of its own physical characteristics or its arrangement in the new combination is invalid as a violation of R. S. § 4888. *Holland Furniture Co.* v. *Perkins Glue Co.*, 277 U. S. 245; *General Electric Co.* v. *Wabash Appliance Corp.*, 304 U. S. 364. Pp. 8, 9.
3. As used in R. S. § 4888, the word "machine" includes a combination of old elements. P. 9.
4. The requirement of R. S. § 4888 for a "full, clear, concise, and exact" description in claims applies to a combination of old devices. Pp. 9–11.
5. Under R. S. § 4888, a patentee cannot obtain greater coverage by failing accurately to describe his invention than by describing it as the statute commands. P. 13.

146 F. 2d 817, reversed.

Respondent sued petitioner for infringement of Walker Patent No. 2,156,519. The District Court held the claims in issue valid and infringed by petitioner. The Circuit Court of Appeals for the Ninth Circuit affirmed, 146 F. 2d 817, and denied a petition for rehearing. 149 F. 2d 896. This Court granted certiorari. 326 U. S. 705. The case was affirmed by an evenly divided Court. 326 U. S. 696. A petition for rehearing was granted and the case was restored to the docket for reargument before a full bench. 327 U. S. 812. *Reversed,* p. 14.

Earl Babcock reargued the cause and filed a brief for petitioner. With him on the brief was *Harry C. Robb.*

Harold W. Mattingly reargued the cause and filed a brief for respondents.

Mr. Justice Black delivered the opinion of the Court.

Cranford P. Walker, owner of Patent No. 2,156,519, and the other respondents, licensees under the patent, brought this suit in a Federal District Court alleging that petitioner, Halliburton Oil Well Cementing Company, had infringed certain of the claims of the Walker patent. The District Court held the claims in issue valid and infringed by Halliburton. The Circuit Court of Appeals affirmed, 146 F. 2d 817, and denied Halliburton's petition for rehearing. 149 F. 2d 896. Petitioner's application to this Court for certiorari urged, among other grounds, that the claims held valid failed to make the "full, clear, concise, and exact" description of the alleged invention required by Rev. Stat. 4888, 35 U. S. C. § 33,[1] as that statute was

[1] "33. Application for Patent; Description; Specification and Claim.—Before any inventor or discoverer shall receive a patent for his invention or discovery he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the

interpreted by us in *General Electric Co.* v. *Wabash Appliance Corp.*, 304 U. S. 364.[2] This statutory requirement of distinctness and certainty in claims is important in patent law. We granted certiorari to consider whether it was correctly applied in this case. 326 U. S. 705.[3]

The patent in suit was sustained as embodying an improvement over a past patent of Lehr and Wyatt (No. 2,047,974) upon an apparatus designed to facilitate the pumping of oil out of wells which do not have sufficient natural pressures to force the oil to gush. An outline of the background and setting of these patents is helpful to an understanding of the problem presented.

In order to operate a pump in an oil well most efficiently, cheaply, and with the least waste, the pump must be placed in an appropriate relationship to the fluid surface of the oil. Properly to place the pump in this relationship requires knowledge of the distance from the well top to the fluid surface. At least by the latter 1920's problems

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Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. . . ."

[2] Other alleged errors were urged in the application for certiorari and have been argued here, but since we find the question of definiteness of the claim decisive of the controversy, we shall not further advert to the other contentions.

[3] This case was previously affirmed by a divided court, 326 U. S. 696, and upon petition for rehearing was restored to the docket for reargument. 327 U. S. 812.

of waste and expense in connection with non-gusher oil wells pressed upon the industry. See *Railroad Comm'n of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; *Burford* v. *Sun Oil Co.*, 319 U. S. 315. It became apparent that inefficient pumping, one cause of waste, was in some measure attributable to lack of accurate knowledge of distance from well top to fluid surface. Ability to measure this distance in each separate non-gusher oil well became an obvious next step in the solution of this minor aspect of the problem of waste.

The surface and internal machinery and the corkscrew conformation of some oil wells make it impractical to measure depth by the familiar method of lowering a rope or cable. In casting about for an alternative method it was quite natural to hit upon the possibility of utilizing a sound-echo-time method. Unknown distances had frequently been ascertained by this method. Given the time elapsing between the injection of a sound into an oil well and the return of its echo from the fluid surface, and assuming the velocity of the sound to be about 1100 feet per second, as it is in the open air, it would be easy to find the distance. Not only had this sound-echo-time method been long known and generally used to find unknown distances, but in 1898 Batcheller, in Patent No. 602,422, had described an apparatus to find a distance in a tubular space. Obviously an oil well is such a space. He described a device whereby the noise from a gun might be injected into a tube; the returning echoes from obstructions agitated a diaphragm, which in turn moved a stylus. The stylus recorded on a piece of paper a graph or diagram showing the variant movements of the diaphragm caused by its response to all the different echo waves.

In the late 1920's the oil industry began to experiment in the use of this same sound-echo-time method for measur-

ing the distance to the fluid surface in deep oil wells. A product of this experimentation was the Lehr and Wyatt patent, upon which the present patent claims to be an improvement. It proposed to measure the distance by measuring the time of travel of the echo of an "impulse wave" generated by a "sudden change in pressure." The apparatus described included a gas cylinder with a quick operating valve by means of which a short blast of gas could be injected into a well. It was stated in the patent that the time elapsing between the release of the gas and the return of the echo of the waves produced by it could be observed in any desired manner. But the patentee's application and drawings noted that the wave impulses could be recorded by use of a microphone which might include an amplifier and an appropriate device to record a picture of the wave impulses.

This Lehr and Wyatt patent, it is therefore apparent, simply provided an apparatus composed of old and well-known devices to measure the time required for pressure waves to move to and back from the fluid surface of an oil well. But the assumption that sound and pressure waves would travel in oil wells at open-air velocity of 1100 feet per second proved to be erroneous. For this reason the time-velocity computation of Lehr and Wyatt for measuring the distance to the fluid surface produced inaccurate results.

After conferences with Lehr, Walker undertook to search for a method which would more accurately indicate the sound and pressure wave velocity in each well. Walker was familiar with the structure of oil wells. The oil flow pipe in a well, known as a tubing string, is jointed and where these joints occur there are collars or shoulders. There are also one or more relatively prominent projections on the oil flow pipe known as tubing catchers.

In wells where the distance to the tubing catcher is known, Walker observed that the distance to the fluid surface could be measured by a simple time-distance proportion formula.[4] For those wells in which the distance to the tubing catcher was unknown, Walker also suggested another idea. The sections of tubing pipe used in a given oil well are generally of equal length. Therefore the shoulders in a given well ordinarily are at equal intervals from each other. But the section length and therefore the interval may vary from well to well. Walker concluded that he could measure the unknown distance to the tubing catcher if he could observe and record the shoulder echo waves. Thus multiplication of the number of shoulders observed by the known length of a pipe section would produce the distance to the tubing catcher. With this distance, he could solve the distance to the fluid surface by the same proportion formula used when the distance to the tubing catcher was a matter of record. The Lehr and Wyatt instrument could record all these echo waves. But the potential usefulness of the echoes from the shoulders and the tubing catcher which their machine recorded had not occurred to Lehr and Wyatt and consequently they had made no effort better to observe and record them. Walker's contribution which he claims to be invention was in effect to add to Lehr and Wyatt's apparatus a well-known device which would make the regularly appearing

[4] The known distance from well top to the tubing catcher is to the unknown distance from well top to the fluid surface as the time an echo requires to travel from the tubing catcher is to the time required for an echo to travel from the fluid surface.

Walker's patent emphasizes that his invention solves the velocity of sound waves in wells of various pressures in which sound did not travel at open-air or a uniform speed. Mathematically, of course, his determination of the distance by proportions determines the distance to the fluid surface directly without necessarily considering velocity in feet per second as a factor.

shoulder echo waves more prominent on the graph and easier to count.

The device added was a mechanical acoustical resonator. This was a short pipe which would receive wave impulses at the mouth of the well. Walker's testimony was, and his specifications state, that by making the length of this tubal resonator one-third the length of the tubing joints, the resonator would serve as a tuner, adjusted to the frequency of the shoulder echo waves. It would simultaneously amplify these echo waves and eliminate unwanted echoes from other obstructions thus producing a clearer picture of the shoulder echo waves. His specifications show, attached to the tubal resonator, a coupler, the manipulation of which would adjust the length of the tube to one-third of the interval between shoulders in a particular well. His specifications and drawings also show the physical structure of a complete apparatus, designed to inject pressure impulses into a well, and to receive, note, record and time the impulse waves.

The District Court held the claims here in suit valid upon its finding that Walker's "apparatus differs from and is an improvement over the prior art in the incorporation in such apparatus of a tuned acoustical means which performs the function of a sound filter . . ." The Circuit Court of Appeals affirmed this holding, stating that the trial court had found "that the only part of this patent constituting invention over the prior art is the 'tuned acoustical means which performs the functions of a sound filter.' "

For our purpose in passing upon the sufficiency of the claims against prohibited indefiniteness we can accept without ratifying the findings of the lower court that the addition of "a tuned acoustical means" performing the "function of a sound filter" brought about a new patentable combination, even though it advanced only a narrow

step beyond Lehr and Wyatt's old combination.[5] We must, however, determine whether, as petitioner charges, the claims here held valid run afoul of Rev. Stat. 4888 because they do not describe the invention but use "conveniently functional language at the exact point of novelty." *General Electric Co.* v. *Wabash Appliance Corp., supra,* at 371.

Walker, in some of his claims, *e. g.,* claims 2 and 3, does describe the tuned acoustical pipe as an integral part of his invention, showing its structure, its working arrangement in the alleged new combination, and the manner of its connection with the other parts. But no one of the claims on which this judgment rests has even suggested the physical structure of the acoustical resonator.[6] No one of these claims describes the physical relation of the Walker addition to the old Lehr and Wyatt machine. No one of these claims describes the manner in which the Walker addition will operate together with the old Lehr and Wyatt machine so as to make the "new" unitary apparatus perform its designed function. Thus the claims failed adequately to depict the structure, mode, and operation of the parts in combination.

A claim typical of all of those held valid only describes the resonator and its relation with the rest of the apparatus as "means associated with said pressure responsive device for tuning said receiving means to the frequency of echoes from the tubing collars of said tubing sections to clearly distinguish the echoes from said couplings from

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[5] See *Hailes* v. *Van Wormer,* 20 Wall. 353; *Knapp* v. *Morss,* 150 U. S. 221, 227–28; *Textile Machine Works* v. *Louis Hirsch Textile Machines, Inc.,* 302 U. S. 490; *Lincoln Engineering Co.* v. *Stewart-Warner Corp.,* 303 U. S. 545, 549–50.

[6] Halliburton does not challenge the adequacy of the description of any other features of the "new combination." The elements of Walker's apparatus other than the filter are so nearly identical to what Lehr and Wyatt patented that we can speak of these other elements as the "Lehr and Wyatt machine."

each other." [7] The language of the claim thus describes this most crucial element in the "new" combination in terms of what it will do rather than in terms of its own physical characteristics or its arrangement in the new combination apparatus. We have held that a claim with such a description of a product is invalid as a violation of Rev. Stat. 4888. *Holland Furniture Co.* v. *Perkins Glue Co.*, 277 U. S. 245, 256–57; *General Electric Co.* v. *Wabash Appliance Corp., supra.* We understand that the Circuit Court of Appeals held that the same rigid standards of description required for product claims is not required for a combination patent embodying old elements only. We have a different view.

Rev. Stat. 4888 pointedly provides that "in case of a machine, he [the patentee] shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." It has long been held that the word "machine" includes a combination. *Corning* v. *Burden,* 15 How. 252, 267. We are not persuaded that the public and those affected by patents

[7] Both parties have used Claim 1 as a typical example for purposes of argument throughout the litigation. Other claims need not be set out. Claim 1 is as follows:

"In an apparatus for determining the location of an obstruction in a well having therein a string of assembled tubing sections interconnected with each other by coupling collars, means communicating with said well for creating a pressure impulse in said well, echo receiving means including a pressure responsive device exposed to said well for receiving pressure impulses from the well and for measuring the lapse of time between the creation of the impulse and the arrival at said receiving means of the echo from said obstruction, and means associated with said pressure responsive device for tuning said receiving means to the frequency of echoes from the tubing collars of said tubing sections to clearly distinguish the echoes from said couplings from each other."

should lose the protection of this statute merely because the patented device is a combination of old elements.

Patents on machines which join old and well-known devices with the declared object of achieving new results, or patents which add an old element to improve a pre-existing combination, easily lend themselves to abuse. And to prevent extension of a patent's scope beyond what was actually invented, courts have viewed claims to combinations and improvements or additions to them with very close scrutiny. *Cf. Lincoln Engineering Co.* v. *Stewart-Warner Corp.*, 303 U. S. 545, 549–51. For the same reason, courts have qualified the scope of what is meant by the equivalent of an ingredient of a combination of old elements. *Gill* v. *Wells*, 22 Wall. 1, 28, 29; *Fuller* v. *Yentzer*, 94 U. S. 288, 297, 298. It is quite consistent with this strict interpretation of patents for machines which combine old elements to require clear description in combination claims. This view, clearly expressed in *Gill* v. *Wells, supra*, is that

> "Where the ingredients are all old the invention . . . consists entirely in the combination, and the requirement of the Patent Act that the invention shall be fully and exactly described applies with as much force to such an invention as to any other class, because if not fulfilled all three of the great ends intended to be accomplished by that requirement would be defeated. . . . (1.) That the government may know what they have granted and what will become public property when the term of the monopoly expires. (2.) That licensed persons desiring to practice the invention may know, during the term, how to make, construct, and use the invention. (3.) That other inventors may know what part of the field of invention is unoccupied.
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> "Purposes such as these are of great importance in every case, but the fulfilment of them is never more

necessary than when such inquiries arise in respect to a patent for a machine which consists of a combination of old ingredients. Patents of that kind are much more numerous than any other, and consequently it is of the greatest importance that the description of the combination, which is the invention, should be full, clear, concise, and exact." *Gill* v. *Wells, supra,* at 25–26.

These principles were again emphasized in *Merrill* v. *Yeomans,* 94 U. S. 568, 570, where it was said that ". . . in cases where the invention is a new combination of old devices, he [the patentee] is bound to describe with particularity all these old devices, and then the new mode of combining them, for which he desires a patent." This view has most recently been reiterated in *General Electric Co.* v. *Wabash Appliance Corp., supra,* at 368, 369. Cogent reasons would have to be presented to persuade us to depart from this established doctrine. The facts of the case before us, far from undermining our confidence in these earlier pronouncements, reinforce the conclusion that the statutory requirement for a clear description of claims applies to a combination of old devices.

This patent and the infringement proceedings brought under it illustrate the hazards of carving out an exception to the sweeping demand Congress made in Rev. Stat. 4888. Neither in the specification, the drawing, nor in the claims here under consideration, was there any indication that the patentee contemplated any specific structural alternative for the acoustical resonator or for the resonator's relationship to the other parts of the machine. Petitioner was working in a field crowded almost, if not completely, to the point of exhaustion. In 1920, Tucker, in Patent No. 1,351,356, had shown a tuned acoustical resonator in a sound detecting device which measured distances. Lehr and Wyatt had provided for amplification of their waves. Sufficient amplification and exaggeration of *all* the differ-

727731 O—47——7

ent waves which Lehr and Wyatt recorded on their machine would have made it easy to distinguish the tubing catcher and regular shoulder waves from all others. For, even without this amplification, the echo waves from tubing collars could by proper magnification have been recorded and accurately counted, had Lehr and Wyatt recognized their importance in computing the velocity. *Cf. General Electric Co.* v. *Jewel Incandescent Lamp Co.*, 326 U. S. 242.

Under these circumstances the broadness, ambiguity, and overhanging threat of the functional claim of Walker become apparent. What he claimed in the court below and what he claims here is that his patent bars anyone from using in an oil well any device heretofore or hereafter invented which combined with the Lehr and Wyatt machine performs the function of clearly and distinctly catching and recording echoes from tubing joints with regularity. Just how many different devices there are of various kinds and characters which would serve to emphasize these echoes, we do not know. The Halliburton device, alleged to infringe, employs an electric filter for this purpose. In this age of technological development there may be many other devices beyond our present information or indeed our imagination which will perform that function and yet fit these claims. And unless frightened from the course of experimentation by broad functional claims like these, inventive genius may evolve many more devices to accomplish the same purpose. See *United Carbon Co.* v. *Binney & Smith Co.*, 317 U. S. 228, 236; *Burr* v. *Duryee*, 1 Wall. 531, 568; *O'Reilly* v. *Morse*, 15 How. 62, 112–13. Yet if Walker's blanket claims be valid, no device to clarify echo waves, now known or hereafter invented, whether the device be an actual equivalent of Walker's ingredient or not, could be used in a combination such as this, during the life of Walker's patent.

Had Walker accurately described the machine he claims to have invented, he would have had no such broad rights to bar the use of all devices now or hereafter known which could accent waves. For had he accurately described the resonator together with the Lehr and Wyatt apparatus, and sued for infringement, charging the use of something else used in combination to accent the waves, the alleged infringer could have prevailed if the substituted device (1) performed a substantially different function; (2) was not known at the date of Walker's patent as a proper substitute for the resonator; or (3) had been actually invented after the date of the patent. *Fuller* v. *Yentzer, supra,* at 296–97; *Gill* v. *Wells, supra,* at 29. Certainly, if we are to be consistent with Rev. Stat. 4888, a patentee cannot obtain greater coverage by failing to describe his invention than by describing it as the statute commands.

It is urged that our conclusion is in conflict with the decision of *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.,* 210 U. S. 405. In that case, however, the claims structurally described the physical and operating relationship of all the crucial parts of the novel combination.[8]

[8] The typical claim there in suit was as follows:

"2. In a paper bag machine, the combination of the rotating cylinder provided with one or more pairs of side folding fingers adapted to be moved toward or from each other, a forming plate also provided with side forming fingers adapted to be moved toward or from each other, means for operating said fingers at definite times during the formative action upon the bag tube, operating means for the forming plate adapted to cause the said plate to oscillate about its rear edge upon the surface of the cylinder during the rotary movement of said cylinder for the purpose of opening and forming the bottom of the bag tube, a finger moving with the forming plate for receiving the upper sheet of the tube and lifting it during the formative action, power devices for returning the forming plate to its original position to receive a new bag tube, and means to move the bag tube with the cylinder." *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.,* 210 U. S. 405, 417, n. 1.

The Court there decided only that there had been an infringement of this adequately described invention. That case is not authority for sustaining the claims before us which fail adequately to describe the alleged invention.

Reversed.

MR. JUSTICE FRANKFURTER concurs with the Court's opinion in so far as it finds this claim lacking in the definiteness required by Rev. Stat. 4888, 35 U. S. C. § 33, but reserves judgment as to considerations that may be peculiar to combination patents in satisfying that requirement.

MR. JUSTICE BURTON dissents.

CLEVELAND *v.* UNITED STATES.

NO. 12. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.*

Argued October 10, 1945. Reargued October 17, 1946.—Decided November 18, 1946.

1. It is a violation of the Mann Act, 36 Stat. 825, 18 U. S. C. § 398, for a man to transport a woman across state lines for the purpose of making her his plural wife or cohabiting with her as such—notwithstanding the fact that the practice is founded on his religious belief. Pp. 16, 20.
2. While the Act was aimed primarily at the use of interstate commerce for the conduct of commercialized prostitution, it is not limited to that and a profit motive is not a *sine qua non* to its application. *Caminetti* v. *United States*, 242 U. S. 470. Pp. 17, 18.

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*Together with No. 13, *Cleveland* v. *United States;* No. 14, *Cleveland* v. *United States;* No. 15, *Darger* v. *United States;* No. 16, *Jessop* v. *United States;* No. 17, *Dockstader* v. *United States;* No. 18, *Stubbs* v. *United States;* and No. 19, *Petty* v. *United States,* on certiorari to the same court.

(a) It expressly applies to transportation for purposes of debauchery, which may be motivated solely by lust. P. 17.

(b) Under the *ejusdem generis* rule, the words "or for any other immoral purpose" cannot be given a narrower meaning. P. 18.

3. Polygamous practices are not excluded from the Act, have long been branded as immoral, and are of the same genus as the other immoral practices covered by the Act. Pp. 18, 19.
4. The fact that the regulation of marriage is a state matter does not make the Act an unconstitutional interference by Congress with the police powers of the States. P. 19.
5. The power of Congress over the instrumentalities of commerce is plenary; it may be used to defeat immoral practices; and the fact that the means used may have "the quality of police regulations" is not consequential. P. 19.
6. Transportation of a woman across state lines for the purpose of entering into a plural marriage or cohabiting with her as a plural wife is for a purpose prohibited by the Act. P. 19.
7. Guilt under the Act turns on the purpose which motivates the transportation, not on its accomplishment. P. 20.
8. The fact that the accused was motivated by a religious belief is no defense to a prosecution under the Mann Act. P. 20.
9. Under the *ejusdem generis* rule, the general words cannot be confined more narrowly than the class of which they are a part. P. 18.

146 F. 2d 730, affirmed.

Petitioners were convicted of violating the Mann Act, 36 Stat. 825, 18 U. S. C. § 398. 56 F. Supp. 890. The Circuit Court of Appeals affirmed. 146 F. 2d 730. This Court granted certiorari. 324 U. S. 835. *Affirmed,* p. 20.

Claude T. Barnes argued the cause for petitioners. With him on the brief were *Ed. D. Hatch* and *O. A. Tangren.*

Assistant Solicitor General Judson argued the cause for the United States on the original argument, and *Robert M. Hitchcock* on the reargument. With *Mr. Judson* on the brief were *W. Marvin Smith, Robert S. Erdahl* and *Beatrice Rosenberg.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners are members of a Mormon sect, known as Fundamentalists. They not only believe in polygamy; unlike other Mormons,[1] they practice it. Each of petitioners, except Stubbs, has, in addition to his lawful wife, one or more plural wives. Each transported at least one plural wife across state lines,[2] either for the purpose of cohabiting with her, or for the purpose of aiding another member of the cult in such a project. They were convicted of violating the Mann Act (36 Stat. 825, 18 U. S. C. § 398) on a trial to the court, a jury having been waived. 56 F. Supp. 890. The judgments of conviction were affirmed on appeal. 146 F. 2d 730. The cases are here on petitions for certiorari which we granted in view of the asserted conflict between the decision below and *Mortensen* v. *United States,* 322 U. S. 369.

The Act makes an offense the transportation in interstate commerce of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." The decision turns on the meaning of the latter phrase, "for any other immoral purpose."

United States v. *Bitty,* 208 U. S. 393, involved a prosecution under a federal statute making it a crime to import an alien woman "for the purpose of prostitution or for any other immoral purpose." The act was construed to cover a case where a man imported an alien woman so that she should live with him as his concubine. Two years later the Mann Act was passed. Because of the similarity of the language used in the two acts, the *Bitty* case became

[1] The Church of Jesus Christ of Latter-Day Saints has forbidden plural marriages since 1890. See *Toncray* v. *Budge,* 14 Ida. 621, 654–55, 95 P. 26.

[2] Petitioners' activities extended into Arizona, California, Colorado, Idaho, Utah and Wyoming.

a forceful precedent for the construction of the Mann Act. Thus one who transported a woman in interstate commerce so that she should become his mistress or concubine was held to have transported her for an "immoral purpose" within the meaning of the Mann Act. *Caminetti* v. *United States,* 242 U. S. 470.

It is argued that the *Caminetti* decision gave too wide a sweep to the Act; that the Act was designed to cover only the white slave business and related vices; that it was not designed to cover voluntary actions bereft of sex commercialism; and that in any event it should not be construed to embrace polygamy which is a form of marriage and, unlike prostitution or debauchery or the concubinage involved in the *Caminetti* case, has as its object parenthood and the creation and maintenance of family life. In support of that interpretation an exhaustive legislative history is submitted which, it is said, gives no indication that the Act was aimed at polygamous practices.

While *Mortensen* v. *United States, supra,* p. 377, rightly indicated that the Act was aimed "primarily" at the use of interstate commerce for the conduct of the white slave business, we find no indication that a profit motive is a *sine qua non* to its application. Prostitution, to be sure, normally suggests sexual relations for hire.[3] But debauchery has no such implied limitation. In common understanding the indulgence which that term suggests may be motivated solely by lust.[4] And so we start with words which

[3] "Of women: The offering of the body to indiscriminate lewdness for hire (esp. as a practice or institution); whoredom, harlotry." 8 Oxford English Dictionary 1497.

[4] "Vicious indulgence in sensual pleasures." 3 Oxford English Dictionary 79; "Excessive indulgence in sensual pleasures of any kind; gluttony; intemperance; sexual immorality; unlawful indulgence of lust." 3 Century Dict. Rev. Ed. 1477.

by their natural import embrace more than commercialized sex. What follows is "any other immoral purpose." Under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it. But we could not give the words a faithful interpretation if we confined them more narrowly than the class of which they are a part.

That was the view taken by the Court in the *Bitty* and *Caminetti* cases. We do not stop to reexamine the *Caminetti* case to determine whether the Act was properly applied to the facts there presented. But we adhere to its holding, which has been in force for almost thirty years,[5] that the Act, while primarily aimed at the use of interstate commerce for the purposes of commercialized sex, is not restricted to that end.

We conclude, moreover, that polygamous practices are not excluded from the Act. They have long been outlawed in our society. As stated in *Reynolds* v. *United States*, 98 U. S. 145, 164:

> "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offence against society."

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[5] *Blackstock* v. *United States*, 261 F. 150; *Carey* v. *United States*, 265 F. 515; *Elrod* v. *United States*, 266 F. 55; *Burgess* v. *United States*, 54 App. D. C. 71, 294 F. 1002; *Corbett* v. *United States*, 299 F. 27; *Hart* v. *United States*, 11 F. 2d 499; *Ghadiali* v. *United States*, 17 F. 2d 236; *United States* v. *Reginelli*, 133 F. 2d 595; *Poindexter* v. *United States*, 139 F. 2d 158; *Simon* v. *United States*, 145 F. 2d 345; *Qualls* v. *United States*, 149 F. 2d 891; *Sipe* v. *United States*, 80 U. S. App. D. C. 194, 150 F. 2d 984; *United States* v. *Chaplin*, 54 F. Supp. 682.

As subsequently stated in *Mormon Church* v. *United States,* 136 U. S. 1, 49, "The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world." And see *Davis* v. *Beason,* 133 U. S. 333. Polygamy is a practice with far more pervasive influences in society than the casual, isolated transgressions involved in the *Caminetti* case. The establishment or maintenance of polygamous households is a notorious example of promiscuity. The permanent advertisement of their existence is an example of the sharp repercussions which they have in the community. We could conclude that Congress excluded these practices from the Act only if it were clear that the Act is confined to commercialized sexual vice. Since we cannot say it is, we see no way by which the present transgressions can be excluded. These polygamous practices have long been branded as immoral in the law. Though they have different ramifications, they are in the same genus as the other immoral practices covered by the Act.

The fact that the regulation of marriage is a state matter does not, of course, make the Mann Act an unconstitutional interference by Congress with the police powers of the States. The power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices; and the fact that the means used may have "the quality of police regulations" is not consequential. *Hoke* v. *United States,* 227 U. S. 308, 323; see *Athanasaw* v. *United States,* 227 U. S. 326; *Wilson* v. *United States,* 232 U. S. 563.

Petitioners' second line of defense is that the requisite purpose was lacking. It is said that those petitioners who already had plural wives did not transport them in interstate commerce for an immoral purpose. The test laid

down in the *Mortensen* case was whether the transportation was in fact "the use of interstate commerce as a calculated means for effectuating sexual immorality." 322 U. S. p. 375. There was evidence that this group of petitioners in order to cohabit with their plural wives found it necessary or convenient to transport them in interstate commerce and that the unlawful purpose was the dominant motive. In one case the woman was transported for the purpose of entering into a plural marriage. After a night with this petitioner she refused to continue the plural marriage relationship. But guilt under the Mann Act turns on the purpose which motivates the transportation, not on its accomplishment. *Wilson* v. *United States, supra,* pp. 570–71.

It is also urged that the requisite criminal intent was lacking since petitioners were motivated by a religious belief. That defense claims too much. If upheld, it would place beyond the law any act done under claim of religious sanction. But it has long been held that the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy. *Reynolds* v. *United States, supra.* Whether an act is immoral within the meaning of the statute is not to be determined by the accused's concepts of morality. Congress has provided the standard. The offense is complete if the accused intended to perform, and did in fact perform, the act which the statute condemns, viz., the transportation of a woman for the purpose of making her his plural wife or cohabiting with her as such.

We have considered the remaining objections raised and find them without merit.

Affirmed.

Mr. Justice Black and Mr. Justice Jackson think that the cases should be reversed. They are of opinion that affirmance requires extension of the rule announced

in the *Caminetti* case and that the correctness of that rule is so dubious that it should at least be restricted to its particular facts.

MR. JUSTICE RUTLEDGE, concurring.

I concur in the result. Differences have been urged in petitioners' behalf between these cases and *Caminetti* v. *United States,* 242 U. S. 470.[1] Notwithstanding them, in my opinion it would be impossible rationally to reverse the convictions, at the same time adhering to *Caminetti* and later decisions perpetuating its ruling.[2]

It is also suggested, though not strongly urged, that *Caminetti* was wrongly decided and should be overruled. Much may be said for this view. In my opinion that case and subsequent ones following it extended the Mann Act's coverage beyond the congressional intent and purpose, as the dissenting opinion of Mr. Justice McKenna convincingly demonstrated. 242 U. S. at 496.[3] Moreover, as I

[1] Counsel has emphasized the religious aspect presented by these cases and has stressed the familial aspect and purpose of so-called "celestial marriage" in the Mormon conception as distinguishing the relation in fact and in consequence from such as were involved in the *Caminetti* and other Mann Act cases. The argument from religious motivation has been foreclosed, so far as legislative power is concerned, since *Reynolds* v. *United States,* 98 U. S. 145. Apropos of the Mann Act's application, the relationship is not only illegal under state law but also as regular and continuous as that involved in *Caminetti,* or more so.

[2] See e. g., *Gebardi* v. *United States,* 287 U. S. 112; *United States* v. *Reginelli,* 133 F. 2d 595; *Christian* v. *United States,* 28 F. 2d 114. Compare *United States* v. *Beach,* 324 U. S. 193; *Mortensen* v. *United States,* 322 U. S. 369.

[3] See also the dissenting opinion of MR. JUSTICE MURPHY herein. The dissenting opinion in the *Caminetti* case was joined by the Chief Justice and Mr. Justice Clarke. Only five justices adhered to the majority opinion, Mr. Justice McReynolds not participating. Cf. the opinion of Mr. Justice McKenna in *Athanasaw* v. *United States,* 227 U. S. 326.

also think, this legislation and the problems presented by the cases arising under it are of such a character as does not allow this Court properly to shift to Congress the responsibility for perpetuating the Court's error.

Notwithstanding recent tendency, the idea cannot always be accepted that Congress, by remaining silent and taking no affirmative action in repudiation, gives approval to judicial misconstruction of its enactments. See *Girouard* v. *United States,* 328 U. S. 61, 69. It is perhaps too late now to deny that, legislatively speaking as in ordinary life, silence in some instances may give consent.[4] But it would be going even farther beyond reason and common experience to maintain, as there are signs we may be by way of doing, that in legislation any more than in other affairs silence or nonaction always is acquiescence equivalent to action.

There are vast differences between legislating by doing nothing and legislating by positive enactment, both in the processes by which the will of Congress is derived and stated[5] and in the clarity and certainty of the expression of its will.[6] And there are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them

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[4] As an original matter, in view of the specific and constitutional procedures required for the enactment of legislation, it would seem hardly justifiable to treat as having legislative effect any action or nonaction not taken in accordance with the prescribed procedures.

[5] See note 4. Legislative intent derived from nonaction or "silence" lacks all the supporting evidences of legislation enacted pursuant to prescribed procedures, including reduction of bills to writing, committee reports, debates, and reduction to final written form, as well as voting records and executive approval. Necessarily also the intent must be derived by a form of negative inference, a process lending itself to much guesswork.

[6] See note 5.

may be the sheer pressure of other and more important business. See *Moore* v. *Cleveland Ry. Co.,* 108 F. 2d 656, 660. At times political considerations may work to forbid taking corrective action. And in such cases, as well as others, there may be a strong and proper tendency to trust to the courts to correct their own errors, see *Girouard* v. *United States, supra,* at 69, as they ought to do when experience has confirmed or demonstrated the errors' existence.

The danger of imputing to Congress, as a result of its failure to take positive or affirmative action through normal legislative processes, ideas entertained by the Court concerning Congress' will, is illustrated most dramatically perhaps by the vacillating and contradictory courses pursued in the long line of decisions imputing to "the silence of Congress" varied effects in commerce clause cases.[7] That danger may be and often is equally present in others. More often than not, the only safe assumption to make from Congress' inaction is simply that Congress does not intend to act at all. Cf. *United States* v. *American Trucking Assns.,* 310 U. S. 534, 550. At best the contrary view can be only an inference, altogether lacking in the normal evidences of legislative intent and often subject to varying views of that intent.[8] In short, although recognizing that by silence Congress at times may be taken to acquiesce and thus approve, we should be very sure that, under all the circumstances of a given situation, it has done so before we so rule and thus at once relieve ourselves from and

[7] See *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, 424–425; Ribble, State and National Power Over Commerce (1937) c. X; Biklé, The Silence of Congress (1927) 41 Harv. L. Rev. 200; Powell, The Validity of State Legislation under the Webb-Kenyon Law (1917) 2 So. L. Q. 112. An example of judicial interpretation of the silence of Congress as giving consent to state legislation is *Wilson* v. *McNamee,* 102 U. S. 572, 575.

[8] Cf. note 5.

shift to it the burden of correcting what we have done wrongly. The matter is particular, not general, notwithstanding earlier exceptional treatment and more recent tendency. Just as dubious legislative history is at times much overridden, so also is silence or inaction often mistaken for legislation.

I doubt very much that the silence of Congress in respect to these cases, notwithstanding their multiplication and the length of time during which the silence has endured, can be taken to be the equivalent of bills approving them introduced in both houses, referred to and considered by committees, discussed in debates, enacted by majorities in both places, and approved by the executive. I doubt, in other words, that, in view of all the relevant circumstances including the unanticipated consequences of the legislation,[9] such majorities could have been mustered in approval of the *Caminetti* decision at any time since it was rendered. Nor is the contrary conclusion demonstrated by Congress' refusal to take corrective action.[10]

The *Caminetti* case, however, has not been overruled and has the force of law until a majority of this Court may concur in the view that this should be done and take action to that effect. This not having been done, I acquiesce in the Court's decision.

MR. JUSTICE MURPHY, dissenting.

Today another unfortunate chapter is added to the troubled history of the White Slave Traffic Act. It is a

[9] See opinion of Mr. Justice McKenna, 242 U. S. at 502, dissenting in *Caminetti* v. *United States;* see also the dissenting opinion in *United States* v. *Beach,* 324 U. S. 193, 199–200.

[10] Since the *Caminetti* decision two bills have been introduced to limit the effect of that case. S. 2438, 73d Cong., 2d Sess.; S. 101, 75th Cong., 1st Sess. Neither was reported out of committee. In such circumstances the failure of Congress to amend the Act raises no presumption as to its intent. *Order of Railway Conductors* v. *Swan,* 152 F. 2d 325, 329.

chapter written in terms that misapply the statutory language and that disregard the intention of the legislative framers. It results in the imprisonment of individuals whose actions have none of the earmarks of white slavery, whatever else may be said of their conduct. I am accordingly forced to dissent.

The statute in so many words refers to transportation of women and girls across state lines "for the purpose of prostitution or debauchery, or for any other immoral purpose." The issue here is whether the act of taking polygamous or plural wives across state lines, or taking girls across state borders for the purpose of entering into plural marriage, constitutes transportation "for any other immoral purpose" so as to come within the interdict of the statute.

The Court holds, and I agree, that under the *ejusdem generis* rule of statutory construction the phrase "any other immoral purpose" must be confined to the same class of unlawful sexual immoralities as that to which prostitution and debauchery belong. But I disagree with the conclusion that polygamy is "in the same genus" as prostitution and debauchery and hence within the phrase "any other immoral purpose" simply because it has sexual connotations and has "long been branded as immoral in the law" of this nation. Such reasoning ignores reality and results in an unfair application of the statutory words.

It is not my purpose to defend the practice of polygamy or to claim that it is morally the equivalent of monogamy. But it is essential to understand what it is, as well as what it is not. Only in that way can we intelligently decide whether it falls within the same genus as prostitution or debauchery.

There are four fundamental forms of marriage: (1) monogamy; (2) polygyny, or one man with several wives; (3) polyandry, or one woman with several husbands; and (4) group marriage. The term "polygamy" covers both

polygyny and polyandry. Thus we are dealing here with polygyny, one of the basic forms of marriage. Historically, its use has far exceeded that of any other form. It was quite common among ancient civilizations and was referred to many times by the writers of the Old Testament; even today it is to be found frequently among certain pagan and non-Christian peoples of the world. We must recognize, then, that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears. It is equally true that the beliefs and mores of the dominant culture of the contemporary world condemn the practice as immoral and substitute monogamy in its place. To those beliefs and mores I subscribe, but that does not alter the fact that polygyny is a form of marriage built upon a set of social and moral principles. It must be recognized and treated as such.

The Court states that polygamy is "a notorious example of promiscuity." The important fact, however, is that, despite the differences that may exist between polygamy and monogamy, such differences do not place polygamy in the same category as prostitution or debauchery. When we use those terms we are speaking of acts of an entirely different nature, having no relation whatever to the various forms of marriage. It takes no elaboration here to point out that marriage, even when it occurs in a form of which we disapprove, is not to be compared with prostitution or debauchery or other immoralities of that character.

The Court's failure to recognize this vital distinction and its insistence that polygyny is "in the same genus" as prostitution and debauchery do violence to the anthropological factors involved. Even etymologically, the words "polygyny" and "polygamy" are quite distinct from "prostitution," "debauchery" and words of that ilk. There is thus no basis in fact for including polygyny within the

phrase "any other immoral purpose" as used in this statute.

One word should be said about the Court's citation of *United States* v. *Bitty,* 208 U. S. 393, and the statement that the interpretation of the statute there involved is a forceful precedent for the construction of the White Slave Traffic Act. The thought apparently is that the phrase "any other immoral purpose," appearing in the White Slave Traffic Act, was derived from the identical phrase used in the statute regulating the immigration of aliens into the United States, the statute which was under consideration in the *Bitty* case. 34 Stat. 898. That case concerned itself with the portion of the immigration statute forbidding " the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose." Significantly, however, the statute made separate provision for the exclusion of "polygamists, or persons who admit their belief in the practice of polygamy." Thus the phrase "any other immoral purpose," following the reference to prostitution, certainly did not comprehend polygamy. And if that statute, or the interpretation given it in the *Bitty* case, is to be any authority here, the conclusion to be drawn is inconsistent with the result reached by the Court today. As a matter of fact, Congress has always referred to polygamy by name when it desired to deal with that subject, as distinguished from immoralities in the nature of prostitution. See, for example, 8 U. S. C. § 136 (f); 18 U. S. C. § 513.

The result here reached is but another consequence of this Court's long-continued failure to recognize that the White Slave Traffic Act, as its title indicates, is aimed solely at the diabolical interstate and international trade in white slaves, "the business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes." H. Rep. No. 47, 61st Cong., 2d Sess.,

727731 O—47——8

p. 11; S. Rep. No. 886, 61st Cong., 2d Sess., p. 11. The Act was suggested and proposed to meet conditions which had arisen in the years preceding 1910 and which had revealed themselves in their ugly details through extensive investigations. The framers of the Act specifically stated that it is not directed at immorality in general; it does not even attempt to regulate the practice of voluntary prostitution, leaving that problem to the various states. Its exclusive concern is with those girls and women who are "unwillingly forced to practice prostitution" and to engage in other similar immoralities and "whose lives are lives of involuntary servitude." *Ibid.* A reading of the legislative reports and debates makes this narrow purpose so clear as to remove all doubts on the matter. And it is a purpose that has absolutely no relation to the practice of polygamy, however much that practice may have been considered immoral in 1910.

Yet this Court in *Caminetti* v. *United States,* 242 U. S. 470, over the vigorous dissent of Justice McKenna in which Chief Justice White and Justice Clarke joined, closed its eyes to the obvious and interpreted the broad words of the statute without regard to the express wishes of Congress. I think the *Caminetti* case can be factually distinguished from the situation at hand since it did not deal with polygamy. But the principle of the *Caminetti* case is still with us today, the principle of interpreting and applying the White Slave Traffic Act in disregard of the specific problem with which Congress was concerned. I believe the issue should be met squarely and the *Caminetti* case overruled. It has been on the books for nearly 30 years and its age does not justify its continued existence. *Stare decisis* certainly does not require a court to perpetuate a wrong for which it was responsible, especially when no rights have accrued in reliance on the error. Cf. *Helvering* v. *Hallock,* 309 U. S. 106, 121–22. Otherwise the error

is accentuated; and individuals, whatever may be said of their morality, are fined and imprisoned contrary to the wishes of Congress. I shall not be a party to that process.

The consequence of prolonging the *Caminetti* principle is to make the federal courts the arbiters of the morality of those who cross state lines in the company of women and girls. They must decide what is meant by "any other immoral purpose" without regard to the standards plainly set forth by Congress. I do not believe that this falls within the legitimate scope of the judicial function. Nor does it accord the respect to which Congressional pronouncements are entitled.

Hence I would reverse the judgments of conviction in these cases.

CHAMPLIN REFINING CO. *v.* UNITED STATES ET AL.

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

No. 21. Argued November 8, 9, 1945.—Reargued October 18, 21, 1946.—Decided November 18, 1946.

Appellant owns and operates a pipe line from its refinery in Oklahoma to various distributing points in other States. It carries no commodities except its own, produced in its own refinery and delivered into its own storage tanks for sale to its customers. Delivery is made from appellant's storage tanks by means of truck racks or railroad tank car racks and never directly from the pipe line. Appellant has never transported, offered to transport, or been asked to transport any products belonging to others and has never filed any tariffs of transportation charges with the Interstate Commerce Commission or any state commission or regulatory body. However, the price at the terminal points, with some exceptions, includes the f. o. b. price at the refinery, plus a differential based on the railroad freight rate from the refinery to final destination. The Interstate Commerce Commission ordered appellant to file an inventory

of its property for the purpose of valuation pursuant to § 19 (a) of the Interstate Commerce Act. *Held:*

1. Appellant is a "common carrier" within the meaning of § 1 (3) (a) of the Interstate Commerce Act; and the Commission's order requiring appellant to file an inventory of its property for purposes of valuation pursuant to § 19 (a) is authorized by the Act. Pp. 32–34.

(a) Section 1 (3) (a) of the Act defines the term "common carrier" as including "all pipe line companies" and not merely those engaged in the business of common law carriers for hire. Pp. 33, 34.

(b) Appellant's operation is "transportation" within the meaning of § 1 (1) (b), which provides that the Act shall apply to "common carriers" engaged in the "transportation of oil or other commodity . . . by pipe line . . ." P. 34.

2. As so construed, the Act does not exceed the commerce power of Congress or violate the due process clause of the Fifth Amendment. Pp. 34, 35.

(a) The power of Congress to regulate interstate commerce is not dependent on a technical common carrier status but is quite as extensive over a private carrier. P. 35.

(b) It is adequate to support a requirement that appellant furnish information as to facilities being used in interstate marketing of its products—whether appellant be considered a private carrier or a common carrier. P. 35.

(c) A mere requirement that appellant provide information about a subject within the power possessed by Congress and delegated to the Commission cannot be considered a taking of property. P. 35.

59 F. Supp. 978, affirmed.

A three-judge District Court denied an injunction against an order of the Interstate Commerce Commission requiring appellant to file an inventory of its pipe line property for purposes of valuation pursuant to § 19 (a) of the Interstate Commerce Act. 59 F. Supp. 978. *Affirmed*, p. 35.

Dan Moody argued the cause for appellant on the original argument. With him on the briefs was *Harry O. Glasser*. Both argued the cause on reargument.

Edward Dumbauld argued the cause for the United States and the Interstate Commerce Commission, appel-

lees. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Berge, Daniel W. Knowlton* and *Nelson Thomas.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

The Interstate Commerce Commission, acting under § 19 (a) of the Interstate Commerce Act,[1] ordered the appellant to furnish certain inventories, schedules, maps and charts of its pipe line property.[2] Champlin's objections that the Act does not authorize the order, or if it be construed to do so is unconstitutional, were overruled by the Commission and again by the District Court which dismissed the company's suit for an injunction.[3] These

[1] ". . . the commission shall . . . investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. . . . The commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission." 37 Stat. 701, 49 U. S. C. § 19a.

[2] On May 15, 1941, the Interstate Commerce Commission, by letter addressed to the president of the Champlin Refining Company, requested that the company prepare and file with the Commission "a complete inventory of the pipe line property of the Champlin Refining Company, except land, showing the quantities, units, classes, kinds, and condition thereof." The Commission enclosed with its letter copies of its Valuation Orders Nos. 26 and 27, with which the inventory was to comply. The Champlin company did not respond to the request in a manner satisfactory to the Commission, and on June 12, 1944, the Commission made the order of which the company here complains. It directed the company to comply with the provisions of Valuation Orders Nos. 26 and 27 within ninety days of the service of the order.

[3] In response to the Commission's letter of May 15, 1941, the Champlin company filed with the Commission information and charts which it believed would satisfy the Commission's request. The Com-

questions of law are brought here by appeal. Judicial Code § 238, 28 U. S. C. § 345.

Champlin owns and operates a line of six-inch pipe five hundred and sixteen miles in length lying in five states. Originating at Champlin's Enid, Oklahoma refinery, it crosses Kansas, Nebraska, a part of South Dakota, and ends in Iowa. It is used only to convey the company's own refinery products to its own terminal stations at Hutchinson, Kansas; Superior, Nebraska; and Rock Rapids, Iowa, at each of which the line connects with storage facilities from which deliveries are made.

The statute, so far as relevant, says that it shall apply "to common carriers engaged in" "transportation of oil or other commodity" by pipe line from one state to another. It provides also that "common carrier" includes "all pipeline companies." [4] This language on its face would seem to cover the appellant's operation.

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mission, however, returned that report to the company, because in it the company had not recognized that it was a statutory common carrier and had not compiled the report from that viewpoint. The company then requested a hearing before the Commission to determine its status. On December 14, 1942, and on reargument, June 12, 1944, the Commission decided that appellant is a common carrier subject to the provisions of the Act. After the Commission had issued its supplementary order of June 12, 1944, appellant petitioned the district court for an injunction against the order. In accordance with §§ 46 and 47 of Title 28, U. S. C., the district judge convened a three judge court, which heard the case and dismissed appellant's petition.

[4] § 1. "(1) That the provisions of this Act shall apply to common carriers engaged in—

"(b) The transportation of oil or other commodity . . . by pipe line . . . from one State . . . to any other State . . .

"(3) (a) The term 'common carrier' as used in this Act shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire." 41 Stat. 474, as amended, 48 Stat. 1102, 49 U. S. C. § 1. The last words of § 1 (3) (a), "engaged in such transportation as aforesaid as common carriers for hire," do

Champlin contends, however, that the "transportation" mentioned in the Act does not refer to the carriage of one's own goods. The District Court has found that Champlin is the sole owner of the products transported through its pipe line; it has never transported, offered to transport, or been asked to transport any products belonging to any other company or person; its pipe line does not connect with any other pipe line but only with storage tanks at the three terminal points; there are no facilities for putting any petroleum product into the line other than at the Enid refinery; delivery of the products at the three terminal points is made from Champlin's storage tanks by means of truck racks or railroad tank car racks and is not made directly from the pipe line in any instance; no tariffs stating transportation charges have been filed with the Interstate Commerce Commission or with any state commission or regulatory body.

Because of these facts the appellant suggests that the language and holding of this Court concerning the Uncle Sam Oil Company in *The Pipe Line Cases,* 234 U. S. 548, approved in *Valvoline Oil Company* v. *United States,* 308 U. S. 141, govern this case. The Uncle Sam Company operation is described as "simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all . . . ." *The Pipe Line Cases,* 234 U. S. 548, 562. The Court considered this was not "transportation" within the meaning of the Act.

But we think it would expand the actual holding of that case to apply its conclusion to Champlin. The controlling fact under the statute is transporting commodities from state to state by pipe line. Admittedly Champlin is not a common carrier in the sense of the common law carrier for hire. However, the Act does not stop at this but

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"not affect the generality of the first clause as to pipe-line companies." *Valvoline Oil Co.* v. *United States,* 308 U. S. 141, 146.

goes on to say that its use of the term "common carrier" is to include all pipe line companies—a meaningless addition if it thereby included only what the term without more always had included. While Champlin technically is transporting its own oil, manufacturing processes have been completed; the oil is not being moved for Champlin's own use. These interstate facilities are operated to put its finished products in the market in interstate commerce at the greatest economic advantage.

Examination of Champlin's pricing methods supports the view that appellant is engaged in transportation even though the products are still its own when moved. The District Court found that price at the terminal points includes f. o. b. price at the Enid refinery and an additional sum called a differential. The differential is the through railroad freight rate from Enid to the final destination (usually the purchaser's place of business), less the carrying charges from the pipe line terminal to final destination. The District Court found, however, that competitive and other conditions "sometimes cause departures from the prices arrived at in accordance with the formula above described." Appellant states that as to some deliveries "rail rates were used merely as a basis for calculating a delivered price, not as a charge for transportation." Even so, and even though departures from the calculated differential are substantial and frequent, we think this practice points up a significant distinction from the *Uncle Sam* case.

We hold that Champlin's operation is transportation within the meaning of the Act and that the statute supports the Commission's order to furnish information.

Appellant further contends that, as so construed, the Act exceeds the commerce power of Congress and violates the due process clause of the Fifth Amendment because, it is argued, this interpretation converts a private pipe line into a public utility and requires a private carrier to

become a common carrier. But our conclusion rests on no such basis and affords no such implication. The power of Congress to regulate interstate commerce is not dependent on the technical common carrier status but is quite as extensive over a private carrier. This power has yet been invoked only to the extent of requiring Champlin to furnish certain information as to facilities being used in interstate marketing of its products. The commerce power is adequate to support this requirement whether appellant be considered a private carrier or a common carrier.

The contention that the statute as so construed violates the due process clause by imposing upon a private carrier the obligations of a conventional common carrier for hire is too premature and hypothetical to warrant consideration on this record. The appellant in its entire period of operation has never been asked to carry the products of another and may never be. So far, the Commission has made no order which changes the appellant's obligations to any other company or person. If it does, it will be timely to consider concrete requirements and their specific effects on appellant. At present, appellant is asked only to provide information about a subject within the power possessed by Congress and delegated to the Commission, and that cannot be considered a taking of property even if it arouses appellant's premonitions.

We hold that the order before us is authorized by statute and that in this respect the statute is within the commerce power and does not offend the Fifth Amendment.

Affirmed.

MR. JUSTICE REED, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON join, dissenting.

This appeal brings into question the extent to which the Interstate Commerce Act covers pipe lines by virtue of

the provisions of § 1 and § 19a.[1] Acting under the authority of these sections, the Interstate Commerce Commission called upon the appellant, Champlin Refining Company, for reports deemed appropriate for it to make, if it is a common carrier under the act. The appellant challenged the Commission's order on the ground that it was not covered by the sections.

Champlin owns a pipe line for the carriage of oil or other similar commodity from its refinery in Oklahoma to various distributing points in other states. It carries no commodities except its own produced in its own refinery and delivered at the ends of the pipe line into its own storage or holding tanks for sale to its customers. It also is sole owner of the stock of the Cimarron Valley Pipe Line Company, admittedly an intrastate common carrier, that supplies the Champlin refinery with its crude oil. The Commission's orders for valuation reports do not treat

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[1] 49 U. S. C. § 1:

"(1) . . . The provisions of this chapter shall apply to common carriers engaged in—

"(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water;

. . . . . .

"(3) (a) The term 'common carrier' as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire . . . ."

49 U. S. C. § 19a:

". . . The Commission shall . . . investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this chapter . . . . The Commission shall . . . make an inventory which shall list the property of every common carrier subject to the provisions of this chapter in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission."

Champlin and Cimarron as a unitary operation. The Commission, at this bar, disclaimed expressly any intention to test the subjection of Champlin's distributing pipe line to Commission power by Champlin's ownership of the Cimarron stock. As the Court treats the situation as though Champlin's distributing pipe line, between the refinery and the sale tanks only, were involved, we accept for the purpose of this dissent the Commission's view of the test to be applied to Champlin.

Section 1 of the act applies its provisions to "common carriers engaged in the transportation of oil" or similar commodities. In *The Pipe Line Cases,* 234 U. S. 548, and *Valvoline Oil Co.* v. *United States,* 308 U. S. 141, this Court interpreted the term "common carrier" to include all interstate pipe-line companies that are engaged, within the purview of the act, in the transportation of oil. In these cases, pipe-line companies that carried only their own oil, although all or a large part of it was purchased from producers prior to its carriage in the pipe lines, were held common carriers within the meaning and purpose of the act, though not common carriers in the technical sense of holding one's self out to carry indiscriminately all oil offered, because the act's evident purpose was to bring within its scope all pipe lines that would carry all oil offered "if only the offerers would sell" at the carrier's price. In the *Valvoline* case, this interpretation of the 1906 Act, 34 Stat. 584, was found to have been carried into the act as amended in 1920, 41 Stat. 474, despite certain changes in language. 308 U. S. at 145.

It is to be noted, however, that the *Pipe Line* and *Valvoline* cases did not bring within the scope of the Interstate Commerce Act all pipe lines that carried oil interstate. If the companies were common carriers in substance, the act made them so in form. Those pipe lines held covered by the act in *The Pipe Line Cases* and *Valvoline* were found common carriers in substance because they purchased and

carried all oil offered. The Interstate Commerce Act continually has required such carriers to be engaged in the transportation of oil or other commodities. In *The Pipe Line Cases,* a company, Uncle Sam Oil Company, though operating a pipe line carrying oil, was held beyond the act's reach because not engaged in the transportation of oil as a common carrier within the purpose of the act.

> "When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end." 234 U. S. at 562.

There has been no change bearing on this question in the applicable acts since *The Pipe Line Cases.* As a matter of statutory construction, we see no reason to change from this Court's long-standing interpretation. If Congress desires to undertake regulation of the transportation of an interstate carrier, in substance a private carrier, it understands the method of approach. 49 U. S. C. § 304 (a) (3). There is no pertinent legislative history to support so broad an interpretation of pipe line legislation. The evil sought to be remedied was the mastery of oil through control of the gathering facilities.[2] If a line does not carry oil of others, it is not transporting within the contemplation of the act.

In the *Uncle Sam* case it was said that the transportation of oil from well to refinery was "merely an incident to use at the end." We see no difference between the use contemplated by the Uncle Sam Company and this company.

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[2] 234 U. S. at 558–59:

"By the before mentioned and subordinate lines the Standard Oil Company had made itself master of the only practicable oil transportation between the oil fields east of California and the Atlantic Ocean and carried much the greater part of the oil between those points."

Each carries its own oil for the same ultimate purpose—to reach the market.

Nor can we see any significant distinction from the *Uncle Sam* case in the practice of Champlin to use frequently the freight rate from Enid to the final destination as a measure of the addition to Enid refinery, f. o. b. price that it will charge at its distributing tanks. This practice is departed from to meet competition. Naturally some transportation cost must be added to the refinery price for deliveries elsewhere. How much it is or how it is calculated does not seem to us to bear upon the question of whether Champlin is "a common carrier engaged in the transportation of oil" within the scope of the act.

We would have a very different case than the one before us if Congress had provided that all owners of pipe lines carrying oil in interstate commerce should give appropriate information to the Interstate Commerce Commission. This is not what § 19a does. It requires reports only from "every common carrier subject to the provisions" of the act. When an enterprise is "subject to the provisions" of the act is defined by § 1 (1) (b) and § 1 (3). Therefore, it is not § 19a but § 1 that must be construed. The definition of § 1 flows not only into § 19a but also into various other sections. Once an enterprise is found to be included in § 1, the Interstate Commerce Act subjects it to § 19a and other provisions dealing with common carriers "subject to" the act. Thus, to give two instances, it must provide equal and reasonable transportation to all comers, (§ 1 (4)–(6)); and it must file a schedule of rates (§ 6 (1)). If, therefore, any doubt is felt about the applicability of some of these requirements, the doubts are properly to be taken into account in determining the scope of § 1. The range of servitudes to which this pipe line is subjected by including it in § 1 bears vitally upon whether such a construction should be given to § 1.

For the reasons detailed above, we do not think that Champlin is covered by the act and we would reverse the decree of the District Court.

UNITED STATES *v.* ALCEA BAND OF TILLAMOOKS ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 26. Argued January 31, February 1, 1946.—Reargued October 25, 1946.—Decided November 25, 1946.

Under the Act of August 26, 1935, 49 Stat. 801, conferring jurisdiction on the Court of Claims to adjudicate and render final judgment on "any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands" previously occupied by certain Indian tribes and bands in Oregon, *held*, that tribes which successfully identify themselves as entitled to sue under the Act, prove their original Indian title to designated lands, and demonstrate that their interest in such lands was taken without their consent and without compensation, are entitled to recover compensation therefor without showing that the original Indian title ever was formally recognized by the United States. Pp. 45–54.

103 Ct. Cl. 494, 59 F. Supp. 934, affirmed.

Certain Indian tribes sued the United States in the Court of Claims under the Act of August 26, 1935, 49 Stat. 801, and recovered judgment for the taking without their consent of their interest under original Indian title in certain lands previously occupied by them. 103 Ct. Cl. 494, 59 F. Supp. 934. This Court granted certiorari. 326 U.S. 707. *Affirmed*, p. 54.

Walter J. Cummings, Jr. argued the cause for the United States. With him on the briefs were *Solicitor General McGrath, Assistant Attorney General Bazelon* and *Roger P. Marquis*. *J. Edward Williams* and *John C. Harrington* were also on the brief on the original argument.

Everett Sanders argued the cause for respondents. With him on the brief were *L. A. Gravelle, Douglas Whitlock* and *Edward F. Howrey.*

Ernest L. Wilkinson and *John W. Cragun* filed a brief, as *amici curiae,* and *James E. Curry* and *C. M. Wright* filed a brief for the National Congress of American Indians, as *amicus curiae,* urging affirmance.

MR. CHIEF JUSTICE VINSON announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY joined.

Eleven Indian tribes have sued the United States in the Court of Claims under the Act of August 26, 1935,[1] which gives that court jurisdiction to hear and adjudicate cases involving "any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in . . . the lands . . . occupied by the Indian tribes and bands described in" certain unratified

[1] 49 Stat. 801. The pertinent section in full provides: "That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment . . . (b) any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document Numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua, and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast Range, the Grande Ronde, and the Siletz Reservations in said Territory."

treaties negotiated with Indian tribes in the Territory of Oregon.

Four of the tribes,[2] the Tillamooks, Coquilles, Too-too-to-neys and Chetcos, successfully identified themselves as entitled to sue under the Act, proved their original Indian title [3] to designated lands, and demonstrated an involuntary and uncompensated taking of such lands. The Court of Claims thereupon held that original Indian title was an interest the taking of which without the consent of the Indian tribes entitled them to compensation. In answer to government contentions that original Indian title, in the absence of some form of official "recognition," could be appropriated without liability upon the part of the sovereign, the Act of 1848,[4] establishing the Territory of Oregon, was cited by the Court of Claims as affording any recognition required to support the claim for compensation. The issues decided, not previously passed upon by this Court and being of importance to the administration of Indian affairs, prompted this Court to grant certiorari. The case was argued during the 1945 term and on April 1, 1946, was restored to the docket for reargument before a full bench.

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[2] The remaining seven plaintiff tribes failed to state a cause of action under the jurisdictional act and the rules of the Court of Claims.

[3] "Original Indian title" is used to designate the Indian right of occupancy based upon aboriginal possession.

[4] 9 Stat. 323. The Act created a territorial government and declared: "That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed . . ."

The events giving rise to the claims here occurred as part of the opening and development of the Territory of Oregon. After creating a government for that territory by the Act of 1848,[5] Congress in 1850 authorized the negotiation of treaties with Indian tribes in the area. Under the latter Act,[6] Anson Dart, later succeeded by General Joel Palmer, was appointed Superintendent of Indian Affairs for the Oregon region and was instructed to negotiate treaties for the extinguishment of Indian claims to lands in that district. On August 11, 1855, Palmer and respondent tribes concluded a treaty providing for the cession of Indian lands in return for certain money payments and the creation of a reservation. The treaty was to be operative only upon ratification. It was not submitted to the Senate until February, 1857, and was never ratified.

Pending expected ratification, and following recommendations from Palmer, the President on November 9, 1855, created a reservation, subject to future diminution and almost identical with that provided for in the treaty. A large part of this reservation, called the Coast or Siletz Reservation, consisted of lands to which the Tillamook Tribe held original Indian title. Almost immediately the Tillamooks were confined to that portion of their land within the reservation, and the other three respondent tribes, as well as other tribes, were moved from their original possessions to the reservation. In 1865 an Executive Order reduced the size of the reservation; in 1875 Congress by statute approved the Executive Orders of 1855 and 1865, and in order to open more land for public settlement, removed additional land from the reservation. By an Act of 1894,[7] Congress officially accepted and approved the res-

[5] 9 Stat. 323.

[6] 9 Stat. 437.

[7] 28 Stat. 286, 323.

ervation as it then existed, and thenceforward did not take reservation lands without compensation.

The claims of respondent tribes are for the wrongful taking which occurred when they were deprived of their original possessions by the Executive Order of November 9, 1855. Even as to the Tillamooks, the Court of Claims found the taking complete as of November 9, 1855, since this tribe was forced to share its former lands with other Indians, and since the reservation was, in any event, only a conditional one, subject to being opened for public settlement at the will of the President. Petitioner disputes neither this finding nor the proof of original Indian title as of 1855.

Other than the benefits flowing from the Act of 1894,[8] none of the four respondent tribes has received any compensation for the loss of its lands. Until the present jurisdictional act of 1935, these tribes, lacking consent of the United States to be sued, were forbidden access to the courts. They alone of the tribes with whom Dart and Palmer negotiated some twenty-odd treaties between 1850 and 1855 have yet to receive recognition for the loss of lands held by original Indian title.[9]

Until now this Court has had no opportunity or occasion to pass upon the precise issue presented here. In only one Act prior to 1935 has Congress authorized judicial determination of the right to recover for a taking of nothing more than original Indian title; and no case under that

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[8] 28 Stat. 286, 323.

[9] In 1851 Dart and Palmer negotiated treaties with nineteen tribes other than respondents. None of these treaties was ratified; but twelve of the nineteen tribes were included in further treaties made in 1853, 1854, and 1855, and Congress in 1897 and 1912 provided for paying the remaining seven tribes for their lands taken under the unratified treaties.

Act,[10] passed in 1929, reached this Court.[11] In 1930 [12] Congress again authorized adjudication of Indian claims arising out of original Indian title, but expressly directed an award of damages if a taking of lands held by immemorial possession were shown. This Act thus eliminated any judicial determination of a right to recover, once original Indian title was established.

Prior to 1929, adjudications of Indian claims against the United States were limited to issues arising out of treaties, statutes, or other events and transactions carefully designated by Congress. This Court has always strictly construed such jurisdictional acts and has not offered judicial opinion on the justness of the handling of Indian lands, except in so far as Congress in specific language has permitted its justiciable recognition.

The language of the 1935 Act is specific, and its consequences are clear. By this Act Congress neither admitted nor denied liability. The Act removes the impediments of sovereign immunity and lapse of time and provides for judicial determination of the designated claims. No new right or cause of action is created. A merely moral claim is not made a legal one. The cases are to be heard on their merits and decided according to legal principles pertinent to the issues which might be presented under the Act.[13] Accordingly the 1935 statute permits judicial determina-

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[10] 45 Stat. 1256, as amended in respects immaterial here, 47 Stat. 307.

[11] *Coos Bay Indian Tribe* v. *United States*, 87 Ct. Cl. 143 (1938), discussed *infra* p. 50, arose under the 1929 Act.

[12] 46 Stat. 531, amending 44 Stat. 1263. *Assiniboine Indian Tribe* v. *United States*, 77 Ct. Cl. 347 (1933) was litigated under this jurisdictional act.

[13] *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500 (1913); *The Sac and Fox Indians*, 220 U. S. 481, 489 (1911).

tion of the legal and equitable claims growing out of original Indian title. That which was within the power of Congress to withhold from judicial scrutiny has now been submitted to the courts. If, as has many times been said,[14] the manner of extinguishing Indian title is usually a political question and presents a non-justiciable issue, Congress has expressly and effectively directed otherwise by seeking in the 1935 Act judicial disposition of claims arising from original Indian title. "By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide, as between man and man . . ." *United States* v. *Arredondo,* 6 Pet. 691, 711 (1832).

It has long been held that by virtue of discovery the title to lands occupied by Indian tribes vested in the sovereign.[15] This title was deemed subject to a right of occupancy in favor of Indian tribes, because of their original and previous possession. It is with the content of this right of occupancy, this original Indian title, that we are concerned here.

As against any but the sovereign, original Indian title was accorded the protection of complete ownership; [16] but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. Termination of the right by sovereign action was complete and left the land free and clear of Indian claims. Third parties could not question the justness or fairness of the methods used to extinguish the right of occupancy.[17] Nor could the Indians themselves prevent a taking of tribal lands or forestall a termination of their title. However, it is now for the first time asked

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[14] *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 347 (1941), and cases note 27 *infra.*

[15] *Johnson* v. *McIntosh,* 8 Wheat. 543, 573–74 (1823).

[16] *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339 (1941).

[17] *Beecher* v. *Wetherby,* 95 U. S. 517 (1877).

whether the Indians have a cause of action for compensation arising out of an involuntary taking of lands held by original Indian title.

We cannot but affirm the decision of the Court of Claims. Admitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation need not be paid. In speaking of the original claims of the Indians to their lands, Marshall had this to say: "It is difficult to comprehend the proposition . . . that the discovery . . . should give the discoverer rights in the country discovered, which annulled the pre-existing right of its ancient possessors. . . . It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. . . . The king purchased their lands, . . . but never coerced a surrender of them." *Worcester* v. *Georgia*, 6 Pet. 515, 543, 544, 547 (1832). In our opinion, taking original Indian title without compensation and without consent does not satisfy the "high standards for fair dealing" required of the United States in controlling Indian affairs. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 356 (1941). The Indians have more than a merely moral claim for compensation.[18]

A contrary decision would ignore the plain import of traditional methods of extinguishing original Indian title. The early acquisition of Indian lands, in the main, progressed by a process of negotiation and treaty. The first treaties reveal the striking deference paid to Indian claims,

[18] The "moral" obligation upon Congress, of which the cases speak, refers more to the obligation to open the courts to suit by the Indians. It does not mean that there is no substantive right in the Indians. So in *United States* v. *Blackfeather*, 155 U. S. 180, 194 (1894) it was held that, "While there may be a moral obligation on the part of the government to reimburse the money embezzled by the Indian superintendent . . .," the jurisdictional act in point did not extend to such a claim. Yet, given consent to suit, it would hardly be said that there was no substantive right against the United States for embezzlement of Indian funds.

as the analysis in *Worcester* v. *Georgia, supra,* clearly details. It was usual policy not to coerce the surrender of lands without consent and without compensation.[19] The great drive to open Western lands in the 19th Century, however productive of sharp dealing, did not wholly subvert the settled practice of negotiated extinguishment of original Indian title.[20] In 1896, this Court noted that, ". . . nearly every tribe and band of Indians within the territorial limits of the United States was under some treaty relations with the government." *Marks* v. *United States,* 161 U. S. 297, 302 (1896). Something more than sovereign grace prompted the obvious regard given to original Indian title.

Long before the end of the treaty system of Indian government and the advent of legislative control in 1871,[21] Congress had evinced its own attitude toward Indian relations. The Ordinance of 1787 declared, "the utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent . . ." 1 Stat. 50, 52. When in 1848 the territorial government of Oregon was created, § 14 of that Act [22] secured to the inhabitants of the new territory all the rights and privileges guaranteed by the Ordinance of 1787. Nor did congressional regard for Indian lands change in 1871. In providing for the settlement of Dakota Territory, Congress in 1872 directed the extinguishment of the interests of Indians in certain lands and the determina-

[19] "The practical admission of the European conquerors of this country renders it unnecessary for us to speculate on the extent of that right which they might have asserted from conquest . . . The conquerors have never claimed more than the exclusive right of purchase from the Indians . . ." 1 Op. A. G. 465, 466 (1821) (William Wirt).

[20] See the analysis in Cohen, Handbook of Federal Indian Law (1945) 51–66.

[21] 16 Stat. 544.

[22] 9 Stat. 323, 329, § 14.

tion of what "compensation ought, in justice and equity, to be made to said bands . . . for the extinguishment of whatever title they may have to said lands." 17 Stat. 281; *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55, 59 (1886). The latest indicia of congressional regard for Indian claims is the Indian Claims Commission Act, 60 Stat. 1049, 1050, § 2 (5), in which not only are claims similar to those of the case at bar to be heard, but "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity" may be submitted to the Commission with right of judicial review.

Congressional and executive action consistent with the prevailing idea of non-coercive, compensated extinguishment of Indian title is clear in the facts of the present case. The Act of 1848 declared a policy of extinguishing Indian claims in Oregon only by treaty. The statute of 1850 put in motion the treaty-making machinery. Respondent tribes were among those with whom treaties were negotiated. In many cases, expected ratification did not follow. In the case of respondent tribes alone have no steps been taken to make amends for the taking of Indian lands pending treaty ratification. To determine now that compensation must be paid is only a fair result.

Petitioner would admit liability only if, in addition to clear proof of original Indian title, some act of official "recognition" were shown. Original Indian title would not attain the status of a compensable interest until some definite act of sovereign acknowledgment followed. Apparently petitioner has seized upon language of the Court of Claims in *Duwamish Indians* v. *United States,* 79 Ct. Cl. 530 (1934), and from it has fashioned a full-blown concept of "recognized Indian title." The jurisdictional act in that case authorized suits on "all claims of whatsoever nature, both legal and equitable." [23] Claims based solely

[23] 43 Stat. 886.

on original Indian title were held to be outside the limits of the act; and unless a treaty or act of Congress recognizing the Indians' title by right of occupancy were shown, recovery could not be had.[24] A more specific jurisdictional act was deemed necessary to authorize a suit based upon original Indian title alone.

Petitioner reads into the *Duwamish* case far too much. When the first jurisdictional act specifically allowing suit on original Indian title in language identical with that of the 1935 Act later came before the Court of Claims in *Coos Bay Indian Tribe* v. *United States,* 87 Ct. Cl. 143 (1938), the court clearly recognized the specific directives of the act and denied recovery solely because original Indian title had not been proved. "Recognition" appeared to count only as a possible method of proving Indian title itself, not as a requisite in addition to proof of that title. Furthermore, in the case at bar, the unmistakable language of the Court of Claims stands squarely against the significance petitioner would attach to the *Duwamish* decision: "The Duwamish case did not hold or intend to hold that an Indian tribe could not recover compensation on the basis of original Indian use and occupancy title as for a taking if the jurisdictional act authorized the bringing of a suit and rendition of judgment for compensation on the basis of such original title." *Alcea Band of Tillamooks* v. *United States,* 103 Ct. Cl. 494, 556, 59 F. Supp. 934 (1945).

Authority for petitioner's position is not found in *Shoshone Indians* v. *United States,* 324 U. S. 335 (1945). The jurisdictional act there limited suits to those claims "arising under or growing out of the treaty of July 2, 1863 . . ." [25] Suits based upon original Indian title were not authorized, but we thought a claim would properly arise under the treaty if it were based upon a taking of

[24] *Duwamish Indians* v. *United States,* 79 Ct. Cl. 530, 600 (1934).

[25] 45 Stat. 1407.

land which the treaty had in any way "recognized" or acknowledged as belonging to the Indians. The Court thrice noted that claims based upon original Indian title were not involved, and made no attempt to settle controversies brought under other jurisdictional acts authorizing the litigation of claims arising from the taking of original Indian title.[26]

Nor do other cases in this Court lend substance to the dichotomy of "recognized" and "unrecognized" Indian title which petitioner urges. Many cases recite the paramount power of Congress to extinguish the Indian right of occupancy by methods the justice of which "is not open to inquiry in the courts." *United States* v. *Santa Fe Pacific R. Co., supra,* at 347.[27] Lacking a jurisdictional act permitting judicial inquiry, such language cannot be questioned where Indians are seeking payment for appropriated lands; but here in the 1935 statute Congress has authorized decision by the courts upon claims arising out of original Indian title. Furthermore, some cases speak of the unlimited power of Congress to deal with those Indian lands which are held by what petitioner would call "recog-

[26] *Shoshone Indians* v. *United States,* 324 U. S. 335, 337, 339, 354 (1945).

[27] The statements in many cases are directed to disputes between third parties, one of whom attempts to raise a defect in the other's title by tracing it to a government grant out of Indian territory and attacking the power or the method used by the sovereign to convey Indian lands. *Beecher* v. *Wetherby,* 95 U. S. 517, 525 (1877); *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55, 66 (1886); *Martin* v. *Waddell,* 16 Pet. 367, 409 (1842); *Clark* v. *Smith,* 13 Pet. 195, 201 (1839). And in other cases, the issue was not the right of Indian tribes to be compensated for an extinguishment of original Indian title by the United States. *Shoshone Indians* v. *United States,* 324 U. S. 335 (1945); *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339 (1941); *Conley* v. *Ballinger,* 216 U. S. 84 (1910); *Lone Wolf* v. *Hitchcock,* 187 U. S. 553 (1903); *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294 (1902).

nized" title; [28] yet it cannot be doubted that, given the consent of the United States to be sued, recovery may be had for an involuntary, uncompensated taking of "recognized" title.[29] We think the same rule applicable to a taking of original Indian title. "Whether this tract . . . was properly called a reservation . . . or unceded Indian country, . . . is a matter of little moment . . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Minnesota* v. *Hitchcock,* 185 U. S. 373, 388–89 (1902).[30]

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[28] *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 566 (1903); *Beecher* v. *Wetherby,* 95 U. S. 517, 525 (1877). The *Lone Wolf* case was properly assessed in *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497 (1937): "Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty." See also *Oklahoma* v. *Texas,* 258 U. S. 574, 592 (1922).

In *Barker* v. *Harvey,* 181 U. S. 481 (1901), the Indian claims were deemed extinguished by non-presentment to the land commission, and this was true even if the claims had been "recognized" by the Mexican government prior to the cession of lands to the United States.

[29] *United States* v. *Klamath Indians,* 304 U. S. 119 (1938); *Chippewa Indians* v. *United States,* 301 U. S. 358 (1937); *Shoshone Tribe* v. *United States,* 299 U. S. 476 (1937); *United States* v. *Creek Nation,* 295 U. S. 103 (1935).

[30] Other cases also draw no distinction between original Indian title and "recognized" Indian title. "The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated." *Spalding* v. *Chandler,* 160 U. S. 394, 403 (1896). Of similar tenor is *Conley* v. *Ballinger,* 216 U. S. 84, 90–91 (1910).

The older cases explaining and giving substance to the Indian right of occupancy contain no suggestion that only "recognized" Indian title

Requiring formal acknowledgment of original Indian title as well as proof of that title would nullify the intended consequences of the 1935 Act. The rigors of "recognition," according to petitioner's view, would appear to require in every case some definite act of the United States guaranteeing undisturbed, exclusive and perpetual occupancy, which, for example, a treaty or statute could provide. Yet it was the very absence of such acknowledgment which gave rise to the present statute.

Congress was quite familiar with the precision advisable when drafting statutes giving jurisdiction to the Court of Claims in Indian cases. In 1925 an act authorizing the litigation of any and all claims of certain Indian tribes was passed. In June, 1934, that act was held, for lack of specificity, not to extend to claims based on original title.[31] The following year Congress passed the present Act, employing the specific language used once before in the Act of 1929,[32] under which *Coos Bay Indian Tribe* v. *United States, supra,* arose. The considered attention given to the many ramifications of Indian affairs in the 1930's [33] suggests that Congress well realized the import of the words used in the jurisdictional act of 1935, and that Congress did not expect respondent tribes to be turned out of court either because congressional power over Indian title was deemed to have no limits or because there was, as was obvious to all, no formal guarantee of perpetual and

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was being considered. Indeed, the inference is quite otherwise. *Mitchel* v. *United States,* 9 Pet. 711, 746 (1835); *Worcester* v. *Georgia,* 6 Pet. 515, 543–48 (1832); *Johnson* v. *McIntosh,* 8 Wheat. 543, 573–74 (1823).

[31] *Duwamish Indians* v. *United States,* 79 Ct. Cl. 530 (1934).

[32] 45 Stat. 1256, as amended in respects immaterial here, 47 Stat. 307.

[33] "The decade from 1930 to 1939 is as notable in the history of Indian legislation as that of the 1830's or the 1880's." Cohen, Handbook of Federal Indian Law (1945) 83.

exclusive possession prior to the taking of respondents' lands in 1855.

Respondents have satisfactorily proved their claim of original Indian title and an involuntary taking thereof. They are entitled to compensation under the jurisdictional act of 1935. The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.[34] It does not "enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them." *United States* v. *Creek Nation,* 295 U. S. 103, 110 (1935).

In view of the grounds upon which decision rests, it is not necessary to consider the alternate holding of the court below relative to the 1848 act affording sufficient "recognition" of respondents' Indian title.

Affirmed.

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

MR. JUSTICE BLACK, concurring.

Before Congress passed the special Act under which this suit was brought, I think that the Government was under no more legal or equitable obligation to pay these respondents than it was under obligation to pay whatever descendants are left of the numerous other tribes whose lands and homes have been taken from them since the Nation was founded. See *Northwestern Shoshone Indians* v. *United States,* 324 U. S. 335, 354–358, concurring opinion. It seems pretty clear to me, however, that Congress in the Act of August 26, 1935, 49 Stat. 801, created an obligation on the part of the Government to pay these Indians for all lands to which their ancestors held an "original Indian title." This interpretation of the Act is not only consistent

[34] *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 478 (1899).

with the unusually broad language Congress used, but also fits into the pattern of congressional legislation which has become progressively more generous in its treatment of Indians. The capstone of this type of legislation was an Act passed by the last Congress, which established an Indian Claims Commission with sweeping powers to pay old Indian claims growing out of seizure of their lands, among other things. This Commission is given power to make awards, subject to review by the Court of Claims, with and without regard to previous rules of law or equity courts. The Commission is even given a blanket power to make awards upon finding, for example, that the land of Indians was taken by the Government in a way that did not comport with "fair and honorable dealings." 60 Stat. 1049, 1050, § 2 (5). Since whatever our action here, these Indians could, I assume, pursue their claims under this broad recent legislation, and since the language of the Act before us does not preclude a similarly broad interpretation, I see no reason why it should be otherwise interpreted. This leads me to concur in affirmance of the judgment.

MR. JUSTICE REED, with whom MR. JUSTICE RUTLEDGE and MR. JUSTICE BURTON join, dissenting.

This case presents directly for the first time in this Court the question of whether an Indian band is legally entitled to recover compensation from the United States for the taking by the Government of the aboriginal lands of the Indians when there has been no prior recognition by the United States through treaty or statute of any title or legal or equitable right of the Indians in the land. The Court allows compensation. The importance of the issue persuades us that we should express the reasons for our dissent. It is difficult to foresee the result of this ruling in the consideration of claims by Indian tribes against the United States. We do not know the amount of land so taken.

West of the Mississippi it must be large. Even where releases of Indian title have been obtained in return for recognition of Indian rights to smaller areas, charges of unfair dealings may open up to consideration again legal or equitable claims for taking aboriginal lands.[1]

The Court rightly states the effect of the jurisdictional act in these words:

> "The Act removes the impediments of sovereign immunity and lapse of time and provides for judicial determination of the designated claims. No new right or cause of action is created. A merely moral claim is not made a legal one. [*Ante,* p. 45.]
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[1] See Indian Claims Commission Act, approved August 13, 1946, 60 Stat. 1049, 1050:

"SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

"All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States."

> "Lacking a jurisdictional act permitting judicial inquiry, such language cannot be questioned where Indians are seeking payment for appropriated lands; but here in the 1935 statute Congress has authorized decision by the courts upon claims arising out of original Indian title." [*Ante*, p. 51.]

This means, and the Court so treats the claims, that the Indians here get no money by grace or charity or for reasons of honorable dealings with helpless peoples.[2] The recovery by them under this Act will be because they have had valid claims against the United States on account of their ouster from these lands in 1855. These Indians have not been paid the sums owing them, one deduces from the Court's opinion, because the sovereign, our nation, kept the courts closed to them. The jurisdictional act, the Court holds, removes this bar to recovery. This conclusion conflicts with our understanding of this Government's right in the public lands of the nation.

The character of Indian occupancy of tribal lands is at least of two kinds: first, occupancy as aborigines until that occupancy is interrupted by governmental order; and, second, occupancy when by an act of Congress they are given a definite area as a place upon which to live. When Indians receive recognition of their right to occupy lands by act of Congress, they have a right of occupancy which cannot be taken from them without compensation.[3] But by

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[2] There are sound reasons for congressional generosity toward the remnants of the aborigines. Such reasons as lead the nation to succor the vanquished in any contest. Cf. *United States* v. *Realty Co.*, 163 U. S. 427; *Pope* v. *United States*, 323 U. S. 1; and 60 Stat. 1049, 1055, § 24.

[3] *Chippewa Indians* v. *United States*, 301 U. S. 358, 375–76; *United States* v. *Klamath Indians*, 304 U. S. 119; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497; *United States* v. *Creek Nation*, 295 U. S. 103, 109–10.

the other type of occupancy, it may be called Indian title, the Indians get no right to continue to occupy the lands; and any interference with their occupancy by the United States has not heretofore given rise to any right of compensation, legal or equitable.[4]

This distinction between rights from recognized occupancy and from Indian title springs from the theory under which the European nations took possession of the lands of the American aborigines. This theory was that discovery by the Christian nations gave them sovereignty over and title to the lands discovered. *Johnson* v. *M'Intosh,* 8 Wheat. 543, 572–86; 1 Story, Commentaries on the Constitution (5th Ed.) § 152. While Indians were permitted to occupy these lands under their Indian title,[5] the conquering nations asserted the right to extinguish that Indian title without legal responsibility to compensate the Indian for his loss.[6] It is not for the courts of the conqueror to question the propriety or validity of such an assertion of power. Indians who continued to occupy their aboriginal homes, without definite recognition of their right to do so are like paleface squatters on public lands without compensable rights if they are evicted. Tenure for Indian tribes specifically recognized by Congress developed along different lines in the original states, the Louisiana Purchase, the Mexican Session or the lands obtained by the Northwest Boundary Treaty. But there is no instance known to us where there has been intimation or holding that congressional power to take Indian title to lands is limited. Whenever the lands to which the Indians had only Indian title were required for settlement

[4] See *Shoshone Indians* v. *United States,* 324 U. S. 335, 339.

[5] See *Mitchel* v. *United States,* 9 Pet. 711, 745.

[6] The Treaty of Paris, 1783, confirmed the sovereignty of the United States without reservation of Indian rights.

or public use, the sovereign without legal obligation could extinguish that title by purchase or the sword.[7]

In *Barker* v. *Harvey,* 181 U. S. 481, Mission Indians claimed a right of permanent occupancy in former Mexican lands ceded to the United States by the treaty of Guadalupe Hidalgo. They made this claim against a right arising by virtue of a patent that was issued by the United States in confirmation of grants by the Mexican Government in derogation of the Indian title. This Court said as to this Indian title, p. 491, "that a claim of a right to permanent occupancy of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States." [8] This Court confirmed title contrary to the Indian claim. Rights of occupancy given to Indians by an executive order may be withdrawn without compensation to the Indians where their title was not recognized by congressional act. The Indians do not hold such lands by the same tenure as they do the lands by the terms of a ratified treaty or statute. *Sioux Tribe* v. *United States,* 316 U. S. 317, 326–28.

As we understand the present holding of the Court, it is that the manner of terminating this Indian title by the United States is limited by the duty to pay compensation. Therein, we think, lies the fundamental error of the Court's opinion. It is true that distinctions have been made between plenary authority over tribal lands and absolute power, with the suggestion that congressional

[7] *Johnson* v. *M'Intosh, supra,* at 587–89; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 568; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts,* 152 U. S. 114, 117. See *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 311.

[8] Cf. *Duwamish Indians* v. *United States,* 79 Ct. Cl. 530, 597–600.

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power over Indian title was not unlimited. See Cohen, Handbook of Indian Law, 94, 291, 309, 310, 311. Examination of the authorities cited, however, will show, we think, in every instance, that where reference is made to the protection of Indian lands by the Fifth Amendment or to the legal obligation of the United States to compensate Indians for lands taken, the lands under discussion were lands held by the Indians under titles recognized by specific acts of Congress.[9]

When Chief Justice Marshall expounded for the Court the power of the United States to extinguish Indian title, this doctrine was laid down for the nation's guidance in dealing with the Indians:

> "The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.
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> ". . . All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognised the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.
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> ". . . Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting

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[9] E. g. *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, 113; *United States* v. *Creek Nation*, 295 U. S. 103, 109; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496; *Chippewa Indians* v. *United States*, 301 U. S. 358, 375–77.

the original justice of the claim which has been successfully asserted. . . .

. . . . .

"The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. . . . Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

. . . . .

". . . the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

"What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

"Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As

the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies." 8 Wheat. 587–91.

It is unnecessary for this case to undertake at this late date to weigh the rights and wrongs of this treatment of aboriginal occupancy. Where injustices have been done to friendly peoples, Congress has sought to soften their effect by acts of mercy. Never has there been acknowledgment before of a legal or equitable right to compensation that springs from the appropriation by the United States of the Indian title.

"Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. *Buttz* v. *Northern Pacific Railroad, supra,* p. 66. As stated by Chief Justice Marshall in *Johnson* v. *M'Intosh, supra,* p. 586, 'the exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher* v. *Wetherby,* 95 U. S. 517, 525." *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 347.

The colonies, the states and the nation alike, by their early legislation, provided that only the respective sovereigns could extinguish the Indian title.[10] The way in which it was to be extinguished has been held, continually, a political matter.[11] The jurisdictional act now under consideration does not purport to change a political matter to a justiciable one.

When this present jurisdictional act was considered by Congress, nothing in the reports or the debates [12] indicates that Congress intended to create a new liability because Indian title had been taken. This Court relies upon no change of attitude in Congress, but finds that this liability has always existed and that this act merely removes the bar against suit. This we think is contrary to the whole course of our relations with the Indians.

The Court finds a basis for this action in that this nation should not take the Indian title without compensation because such a taking would not satisfy the " 'high standards for fair dealing' required of the United States in controlling Indian affairs." The language used by the Court is taken from *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339 at 356. It there referred to an act unauthorized by Congress and not to such takings as here occurred when Congress opened the original home of these respondents for settlement.

In *Worcester* v. *Georgia*, 6 Pet. 515, 543, 544, 547, lands had been specifically set apart for the Cherokees. P. 556.

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[10] See passim, Laws of the Colonial and State Governments, Relating to Indians and Indian Affairs, from 1633 to 1831, inclusive: With an Appendix Containing the Proceedings of the Congress of the Confederation and the Laws of Congress, from 1800 to 1830, on the Same Subject.

[11] *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 311.

[12] See S. Reps. Nos. 571, 795, 74th Cong., 1st Sess.; H. Reps. Nos. 1085, 1134, 74th Cong., 1st Sess.; 79 Cong. Rec. 7806, 11188, 12520.

Therefore Chief Justice Marshall's comments were directed at a situation that does not exist here.

A concurring opinion has been filed which holds that Congress in the act here involved "created an obligation on the part of the Government to pay these Indians" for their Indian title. We do not think this present act is susceptible of that interpretation. We read the act, as we understand our Brethren do, to permit recovery of compensation only in case there were rights in the Indians prior to its passage "arising under or growing out of the original Indian title." We think no rights arose from this Indian title. Therefore no compensation is due.

As we are of the opinion that the jurisdictional act permitted judgment only for claims arising under or growing out of the original Indian title and are further of the opinion that there were no legal or equitable claims that grew out of the taking of this Indian title, we would reverse the judgment of the Court of Claims and direct that the bill of the respondents should be dismissed. Cf. *Shoshone Indians* v. *United States,* 324 U. S. 335.

UNITED STATES *v.* HOWARD P. FOLEY CO., INC.

CERTIORARI TO THE COURT OF CLAIMS.

No. 50. Argued October 25, 1946.—Decided November 25, 1946.

1. Under the government construction contract here involved, for installation of lighting of the runways of an airport, the Government was not liable for damages for delay in making the runways available to the contractor, though the delay prevented completion within the specified time, since the contract did not obligate the Government expressly or impliedly to make the runways available promptly, it contained provisions anticipating delays caused by the Government and providing remedies other than an award of damages to the contractor, and no fault actually was chargeable to the Government. Pp. 66–67.

2. The fact that no other contractor was involved in this case does not require a result different from that reached in *Crook Co.* v. *United States,* 270 U. S. 4, and *United States* v. *Rice,* 317 U. S. 61. P. 68.

105 Ct. Cl. 161, 63 F. Supp. 209, reversed.

Respondent brought suit in the Court of Claims upon a contract and was awarded a judgment against the United States. 105 Ct. Cl. 161, 63 F. Supp. 209. This Court granted certiorari. 327 U. S. 777. *Reversed,* p. 69.

A. Devitt Vanech argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Sonnett, Stanley M. Silverberg, Paul A. Sweeney, Abraham J. Harris* and *M. M. Heuser.*

Alexander M. Heron argued the cause for respondent. With him on the brief was *William L. Owen.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The Court of Claims rendered a judgment for the respondent and against the Government for an asserted breach of a construction contract. 105 Ct. Cl. 161, 63 F. Supp. 209. We granted the Government's petition for certiorari which alleged that the Court of Claims' decision was in direct conflict with *Crook Co.* v. *United States,* 270 U. S. 4, and *United States* v. *Rice,* 317 U. S. 61. We hold that the Government's contention is correct.

The respondent, an electrical contractor, agreed for a fixed fee to supply the materials for and install a field lighting system at the National Airport, Gravelly Point, Virginia, then under construction. The agreement was embodied in a standard form Government contract. Respondent promised to complete the job within 120 days after notice to proceed. In fact the job was not finished until 277 days after notice was given. The delay came

about in this way. The site of the airport was being built up from under water by a fast but then unique method of hydraulic dredging. As portions of the earth base for the runways and taxiways settled, they were to be paved and the shoulders "rough-graded." As segments of this work were finished, respondent was to move in, wire them, and install the lighting fixtures. The dredging took longer than Government engineers had anticipated, because some of the dredged soil, proving to be too unstable for runways and taxiways, had to be replaced. This in turn delayed completion of the runway sections; and, until each was finished, the lighting equipment for each segment could not be installed. The 157 days delay resulted from the consequently long and irregular intervals between the times when these segments were made available to respondent to do its job. But for these delays, respondent apparently could have finished its work in 120 days.

The Court of Claims considered that the Government breached its contract by failing to make the runways available in time for respondent to do its work within 120 days. The judgment against the Government was for certain overhead and administrative expenses which respondent incurred during the consequent period of delay.[1]

In no single word, clause, or sentence in the contract does the Government expressly covenant to make the runways available to respondent at any particular time. *Cf. United States* v. *Blair,* 321 U. S. 730, 733–734. It is suggested that the obligation of respondent to complete the job in 120 days can be inverted into a promise by the Government not to cause performance to be delayed beyond that time by its negligence. But even if this provision stand-

[1] The damages awarded were for the wages respondent paid supervisory employees who stood by during the delay intervals, and for certain expenses of respondent incurred on account of these employees for unemployment and similar taxes.

ing alone could be stretched to mean that the Government obligated itself to exercise the highest degree of diligence and the utmost good faith in efforts to make the runways promptly available, the facts of this case would show no breach of such an undertaking. For the Court of Claims found that the Government's representatives did this work "with great, if not unusual, diligence," and that "no fault is or can be attributed to them." Consequently, the Government cannot be held liable unless the contract can be interpreted to imply an unqualified warranty to make the runways promptly available.

We can find no such warranty if we are to be consistent with our *Crook* and *Rice* decisions, *supra*. The pertinent provisions in the instant contract are, in every respect here material, substantially the same as those which were held in the former cases to impose no obligation on the Government to pay damages for delay. Here, as in the former cases, there are several contract provisions which showed that the parties not only anticipated that the Government might not finish its work as originally planned, but also provided in advance to protect the contractor from the consequences of such governmental delay, should it occur. The contract reserved a governmental right to make changes in the work which might cause interruption and delay, required respondent to coordinate his work with the other work being done on the site, and clearly contemplated that he would take up his work on the runway sections as they were intermittently completed and paved. Article 9 of the contract, entitled "Delays—Damages," set out a procedure to govern both parties in case of respondent's delay in completion, whether such delay was caused by respondent, the Government, or other causes. If delay were caused by respondent, the Government could terminate the contract, take over the work, and hold respondent and its sureties liable. Or, in the alternative, the Govern-

ment could collect liquidated damages. If, on the other hand, delay were due to "acts of the Government" or other specified events, including "unforeseeable causes," procedure was outlined for extending the time in which respondent was required to complete its contract, and relieving him from the penalties of contract termination or liquidated damages.

In the *Crook* and *Rice* cases we held that the Government could not be held liable for delay in making its work available to contractors unless the terms of the contract imposed such liability. Those contracts, practically identical with the one here, were held to impose none. See also *United States* v. *Blair, supra.* The distinction which the Court of Claims found between this and the prior cases is not in point. It seems to be this: In the *Crook* and *Rice* cases the Government had a prime and a subcontractor: the Government reserved a right to make changes by which the prime contractor must thereafter be governed; the Government exercised this right; these changes made it impossible for the prime contractor and ultimately the subcontractor to do their work in time; since the Government had reserved the right against the prime contractor to make these changes, and the subcontractor knew this, the Government was not contractually responsible for the delay. Therefore it is suggested that the subcontractor in the *Rice* and *Crook* cases could know in advance that the performance time was "provisional," whereas here the contractor had reason to believe that it was certain. But in this case there is ample indication, both in the extrinsic facts and in the contract terms, that changes and delays were anticipated and remedies therefor provided. The contractor here only lacked the one additional indication that changes were anticipated which he could have read from the prime contract had there been a prime contract and if a prime contract had been available for him to read. If this be a distinction, it is a distinction

with no significant difference. This contract, like the others, shows that changes and delays were anticipated and provided for. The question on which all these cases turn is: Did the Government obligate itself to pay damages to a contractor solely because of delay in making the work available? We hold again that it did not for the reasons elaborated in the *Crook* and *Rice* decisions.

Reversed.

MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE JACKSON dissent. It is admitted that the Government had given the contractor "notice to proceed" which in our opinion had the legal consequences set forth in the opinion of the court below whose judgment we would affirm.

RICHFIELD OIL CORP. *v.* STATE BOARD OF EQUALIZATION.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 46. Argued October 24, 1946.—Decided November 25, 1946.

1. A judgment of the Supreme Court of California reversing, without directions, a judgment for the plaintiff in a suit for a refund of a tax unconstitutionally levied on an export under the California Retail Sales Tax Act, the case having been tried on the pleadings and stipulated facts and the State Supreme Court having passed on the issues which control the litigation, *held* reviewable here as a "final judgment" within the meaning of Judicial Code § 237, 28 U. S. C. § 344 (a). P. 72.
2. Appellant, which was engaged in producing and selling oil in California, entered into a contract for the sale of oil to the New Zealand Government. The oil was delivered by appellant from dockside tanks into a vessel of the New Zealand Government at a California port; was consigned to a New Zealand official at Auckland; was transported to New Zealand; and none of it was used or consumed in the United States. Appellant filed with the Collector of Customs

a shipper's export declaration; and did not collect, nor attempt to collect, any sales tax from the purchaser. *Held* that a tax levied upon appellant pursuant to the California Retail Sales Tax Act and measured by the gross receipts from the transaction was an impost upon an export, within the meaning of Art. I, § 10, Cl. 2 of the Federal Constitution, and therefore unconstitutional. Pp. 71–72, 75.

3. The fact that the provision of the Federal Constitution that no State shall, without the consent of Congress, lay "any" tax on imports or exports specifies but a single exception—"except what may be absolutely necessary for executing it's inspection Laws"—indicates that no other qualification of the absolute prohibition was intended. P. 76.
4. The constitutional prohibition against "any" state tax on imports or exports is not to be read as a prohibition against any "discriminatory" state tax. P. 76.
5. The commerce clause and the import-export clause of the Constitution, though complementary, serve different ends; and the limitations of the former are not to be read into the latter. P. 76.
6. The constitutional prohibition of "any" state tax on exports is not to be read as containing an implied qualification. Pp. 76–77.
7. The process of exportation commenced not later than when the oil was delivered into the vessel of the foreign purchaser. P. 83.
8. The construction of a state tax law by the highest court of the State is binding here, but is not determinative of whether the tax denies the taxpayer a federal right. P. 84.
9. Whether a state tax denies a federal right depends not upon the State's characterization of the tax, but upon its operation and effect. P. 84.
10. The incident which gave rise to the accrual of the state tax in this case—viz., the delivery of the oil into the vessel of the foreign purchaser—was a step in the export process. P. 84.
11. The constitutional prohibition of state taxes on exports involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. P. 85.

27 Cal. 2d 150, 163 P. 2d 1, reversed.

Appellant brought suit in a state court for a refund of an allegedly unconstitutional state tax. A judgment for the appellant was reversed by the state supreme court. 27 Cal. 2d 150, 136 P. 2d 1. Appellant appealed to this Court. *Reversed,* p. 86.

Norman S. Sterry argued the cause for appellant. With him on the brief was *Robert E. Paradise.*

John L. Nourse, Deputy Attorney General of California, argued the cause for appellee. With him on the brief was *Robert W. Kenny,* Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case is here on appeal from the Supreme Court of California which sustained a California tax against the claim that it was repugnant to Article I, Section 10, Clause 2 of the Constitution of the United States. Judicial Code § 237, 28 U. S. C. §§ 344 (a), 861a.

Appellant is engaged in producing and selling oil and oil products in California. It entered into a contract with the New Zealand Government for the sale of oil. The price was f. o. b. Los Angeles, payment in London. Delivery was "to the order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank steamer R. F. A. 'Nucula' at Los Angeles, California." The oil was to be consigned to the Naval-Officer-In-Charge, Auckland, New Zealand. Appellant carried the oil by pipe line from its refinery in California to storage tanks at the harbor where the Nucula appeared to receive the oil. When the Nucula had docked and was ready to receive the oil, appellant pumped it from the storage tanks into the vessel. Customary shipping documents were given the master, including a bill of lading which designated appellant as shipper and consigned the oil to the designated naval officer in Auckland. Payment of the price was made in London. The oil was transported to Auckland, no portion of it being used or consumed in the United States. Appellant filed with the Collector of Customs a shipper's export declaration. It did not collect, nor attempt to do so, any sales tax from the purchaser. Appellee assessed a retail sales tax against appellant meas-

ured by the gross receipts from the transaction. The tax was paid under protest, a claim for refund was filed asserting that the levy of the tax violated the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States, and this suit was brought to obtain a refund. The California Supreme Court, one justice dissenting, first allowed a recovery on that ground. 155 P. 2d 1. After a rehearing it reversed its position and held the tax constitutional, two justices dissenting. 27 Cal. 2d 150, 163 P. 2d 1.

I. We are met at the outset with the question whether the judgment of the California Supreme Court is a "final judgment" within the meaning of the Judicial Code § 237, 28 U. S. C. § 344 (a). The case was tried on the pleadings and stipulated facts, a jury having been waived. The trial court found for appellant. The Supreme Court ordered that the judgment "be and the same is hereby reversed." The argument is that under California law where a judgment has been reversed without directions, there is a new trial; that on a new trial appellant might amend its complaint and produce other evidence; and that if a new trial were had, new or different findings of fact might be made. See *Erlin* v. *National Union Fire Ins. Co.*, 7 Cal. 2d 547, 61 P. 2d 756.

The designation given the judgment by state practice is not controlling. *Department of Banking* v. *Pink*, 317 U. S. 264, 268. The question is whether it can be said that "there is nothing more to be decided" (*Clark* v. *Williard*, 292 U. S. 112, 118), that there has been "an effective determination of the litigation." *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548, 551; see *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 123–24. That question will be resolved not only by an examination of the entire record (*Clark* v. *Williard, supra*) but, where necessary, by resort to the local law to determine what effect the judgment has under the state rules of practice. *Brady* v.

Terminal Railroad Assn., 302 U. S. 678; *Brady* v. *Southern Ry. Co.*, 319 U. S. 777. See Boskey, Finality of State Court Judgments under the Federal Judicial Code, 43 Col. L. Rev. 1002, 1005.

This suit is brought under the California Retail Sales Tax Act, § 23 and § 31, which prescribes the sole remedy for challenging the tax. The procedure prescribed is payment of the tax, the filing of a claim for refund which sets forth "the specific grounds upon which the claim is founded," Cal. Stats. 1941, pp. 1328, 1329, and, in case the claim is denied, the institution of a suit within ninety days "on the grounds set forth in such claim." Cal. Stats. 1939, pp. 2184, 2185. The claim thus frames and restricts the issues for the litigation. Although the Supreme Court reversed the judgment of the trial court without direction, its decision controls the disposition of the case. See *Estate of Baird*, 193 Cal. 225, 223 P. 974; *Bank of America* v. *Superior Court*, 20 Cal. 2d 697, 128 P. 2d 357. Since the facts have been stipulated [1] and the Supreme Court of California has passed on the issues which control the litigation, we take it that there is nothing more to be

[1] In California a valid stipulation is binding upon the parties. *McGuire* v. *Baird*, 9 Cal. 2d 353, 70 P. 2d 915; *Webster* v. *Webster*, 216 Cal. 485, 14 P. 2d 522; see 23 Cal. Juris. 826. It is available at a second trial unless in terms otherwise limited, *Nathan* v. *Dierssen*, 146 Cal. 63, 79 P. 739; *Crenshaw* v. *Smith*, 74 A. C. A. 295, 168 P. 2d 752; see 100 A. L. R. 775, and will be controlling at the second trial unless the trial court relieves a party from the stipulation. *First National Bank* v. *Stansbury*, 118 Cal. App. 80, 5 P. 2d 13. Relief from a stipulation may be granted in the sound discretion of the trial court in cases where the facts stipulated have changed, there is fraud, mistake of fact, or other special circumstance rendering it unjust to enforce the stipulation. *Sacre* v. *Chalupnik*, 188 Cal. 386, 205 P. 449; *Back* v. *Farnsworth*, 25 Cal. App. 2d 212, 77 P. 2d 295; *Sinnock* v. *Young*, 61 Cal. App. 2d 130, 142 P. 2d 85; see 161 A. L. R. 1163. In the present case there is no intimation in the record or briefs of fraud, excusable neglect, or other ground for relief. Indeed the parties both accept the stipulation as accurate and complete.

decided. The jurisdictional objection is thus without merit. See *Gulf Refining Co.* v. *United States,* 269 U. S. 125, 136.

II. We turn then to the merits. Article I, Section 10, Clause 2 of the Constitution provides that "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 Supreme Court of California held that this provision did not bar the tax because the delivery of the oil which resulted in the passage of title occurred prior to the commencement of the exportation. The court suggested, and the appellee concedes, that a different result might follow if the oil had been delivered to a common carrier; "for then it would have been placed in the hands of an instrumentality whose *sole purpose* is to export goods, thus indelibly characterizing the process as a part of exportation." 27 Cal. 2d p. 153, 163 P. 2d p. 3. The court, in reaching the conclusion that the tax was constitutional, rested in part on our recent decisions (particularly *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33; *Department of Treasury* v. *Wood Preserving Corp.,* 313 U. S. 62; *International Harvester Co.* v. *Department of Treasury,* 322 U. S. 340) which sustained the levy of certain state taxes against the claim that they violated the Commerce Clause. The court concluded that if this had been an interstate transaction, it would have been subject to the tax. It saw no greater limitation on the power of the States under Article I, Section 10, Clause 2, than this Court has found to exist under the Commerce Clause.

We do not pursue the inquiry as to the validity of the tax under the Commerce Clause. For we are of the view that whatever might be the result of that inquiry, the tax is unconstitutional under Article I, Section 10, Clause 2.

The two constitutional provisions, while related, are not coterminous. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. *Brown* v. *Maryland,* 12 Wheat. 419; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292. But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was, or had ever been, an import or export. See *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 665–66, and cases cited. Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the States, even in absence of action by Congress. *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761; *Morgan* v. *Virginia,* 328 U. S. 373. But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. As recently stated in *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* p. 48, the law under the Commerce Clause has been fashioned by the Court in an effort "to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed." That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits (see e. g. *Western Live Stock* v. *Bureau of Reve-*

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nue, 303 U. S. 250, 254–55, and cases cited; *McGoldrick* v. *Berwind-White Coal Mining Co., supra*) and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it. *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434; *Best & Co.* v. *Maxwell*, 311 U. S. 454; *Nippert* v. *Richmond*, 327 U. S. 416.

It seems clear that we cannot write any such qualifications into the Import-Export Clause. It prohibits every State from laying "any" tax on imports or exports without the consent of Congress. Only one exception is created—"except what may be absolutely necessary for executing it's inspection Laws." The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against "any" tax a prohibition against "any discriminatory" tax. As we shall see, the question as to what is exportation is somewhat entwined with the question as to what is interstate commerce. But the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other.

It is suggested, however, that the history of the Import-Export Clause shows that it was designed to prevent discriminatory taxes and not to preclude the levy of general taxes applicable alike to all goods. Support for that is found in the fact that this provision was defended in the Convention [2] and later in the debates [3] on the ground that it protected the inland States from levies by the coastal States through the taxation of exports. Yet that func-

[2] See 2 Farrand, The Records of the Federal Convention (1911), pp. 307, 359–62, 442.

[3] See particularly Madison's statement, 3 Elliot's Debates (2d ed.) p. 483. And see The Federalist No. 42.

tion was only a phase of a larger design. The Import-Export Clause was considered in connection with Article I, Section 9, Clause 5, which provides that "No Tax or Duty shall be laid on Articles exported from any State." [4] The purpose was to withhold from Congress the power to tax exports,[5] and to deprive any State of the power except with the consent of Congress and even then, it seems, to require the net proceeds to be paid into the federal treasury. A proposal was made to prohibit the States "from taxing the produce of other States exported from their harbours." [6] But that suggestion was not followed. The language adopted was supported by Madison "as preventing all State imposts." [7] The qualified interpretation urged upon us has therefore no substantial support in the history of the Import-Export Clause. Moreover, to infer qualifications does not comport with the standards for expounding the Constitution. As stated by Chief Justice Marshall in *Sturges* v. *Crowninshield,* 4 Wheat. 122, 202, "it would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation." For, as Chief Justice Taney said in *Holmes* v. *Jennison,* 14 Pet. 540, 570–71:

> "In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole

[4] See 2 Farrand, op. cit., *supra,* note 2, pp. 305–08, 358–63, 441–42.

[5] The consensus of opinion was expressed by Gerry—that "the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partially, raising one and depressing another part of it." See 2 Farrand, op. cit., *supra,* note 2, p. 307. Or as stated by Sherman, "A power to tax exports would shipwreck the whole." *Id.,* p. 308.

[6] This was suggested by Langdon. See 2 Farrand, op. cit., *supra,* note 2, p. 361.

[7] See 2 Farrand, op. cit., *supra,* note 2, p. 442.

> instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning . . ."

We cannot, therefore, read the prohibition against "any" tax on exports as containing an implied qualification.

The questions remain whether we have here an export within the meaning of the constitutional provision and, if so, whether this tax was a prohibited impost upon it.

The requirement that foreign commerce be involved (*Woodruff* v. *Parham,* 8 Wall. 123, 136) is met, for concededly the oil was sold for shipment abroad. The question whether at the time the tax accrued the oil was an export presents a different problem. There are few decisions of the Court under Article I, Section 10, Clause 2, which illuminate the problem. In *Brown* v. *Houston,* 114 U. S. 622, Louisiana taxed coal held in that State for sale. After the tax was assessed some of the coal was sold for export. The Court held that the coal when taxed was not an export, saying, pp. 629–30:

> "When taxed it was not held with the intent or for the purpose of exportation, but with the intent and for the purpose of sale there, in New Orleans. A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine. But cer-

> tainly, where a general tax is laid on all property alike, it cannot be construed as a duty on exports when falling upon goods not then intended for exportation, though they should happen to be exported afterwards."

In *Coe* v. *Errol,* 116 U. S. 517, the Court had before it a case under the Commerce Clause. Logs, cut in New Hampshire, were being held on a river there for transportation to Maine. New Hampshire's non-discriminatory tax on them was sustained. What the Court said concerning commerce is what we deem to be the correct principle governing exports: ". . . goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." P. 527.

That view has been followed in cases involving Article I, Section 9, Clause 5 of the Constitution, which, as we have noted, prohibits Congress from laying any tax on "Articles exported from any State." In *Turpin* v. *Burgess,* 117 U. S. 504, the Court sustained a federal excise tax on manufactured tobacco. The tax was laid upon the goods before they left the factory. The Court said, p. 507, "They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer." The same result was reached in *Cornell* v. *Coyne,* 192 U. S. 418, where a federal manufacturing tax on filled cheese was sustained against the claim that it was a tax levied by Congress on exports. The cheese was manufactured under contract for export. The Court said, "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of

articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation." P. 427.

That line has been marked by other decisions under Article I, Section 9, Clause 5 of the Constitution. Thus a federal stamp tax on a foreign bill of lading is a tax on exports, since it is the equivalent of a direct tax on the articles included in the bill of lading. *Fairbank* v. *United States,* 181 U. S. 283. The same is true of federal stamp taxes on charter parties made exclusively for the carriage of cargo in foreign commerce, *United States* v. *Hvoslef,* 237 U. S. 1, 17, for a tax on those charter parties is "in substance a tax on the exportation; and a tax on the exportation is a tax on the exports." The same is likewise true of federal stamp taxes on policies insuring exports against maritime risks. *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19. The Court stated, p. 27:

> "The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process."

Closer in point is *Spalding & Bros.* v. *Edwards,* 262 U. S. 66. It involved a federal tax on baseball bats and balls sold by the manufacturer. A Venezuelan firm ordered a New York commission house to buy a quantity of bats and balls for their account. The New York commission house placed the order with the manufacturer instructing it to deliver the packages to an exporting carrier in

New York for shipment to Venezuela. The goods were delivered to the carrier and an export bill of lading was issued. In due course the goods were transported to Venezuela. The issue, as stated by the Court, p. 68, was "whether the sale was a step in exportation." The Court pointed out that the goods would not have been exempt from tax while they were "in process of manufacture" though they were intended for export but that they would be exempt "after they had been loaded upon the vessel for Venezuela and the bill of lading issued." The question was whether the "export had begun." After noting that title passed when the goods were delivered into the carrier's hands, the Court stated, pp. 69–70:

> "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result."

The circumstance that title was in the New York commission house and that it might change its mind and retain the goods for its own use was dismissed by the statement that "Theoretical possibilities may be left out of account." P. 70. The Court concluded that if exportation was put at a later point, exports would not receive "the liberal protection that hitherto they have received." P. 70.

This line of cases was summarized in *Willcuts* v. *Bunn,* 282 U. S. 216, 228, as construing the constitutional prohibition against federal taxation of exports so as to give "immunity to the process of exportation and to the trans-

actions and documents embraced in that process. . . . Only on that construction can the constitutional safeguard be maintained."

The fact that delivery to a common carrier for export gave the sale immunity in *Spalding & Bros.* v. *Edwards, supra,* is seized upon as stating a rule that the process of exportation has not started until such delivery has been made. And cases like *Superior Oil Co.* v. *Mississippi,* 280 U. S. 390, are relied upon as indicating that delivery to the purchaser is not sufficient. That case arose under the Commerce Clause. Mississippi was upheld in its effort to tax a distributor or wholesaler who purchased gasoline and later took it to Louisiana for sale. The Court said, p. 395, that although the course of business indicated the likely destination of the oil, it was "in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes." The Court held, therefore, that the tax was not on goods moving in interstate commerce. But it added, p. 396, "Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here."

The certainty that the goods are headed to sea and that the process of exportation has started [8] may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel

[8] See *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95.

from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain.

It seems clear under the decisions which we have reviewed involving Article I, Section 9, Clause 5 of the Constitution that the commencement of the export would occur no later than the delivery of the oil into the vessel. As the meaning of "export" is the same under that Clause and the Import-Export Clause (see *Brown* v. *Maryland, supra,* p. 445; *Turpin* v. *Burgess, supra,* p. 506), the same result follows here.

It is argued, however, that the present tax is not an impost within the meaning of the Import-Export Clause. The tax is measured by the gross receipts of retail sales and is levied on retailers "For the privilege of selling tangible personal property at retail." Cal. Stats. 1935, p. 1253. The retailers are authorized to collect the tax from the consumers. Cal. Stats. 1933, p. 2602. And a sale is "any transfer of title or possession . . . in any manner or by any means whatsoever, of tangible personal property, for a consideration." Cal. Stats. 1935, p. 1256. The California Supreme Court held that the tax is an excise tax for the privilege of conducting a retail business meas-

ured by the gross receipts from sales; that it is not laid upon the consumer and does not become a tax on the sale or because of the sale. 27 Cal. 2d p. 152, 163 P. 2d p. 2.

That construction, being a matter of state law, is binding on us. But it is not determinative of the question whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but on its operation and effect. See *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 362; *Kansas City, Ft. S. & M. R. Co.* v. *Kansas,* 240 U. S. 227, 231.

Appellee concedes that the prohibition of the Import-Export Clause would be violated if the goods were taxed as exports or because of their exportation, or if the process of exportation were itself taxed. We perceive, however, no difference in substance between any tax so labeled and the present tax. The California Supreme Court conceded that the delivery of the oil "resulted in the passage of title, and the completion of the sale, and the taxable incident." 27 Cal. 2d p. 153, 163 P. 2d pp. 2–3. The incident which gave rise to the accrual of the tax was a step in the export process.

Moreover, *Brown* v. *Maryland, supra,* rejected an argument that while a State could not tax imports, it could tax the privilege of selling imports. Chief Justice Marshall stated, p. 444:

> "All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition

> extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution."

The same reasoning was applied to exports, p. 445:

> "The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"

The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. That is true of the constitutional prohibition against federal taxes on exports. *United States* v. *Hvoslef, supra.* What was said there (p. 13) is equally applicable here: "If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it." And see *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218.

We conclude that the tax which California has exacted from appellant is an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional.

Reversed.

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

MR. JUSTICE BLACK, dissenting.

Richfield Oil Corporation, while doing business in California, sold oil extracted from California soil. Its purchaser bought the oil to transport and use abroad. California, like many other states, raises a large proportion of its revenue by a generally applied tax on sales.[1] The Court holds that application of the California sales tax to this transaction is a "tax on exports" and therefore violates Article I, Section 10, Clause 2 of the Federal Constitution. I cannot agree.

In *Spalding & Bros.* v. *Edwards*, 262 U. S. 66, 69, a precedent upon which today's decision heavily relies, this Court said that "with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary." This principle announced in the *Spalding* case seems to follow what was said in *Cornell* v. *Coyne*, 192 U. S. 418, 427, that the constitutional prohibition against a tax on exports was not intended to relieve exported articles "from the prior ordinary burdens of taxation which rest upon all property

[1] In 1945 California's total revenue was $676,828,000. It collected $242,757,000 from its sales tax. *California State Finances in 1945, 1 State Finances: 1945, Dept. of Commerce, Bureau of the Census* (1946) 33.

similarly situated." Every transaction held by this Court to have occurred *after* rather than *before* exportation began makes an encroachment not only on the power of states to tax, but, as the Court points out, the Federal Government's area of taxation is also narrowed. The result of such a holding is all the more serious because, unlike the consequences of holding a state tax invalid under the Commerce Clause, the prohibitions against taxing exports are, with a minor exception, permanent, absolute and unqualified. After today's ruling, Congress itself can neither tax nor permit states to tax sales like the one here proscribed. To classify sales transactions as having occurred after exportation began, therefore, results in creating an island of constitutional tax immunity for a substantial proportion of the profitable business of the nation. Such a result not only grants tax immunity to many profitable businesses which share governmental protections from payment of their fair part of taxes; it also throws an unfair part of the tax burden on others. Since we cannot assume that the framers of the Constitution looked with favor on such consequences, we should, before classifying a transaction in such a way as to render a tax on it unconstitutional, give it the most careful factual scrutiny. We should not invalidate such a tax unless satisfied beyond doubt that it falls squarely and wholly within the area marked by the Constitution for tax exemption.

The economic consequences of such sales taxes are probably about the same as would flow from a property or severance tax applied to Richfield. For all three types of taxes would likely be reflected in an increased sales price of Richfield's oil. No one, I suppose, would think of saying that such a property or severance tax would be unconstitutional as a tax on exports. The reason would be that the taxable event clearly arose before and not after exportation began. This sales tax was no more applied after export had actually begun than a property or severance

tax would have been. The tax was not even levied on an exporter or an exporter's agent or broker. Richfield was neither. Its sale of local California goods was negotiated and completed wholly in California. This purely intrastate sale transaction cannot properly be held to have lost its intrastate pre-exportation status by reason of the fact that the parties did not intend "title to pass" until the oil was delivered at the purchaser's ship. For formal "passage of title" is not an adequate criterion for measuring a state's constitutional power to tax sales made within the state. Private parties are free to decide, so far as their own interests are concerned, when legal title shall be considered to "pass." But a state surely is not required by the Constitution to forbear from taxing that part of a sales transaction which precedes the particular moment the parties have arbitrarily selected for a conceptual transfer of title. Nor need a state withhold the exercise of its power to tax sales until an article is delivered or paid for. That delivery, perhaps the last step in executing this agreement to sell, happened to border on the imaginary line where the actual exporter took possession does not justify us in concluding that therefore the whole sales transaction occurred after exportation. Constitutional interpretations which make serious inroads into the power of both the States and the Federal Government to tax sales made by local businesses should not turn on fine legal concepts of when title passed or delivery occurred in relation to the beginning of exportation.

Concededly, as the Court points out, the Constitution prohibits imposition of state and federal "imposts and duties" on "exports." But the Constitution does not define in words what is an impost or tax on exports and what is not. It is well known that taxation of exports was primarily forbidden by the Constitution at the insistence of inland states which feared that seaboard states would exact a tribute from all goods sold in the interior which were

thereafter transported through ports en route to foreign destinations. It was not intended to bestow a bounty of blanket tax immunity upon all those who engaged in the production, processing, purchase, or sale of goods shipped abroad. There was no broad purpose of encouraging foreign commerce by making all these preliminary steps tax free. The motivation of this tax and its economic consequences plainly are not those which the writers of the Constitution condemned. This was no tax on goods from an inland state which came through California in transit after severance, processing, and sale had been completed. Nor was it a disguised tax on a product of California soil or manufacture imposed solely because the oil was intended for a foreign destination. The tax was nothing more than an effort of California to defray a part of the state's expenses by a uniform sales tax on all those businesses, including Richfield, which enjoyed California's natural resources, the labor of its people, and the services and protection of its government.

True, the tax would impose a burden on export commerce to the extent that it increased the export price of Richfield oil. But if a tax on export sales be unconstitutional for imposing such a burden, so is a property tax or a severance tax applied to Richfield's oil anywhere from well to consumer. For all these types of taxes would likely be reflected in the price of Richfield's oil. But the history and the evolution of the constitutional prohibition against taxation of exports manifest that there was no intention to subsidize either export businesses or foreign purchasers by any such broad immunity from state and federal taxation.

I cannot believe that it was the purpose of the Constitution to let all goods destined for shipment abroad escape uniformly applied state and federal taxes, nor that a state whose resources are depleted is powerless to enforce its sales tax if the depleter sells to customers for immediate

shipment for ultimate use in foreign countries. No persuasive evidence has been produced to indicate that those who wrote the Constitution thought in such terms or that they would have handicapped the state and federal taxing power in such a way. And no other sufficiently cogent reasons have been advanced to require a present interpretation which so disarranges, confuses, and handicaps the sales taxes of all the states.

AMERICAN POWER & LIGHT CO. *v.* SECURITIES & EXCHANGE COMMISSION.

NO. 4. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.*

Argued November 16, 1945. Reargued October 14, 15, 1946.—Decided November 25, 1946.

1. Section 11 (b) (2) of the Public Utility Holding Company Act of 1935 directs the Securities & Exchange Commission, as soon as practicable after January 1, 1938, "To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system." In a proceeding instituted by the Commission under § 11 (b) (2), the Commission found, after notice and hearing, that the corporate structure and continued existence of petitioners, two subholding companies in a holding company system, unduly and unnecessarily complicated the structure of the system and unfairly and inequitably distributed voting power among the security holders of the system, in violation of the standards of § 11 (b) (2). The Commission thereupon entered orders requiring the dissolution of both petitioners and requir-

*Together with No. 5, *Electric Power & Light Corp.* v. *Securities & Exchange Commission,* on certiorari to the same court.

ing them to submit plans for effectuating the orders. *Held* that the orders were authorized by § 11 (b) (2) and that the section as so applied is constitutional. Pp. 96, 121.

2. Section 11 (b) (2) is a valid exercise of the power of Congress under the commerce clause of the Federal Constitution. Pp. 96–104.

(a) Section 11 (b) (2) applies only to registered holding companies and their subsidiaries. P. 97.

(b) The impact of § 11 (b) (2) is limited, by reference to the registration requirements, to those holding companies which are in fact in the stream of interstate activity or that affect commerce in more States than one, *North American Co.* v. *S. E. C.*, 327 U. S. 686, and depend for their very existence upon the constant and systematic use of the mails and the instrumentalities of interstate commerce. P. 98.

(c) The holding company system in which the petitioners are embraced possesses an undeniable interstate character which makes it properly subject, from the statutory standpoint, to the provisions of § 11 (b) (2). P. 98.

(d) Congress has power under the commerce clause to impose relevant conditions and requirements on those who use the channels of interstate commerce so that those channels will not be conduits for promoting or perpetuating economic evils. P. 99.

(e) Congress is completely uninhibited by the commerce clause in selecting the means considered necessary for bringing about the desired conditions in the channels of interstate commerce. Any limitations are to be found in other sections of the Constitution. P. 100.

(f) Congress has constitutional authority under the commerce clause to undertake to solve national problems directly and realistically, giving due recognition to the scope of state power. P. 103.

3. Section 11 (b) (2) does not unconstitutionally delegate legislative power to the Securities & Exchange Commission. Pp. 104–106.

(a) The standards of § 11 (b) (2), which provides that the Commission shall act so as to ensure that the corporate structure or continued existence of any company in a particular holding company system does not "unduly or unnecessarily complicate the structure" or "unfairly or inequitably distribute voting power among security holders," are not too indefinite, in the light of the purpose of the Act, its factual background and the statutory context in which they appear. Pp. 104–105.

(b) Necessity fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules. It

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then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations. P. 105.

(c) Under these circumstances, it is of no constitutional significance that the Commission, in executing the policies of § 11 (b) (2), also has discretion to fashion remedies of a civil nature necessary for attaining the desired goals. P. 106.

(d) The Constitution does not require that the Commission translate the legislative standards into formal and detailed rules of thumb prior to their application to particular cases. It is sufficient that the Commission's actions conform to the statutory language and policy. P. 106.

4. Section 11 (b) (2) does not violate the due process clause of the Fifth Amendment. Pp. 106–108.

(a) It is not the function of the Court to reweigh the factors considered by Congress in enacting the legislation, or to question the conclusion reached by Congress. P. 106.

(b) Section 11 (b) (2) does not on its face authorize or necessarily involve any destruction of any valuable interests without just compensation. *North American Co.* v. *S. E. C.*, 327 U. S. 686. P. 107.

(c) Section 11 (b) (2) is not rendered void by the absence of an express provision for notice and opportunity for hearing to security holders regarding proceedings under that section. P. 107.

(d) The managements of the petitioners, having been notified and having participated in § 11 (b) (2) proceedings, possess no standing to assert the invalidity of that section from the viewpoint of the security holders' constitutional rights to notice and hearing. P. 107.

(e) The Commission is bound under the statute to give notice and opportunity for hearing to consumers, investors and other persons whenever constitutionally necessary. P. 108.

(f) Section 11 (b) (2), fairly construed, neither expressly nor impliedly authorizes unconstitutional procedure. P. 108.

5. The record amply supports the Commission's findings that the corporate structures and continued existence of petitioners unduly and unnecessarily complicate the holding company system in which they are subholding companies, and unfairly and inequitably distribute voting power among the security holders of that system. Pp. 108–112.

6. The Commission's choice of the dissolution of petitioners as "necessary to ensure" effectuation of the Act was authorized and may not be set aside on judicial review. Pp. 112–118.

(a) Where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy, the relation of remedy to policy is peculiarly a matter for administrative competence. P. 112.

(b) Only if the remedy chosen is unwarranted in law or without justification in fact should a court intervene. Pp. 112–113.

(c) Dissolution of a holding company or a subholding company is contemplated and authorized by § 11 (b) (2) as a possible remedy. P. 113.

(d) The phrase "in the holding-company system" does not limit the authority of the Commission to orders removing a particular company from the holding company system of which it is a part but permits an order terminating its corporate existence. P. 113.

(e) The legislative history of the Act compels the conclusion that dissolution is one of the remedies contemplated by § 11 (b) (2) and that its choice falls within the allowable area of the Commission's discretion. Pp. 114–115.

(f) The Commission's choice of dissolution with respect to the petitioners is not so lacking in reasonableness as to constitute an abuse of discretion. P. 115.

(g) Dissolution is not so drastic a remedy as to be unreasonable. P. 116.

(h) Since the Commission's choice of dissolution of the petitioners has a rational basis, the fact that other solutions might have been selected is immaterial. P. 118.

(i) Review by this Court of the Commission's choice of remedies is limited solely to testing the propriety of the remedy so chosen from the standpoint of the Constitution and the statute. P. 118.

(j) The Commission's finding that the continued existence of petitioners violates the statutory standards warrants the order of their dissolution, whatever may be the shortcomings of the parent holding company. P. 118.

7. When the hearings in the proceedings instituted against the petitioners by the Commission under § 11 (b) (2) had been in progress for more than a year and the record was approaching completion, petitioners moved to consolidate applications for approval of plans filed by them under § 11 (e), designed to adjust the companies to the standards of § 11 (b) (2) without the necessity of dissolution.

The Commission deferred consideration of the motions until it entered the dissolution orders under § 11 (b) (2). It then denied the motions and refused to grant hearings on the plans in advance of its orders of dissolution. It did this after thorough examination of the plans and after finding that they were incomplete and inadequate on their face and that they failed to hold out any real promise of effectuating the standards of § 11 (b) (2). *Held* that there was no error in this procedure. Pp. 118–119.

(a) The filing of the plans under § 11 (e) did not oust the Commission of jurisdiction to enter its orders under § 11 (b) (2). P. 119.

(b) Where consideration of plans filed under § 11 (e) leads the Commission to the conclusion that on their face they are incomplete, inadequate and unlikely to satisfy the statutory standards, or where they are found to have been filed solely for purposes of delay, it would be contrary to the statutory policy of prompt action to require the Commission to hold hearings on them before entering an order under § 11 (b) (2). P. 120.

(c) To the extent that entry of the § 11 (b) (2) orders made the plans filed under § 11 (e) moot or hearings thereon unnecessary, the result is one that is inevitable if proper accommodation is to be made for the different sections of the Act and for the various statutory policies. Pp. 120–121.

(d) Moreover, a § 11 (b) (2) proceeding leads only to the expression of the Commission's view of what must be done to ensure compliance with the statutory standards. Petitioners are not yet foreclosed from attacking the Commission's orders under § 11 (b) (2). P. 121.

141 F. 2d 606, affirmed.

In a proceeding under § 11 (b) (2) of the Public Utility Holding Company Act of 1935, the Securities & Exchange Commission entered orders requiring the dissolution of petitioners and requiring them to submit plans for the effectuation of the orders. 11 S. E. C. 1146. The Circuit Court of Appeals sustained the orders. 141 F. 2d 606. This Court granted certiorari. 325 U. S. 846. *Affirmed*, p. 121.

Arthur A. Ballantine and *John F. MacLane* argued the cause for petitioner in No. 4 on the original argument,

and *Mr. Ballantine* on the reargument. With them on the briefs were *Frank A. Reid, Wilkie Bushby* and *Joseph Schreiber.*

Daniel James argued the cause for petitioner in No. 5. With him on the briefs were *John F. MacLane, Frank A. Reid* and *John W. Nields.*

Roger S. Foster argued the cause for respondent. With him on the brief were *Solicitor General McGrath, Paul A. Freund, Milton V. Freeman, Morton E. Yohalem* and *David Ferber.*

Percival E. Jackson filed a brief for the Holders of Preferred Stock of Electric Power & Light Corporation, as *amicus curiae,* urging affirmance.

MR. JUSTICE MURPHY delivered the opinion of the Court.

We are concerned here with the constitutionality of § 11 (b) (2) of the Public Utility Holding Company Act of 1935 [1] and its application to the petitioners, the American Power & Light Company and the Electric Power & Light Corporation.

American and Electric are two of the subholding companies in the Electric Bond and Share Company holding company system, certain aspects of which were considered by this Court in *Electric Bond & Share Co.* v. *S. E. C.,* 303 U. S. 419. This system is a pyramid-like structure of which Bond and Share itself constitutes the apex, five subholding companies (including American and Electric) create an intermediate tier,[2] and approximately 237 direct

[1] 49 Stat. 803, 821; 15 U. S. C. § 79k (b) (2).

[2] The other three subholding companies are the American & Foreign Power Company, Inc., the National Power & Light Company and the American Gas & Electric Company. Bond and Share also has a

and indirect subsidiaries of the latter form the base. From the standpoint of book capitalization and assets, number of customers and areas served by the operating companies, and quantity of electricity generated and gas sold, the Bond and Share system constitutes the largest single public utility holding company system registered under the Act.

The proceeding now under review was instituted by the Securities and Exchange Commission under § 11 (b) (2) of the Act. After appropriate notice and hearing, the Commission found that the corporate structure and continued existence of American and Electric unduly and unnecessarily complicated the Bond and Share system and unfairly and inequitably distributed voting power among the security holders of that system, in violation of the standards of § 11 (b) (2). 11 S. E. C. 1146. Orders were accordingly entered requiring the dissolution of both American and Electric and requiring them to submit plans for the effectuation of these orders. The First Circuit Court of Appeals sustained the Commission's action in all respects and affirmed its orders, while refusing to consider certain contentions of American and Electric which had not been raised before the Commission. 141 F. 2d 606. We granted certiorari because of the obvious public importance of the issues presented. 325 U. S. 846.

I.

At the outset, we reject the claim that § 11 (b) (2), viewed from the standpoint of the commerce clause, is unconstitutional.

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wholly-owned service subsidiary, Ebasco Services Incorporated. The organizational set-up is more fully explained in the Commission's opinion in this proceeding, 11 S. E. C. 1146, and in *In re Electric Bond & Share Co.*, 9 S. E. C. 978.

So far as here pertinent,[3] § 11 (b) (2) directs the Securities and Exchange Commission, as soon as practicable after January 1, 1938, "To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. . . . Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company."

Like § 11 (b) (1), its statutory companion, § 11 (b) (2) applies only to registered holding companies and their subsidiaries. We noted in *North American Co.* v. *S. E. C.*, 327 U. S. 686, 698, that by making certain interstate transactions unlawful unless a holding company registers with the Commission, § 4 (a), and by extending § 11 (b) (1) to registered holding companies, Congress has effectively applied § 11 (b) (1) to those holding companies that are

[3] The so-called "great-grandfather clause" of § 11 (b) (2) is not involved in this case. That provides that "In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company." See *Otis & Co.* v. *S. E. C.*, 323 U. S. 624.

in fact in the stream of interstate activity or that affect commerce in more states than one. The identical observations can be made as to § 11 (b) (2). Its impact is likewise limited, by reference to the registration requirements, to those holding companies which depend for their very existence upon the constant and systematic use of the mails and the instrumentalities of interstate commerce. Effect is thereby given to the legislative policy set forth in § 1 (c) of interpreting all provisions of the Act to meet the problems and to eliminate the evils "connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce."

The Bond and Share system, including American and Electric, possesses an undeniable interstate character which makes it properly subject, from the statutory standpoint, to the provisions of § 11 (b) (2). This vast system embraces utility properties in no fewer than 32 states, from New Jersey to Oregon and from Minnesota to Florida, as well as in 12 foreign countries. Bond and Share dominates and controls this system from its headquarters in New York City.[4] As was the situation in the *North American* case, the proper control and functioning of such an exten-

[4] The Commission found that "This control of the subholding companies by Bond and Share is not limited in operation to the mere casting of a certain percentage of votes at stockholders' meetings. It permeates every stratum and unit of the holding company system in the most comprehensive manner. . . . Through the concentrated voting power of the securities owned by Bond and Share, it is able to elect the directors of the subholding companies, and thus govern selection of the respective managements. Through the managements of the subholding companies it is able to govern selection of the directors and managements of each of the operating company subsidiaries of each of the subholding companies. The latter are in turn responsive to Bond and Share's wishes respecting entry into service contracts with Ebasco Services Incorporated, and the details of the operations of their companies." 11 S. E. C. at 1203–04.

sive multi-state network of corporations necessitates continuous and substantial use of the mails and the instrumentalities of interstate commerce. Only in that way can Bond and Share, or its subholding companies or service subsidiary, market and distribute securities, control and influence the various operating companies, negotiate inter-system loans, acquire or exchange property, perform service contracts, or reap the benefits of stock ownership. See § 1(a). See also *International Textbook Co.* v. *Pigg,* 217 U. S. 91. Moreover, many of the operating companies on the lower echelon sell and transmit electric energy or gas in interstate commerce to an extent that cannot be described as spasmodic or insignificant. *Electric Bond & Share Co.* v. *S. E. C., supra,* 432–33.[5] Such activities serve to augment the interstate nature of the Bond and Share system. And they make even plainer the fact that this system falls within the intended scope of § 11 (b) (2).

Congress, of course, has undoubted power under the commerce clause to impose relevant conditions and requirements on those who use the channels of interstate commerce so that those channels will not be conduits for promoting or perpetuating economic evils. *North American Co.* v. *S. E. C., supra*; *United States* v. *Darby,* 312 U. S. 100; *Brooks* v. *United States,* 267 U. S. 432. Thus to the extent that corporate business is transacted through such channels, affecting commerce in more states than one, Congress may act directly with respect to that business to protect what it conceives to be the national welfare. It

[5] The record before this Court in the *Bond and Share* case revealed that more than 31% of the total electric energy generated by Bond and Share subsidiaries is transmitted across state lines, while more than 25% of all the electric energy transmitted across state lines in the United States is handled by Bond and Share companies. Approximately 47% of the gas handled by Bond and Share companies is transported across state lines, this amount constituting more than 20% of all the gas transported across state lines in the United States.

may prescribe appropriate regulations and determine the conditions under which that business may be pursued.[6] It may compel changes in the voting rights and other privileges of stockholders.[7] It may order the divestment or rearrangement of properties.[8] It may order the reorganization or dissolution of corporations.[9] In short, Congress is completely uninhibited by the commerce clause in selecting the means considered necessary for bringing about the desired conditions in the channels of interstate commerce. Any limitations are to be found in other sections of the Constitution. *Gibbons* v. *Ogden,* 9 Wheat. 1, 196.

Since the mandates of § 11 (b) (2) are directed solely to public utility holding company systems that use the channels of interstate commerce, the validity of that section under the commerce clause becomes apparent. It is designed to prevent the use of those channels to propagate and disseminate the evils which had been found to flow from unduly complicated systems and from inequitable distributions of voting power among security holders of the systems. Such evils are so inextricably entwined around the interstate business of the holding company systems as to present no serious question as to the power of Congress under the commerce clause to eradicate them.

In the extensive studies which preceded the passage of the Public Utility Holding Company Act, it had been

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[6] *United States* v. *Darby,* 312 U. S. 100; *Electric Bond & Share Co.* v. *S. E. C.,* 303 U. S. 419.

[7] *Northern Securities Co.* v. *United States,* 193 U. S. 197; *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106.

[8] *North American Co.* v. *S. E. C.,* 327 U. S. 686.

[9] *Northern Securities Co.* v. *United States, supra; Standard Oil Co.* v. *United States, supra; United States* v. *Reading Co.,* 253 U. S. 26; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366. See also Breckenridge, "Legal Study on Constitutional Power of Congress to Regulate Stock Ownership in Railroads Engaged in Interstate Commerce," House Report No. 2789, 71st Cong., 3d Sess., Vol. 1, p. 1.

found that "The most distinctive characteristic, and perhaps the most serious defect of the present form of holding-company organization is the pyramided structure which is found in all of the important holding-company groups examined." [10] The pyramiding device in its most common form consisted of interposing one or more subholding companies between the holding company and the operating companies and issuing, at each level of the structure, different classes of stock with unequal voting rights. Most of the financing of the various companies in the structure occurred through the sale to the public of bonds and preferred stock having low fixed returns and generally carrying no voice in the managements. Under such circumstances, a relatively small but strategic investment in common stock (with voting privileges) in the higher levels of a pyramided structure often resulted in absolute control of underlying operating companies with assets of hundreds of millions of dollars.[11] A tremendous "leverage" in rela-

[10] Federal Trade Commission Report to the Senate, "Utility Corporations," S. Doc. 92, Part 72–A, 70th Cong., 1st Sess., p. 858. See also Bonbright and Means, The Holding Company (1932), p. 147; Barnes, The Economics of Public Utility Regulation (1942), pp. 71–81, 143–48.

[11] "By the pyramiding of holdings through numerous intermediate holding companies and by the issue, at each level of the structure, of different classes of stock with unequal voting rights, it has frequently been possible for relatively small but powerful groups with a disproportionately small investment of their own to control and to manage solely in their own interest tremendous capital investments of other people's money." Report of the National Power Policy Committee on Public-Utility Holding Companies, H. Doc. 137, 74th Cong., 1st Sess., pp. 4–5.

"The effect of such pyramiding is to multiply greatly the control that can be exercised by the dominant parties through their personal resources. For example, in the illustration just given, an investment of $1 in common stock of Corporation Securities Co. of Chicago would exercise control over about $2,000 invested in properties of some of the operating companies at the bottom of the pyramid. It seems very

tion to that stock was thus produced; the earnings of the top holding company were greatly magnified by comparatively small changes in the earnings of the operating companies. The common stock of the top holding company might quickly rise in value and just as quickly fall, making it a natural object for speculation and gambling. In many instances this created financially irresponsible managements and unsound capital structures.[12] Public investors in such stock found themselves the innocent victims, while those who supplied most of the capital through the purchase of bonds and preferred stock likewise suffered in addition to being largely disfranchised. Prudent management of the operating companies became a minor consideration, with pressure being placed on them to sustain the excessive capitalization to the detriment of their service to consumers. Reduction of rates was firmly resisted. The conclusion was accordingly reached by those making the studies that the highly pyramided system "is dangerous and has no justification for existence" [13]

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unsafe to have any form of pyramiding which has such a financial basis, not only on account of the excessive concentration of control over immense masses of property but also because of the opportunity it offers to financial adventurers to have too much influence over the general economic interests of the country." Federal Trade Commission Report, *supra*, note 10, p. 161.

[12] The Federal Trade Commission Report, *supra*, note 10, p. 860, found that the highly pyramided holding company system tends to make those few in control at the top "(1) neglect good management of operating companies, especially by failing to provide for adequate depreciation; (2) exaggerate profits by unsound, deceptive accounting; (3) seek exorbitant profits from service fees exacted from subsidiaries; (4) disburse unearned dividends, because the apparent gains, so obtained, greatly magnify the rate of earnings for the top holding company; and (5) promote extravagant speculation in the prices of such equity stocks on the exchanges."

[13] *Ibid.*, p. 162.

and "represents the holding-company system at its worst." [14]

Such was the general nature of the problem to which Congress addressed itself in § 11 (b) (2). Various abuses traceable in substantial measure to the use of the pyramiding device were enumerated in § 1 (b). And it was specifically found in § 1 (b) (3) that the national public interest and the interests of the investors and consumers are or may be adversely affected "when control of such [subsidiary] companies is exerted through disproportionately small investment."

The problem which underlies § 11 (b) (2), therefore, deals with the very essence of holding company systems. Their pyramided structures and the resulting abuses, like their other characteristics, rest squarely upon an extensive use of the mails and the instrumentalities of interstate commerce. Conversely, every interstate transaction of such systems is impregnated in one degree or another with the effects of complicated corporate structures and inequitable distributions of voting power. Many of these effects may be intangible and indistinct, but they are nonetheless real.

To deny that Congress has power to eliminate evils connected with pyramided holding company systems, evils which have been found to be promoted and transmitted by means of interstate commerce, is to deny that Congress can effectively deal with problems concerning the welfare of the national economy. We cannot deny that power. Rather we reaffirm once more the constitutional authority resident in Congress by virtue of the commerce clause to undertake to solve national problems directly and realistically, giving due recognition to the scope of state power. That follows from the fact that

[14] *Ibid.*, p. 860.

the federal commerce power is as broad as the economic needs of the nation. *North American Co.* v. *S. E. C., supra.*

II.

We likewise reject the claim that § 11 (b) (2) constitutes an unconstitutional delegation of legislative power to the Securities and Exchange Commission because of an alleged absence of any ascertainable standards for guidance in carrying out its functions.

Section 11 (b) (2) itself provides that the Commission shall act so as to ensure that the corporate structure or continued existence of any company in a particular holding company system does not "unduly or unnecessarily complicate the structure" or "unfairly or inequitably distribute voting power among security holders." It is argued that these phrases are undefined by the Act, are legally meaningless in themselves and carry with them no historically defined concepts. As a result, it is said, the Commission is forced to use its unlimited whim to determine compliance or non-compliance with § 11 (b) (2); and in framing its orders, the Commission has unfettered discretion to decide whose property shall be taken or destroyed and to what extent. Objection is also made on the score that no standards have been developed or announced by the Commission which justify its action in this case.

These contentions are without merit. Even standing alone, standards in terms of unduly complicated corporate structures and inequitable distributions of voting power cannot be said to be utterly without meaning, especially to those familiar with corporate realities. But these standards need not be tested in isolation. They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear. See *Intermountain Rate Cases,* 234 U. S.

476. From these sources—from the manifold evils revealed by the legislative investigations, the express recital of evils in § 1 (b) of the Act, the general policy declarations of Congress in § 1 (c), the standards for new security issues set forth in § 7, the conditions for acquisitions of properties and securities prescribed in § 10, and the nature of the inquiries contemplated by § 11 (a)—a veritable code of rules reveals itself for the Commission to follow in giving effect to the standards of § 11 (b) (2). These standards are certainly no less definite in nature than those speaking in other contexts in terms of "public interest," "just and reasonable rates," "unfair methods of competition" or "relevant factors." The approval which this Court has given in the past to those standards thus compels the sanctioning of the ones in issue. See *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24–25; *Yakus* v. *United States,* 321 U. S. 414, 419–27, and cases cited.

The judicial approval accorded these "broad" standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems. See *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 398. The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations. Such is the situation here.

Under these circumstances, it is of no constitutional significance that the Commission, in executing the policies of § 11 (b) (2), also has discretion to fashion remedies of a civil nature necessary for attaining the desired goals. See *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194. The legislative policies and standards being clear, judicial review of the remedies adopted by the Commission safeguards against statutory or constitutional excesses.

Nor is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle. All that can be required is that the Commission's actions conform to the statutory language and policy.

III.

Our decision in *North American Co.* v. *S. E. C., supra,* largely disposes of the objections to § 11 (b) (2) on the basis of the due process clause of the Fifth Amendment.

Section 11 (b) (2), like § 11 (b) (1), materially affects many property interests of holding companies and their investors; it may even destroy whatever right there is to continued corporate existence on the part of a holding company that is found to complicate a system unnecessarily and to serve no useful function. But Congress carefully considered these various interests and found them "outweighed by the political and general economic desirability of breaking up concentrations of financial power in the utility field too big to be effectively regulated in the interest of either the consumer or the investor and too big to permit the functioning of democratic institutions." [15] It is not our function to reweigh these diverse

[15] Senate Report No. 621, 74th Cong., 1st Sess., p. 12.

factors or to question the conclusion reached by Congress. Nor can we say that § 11 (b) (2) on its face authorizes or necessarily involves any destruction of any valuable interests without just compensation. The legislative policy and the statutory safeguards pointed out in the *North American* case (pp. 709–710) negative that argument.

Equally groundless is the contention that § 11 (b) (2) is void in the absence of an express provision for notice and opportunity for hearing as to security holders regarding proceedings under that section. The short answer is that such a contention can be raised properly only by a security holder who has suffered injury due to lack of notice or opportunity for hearing. No security holder of that type is now before us. The managements of American and Electric admittedly were notified and participated in the hearings as required by § 11 (b) (2); and they possess no standing to assert the invalidity of that section from the viewpoint of the security holders' constitutional rights to notice and hearing. See *Tyler* v. *Judges of Court of Registration,* 179 U. S. 405, 410; *Hatch* v. *Reardon,* 204 U. S. 152, 160.

However, the Commission in this instance actually gave all security holders of American and Electric public notice of the pendency of the § 11 (b) (2) proceedings and invited them to file applications for intervention before a stated time. This was done pursuant to § 19, which permits the Commission, in accordance with such rules and regulations as it may prescribe, to admit any representative of interested consumers or investors, or any other appropriate person, as a party to any proceeding before that body. These security holders thus received everything which the Constitution could possibly guarantee them in this respect.

That the statute does not expressly insist upon what in fact has been given the security holders is without consti-

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tutional relevance under these circumstances. Wherever possible, statutes must be interpreted in accordance with constitutional principles. Here, in the absence of definite contrary indications, it is fair to assume that Congress desired that § 11 (b) (2) be lawfully executed by giving appropriate notice and opportunity for hearing to all those constitutionally entitled thereto. And when that assumption is added to the provisions of § 19, it becomes quite evident that the Commission is bound under the statute to give notice and opportunity for hearing to consumers, investors and other persons whenever constitutionally necessary. See *The Japanese Immigrant Case,* 189 U. S. 86, 100–101.

But should the Commission neglect to follow the necessary procedure in a particular case, such failure would at most justify an objection to the administrative determination rather than to the statute itself. It would then be needless to do more than nullify the action taken in disregard of the constitutional rights to notice and opportunity for hearing. Since we do not have that situation here, however, we need only reiterate that § 11 (b) (2), fairly construed, neither expressly nor impliedly authorizes unconstitutional procedure. It is thus immune to attack on that basis. See *Kentucky Railroad Tax Cases,* 115 U. S. 321; *Bratton* v. *Chandler,* 260 U. S. 110; *Toombs* v. *Citizens Bank,* 281 U. S. 643. Cf. *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413; *Wuchter* v. *Pizzutti,* 276 U. S. 13.

IV.

Turning to the Commission's action under § 11 (b) (2) with respect to American and Electric, we find that the record amply supports the finding that their corporate structures and continued existence unduly and unnecessarily complicate the Bond and Share system and unfairly and inequitably distribute voting power among the secu-

rity holders of that system. We need do no more here than state the major facts before the Commission underlying this crucial finding.

Bond and Share organized these two subholding companies under the laws of Maine in 1909 and 1925, respectively. Until 1935, American and Electric had neither offices nor employees; their books were kept by Bond and Share employees in Bond and Share's offices in New York City. Their officers were employed by and paid by Bond and Share. Their subsidiaries were managed in every detail by Bond and Share. And whenever they dealt with their parent they were represented solely by employees and counsel of Bond and Share. Functionally, the Commission found, American and Electric were mere sets of books in Bond and Share's office.

In 1935, shortly before the effective date of the Public Utility Holding Company Act, certain superficial changes were made in the organizational set-up of the Bond and Share system. A separate service subsidiary, Ebasco Services Incorporated, was created to continue functions formerly carried out by the Bond and Share service department. Each of the subholding companies, including American and Electric, was given its own set of officers and employees as well as a separate suite of offices in the Bond and Share office building. Other minor changes took place, but the system in effect continued to operate precisely as it had prior to 1935. Bond and Share still had complete and unquestioned control over American, Electric and their operating subsidiaries.

There is an absence of substantial evidence that either American or Electric is presently able to perform any useful role in the operations of its subsidiaries, such as organizing them into integrated systems or furnishing them with capital or cash. Both companies currently have vast accumulations of unpaid preferred dividends

in arrears, not having been able to meet dividend requirements in the ten years preceding 1941. Instances of past functions relating to subsidiaries reveal either harmful results or the guiding hand of Bond and Share.

The real purpose of American and Electric, as the Commission found, is to act as the leverage and pyramiding device whereby Bond and Share can amass control over vast sums contributed by others and realize for itself large earnings and profits without proportionate investment—the prime evil at which § 11 (b) (2) is directed.

Bond and Share holds 20.7% of the total voting stock of American, this holding having a book value of nearly $10,000,000 or 3.68% of American's total capitalization of $270,000,000. Through this investment, Bond and Share controls not only American but also American's 21 subsidiaries with a total capitalization of $729,000,000. An investment of $10,000,000 thus controls $729,000,000, a ratio of 1 to 73.

Bond and Share also holds 46.8% of Electric's total voting stock; the book equity of this holding amounts to $17,500,000 or 9.14% of Electric's total capitalization of $192,000,000. Bond and Share is thereby enabled to control not only Electric but also Electric's 11 direct and 11 indirect subsidiaries with a total capitalization of $654,000,000. An investment of $17,500,000 thus controls $654,000,000, a ratio of 1 to 37.

The Commission, however, made alternative calculations which gave American and Electric the benefit of a more favorable assumption. It adjusted upward the book figures for Bond and Share's common stock interests in these companies to reflect the amount by which the values on the books of the subsidiaries exceeded corresponding values at which American and Electric carried their stock interest in those subsidiaries. But even after such adjustments, Bond and Share's investment equals only 8.2% of

American's capitalization and only 3.42% of the book values of American's subsidiaries; and its investment in Electric is the equivalent of only 22.25% of Electric's capitalization and 8.72 % of the book values of Electric's subsidiaries.[16]

This disproportion between Bond and Share's investment and the value of the property controlled is even more acute if further adjustments are made to reflect the unconscionable write-ups and inadequate depreciation which the Commission found in the book figures of the various operating companies. American and Electric disagree with many of these adjustments and urge that the book values can be justified; and complaint is made that the Commission refused to consider certain valuation testimony offered by American in this respect. We deem it unnecessary, however, to enter into these disputed matters. Even with the use of the book values, the attenuated investment ratio is such as to justify the Commission's conclusion that Bond and Share's control of the operating companies is achieved "through disproportionately small investment." On that basis, over 96% of the investment in American's subsidiaries is without effective voting representation, while over 91% of the book values of Electric's subsidiaries is similarly disfranchised.[17]

[16] Bond and Share's holdings of voting stock of all five of its subholding companies have a stated book value of only $53,337,600, after adjustment for preferred arrearages, which is equal to about 1.85% of the combined consolidated capitalization of the five subholding company systems. This results, after adjustments, in rendering completely ineffectual whatever voting power remains for the securities in the hands of the public investors who have contributed over 80% of the total capitalizations.

[17] We do not understand the Commission to contend that the percentage of voting power and the percentage of investment should necessarily be equal. Its view simply is that no process of weighting could render fair and equitable a distribution of voting power by which Bond and Share controls all of American's subsidiaries by an

Such evidence is more than enough to support the finding that American and Electric are but paper companies without legitimate functional purpose. They serve merely as the mechanism by which Bond and Share maintains a pyramided structure containing the seeds of all the attendant evils condemned by the Act. It was reasonable, therefore, for the Commission to conclude that American and Electric are undue and unnecessary complexities in the Bond and Share system and that their existence unfairly and inequitably distributes voting power among the security holders of the system.

V.

The major objection raised by American and Electric relates to the Commission's choice of dissolution as "necessary to ensure" that the evils would be corrected and the standards of § 11 (b) (2) effectuated. Emphasis is placed upon alternative plans which are less drastic in nature and which allegedly would meet the statutory standards.

It is a fundamental principle, however, that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy "the relation of remedy to policy is peculiarly a matter for administrative competence." *Phelps Dodge Corp.* v. *Labor Board, supra,* 194. In dealing with the complex problem of adjusting holding company systems in accordance with the legislative standards, the Commission here has accumulated experience and knowledge which no court can hope to attain. Its judgment is entitled to the greatest weight. While recognizing that the Commission's discretion must square with its responsibility, only if the remedy chosen is unwarranted in law

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investment representing at best 3.42% of their capitalization, or 8.72% in the case of Electric's subsidiaries. See *In re Electric Bond & Share Co.,* 9 S. E. C. 978, 992.

or is without justification in fact should a court attempt to intervene in the matter. Neither ground of intervention is present in this instance.

Dissolution of a holding company or a subholding company plainly is contemplated by § 11 (b) (2) as a possible remedy. It directs the Commission to take such steps as it finds necessary to ensure that "the corporate structure or continued existence of any company in the holding-company system" does not violate the standards set forth. American and Electric argue that the phrase "in the holding-company system" limits the authority of the Commission to orders removing a particular company from the holding company system of which it is a part and does not permit an order terminating its corporate existence. Grammatically, this contention is without merit. The phrase "in the holding-company system" no more modifies "continued existence" than it does "corporate structure." It relates, rather, to the word "company," [18] as though the phrase read "the corporate structure or continued existence of any company which is in the holding-company system."

Such a construction accords with the policy as well as other provisions of the Act. Section 1 (c) declares it to be one of the policies of the Act, in accordance with which all provisions shall be interpreted, "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title." The last sentence of § 11 (b) (2) provides that "Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding com-

[18] The words "any company in the holding-company system" were substituted for the words "such company" in an earlier draft of § 11 (b) (2). No change in substance was thereby indicated.

pany, . . ." Moreover, §§ 11 (f) and 11 (g) specifically refer to dissolution or plans for dissolution of registered holding companies or their subsidiaries in accordance with § 11.[19] Such statements would be meaningless and unnecessary were dissolution not contemplated as a possible remedy under § 11 (b) (2).

The legislative history supports this interpretation. The original bill which passed the Senate (S. 2796, 74th Cong., 1st Sess.) contained a provision quite similar to the present first sentence of § 11 (b) (2), except that it was mandatory that the Commission require each registered holding company and subsidiary "to be reorganized or dissolved" when the Commission found that it violated the standards of that section. In addition, § 11 (e) as then written permitted a voluntary plan "for the divestment of control, securities, or other assets, or for the reorganization or dissolution, of such company or any subsidiary company." The bill also contained a § 11 (b) (3), providing that within five years all holding companies should cease to be holding companies unless the equivalent of a certificate of convenience and necessity were obtained from the Federal Power Commission. But the House of Representatives insisted upon the elimination of § 11 (b) (3) and the bill finally reported out by the joint conference committee deleted that provision. A further change was made at this time so that § 11 (b) (2), instead of specifying reorganization or dissolution as the remedies, gave the Commission power to require "such steps" as it might find necessary to ensure compliance. Section 11 (e) was also

[19] Section 11 (f) refers to fees, expenses and remuneration paid in connection with any reorganization, dissolution, liquidation, bankruptcy or receivership of a registered holding company or a subsidiary thereof. Section 11 (g) speaks of proxies, etc., used "in respect of any plan under this section for the divestment of control, securities, or other assets, or for the dissolution of any registered holding company or any subsidiary company thereof."

changed to permit a voluntary plan "for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof."

Thus the compromise bill which became law omitted the unconditional provision of § 11 (b) (3) for the elimination of all holding companies within five years, substituting therefor the "great-grandfather clause" of § 11 (b) (2), and gave the Commission discretion to determine the necessary steps for compliance instead of specifying reorganization or dissolution. There is nothing to indicate that the framers of the compromise bill meant to forbid reorganization or dissolution as remedies which the Commission might choose. Indeed, the fact that these two remedies had been previously specified is strong evidence that they were in the minds of those who wrote the portion of § 11 (b) (2) now under consideration and that those persons merely wished not to restrict the Commission to those two remedies; they thus gave the Commission discretion to choose whatever remedy it felt necessary. This legislative history, when combined with the various references to dissolution in other parts of § 11, compels the conclusion that dissolution is one of the remedies contemplated by § 11 (b) (2) and that its choice falls within the allowable area of the Commission's discretion.

Nor can we say that the Commission's choice of dissolution with respect to American and Electric is so lacking in reasonableness as to constitute an abuse of its discretion. The Commission chose dissolution because it felt that such action is calculated to correct the situation "most effectively and quickly, ever bearing in mind the stated policy of the Act to provide *as soon as practicable* for the elimination of all holding companies except as expressly provided in the Act." 11 S. E. C. at 1215. It stated that while some measure of amelioration in the statutory offensiveness of American and Electric might be afforded by other approaches, "in our opinion no approach presently avail-

able holds out the promise of effectuating the statute's requirements fully or promptly." *Ibid.*, p. 1215. Cf. *Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608. That this choice of dissolution in preference to other remedies is not lightly to be disregarded is shown by the statement of Dr. Walter Splawn, much relied upon by Congress in shaping this statute, that "The most effective means of preventing pyramiding is to eliminate the so-called intermediary companies interposed between the operating company and the company at the top." [20]

Without attempting to invade the domain of the Commission's discretion, we can readily perceive a factual basis underlying the choice of dissolution in this instance. The Commission reasonably could conclude from the record that American and Electric perform no justifiable function; they are unnecessary complexities enabling Bond and Share to perpetuate its pyramided system. The actual and potential evils resulting from their continued existence may well be said to outweigh any of their claimed advantages, especially since many of the latter seem impossible of attainment due to the unsound financial structures of the companies. The Commission was thus warranted in feeling that dissolution of these companies is necessary to the attainment of the standards of § 11 (b) (2).

We are unimpressed, moreover, by the claim that dissolution is so drastic a remedy as to be unreasonable. Elimination of useless holding companies may be carried out by fair and equitable methods so as to destroy nothing of real value. American and Electric, the Commission found, are little more than a set of books and a portfolio of securities. And we cannot say that the Commission was without basis for its belief that dissolution under these circumstances

[20] Splawn Report, H. Rep. No. 827, 73d Cong., 2d Sess., Pt. 2, p. VII, made pursuant to H. J. Res. 572, 72d Cong., 2d Sess., referred to in § 1 (b) of the Act.

would harm no one. It may well have considered the fact brought out in the argument before us that, so far as Bond and Share and the public security holders are concerned, dissolution would mean little more than the receipt of securities of the operating companies in lieu of their present shares in American and Electric. Any number of benefits might thereafter accrue to these security holders. Their equities in the Bond and Share system would be materially strengthened by the removal of the useless and costly subholding companies and their voting power would tend to be more in proportion to their investment. The financial weaknesses of the various companies remaining in the system would be easier to correct, with numerous benefits to the consumers and the general public as well as the investors.[21] "In short, the individual investor should receive the kind of a security he thought he was buying in the first place. The actual clearing up, through clean reorganizations, of the tangle in which holding-company finance has left the industry and those who have invested in it, can reestablish a confident, stable market for good utility securities." Senate Report No. 621, 74th Cong., 1st Sess., p. 17. These factors lend substance to the Commission's conclusion that "the dissolution of these companies which not only have never served any useful purpose but have been a medium of much harm, will effectuate the provisions and policies of the Act and will in all respects be

[21] "It is thus apparent that though Section 11 is on occasions still referred to as a 'death sentence,' the sophisticated observer no longer regards even the directed reorganization or liquidation of a holding company as a step to be feared by investors. There is increased recognition that these steps in the enforcement of the Act have been 'akin to a surgical operation, through which the dead skin (the top holding company) was being cut away from the pores (the operating companies) in order to allow the latter to breathe.'" Blair-Smith and Helfenstein, "A Death Sentence or a New Lease on Life?" 94 Univ. of Pa. L. Rev. 148, 201.

beneficial to the public interest and the interest of investors and consumers; and we so find." 11 S. E. C. at 1215.

In view of the rational basis for the Commission's choice, the fact that other solutions might have been selected becomes immaterial. The Commission is the body which has the statutory duty of considering the possible solutions and choosing that which it considers most appropriate to the effectuation of the policies of the Act. Our review is limited solely to testing the propriety of the remedy so chosen from the standpoint of the Constitution and the statute. We would be impinging upon the Commission's rightful discretion were we to consider the various alternatives in the hope of finding one that we consider more appropriate. Since the remedy chosen by the Commission in this instance is legally and factually sustainable, it matters not that American and Electric believe that alternative orders should have been entered. It is likewise irrelevant that they feel that Bond and Share is the principal offender against the statutory standards and that the Commission should merely have required Bond and Share to divest itself of its interests in American and Electric. The Commission found that American and Electric violate the statutory standards, a finding that is supportable whatever may be the shortcomings of Bond and Share.

Finally, lengthy objections have been made relative to the Commission's procedure in treating alternative plans filed under § 11 (e) by American and Electric. These plans were designed to adjust the companies to the standards of § 11 (b) (2) without the necessity of dissolution. Motions were made to consolidate the applications for approval of these plans with the proceedings instituted by the Commission under § 11 (b) (2), the hearings then having been in progress for more than a year and the record approaching completion. The Commission deferred consideration of the motions until it entered the § 11 (b) (2)

orders now under review; it then denied the motions and refused to grant hearings on the plans in advance of its orders of dissolution. It did this, however, only after thorough examination of the proposed plans and after finding that they failed to hold out any real promise of effectuating the standards of § 11 (b) (2).

We fail to perceive any error in this procedure. The filing of the § 11 (e) plans, of course, did not oust the Commission of jurisdiction to enter its orders under § 11 (b) (2). That jurisdiction grows out of the statutory command that the Commission declare by order, as soon as practicable, what each holding company system requires by way of integration and simplification. Section 11 (e) merely permits the holding companies to formulate their own programs for compliance with § 11 (b) or to submit plans in conformity with prior Commission orders under § 11 (b), appropriate notice and hearing being contemplated. It does not necessarily give such plans the effect of staying proceedings under § 11 (b) (2) where such proceedings are initiated prior to the filing of the plans. Any other conclusion would permit the filing of dilatory plans so as to render impotent the power and duty of the Commission to enter § 11 (b) (2) orders as soon as practicable.

We assume that the Commission will give due consideration to any plans that are filed under § 11 (e) before it enters a § 11 (b) (2) order. If it finds that such plans may have merit and may effectuate the policies of § 11 (b) (2), the principles of orderly administration would dictate that entry of the § 11 (b) (2) order be deferred until full hearings are had with respect to the plans.[22] It might then

[22] With reference to S. 2796, it was said: "Subsection (e) expressly authorizes a holding company subject to the approval of the Commission and the court to work out a plan of reorganization to make unnecessary the issuance of an involuntary order for its reorganization by the Commission, . . ." Senate Report No. 621, 74th Cong., 1st Sess., p. 33.

become apparent that an involuntary order under § 11 (b) (2) would be unnecessary and statutory compliance could be worked out solely under § 11 (e). But where consideration leads the Commission to the conclusion that the plans on their face are incomplete, inadequate and unlikely to satisfy the statutory standards, or where the plans are found to have been filed solely for purposes of delay, it would be contrary to the statutory policy of prompt action to require the Commission to hold hearings on the plans before entering a § 11 (b) (2) order. The Commission then would have no reasonable statutory alternative but to enter the § 11 (b) (2) order as soon as practicable, especially where the unsatisfactory plans are filed long after the institution of the § 11 (b) (2) proceedings. And it is proper for the Commission to make an adverse determination of this nature in regard to the § 11 (e) plans at the time of entry of the § 11 (b) (2) order, such matter lying within the sound discretion of the Commission.

Here the Commission gave due consideration to the § 11 (e) plans and found them to be incomplete and inadequate on their face. It pointed out that seven years had elapsed since the effective date of the Act, four and a half years since the date after which action under § 11 was to be required "as soon as practicable" and more than two years since the present proceedings had been instituted. These factors of time and the lack of substance in the § 11 (e) plans led the Commission to conclude that a delay in the entry of the § 11 (b) (2) orders which it felt necessary to the effectuation of the statutory standards would not be justified. And our examination of the situation reveals an adequate basis in fact for the Commission's action. Note should be made of the fact that the Commission did not refuse by order to hold hearings on the § 11 (e) plans. But to the extent that the entry of the § 11 (b) (2) orders has made the plans moot or the hearings unnecessary, the

result is one that is inevitable if proper accommodation is to be made for the different sections of the Act and for the various statutory policies.

Moreover, a § 11 (b) (2) proceeding leads only to the expression of the Commission's view of what must be done to ensure compliance with the statutory standards. Actual compliance comes later. In the meantime, nothing precludes American or Electric from seeking revocation of the dissolution orders on a showing that the conditions upon which the orders were predicated do not exist, thereby making some other type of order more appropriate. Section 11 (b) expressly envisages such a procedure, with provision for notice and hearing. American and Electric thus are not yet foreclosed from attacking the Commission's orders under § 11 (b) (2).

From what we have said it follows that we must affirm the judgment of the court below and sustain the action of the Commission. The other points that have been raised either do not merit discussion or have been adequately answered in the opinion of the court below.

Affirmed.

MR. JUSTICE FRANKFURTER agrees with this opinion except that he believes that consideration of the requirements of notice and hearing under § 11 (e) does not arise, in view of the particular circumstances under which the § 11 (b) (2) orders were here made.

MR. JUSTICE REED, MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

MR. JUSTICE RUTLEDGE, concurring.

I concur in the result and in the Court's opinion, except those portions of Part V dealing with the Commission's procedure in treating the alternative plans filed under § 11 (e) of the Act by American and Electric.

Although, for reasons to be stated, I think the Commission's action in entering its § 11 (b) (2) order must be sustained, I do not think its procedure in respect to making provision for dealing with the alternative plans was in compliance with § 11 (e) or the rights to notice and hearing on such plans which it assured. Because the matter may be of considerable importance for the future, I desire to state my reasons for difference from the views expressed by the Court in this respect.

Section 11 (b) (2) makes it the Commission's duty "as soon as practicable after January 1, 1938," to require by order each registered holding company and each subsidiary thereof, after notice and opportunity for hearing, to take such steps as the Commission shall find necessary to ensure "that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system." 49 Stat. 803, 821. If this section stood alone and unqualified in the Act, the Commission's power would be unquestionable to require the necessary steps to be taken to accomplish the section's stated purposes without reference to voluntary plans submitted by the companies affected.

But § 11 (b) (2) does not stand alone or unqualified in this respect. Section 11 (e)[1] expressly provides for the

[1] "*In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers,* any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). *If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the*

submission of plans to effectuate the objects of § 11 (b) (2) by "any registered holding company or any subsidiary company of a registered holding company." This is to be done "in accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers." Moreover, "if, *after notice and opportunity for hearing,* the Commission shall find such plan, *as submitted or as modified,* necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan . . . ." (Emphasis added.)

I do not think that § 11 (e) simply provides a procedure alternative to that of § 11 (b) which the Commission is free to follow or disregard at its pleasure. Both the terms of the Act and the legislative history show that the purpose of § 11 (e) was to allow companies affected "to work out a plan of reorganization to make unnecessary the issuance of an involuntary order for its reorganization . . .," which could only be issued under § 11 (b). S. Rep. No. 621, 74th Cong., 1st Sess., 33; *Commonwealth & Southern Corp.* v. *S. E. C.*, 134 F. 2d 747, 751. In my opinion this purpose, together with the provision for voluntary plans to be submitted "in accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors," [2] assures the right to submit such plans for

provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. . . ." 49 Stat. 803, 822. (Emphasis added.)

[2] The requirement obviously is not a permission to the Commission to dispense altogether with such rules, regulations or order in its dis-

the Commission's consideration and to have them considered and determined "after notice and opportunity for hearing." See *Chicago Junction Case,* 264 U. S. 258, 264–265.

Furthermore, although the section gives the Commission broad discretion concerning the procedure to be followed, it would seem clear, both from the section's purpose and from its terms, that the Act contemplates that it shall make the required determination, concerning such a voluntary plan properly submitted, prior to the entry of any order under § 11 (b). Cf. *Ashbacker Radio Corp.* v. *F. C. C.,* 326 U. S. 327. Only in this way could the legislative purpose "to make unnecessary issuance of an involuntary order" be made effective. This being true, the section cast upon the Commission the duty of providing the appropriate procedure for submitting voluntary plans, by rules, regulations or order comporting with the specified standards, including those for notice and hearing.

The record does not disclose that the Commission at any time complied with those requirements in these cases. So far as appears no general rules or regulations were issued. Nor was any order made or entered providing for such a procedure. On the contrary, the procedure followed was not, in its initial stages, in accordance with the statutory provisions, as the following chronology demonstrates.

On May 10, 1940, notice of hearing under § 11 (b) (2) was served on the petitioners. The notice made no reference to § 11 (e) or any possible alternative proceedings under it. The hearing was set for June 10, 1940, scarcely time for the petitioners to prepare both a voluntary plan,

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cretion. It is rather a statutory direction to make them in accordance with the standards prescribed. Any other view would contradict the stated purpose of the section and make of it, in effect, a dead letter.

even if opportunity for filing and hearing were to be afforded, and a defense on the § 11 (b) (2) hearing. Indeed, petitioners recognized that the time was inadequate for preparing their defense, for they applied for postponement of the hearing and other relief.[3] The Commission postponed the hearing one week, but found no adequate ground for further extension.

The hearing was commenced on June 18, 1940. On July 23, 1941, American submitted its voluntary plan under § 11 (e). On December 3, 1941, Electric filed its plan. And on December 6, 1941, both companies moved to consolidate their applications with the pending § 11 (b) (2) proceedings.[4] By agreement of counsel consideration of the motion was delayed for the Commission to pass upon

[3] The application stated in part: "It is obvious from the nature of the proceeding . . . that the matters to be dealt with at the hearing are of vital import to the respondents and their subsidiaries, as well as to the hundreds of thousands of investors in securities of companies in the Electric Bond and Share Company system and the millions of consumers presently receiving necessary public utility service from the operating companies in said system. In the circumstances, respondents believe, first, that they should be given adequate time not only to check and verify the numerous factual allegations contained in the order, but also to develop and correlate for presentation all other facts having a bearing upon the problems and issues presented by the notice and order . . . ."

[4] At the same time American, which previously had filed its plan with the Commission, sought to introduce the plan as an exhibit into the § 11 (b) (2) hearing. The company's attorney stated, "This plan which has been filed by American Power & Light Company with the Commission sets forth a proposal for the compliance with Section 11 of the Act, and I think that it is material and relevant in this proceeding." The reply of the trial examiner, sustaining an objection to its admission, apparently typifies the attitude of the Commission toward the requirements of § 11 (e): "Quite possibly it relates to Section 11; quite possibly it is a matter which the Commission will want to consider before it finally makes up its mind. It is quite probable. But, nevertheless, we are here restricted to this particular proceeding

at the end of the § 11 (b) (2) hearing [5] and on July 22, 1942, that hearing was closed as to petitioners by stipulation.

On August 31, 1942, the Commission filed its opinion in support of the orders which are now enforced. In the same opinion it denied the motion to consolidate and also denied petitioners any hearing on their voluntary plans. The motion was denied on the stated ground: "It appears that if consolidation were granted, the result would be to inject into the present proceeding issues of fact and law in many respects different from, and unrelated to, those here involved. In consequence, no useful purpose would be served by permitting the consolidation of the 11 (e) plans with the present proceeding, but on the contrary, delay and confusion would inevitably result." [6] Consistently, separate hearing was denied as to the voluntary plans apparently on the grounds that consideration of them would delay the § 11 (b) proceeding, so as to defeat the

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and not the power of the Commission or the action of the Commission. The hearing is restricted to 11 (b) (2)."

The Commission at no time before or during the hearing recognized that § 11 (e) plans not only were relevant to whether action should be taken under § 11 (b) (2), but also were required to be considered by hearing before such action is taken. Its view apparently is to the contrary. See *Matter of Electric Bond & Share Co.*, 11 S. E. C. 1146, 1217–1218, quoted in note 7 *infra; Matter of Commonwealth & Southern Corp.*, 11 S. E. C. 138, 154–156. The examiner, of course, could not help himself. The hearing had been limited to § 11 (b) (2). 7 S. E. C. 391.

[5] The record does not disclose what the agreement was or for what reasons it was made. To delay consideration of the motion to consolidate was in effect to deny it insofar as it sought a joint hearing, though it was always possible for the Commission to order a hearing on the voluntary plans before it issued its § 11 (b) (2) order.

[6] 11 S. E. C. 1146, 1152. The Commission noted that "these plans were filed at a time when the record in the present proceeding was nearing completion." *Ibid.*

statutory policy of prompt action,[7] and that the plans were incomplete and ineffective.

It is apparent from this recital that the Commission did not at any time comply with the requirement of § 11 (e) that it provide by rules, regulations or order an orderly procedure to carry out the section's command and purpose for the submission and consideration of voluntary plans. And if petitioners had stood upon their rights in this respect, by timely action taken in good faith, the Commission's failure to observe them would have given ground for reversal.

But it is equally obvious that the petitioners did not assert their rights in a manner which invalidates the Com-

[7] "With respect to the former point, that of promptness, it need only be considered that it would be necessary for respondents and the Public Utilities Division to formulate and present, and for us to explore, detailed and very extensive evidence on a number of extremely complex subjects *before it would be possible for us to determine even the preliminary question of whether the 11 (e) plans do in fact constitute acceptable alternative courses of action* for achieving the objectives of Section 11. In the event it were necessary to determine the question in the negative, presumably we should be free (even under respondents' contention) to enter our order of dissolution herein following the lengthy delay, unless respondents in the meantime proposed a new 11 (e) plan which would necessitate a repetition of this process. On the other hand, in the event we were ultimately able to approve the plans, they would still not become effective unless and until ratified by vote of the companies' stockholders.

"Considering that 7 years have now gone by since the effective date of the Act, that 4½ years have elapsed since the date after which action under Section 11 was to be required 'as soon as practicable,' and that more than 2 years have been consumed since the present proceeding was instituted, it is evident that respondents' program is too fraught with potentialities of delay to be acceptable as a substitute for a dissolution order to meet the problems existing under Section 11 (b) (2). Section 11 (e) which provides a medium for voluntary compliance with Section 11 (b) was not intended to oust the Commission of its jurisdiction, or relieve it of its obligation, to enforce the provisions of 11 (b)." (Emphasis added.) 11 S. E. C. 1146, 1217–1218. Compare notes 4 and 6, *supra*.

mission's action in entering its § 11 (b) (2) order or made the denial of the motion for hearing reversible error. The petitioners had notice that the Commission would proceed with the § 11 (b) (2) hearing from the time such notice was given in May, 1940. They applied for a continuance. But the record does not disclose that they sought it in order to have time to prepare and submit a voluntary plan or indeed that they took any action toward securing a hearing on such a plan until they submitted their plans. In one case this was more than a year after the § 11 (b) hearing began, in the other nearly a year and a half after that time. When shortly after the latter submission the motions to consolidate were made, consideration was deferred by agreement of counsel until the end of the § 11 (b) (2) hearing; and about seven months later that hearing was closed as to the petitioners by stipulation.

Although in my opinion it was the Commission's duty initially to make provision for notice and hearing on voluntary plans, in accordance with § 11 (e), the petitioners hardly can be considered to have been ignorant either of this duty or of the Commission's failure to perform it. By standing by through the long period of the § 11 (b) proceedings prior to the time of submitting their plans without taking earlier action to secure preservation of their rights to hearing on such plans, the petitioners should be taken to have waived their rights to such hearings. They were not entitled to assert them for the first time at so late a stage in the § 11 (b) proceedings. Nor, in my opinion, is the Commission required to give further consideration to such plans in these cases, unless in its own discretion it sees fit to do so.[8]

[8] Cf. § 11 (b): "The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist." 49 Stat. 803, 821.

Syllabus.

ALMA MOTOR CO. *v.* TIMKEN-DETROIT AXLE CO. ET AL.

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

No. 11. Argued April 25, 26, 1945. Reargued October 24, 25, 1946.—Decided December 9, 1946.

1. This Court granted certiorari on a petition raising a question as to the constitutionality of the Royalty Adjustment Act of October 31, 1942, 56 Stat. 1013, and an order of the War Department issued thereunder. After hearing arguments and setting the case for reargument, it found that, in addition to the constitutional question, the Circuit Court of Appeals had before it, but did not pass upon, a question as to the applicability of the Act. *Held:* The judgment of the Circuit Court of Appeals is vacated and the case is remanded to it for decision of any non-constitutional issues material to the appeal. Pp. 132, 136, 142.

   (a) Neither this Court nor the lower courts should pass on the constitutionality of an act of Congress unless such adjudication is unavoidable, even though the question is properly presented by the record. P. 136.

   (b) The Circuit Court of Appeals should have passed on the applicability of the Act and the order before considering their constitutionality, since a decision on their applicability might have made unnecessary any consideration of their constitutionality. P. 137.

   (c) That much time has been wasted by the earlier failure of the parties to indicate, or the Circuit Court of Appeals or this Court to see, the course which should have been followed is no reason to continue on the wrong course or to disregard the traditional policy of avoiding constitutional questions. P. 142.

2. The primary purpose of the Royalty Adjustment Act was to reduce royalties for which the United States was ultimately liable on inventions manufactured for it by a licensee, from pre-war rates to rates appropriate to the volume of production in wartime. P. 134.

3. The applicability of the Royalty Adjustment Act and the jurisdiction of the Court of Claims thereunder turn, not on a claim of coverage, but on actual coverage by a patent and license of an invention manufactured for the United States and upon a condition subsequent—the issuance of notice that the department head be-

lieves the stipulated royalties to be unreasonable. *Smithers* v. *Smith*, 204 U. S. 632, and *Bell* v. *Hood*, 327 U. S. 678, distinguished. Pp. 137–139.

4. The fact that a suit in a District Court involving the question whether certain products manufactured for the United States in wartime were covered by a patent and license might have been dismissed and the owner of the patent relegated to the Court of Claims under the Act of June 25, 1910, as amended, 35 U. S. C. § 68, if the Royalty Adjustment Act were inapplicable because the products were not covered by the license, was no reason for the Circuit Court of Appeals to fail to pass on the question of coverage; since the constitutionality of 35 U. S. C. § 68 already has been sustained by this Court and a dismissal under that section would not have required a decision on any constitutional question. Pp. 139, 140.
5. Section 2 of the Royalty Adjustment Act, providing that, if the licensor sues in the Court of Claims, the United States may avail itself of all defenses that might be pleaded by a defendant in an infringement suit, does not require that all suits involving licenses under the Act and presenting questions of coverage or validity be tried in the Court of Claims. Pp. 140, 141.
6. Neither party having appealed from the part of the judgment of the District Court holding that some of the products were covered by the patent and license, the Circuit Court of Appeals was not properly concerned with their coverage or with the applicability of the Royalty Adjustment Act to them; the part of its order affecting those products was unwarranted; and it should not now be made the basis for approving a constitutional decision which was otherwise unnecessary. P. 141.

144 F. 2d 714, judgment vacated and case remanded.

In a suit to determine the validity of a patent and the rights of a licensor and licensee thereunder, the District Court held that the licensee was estopped to contest the validity of the patent, that some of its products were not covered, that others were covered and that the licensee was indebted for royalties. 47 F. Supp. 582. Only the licensor appealed. While the appeal was pending, the War Department, pursuant to the Royalty Adjustment Act of October 31, 1942, 56 Stat. 1013, 35 U. S. C. Supp. V, §§ 89–96, issued notice stopping payment of royalties by

the licensee on products manufactured for the United States and an order fixing a "fair and just" royalty at zero, on the theory that the patent was invalid. Thereupon the licensee moved to dismiss the appeal and remand to the District Court with directions to vacate its judgment—on the ground that the products were manufactured for the United States alone and that the operation of the Royalty Adjustment Act and the order thereunder transferred jurisdiction of the subject matter of the entire case to the Court of Claims. The licensor challenged the constitutionality of the Act and the Government intervened to defend it. The Circuit Court of Appeals, without passing on the applicability of the Act, sustained its constitutionality, vacated the judgment of the District Court, and remanded the cause with instructions to proceed no further until a justiciable controversy exists between the parties. 144 F. 2d 714. This Court granted certiorari, 324 U. S. 832, heard arguments, and set the case for reargument. Then the Government suggested for the first time that the Circuit Court of Appeals should have avoided the question of constitutionality by first considering the question of coverage. The judgment of the Circuit Court of Appeals is vacated and the case remanded for decision of any non-constitutional issues material to the appeal. P. 142.

I. Joseph Farley argued the cause and filed a brief for petitioner on the original argument. *Thomas J. Hughes* and *John G. Buchanan* argued the cause for petitioner on the reargument. *Messrs. Hughes* and *Farley* filed a brief on the reargument.

Assistant Attorney General Shea argued the cause for the United States, respondent, on the original argument. With him on the brief were *Solicitor General Fahy, David L. Kreeger* and *Jerome H. Simonds*. *Assistant Attorney*

General Sonnett argued the cause for the United States, respondent, on the reargument. With him on the brief were *Solicitor General McGrath, Arnold Raum, Paul A. Sweeney* and *Joseph B. Goldman.*

William A. Stranch argued the cause for the Timken-Detroit Axle Co., respondent. With him on the briefs was *J. Matthews Neale. James A. Hoffman* was also on the brief on the original argument.

James D. Carpenter, Jr. and *John G. Buchanan* filed a brief on the original argument for Roscoe A. Coffman, as *amicus curiae,* urging reversal. *William H. Webb* and *John G. Buchanan, Jr.* were also with them on the brief on the reargument.

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

Certiorari was granted in this case February 5, 1945, on a petition addressed to the question of the constitutionality of the Royalty Adjustment Act of October 31, 1942,[1] and of Royalty Adjustment Order No. W–3, issued by the War Department July 28, 1943. We find now, however, that the Circuit Court of Appeals had before it, not only the constitutional question, which was decided, but also a non-constitutional question, which alone might properly have served as an adequate ground on which to dispose of the appeal. This non-constitutional question was neither considered nor decided by the court below, nor argued here. We have concluded, therefore, that we should not pass on the constitutional question at this time, but should vacate the judgment of the Circuit Court of Appeals, and remand the case to it for decision of any non-constitutional issues material to the appeal.

[1] 56 Stat. 1013, 35 U. S. C. Supp. V, §§ 89–96.

To explain the reasons for this conclusion, we must state the history of the present proceedings in some detail.

They were begun by a complaint in a District Court filed by respondent, The Timken-Detroit Axle Company, against petitioner, Alma Motor Company, asking a declaratory judgment as to their respective rights under a patent held by Alma and a coextensive license from Alma to Timken. The complaint alleged the existence of the patent, purporting to cover certain "transfer cases" or auxiliary automotive transmissions, and the license, by which Timken was authorized to manufacture the patented articles and required to pay certain specified royalties. It further alleged that Timken was engaged in manufacturing various designs of transfer cases, that some of these were once believed to have been covered by Alma's patent and had been made the subject of royalty payments, but on the basis of later information Timken had concluded that none of them were covered, and that the patent was invalid. It asked for a judgment confirming this conclusion.

Alma answered, claiming that all Timken's transfer cases were covered, that the patent was valid, and that Timken was estopped from challenging validity, and counterclaimed for a money judgment for unpaid royalties.

Following a trial, the District Court filed findings and an opinion,[2] and entered judgment December 2, 1942. It held Timken estopped from challenging the validity of Alma's patent; that certain specified types of Timken's transfer cases (generally those denominated T–32 and T–43) were covered by the patent and license; that Timken was indebted to Alma for royalties thereon; and that other types (generally those denominated T–79) were outside the

[2] *Timken-Detroit Axle Co.* v. *Alma Motor Co.*, 47 F. Supp. 582 (D. Del. 1942).

patent and license. The court indicated that unless the parties could agree on the amount of the royalties so held to be payable, a special master would be appointed to determine the amount.

Shortly before this judgment was entered, Congress enacted the Royalty Adjustment Act, which Alma seeks to attack here. The primary purpose of this Act was to reduce royalties for which the United States was ultimately liable on inventions manufactured for it by a licensee, from pre-war rates to rates appropriate to the volume of production in wartime. Whenever during the war a government contractor manufactured under a license, and the royalties seemed excessive to the head of the department concerned, the latter was empowered to stop payments by notice to the licensor and licensee, and after a hearing, to fix by order "fair and just" royalties, "taking into account the conditions of wartime production." [3] Thereafter, the licensor could collect royalties from the licensee only at the rate so determined. If the licensor felt that the reduction was unfair, his remedy was by suit against the United States in the Court of Claims, where he could recover "fair and just compensation . . . taking into account the conditions of wartime production." [4] Whatever reduction was effected by the order was to inure to the benefit of the United States.

The notice, stopping payment of royalties from Timken to Alma, was issued by the War Department December 30, 1942. Royalty Adjustment Order No. W–3 followed on July 28, 1943, fixing a "fair and just" royalty at zero. The basis of this determination was the alleged invalidity of Alma's patent, which the United States claims that the Act permits it to assert.[5]

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[3] 56 Stat. 1013, 35 U. S. C. Supp. V, § 89.

[4] 56 Stat. 1013, 35 U. S. C. Supp. V, § 90.

[5] 56 Stat. 1013, 35 U. S. C. Supp. V, § 90.

In the meantime, Alma had taken an appeal from Paragraph 5 of the judgment of the District Court, which held that the T–79 transfer cases were outside the patent. Timken did not appeal. After the Order was promulgated, Timken moved to dismiss the appeal and remand to the District Court with directions to vacate its judgment. The motion was predicated on an affidavit that Timken had manufactured transfer cases for the United States alone, together with the argument that the operation of the Act and Order transferred jurisdiction of the subject matter of the entire case to the Court of Claims. Alma countered with an attack on the constitutionality of the Act and Order, primarily as working a deprivation of property in contravention of the Fifth Amendment.

The United States had at this time already submitted an *amicus* brief, in which it argued that the Order had made the appeal moot; and when Alma's constitutional attack was filed, the United States intervened in support of the Act and Order.

In its opinion [6] the Circuit Court of Appeals considered that the question of the applicability of the Act and Order in this case was simply a question of their constitutional validity. It proceeded to consider this latter question, and decided that both the Act and the Order were entirely valid. Accordingly, it entered the following order:

> ". . . it is now here ordered and adjudged by this Court that paragraph 5 of the judgment of the said District Court in this case be, and the same is hereby vacated and the cause is remanded to the District Court with directions to proceed no further therein unless and until it shall appear to the Court that a justiciable controversy again [7] exists between the parties arising out of the facts set forth in the com-

[6] *Timken-Detroit Axle Co.* v. *Alma Motor Co.*, 144 F. 2d 714 (CCA 3, 1944).

[7] The word "again" was deleted by an order of October 2, 1944.

plaint, except that the Court may, if it deems such action to be appropriate, vacate all or any part of the remainder of the judgment and dismiss the complaint as moot."

The War Department notice was issued after the District Court's judgment, but before appeal was filed in the Circuit Court of Appeals. It appears that at no time did any party urge on the Circuit Court of Appeals or did that court pass on the question whether the T–79 transfer cases were covered by Alma's patent and license. Indeed, it was not until after we had granted certiorari and heard argument at the October 1944 term on the constitutional question, and set the case down for further argument this term, that the United States pointed to this omission, and suggested that the Circuit Court of Appeals should have avoided the question of constitutionality by first considering the question of coverage. It argued here that the prior determination of any non-constitutional questions which might dispose of a controversy is a practice which is dictated by sound principles of judicial administration. It moved to vacate the judgment of the Circuit Court of Appeals, and to remand the case to it for such determination. Both Alma and Timken opposed the motion. Action was withheld pending argument on the motion and the case itself.

This Court has said repeatedly that it ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable. This is true even though the question is properly presented by the record. If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided.[8]

[8] *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 193; *Light* v. *United States*, 220 U. S. 523, 538; *Spector Motor Co.* v. *McLaughlin*,

This same rule should guide the lower courts as well as this one. We believe that the structure of the problems before the Circuit Court of Appeals required the application of the rule to this case.

At the outset that court was confronted with the merits of the appeal, which involved simply the coverage by the patent and license of the T–79 transfer cases. Later, however, it was confronted also with a problem of jurisdictional nature. This involved the effect wrought by the Act and Order on its power to proceed to an adjudication on the merits. If for any reason, the Act and Order had no applicability in the case, the court should proceed to the merits. If, however, they were controlling, Alma was relegated to its statutory remedy against the United States, and the court would be required to dismiss the appeal, and to vacate Paragraph 5 of the judgment in the District Court.

In the determination of this jurisdictional problem, we are of the opinion that the Circuit Court of Appeals erred. It assumed that this problem involved only the question of the constitutionality of the Act and Order. But the Act and Order, whether or not constitutional, do not control the disposition of this case unless they were intended to apply to it. The question of their applicability is a non-constitutional question, the decision of which might have made unnecessary any consideration of constitutionality.

Were the Act and Order intended to apply? Their terms seem to make that depend upon whether the subject-matter of the appeal—the T–79 transfer cases—were covered by the patent and license. The Act provides that it is only "whenever an invention . . . shall be manufactured . . . for the United States, *with license from the*

323 U. S. 101, 105. See Brandeis, J., concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 347.

owner thereof . . ." and the department head believes the stipulated royalties to be unreasonable, that the latter shall give "written notice of such fact to the licensor and to the licensee." It is only after such notice that the department head may fix "fair and just" royalties, and only "such licensee" who is forbidden to pay additional amounts as royalties, and only "such licensor" who is relegated to the Court of Claims.[9] Conversely, if the putative invention is manufactured without license, or if the putative patentee is not actually the owner, these powers and disabilities do not arise. Even Order No. W–3 does not refer to T–79 transfer cases as such. It forbids the payment of royalties only on transfer cases "under" this license, or any license pursuant to this patent, "which embody . . . the . . . alleged inventions." Again, if the T–79s are not "under" the Alma-Timken license, or if they do not "embody" Alma's patented claim, then the Order expressly leaves Alma's and Timken's rights and remedies unaffected.

Consequently, coverage of the T–79s, as well as constitutionality of the Act and Order, was a crucial issue in deciding the jurisdiction of the Circuit Court of Appeals. If they are covered, the Act and Order apply, and it was then necessary to decide constitutionality in order to determine whether the court could proceed to a judgment on the merits. If the T–79s are not covered, the Act and Order manifestly do not apply, and the court could proceed to a judgment on the merits, whether the Act and Order are constitutional or not. In that event, of course, no constitutional question would be decided.

The Circuit Court of Appeals may have thought that the applicability of the Act and Order turn not on actual coverage, but on a claim of coverage, and hence that applicability was undisputed and only constitutionality was perti-

[9] 35 U. S. C. Supp. V, § 89.

nent to jurisdiction in this case. Such construction is said to have some support in cases like *Smithers* v. *Smith,* 204 U. S. 632, and *Bell* v. *Hood,* 327 U. S. 678, in which bona fide claims of rights were held to satisfy jurisdictional requirements as to the amount in controversy and as to the existence of a certain federal question, regardless of whether such claims would ultimately be established.

The answer to this argument is that the statutory language [10] which controlled the cited cases expressly refers to the claim as the test of jurisdiction, whereas, as we have shown, the instant Act refers to the objective event. Furthermore, the test in the *Smithers* and *Bell* cases, *supra,* is a condition precedent to the exercise of jurisdiction. Unless such exercise is made to turn on what the plaintiff rather than what the court says is at stake, the court's jurisdictional ruling will often deny the plaintiff a forum when a full hearing might later have shown a right to relief. The test in this case, on the other hand, is a condition subsequent, in certain instances depriving the court of jurisdiction, and the same danger is not present.

Timken contends that the jurisdiction of all suits with respect to inventions manufactured for the United States in wartime is transferred to the Court of Claims, and that the coverage question is immaterial. It argues that where the Royalty Adjustment Act does not accomplish this transfer because the manufacture is not by a licensee, the Act of June 25, 1910, as amended,[11] should apply, and that

[10] "The district courts shall have original jurisdiction . . . where the *matter in controversy* exceeds . . . the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States . . ." 28 U. S. C. § 41.

[11] Act of June 25, 1910, 36 Stat. 851, as amended by the Act of July 1, 1918, 40 Stat. 705, 35 U. S. C. § 68, provides in part: "Whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use

it has the same effect. It is said, therefore, that the case should have been dismissed whether there was coverage or not, and that the Circuit Court of Appeals properly refrained from deciding that question.

Assuming the premise is correct, we do not reach the same conclusion. Dismissal can be ordered under the 1910 Act, if it applies, without deciding any constitutional questions, for that Act has already been before this Court and been approved.[12] To order dismissal under the 1942 Act, however, or under one of the two Acts alternatively, requires a determination of the constitutionality of the latter. As we have already indicated, this is sufficient reason for first deciding which Act impels the transfer.

It is true that § 2 of the Royalty Adjustment Act provides that, if the licensor sues in the Court of Claims, the United States "may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement as set forth in title sixty of the Revised Statutes, or otherwise." [13] We deem it clear

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or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture . . ."

[12] *Crozier* v. *Krupp*, 224 U. S. 290; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331.

[13] Section 2 provides in full:

"Any licensor aggrieved by any order issued pursuant to section 1 hereof, fixing and specifying the maximum rates or amounts of royalties under a license issued by him, may institute suit against the United States in the Court of Claims, or in the District Courts of the United States insofar as such courts may have concurrent jurisdiction with the Court of Claims, to recover such sum, if any, as, when added to the royalties fixed and specified in such order, shall constitute fair and just compensation to the licensor for the manufacture, use, sale, or other disposition of the licensed invention for the United States, taking into account the conditions of wartime production. In any such suit the United States may avail itself of any and all defenses,

that such defenses would include questions of coverage as well as validity of a patent. But we do not think that § 2 reflects a decision by Congress that all suits involving licenses under the Act and presenting questions of coverage or validity should be tried in the Court of Claims. As respects the problem with which we are now concerned, § 2 does no more than to make available such defenses in the Court of Claims whenever the suits authorized by the Act are brought there.

Both Alma and Timken maintain that the constitutional question could not be avoided by the Circuit Court of Appeals, because the T–32 and T–43 transfer cases were covered, if the T–79s were not, and were therefore necessarily subject to the Order. Indeed, the District Court decided that they were covered, and Timken did not appeal.

This point carries its own refutation. Neither party appealed from the adjudication as to the T–32 and T–43 transfer cases. No claim as to them was before the Circuit Court of Appeals. There is no claim now that a litigant may not appeal from part of a judgment, or that an appeal from part brings up the whole.[14] The Circuit Court of Appeals was not properly concerned with their coverage, or with the applicability to them of the Act or Order. Therefore, the part of its order affecting T–32s and T–43s was unwarranted, and should not now be made the basis for approving a constitutional decision which was otherwise unnecessary.

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general or special, that might be pleaded by a defendant in an action for infringement as set forth in title sixty of the Revised Statutes, or otherwise."

[14] Rule 73 (b) of the Federal Rules of Civil Procedure provides that the "notice of appeal . . . shall designate the judgment or part thereof appealed from . . ."

Alma objects strenuously to the Government "mending its hold" between the time it urged dismissal in an *amicus* brief in the Circuit Court of Appeals and argued constitutionality there and here, and the time it filed here its motion to vacate and remand. The Government certainly aided and abetted the Circuit Court of Appeals in its error. But Alma is not without fault in creating the confusion. In its "Petition to Review" the Order, Alma asked the Circuit Court of Appeals to hold the Order unconstitutional. In its petition to the Circuit Court of Appeals for rehearing, it argued that the court should not have passed on constitutionality because Timken had not charged any royalties to the United States on T–79s, and the Act and Order were allegedly inapplicable. Before this Court it has returned to its original position.

We agree that much time has been wasted by the earlier failure of the parties to indicate, or the Circuit Court of Appeals or this Court to see, the course which should have been followed. This, however, is no reason to continue now on the wrong course. The principle of avoiding constitutional questions is one which was conceived out of considerations of sound judicial administration. It is a traditional policy of our courts.[15]

The judgment is vacated and the case remanded for further proceedings in conformity with this opinion.

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[15] *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 553 (1837).

Syllabus.

UNEMPLOYMENT COMPENSATION COMMISSION OF ALASKA ET AL. *v.* ARAGON ET AL.

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

No. 25. Argued February 27, 1946. Reargued November 13, 1946.—Decided December 9, 1946.

Companies engaged in catching and canning salmon in Alaska terminated their agreement with the union representing their employees at the end of the 1939 season. Prior to the beginning of the 1940 season, they opened negotiations in San Francisco with the same union for a new agreement. There ensued a controversy over wages which resulted in a failure to reach an agreement and a decision to conduct no operations during the 1940 season. Individuals who had worked for the companies during the 1939 season filed claims for unemployment benefits with the Alaska Unemployment Compensation Commission. The Commission held that they were disqualified from receiving payments for eight weeks under § 5 (d) of Alaska Extra. Sess. L., 1937, c. 4, as amended by Alaska Sess. L., 1939, cc. 1, 51, which disqualifies an individual for eight weeks if "the Commission finds that his . . . unemployment is due to a labor dispute which is in active progress at the factory, establishment or other premises at which he . . . was last employed." *Held:*

1. The Commission could properly find that a "labor dispute" existed within the meaning of § 5 (d) of the Alaska Act. Pp. 149–151.

2. The term "labor dispute," as used in § 5 (d) of the Alaska Act, need not be narrowly construed to require a strike or leaving of employment but may be construed as covering a situation where the controversy precedes the employment. Pp. 149–151.

3. Evidence that two of the companies had made extensive preparations for the 1940 operations, purchasing equipment and supplies, preparing ships and holding them in readiness for the expedition, and that they negotiated in good faith and failed to operate only because of their inability to negotiate satisfactory labor agreements before the beginning of the season, was sufficient to support the Commission's finding that their unemployment was "due" to a labor dispute. Pp. 149–151.

4. Evidence showing, *inter alia,* that the withdrawal of another company from negotiations with the union and its determination

not to operate during the 1940 season occurred prior to the deadline for its operations and was caused primarily by factors other than its inability to negotiate a satisfactory labor contract did not support a finding by the Commission that its employees were unemployed "due" to a labor dispute at the establishment at which they were last employed. Pp. 152, 153.

5. Where the negotiations continued beyond the deadline dates set by the companies for the consummation of an agreement and beyond the dates of the applications for unemployment benefits, the Commission could properly find that a labor dispute was in "active progress" within the meaning of § 5 (d) of the Alaska Act, even if it be assumed that at some time within the eight-week period of disqualification the point was reached when all possibility of settlement disappeared. P. 153.

(a) The question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially. P. 153.

(b) The reviewing court's function is limited; and all that is needed to support the Commission's interpretation is that it has "warrant in the record" and a "reasonable basis in law." Pp. 153, 154.

6. This Court is unable to say that the Commission's construction was irrational or without support in the record, since the Commission might reasonably conclude that the unemployment was not of the "involuntary" nature which the statute was designed to alleviate. P. 154.

7. The fact that, in accordance with the usual procedure, the wage negotiations were conducted in San Francisco and Seattle, instead of at the place of work in Alaska, did not prevent the dispute from being "at the factory, establishment, or other premises" within the meaning of § 5 (d) of the Alaska Act. Pp. 154–156.

8. A reviewing court usurps the administrative agency's function when it sets aside an administrative determination on a ground not theretofore presented and deprives the agency of an opportunity to consider the matter, make its ruling, and state the reasons for its action—where the statute provides that judicial review is permitted only after exhaustion of administrative remedies. P. 155.

149 F. 2d 447, affirmed in part, reversed in part.

The Unemployment Compensation Commission of Alaska held certain employees of salmon canneries disqualified for eight weeks from receiving unemployment

compensation benefits, on the ground that their unemployment was due to a "labor dispute" within the meaning of the Alaska Unemployment Compensation Law, Alaska Extra. Sess. L., 1937, c. 4, as amended by Alaska Sess. L., 1939, cc. 1, 51. The District Court affirmed the Commission's holding. The Circuit Court of Appeals reversed. 149 F. 2d 447. This Court granted certiorari. 326 U. S. 700. *Affirmed in part, reversed in part,* and remanded. P. 156.

Marshall P. Madison argued the cause for petitioners. With him on the briefs were *E. Coke Hill* and *Francis R. Kirkham.*

Herbert Resner argued the cause and filed a brief for respondents.

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

In May, 1940, the individual respondents filed claims for unemployment benefits with the Unemployment Compensation Commission of the Territory of Alaska. After an initial determination by an examiner and after decision by a referee, the Commission held that the claimants were disqualified from receiving benefits for a period of eight weeks, since their unemployment was due to a labor dispute in active progress within the meaning of the Alaska Unemployment Compensation Law.[1] The United States District Court affirmed the Commission's holding in all particulars. The Circuit Court of Appeals reversed, one judge dissenting. We granted certiorari because of the public importance of the questions involved.[2]

[1] Extraordinary Session Laws of Alaska, 1937, Chapter 4 as amended by Chapters 1 and 51, Session Laws of Alaska, 1939.

[2] The Alaska statute is part of the legislative scheme for unemployment compensation induced by the provisions of the Social Security Act of 1935. 49 Stat. 620, 626–627, 640. It is said that forty-three

Among the petitioners are three corporations engaged principally in the business of salmon fishing, canning, and marketing. One of the companies owns canneries and other facilities at Karluk, Chignik, and Bristol Bay, Alaska. The other two companies operate only at Bristol Bay. Catching and canning salmon is a seasonal activity.[3] The companies customarily hire workers at San Francisco at the beginning of the season, transport them to the Alaskan establishments, and return them to San Francisco at the season's end. Similar operations are carried on by other companies out of other west coast ports, notably Seattle and Portland. The individual respondents are all members of the Alaska Cannery Workers Union Local No. 5, and each worked in Alaska for one of the three companies during the 1939 season. Local No. 5 is the recognized bargaining agent of the cannery workers in the San Francisco area.

In 1939, as had been the practice for some years, the union entered into a written agreement with the companies, covering in considerable detail the matters of wages, hours, conditions of employment, and the like. After the end of the 1939 season, the companies terminated the agreement then in effect, which made necessary the negotiation of a new contract for the 1940 season. Consequently, on March 6, 1940, the companies through their authorized agent, Alaska Salmon Industry, Inc., invited the union to enter into negotiations for a new agreement. In a series of meetings held shortly thereafter, serious disagreement

states and territories have provisions similar to those in the Alaska law disqualifying from unemployment benefits persons unemployed due to a labor dispute.

[3] As provided by Benefit Regulation No. 10 of the Alaska Unemployment Compensation Commission, the season at Karluk extends from April 5 to September 5, at Chignik from April 1 to September 10, and at Bristol Bay from May 5 to August 25.

appeared which quickly developed into an impasse on the question of wages. The union demanded wages equal to or in excess of those paid under the terms of the 1939 agreement. The companies offered wages which for the most part were below those paid in 1939. On April 1, 1940, the union caused the negotiations as to the wage issue to be transferred from San Francisco to Seattle, where an attempt was being made to effect a coastwide agreement to cover all west coast companies carrying on salmon operations in Alaska. Local No. 5, however, refused to sign a "memorandum" agreement incorporating such terms as might result from the concurrent Seattle negotiations.

On April 3, the companies notified the union that if operations were to be carried on in Karluk and Chignik during the 1940 season, an agreement with respect to the former would have to be reached by April 10 and with respect to the latter by April 12. Although negotiations proceeded up to the deadlines, the parties arrived at no understanding, and on April 22 Alaska Salmon Industry, Inc., formally announced that no operations would be carried on in Karluk and Chignik during 1940. Meetings continued, however, in an effort to come to an understanding with respect to Bristol Bay before the arrival of the May 3d deadline which had been set for those operations. Although federal mediators intervened in an attempt to discover a suitable compromise, the deadline date passed without agreement. It appears that, after May 3, negotiations continued in Seattle, where a contract affecting only canners and workers operating out of ports other than San Francisco was finally executed on May 29. The companies and union which are involved in this case were specifically excluded from the terms of the 1940 Seattle agreement.

Shortly after May 3, the individual respondents filed claims for unemployment benefits with the Alaska Unem-

ployment Compensation Commission. The Commission, acting through an examiner, held that respondents were disqualified from receiving payments for the statutory period of eight weeks under the provisions of § 5 (d) of the Alaska law. At the time this case arose, that section stated in part: "An individual shall be disqualified for benefits . . . (d) For any week with respect to which the Commission finds that his total or partial unemployment is due to a labor dispute which is in active progress at the factory, establishment or other premises at which he is or was last employed; provided, that such disqualification shall not exceed the 8 weeks immediately following the beginning of such dispute . . ."

In pursuance of the appeal provisions of the statute,[4] respondents asked for a review of the examiner's determination. The Commission, in response to this application, appointed a Referee to pass on the disputed claims. The scope of the hearings was confined to the issue of whether the unemployment of the claimants was caused by the existence of a labor dispute. At the end of the proceedings, the Referee came to the conclusion that, although there was a labor dispute in existence initially, the dispute was no longer "in active progress" after the passing of the dates fixed by the companies for consummation of the working agreements. Consequently, the disqualification under § 5 (d) with respect to each of the localities was held no longer to attach after the passage of the respective deadline dates.[5]

[4] Section 6 (c) and § 6 (d), Chapter 1, Session Laws of Alaska, 1939.

[5] The Referee found that there had been unemployment due to a labor dispute in active progress at Karluk from April 5, when the season opened, to April 10, the deadline date, and at Chignik from April 1 to April 12. Since the deadline date with respect to Bristol Bay was set two days before the season opened there, the Referee found that there was no dispute in active progress at those plants.

The Commission, on appeal,[6] reversed the Referee's decision and held that, within the meaning of the Alaska law, a labor dispute was in active progress throughout the entire eight-week statutory period of disqualification beginning with the opening of the season in each locality. Consequently, no benefits were payable until the expiration of the disqualification period. The United States District Court affirmed the Commission's decision in all particulars.[7] The Circuit Court of Appeals, with one judge dissenting, reversed, however, on the ground that the labor dispute was not physically *at* the Alaska canneries where the individual respondents had been last employed.

We are met at the outset with the contention that the facts of this case do not present a "labor dispute" within the meaning of § 5 (d) of the Alaska Act. Respondents urge that the term must be narrowly construed to require a strike or leaving of employment which, in turn, calls for a presently-existing employment relation at the time the dispute arises.[8] According to this view, the term

[6] This procedure was in pursuance of § 6 (e) of the Act as amended by Chapter 1, Session Laws of Alaska, 1939.

[7] Section 6 (i) of the Act provides that within thirty days after the decision of the Commission has become final, any party aggrieved may secure judicial review in the United States District Court. The section states, "In any judicial proceeding under this Section, the findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said Court shall be confined to questions of law."

[8] A number of state courts in construing similar legislation have found "labor disputes" to have existed in situations where no contractual employment relation presently existed. Each of these cases involved a work stoppage in the interval between the expiration of an old labor contract and the consummation of a new agreement. *Miners in General Group* v. *Hix,* 123 W. Va. 637, 17 S. E. 2d 810 (1941); *Ex parte Pesnell,* 240 Ala. 457, 199 So. 726 (1940); *Barnes* v. *Hall,* 285 Ky. 160, 146 S. W. 2d 929 (1940); *Block Coal & Coke Co.*

would not cover a situation, such as presented here, where the controversy precedes the employment. Respondents would justify this restricted construction on the ground that the Unemployment Compensation Law is remedial legislation, and any provision limiting benefits under the Act should be narrowly interpreted.

The term "labor dispute" is not defined in the statute. The term appears in the Act in one other connection, however. Section 5 (c) (2) (A) provides that benefits under the Act will not be denied any individual, otherwise eligible, who refuses to accept new work "if the position offered is vacant due directly to a strike, lockout, *or other labor dispute.*" The Social Security Act of 1935 [9] requires that the state or territorial law contain a provision to this effect before the legislation can be approved by the Social Security Board. Obviously, for the purposes of § 5 (c) (2) (A), the term, "labor dispute," has a broader meaning than that attributed to it by respondents. Unless the Territorial Legislature intended to give a different meaning to the same language appearing in another subdivision of the same section, the term must be given a broader meaning than that contended for by the respondents, for the purposes of § 5 (d) as well. We need not determine whether "labor dispute" must in all cases be construed as broadly as it is defined in the Norris-LaGuardia Act [10] and the

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v. *United Mine Workers of America,* 177 Tenn. 247, 148 S. W. 2d 364, 149 S. W. 2d 469 (1941); *Sandoval* v. *Industrial Comm'n,* 110 Colo. 108, 130 P. 2d 930 (1942).

[9] 49 Stat. 640, 26 U. S. C. § 1603 (5) (A).

[10] 47 Stat. 70, 29 U. S. C. § 101. The Norris-LaGuardia Act contains the following definition: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 47 Stat. 73, 29 U. S. C. § 113 (c). A number of state courts have found this

National Labor Relations Act.[11] But here there was full-scale controversy. Companies engaged in carrying on a seasonal business were ranged against a union representing seasonal workers who had been employed by the companies in the previous year. Dispute there certainly was; and the subject of that dispute consisted of matters usually contested in labor disputes as that term is normally understood.[12] Since we find nothing to indicate that the Territorial Legislature intended a contrary result, we conclude that the Commission might properly find a "labor dispute" here presented within the meaning of § 5 (d) of the Alaska Act.

We think that there is evidence in the record to support the Commission's conclusion that respondents' unemployment was "due" to a labor dispute insofar as that holding relates to the individual respondents employed in 1939 by the Alaska Packers Association and the Red Salmon Canning Company. At the hearings before the Referee, the respondents attempted to establish that the companies called off their 1940 operations for reasons other than their inability to negotiate a satisfactory labor agreement. It was argued, for example, that the companies feared a poor catch as a result of governmental restrictions on fishing applicable to the 1940 season. The evidence adduced

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and the similar definition in the National Labor Relations Act persuasive in their construction of the term appearing in unemployment compensation legislation similar to the Alaska Act. *Miners in General Group* v. *Hix*, 123 W. Va. 637, 17 S. E. 2d 810 (1941); *Barnes* v. *Hall*, 285 Ky. 160, 146 S. W. 2d 929 (1940); *Ex parte Pesnell*, 240 Ala. 457, 199 So. 726 (1940); *Sandoval* v. *Industrial Comm'n*, 110 Colo. 108, 130 P. 2d 930 (1942). The Alabama legislature incorporated the definition appearing in the Norris-LaGuardia Act into the Alabama unemployment compensation act. Ala. Code, Tit. 26 § 214 (A).

[11] 49 Stat. 449, 29 U. S. C. § 151.

[12] The Examiner, the Referee, the Commission, the District Court, and presumably the Circuit Court of Appeals all found a "labor dispute" to have existed, at least before the arrival of the deadline dates.

before the Referee indicates that both of the above-mentioned companies made extensive preparations for the 1940 operations. In anticipation, equipment and supplies of the value of several hundred thousand dollars were purchased. Ships were prepared and held in readiness for the expeditions. The Referee found that these companies negotiated in good faith and failed to operate in Alaska during the 1940 season only because of their inability to negotiate satisfactory labor agreements before the passing of the deadline dates. There is evidence that the Alaska Packers Association expected to hire about two-thirds the number of workers in 1940 it had employed in 1939. But there is nothing in the record to establish that any of the claimants in this action would have been unemployed as a result of this contemplated curtailment in activity, or, if any of the respondents would have been affected, which of their number would have been unemployed. It appears that the Red Salmon Canning Company expected to use the same number of workers in 1940 as in 1939, or possibly a few more. Under these circumstances, we think that the Commission's finding that the unemployment was "due" to the labor dispute should stand insofar as it relates to the claimants indicated.

But a different situation is presented with reference to the respondents employed by the Alaska Salmon Company in 1939. That company has an establishment only at Bristol Bay. On April 30, three days before the deadline relating to the Bristol Bay operations, Alaska Salmon withdrew from the negotiations with the union and announced that it was unable to send an expedition to Alaska in 1940. The Referee found that the withdrawal was caused primarily by factors other than the company's inability to negotiate a satisfactory labor contract. At the hearings before the Referee, counsel for the company stipulated that, even though the other companies had negotiated a labor agreement with the union before the deadline

date, Alaska Salmon would have conducted no operations out of San Francisco in 1940 after its withdrawal from negotiations. We conclude that the record does not support the finding of the Commission that the respondents employed by the Alaska Salmon Company in 1939 were unemployed "due" to a labor dispute at the establishment at which last employed.

Respondents urge that, assuming their unemployment was due to a labor dispute, there was no labor dispute in active progress," within the meaning of the Act, after the passage of the deadline dates. It is argued that when the expeditions were abandoned by the companies, the dispute must necessarily have terminated since there was no possible way in which negotiations could have brought about a settlement. It should be observed, however, that the record does not reveal that negotiations abruptly terminated with the passing of the last deadline date. Conferences continued at Seattle in which both the companies and the union were represented. The respondents considered the negotiations sufficiently alive to make an offer of terms at least as late as May 29. Even if it be assumed that at some time within the eight-week period of disqualification the point was reached when all possibility of settlement disappeared, it does not follow that the Commission's finding of a dispute in "active progress" must be overturned. Here, as in *Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131 (1944), the question presented "is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially." To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The "reviewing court's function is limited." All that is needed to support the Commission's interpretation is that it has

"warrant in the record" and a "reasonable basis in law." *Labor Board* v. *Hearst Publications, Inc., supra; Rochester Telephone Corp.* v. *United States,* 307 U. S. 125 (1939).

Applying these tests, we are unable to say that the Commission's construction was irrational or without support in the record. The Commission apparently views a dispute as "active" during the continuance of a work stoppage induced by a labor dispute. That agency might reasonably conclude that the unemployment resulting from such work stoppage is not of the "involuntary" nature which the statute was designed to alleviate, as indicated by the statement of public policy incorporated in the Act by the Territorial Legislature.[13] We see nothing in such a view to require our substituting a different construction from that made by the Commission entrusted with the responsibility of administering the statute.[14]

Nor can we accept the argument of the majority of the Court of Appeals that since negotiations between the companies and the workers were carried on in San Francisco and Seattle, the dispute could not be said to be "at" the

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[13] The "Declaration of Territorial Public Policy" states that "*Involuntary unemployment* is . . . a subject of general interest and concern which requires appropriate action by the legislature." It is further stated that the public welfare demands the compulsory setting aside of unemployment reserves "for the benefit of persons unemployed *through no fault of their own.*" Chapter 4, Extraordinary Session Laws of Alaska, 1937. (Italics supplied.)

Several state courts have concluded that the disqualification relating to unemployment due to a labor dispute is a reflection of the broad policy of the legislation to compensate only persons involuntarily unemployed. *Barnes* v. *Hall,* 285 Ky. 160, 146 S. W. 2d 929 (1940); *Deshler Broom Factory* v. *Kinney,* 140 Neb. 889, 2 N. W. 2d 332 (1942); *Sandoval* v. *Industrial Commission,* 110 Colo. 108, 130 P. 2d 930 (1942).

[14] *Labor Board* v. *Hearst Publications, supra; Rochester Telephone Corp.* v. *United States, supra.* Cf. *Social Security Board* v. *Nierotko,* 327 U. S. 358 (1946).

Alaskan establishments as required by the statute. So far as we are able to determine, this issue was injected for the first time by the opinion of the majority of the Court of Appeals. The contention does not seem to have been raised or pressed by respondents up to that point. The responsibility of applying the statutory provisions to the facts of the particular case was given in the first instance to the Commission. A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.[15] Nor do we find the argument advanced below convincing on its merits. It is clear that the subject matter of the dispute related to the operation of the Alaskan establishments. As a result of the dispute, the normal activities involved in catching and canning salmon were not carried on throughout the 1940 season at any of those establishments. We do not consider significant the fact that the companies and the union did not negotiate at the canneries or on the ships in Alaskan waters. A legislature familiar with the nature of seasonal operations carried on in the Territory could hardly have been unaware of the fact that companies and workers customarily carried on negotiations far distant from the Alaskan establishments. It seems unlikely that it was intended that this ordinary and usual procedure should defeat the disqualification for benefits incorporated in the Act. Furthermore, it should be observed that the respondent union

[15] Section 6 (h) of the Act states that judicial review of the Commission's decision "shall be permitted only after any party claiming to be aggrieved thereby has exhausted his administrative remedies as provided by this Act." Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51 (1938); *Regal Knitwear Co.* v. *Labor Board*, 324 U. S. 9, 13 (1945); *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 196–197 (1941).

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voluntarily entered into the negotiations conducted at San Francisco and Seattle and at no time challenged the propriety of this practice. Thus if we assume with respondents that this issue is properly presented for consideration, we conclude that under the circumstances of this case the dispute was "at the factory, establishment, or other premises" in the sense intended by the Territorial Legislature.

For the reasons stated, the judgment of the Circuit Court of Appeals is affirmed insofar as it holds that the statutory eight-week period of disqualification is inapplicable to the individual respondents employed by the Alaska Salmon Company in 1939. In all other particulars, the judgment of the Circuit Court of Appeals is reversed and the case remanded to the District Court with instructions to remand for further proceedings pursuant to this opinion.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE *v.* GREEN ET AL.

NO. 42. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.*

Argued October 22, 1946.—Decided December 9, 1946.

In a reorganization proceeding under Chapter X of the Bankruptcy Act, claim was made under a covenant in a first mortgage indenture for interest on interest which had accrued after payments by the debtor corporation had been suspended by a court order in an equity receivership, which was succeeded by a reorganization proceeding under § 77B and later by the Chapter X proceeding. The corporation was insolvent; its assets were sufficient to pay the first mortgage bondholders in full, including the interest on interest; but to

*Together with No. 43, *Vanston Bondholders Protective Committee* v. *Early et al.;* No. 44, *Vanhorn Bondholders Protective Committee* v. *Green et al.;* and No. 45, *Vanhorn Bondholders Protective Committee* v. *Early et al.,* on certiorari to the same court.

allow payment of the interest on interest would greatly reduce the share of the subordinate creditors in the reorganized corporation. *Held:*

1. Since the interest was left unpaid by order of the court, imposition of interest on that unpaid interest would be inequitable. P. 165.

2. It is not necessary for this Court to pass on the question of possible conflicts between the laws of different States having some interest in the indenture transaction or upon the validity of the provision for the payment of interest on interest under applicable state law; because a bankruptcy court, in determining what claims are allowable and how a debtor's assets shall be distributed, does not apply the law of the State where it sits, but administers and enforces the Bankruptcy Act in accordance with equitable principles. P. 162.

3. The general rule in bankruptcy and in federal equity receivership has long been that interest on the debtor's obligations ceases to accrue at the beginning of proceedings, since exaction of interest where power of a debtor to pay was suspended by law would be inequitable. P. 163.

4. Simple interest on secured claims accruing after the petition was filed is denied unless the security is worth more than the sum of principal and interest due. P. 164.

5. To allow a secured creditor interest where his security is worth less than the value of his debt would be inequitable to unsecured creditors. P. 164.

6. But, where an estate is ample to pay all creditors and to pay interest even after the petition was filed, equitable considerations permit payment of this additional interest to the secured creditor rather than to the debtor. P. 164.

7. The touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor. P. 165.

8. That this proceeding has moved from equity receivership through § 77B to Chapter X in the wake of statutory change does not make these equitable considerations inapplicable. P. 165.

9. It would not be consistent with equitable principles to enrich the first mortgage bondholders at the expense of the subordinate creditors because of a failure to pay when payment had been prohibited by a court order entered for the joint benefit of debtor, creditors, and the public. Pp. 165–167.

151 F. 2d 470, affirmed.

A District Court appointed an equity receiver for a corporation and suspended payment of its debts. The equity receivership was succeeded by reorganization proceedings under § 77B of the Bankruptcy Act and later by a Chapter X proceeding. The District Court held the first mortgage bondholders entitled to interest on interest accruing after the receivership, on the theory that the validity of the covenant therefor was determined by New York law and that it was valid thereunder. Holding that New York law prohibited covenants for payment of interest on interest, the Circuit Court of Appeals reversed. 151 F. 2d 470. This Court granted certiorari. 327 U. S. 774. *Affirmed* on other grounds. P. 167.

George W. Jaques argued the cause for petitioner in Nos. 42 and 43. With him on the brief were *LeWright Browning* and *Rudolf B. Schlesinger.*

Robert J. Bulkley argued the cause and filed a brief for petitioner in Nos. 44 and 45.

Roger S. Foster argued the cause for the Securities & Exchange Commission, respondent. With him on the brief were *Solicitor General McGrath, Philip Elman* and *Alexander Cohen.*

Chas. I. Dawson argued the cause for Early et al., respondents. With him on the brief was *A. Shelby Winstead.*

Jay Raymond Levinson argued the cause for the Green Committee et al., respondents. With him on the brief was *Oscar S. Rosner.*

MR. JUSTICE BLACK delivered the opinion of the Court.

December 2, 1930, a Kentucky District Court appointed an equity receiver of Inland Gas Corporation to take com-

plete and exclusive control, possession, and custody of all of Inland's properties, and enjoined Inland's officers from paying its debts. At that time there was no interest unpaid on Inland's first mortgage bonds. February 1, 1931, semiannual interest coupons fell due on these bonds. The debtor could not pay; the court did not direct the receiver to pay. The indenture trustee, acting under the terms of the indenture, promptly declared the entire principal due and payable despite the previous assumption of custody of the estate by the federal court. In 1935, the same District Court approved a creditor's petition for reorganization under § 77B of the Bankruptcy Act, and at a subsequent date the reorganization was continued as a Chapter X proceeding.[1] The indenture provides for payment of interest on unpaid interest. Inland is insolvent, but its assets are sufficient to pay the first mortgage bondholders in full, including the interest on interest. Should interest on interest be paid, however, subordinate creditors would receive a greatly reduced share in the reorganized corporation. These latter concede that the first mortgage bondholders should receive simple interest on the principal due them, but challenge their right to be paid interest on interest[2] which fell due after the court took charge of Inland, and which interest the Court, out of consideration for orderly and fair administration of the estate, directed the receiver not to pay on the due date. It is this controversy which we must determine.

The first mortgage indenture document was written and signed in New York, designated a New York bank as trus-

[1] Section 77B was enacted June 7, 1934, 48 Stat. 912. The § 77B petition in this case was filed while the estate continued in the equity receivership. Section 77B was superseded by Chapter X, 52 Stat. 883, 11 U. S. C. § 501 *et seq.* Section 276 of Chapter X, 11 U. S. C. 676, authorized continuance of the § 77B proceedings under Chapter X. See *Young* v. *Higbee Co.*, 324 U. S. 204, 205, n. 1.

[2] The claims for interest on interest amount to some $500,000.

tee, and provided for payment of the bonds and attached interest coupons at the office of the trustee in New York or, at the option of the bearer, at a bank in Chicago, Illinois. A group of investment bankers underwrote the issue, sold the bonds to the public, and received a percentage of the proceeds and additional compensation for their services. Inland was organized under the corporation laws of Delaware. Its principal place of business was in Kentucky, and the property mortgaged was located in that state.

Under these circumstances the District Court was of the opinion that it must allow the claim for interest on interest if the indenture covenant was valid; that its validity must be determined by the law of New York, because the indenture was signed and the bonds were payable there; and that the covenant was valid there. Accordingly, the first mortgage bondholders were held entitled to interest on interest. Holding that New York prohibited covenants for payment of interest on interest, the Circuit Court of Appeals reversed. 151 F. 2d 470. We granted certiorari because of the importance of the questions raised.

The Circuit Court of Appeals thought the bankruptcy court must allow or disallow the claim for interest on interest according to whether the covenant to pay it was valid or invalid as between the parties to that covenant. It considered the covenant invalid and therefore unenforceable in bankruptcy upon two alternative assumptions. First, it assumed that a controlling federal rule required the bankruptcy court to determine validity or invalidity of the contract by looking to the law of New York, the state where the court found that the contract was "made" and primarily payable.[3] Second, since the bankruptcy

[3] The Circuit Court of Appeals thought a reference to New York law was authorized by the following cases: *Cromwell* v. *County of*

court was sitting in Kentucky, it should determine validity of the covenant as would a Kentucky court. Reviewing Kentucky decisions, the Circuit Court of Appeals concluded that Kentucky courts also would apply New York substantive law. Arriving at New York law by both hypotheses, the Circuit Court of Appeals interpreted that law as rendering the covenant invalid. We agree with the conclusion of the Circuit Court of Appeals that the claim for interest on interest should not be permitted to share in the debtor's assets, but disagree with the reasons given for that conclusion.

A purpose of bankruptcy is so to administer an estate as to bring about a ratable distribution of assets among the bankrupt's creditors. What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of overruling federal law, is to be determined by reference to state law.[4] *Bryant* v. *Swofford Bros.*, 214 U. S. 279, 290–291; *Security Mortgage Co.* v. *Powers*, 278 U. S. 149, 153–154. But obligations, such as the one here for interest, often have significant contacts in many states, so that the question of which particular state's law should measure the obligation seldom lends itself to simple solution. In determining which contact is the most significant in a particular transaction, courts can

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Sac, 96 U. S. 51; *Scudder* v. *National Bank*, 91 U. S. 406, 412; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 453. None of these cases nor any cited by petitioner here, e. g., *Seeman* v. *Philadelphia Warehouse Co.*, 274 U. S. 403, involve questions of distribution of a debtor's assets in receivership, bankruptcy or reorganization to meet claims for interest on interest said to have accrued after a court took possession of a debtor's estate.

[4] Of course, there might be instances where the validity of the obligation would be determined by reference to the law of some foreign country.

seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states. Certainly the part of this transaction which touched New York, namely, that the indenture contract was written, signed, and payable there, may be a reason why that state's law should govern. But apparently the bonds were sold to people all over the nation. And Kentucky's interest in having its own laws govern the obligation cannot be minimized. For the property mortgaged was there; the company's business was chiefly there; its products were widely distributed there; and the prices paid by Kentuckians for those products would depend, at least to some extent, on the stability of the company as affected by the carrying charges on its debts. But we need not decide which, if either, of these two states' laws govern the creation and subsistence and validity of the obligation for interest on interest here involved. For assuming, *arguendo,* that the obligation for interest on interest is valid under the law of New York, Kentucky, and the other states having some interest in the indenture transaction, we would still have to decide whether allowance of the claim would be compatible with the policy of the Bankruptcy Act. *Cf. Kuehner* v. *Irving Trust Co.,* 299 U. S. 445, 451.

In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. *Erie R. R.* v. *Tompkins,* 304 U. S. 64, has no such implication. That case decided that a federal district court acquiring jurisdiction because of diversity of citizenshp should adjudicate controversies as if it were only another state court. See *Holmberg* v. *Armbrecht,* 327 U. S. 392. But bank-

ruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles.[5] And we think an allowance of interest on interest under the circumstances shown by this case would not be in accord with the equitable principles governing bankruptcy distributions.

When and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by federal law. *Cf. Board of Comm'rs of Jackson County* v. *United States,* 308 U. S. 343; *Royal Indemnity Co.* v. *United States,* 313 U. S. 289. The general rule in bankruptcy and in equity receivership has been that interest on the debtors' obligations ceases to accrue at the beginning of proceedings. Exaction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved. Thus this Court has said: "We cannot agree that a penalty in the name of interest should be inflicted upon the owners of the mortgage lien for resisting claims which we have disallowed. As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate." *Thomas* v. *Western Car Co.,* 149 U. S. 95,

[5] *Heiser* v. *Woodruff,* 327 U. S. 726, 732; *American Security Co.* v. *Sampsell,* 327 U. S. 269, 272; *Pepper* v. *Litton,* 308 U. S. 295, 303–306.

116–117. *Cf. American Iron Co.* v. *Seaboard Air Line,* 233 U. S. 261. Courts have felt that it would be inequitable for anyone to gain an advantage or suffer a loss because of such delay. *Sexton* v. *Dreyfus,* 219 U. S. 339, 346. Accrual of simple interest on unsecured claims in bankruptcy was prohibited in order that the administrative inconvenience of continuous recomputation of interest causing recomputation of claims could be avoided. Moreover, different creditors whose claims bore diverse interest rates or were paid by the bankruptcy court on different dates would suffer neither gain nor loss caused solely by delay.[6]

Simple interest on secured claims accruing after the petition was filed was denied unless the security was worth more than the sum of principal and interest due. *Sexton* v. *Dreyfus, supra.* To allow a secured creditor interest where his security was worth less than the value of his debt was thought to be inequitable to unsecured creditors. Thus we recently said: "Since the distribution provided for these bonds on the basis of their mortgage securities is less than the principal amount of their claim, the limitation of their right to share the unmortgaged assets ratably with the unsecured creditors on the basis of principal and interest prior to bankruptcy only is justified under the rule of *Ticonic National Bank* v. *Sprague,* 303 U. S. 406." *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 318 U. S. 523, 573. But where an estate was ample to pay all creditors and to pay interest even after the petition was filed, equitable considerations were invoked to permit payment of this additional interest to the secured creditor rather than to the debtor.

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[6] See § 63a (1) of the Bankruptcy Act, 11 U. S. C. 103a (1); *cf.* § 63 of the Act of 1898, 30 Stat. 562 and § 19 of the Bankruptcy Act of 1867, 14 Stat. 525. For a discussion of interest claims in bankruptcy see 3 Collier on Bankruptcy (14th Ed.) 281, 1835.

Coder v. *Arts,* 213 U. S. 223, 245; *Sexton* v. *Dreyfus, supra.* See also *Johnson* v. *Norris,* 190 F. 459.[7]

It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor. See *Sexton* v. *Dreyfus, supra,* at 346. That the proceedings before us have moved from equity receivership through § 77B to Chapter X in the wake of statutory change does not make these equitable considerations here inapplicable. A Chapter X or § 77B reorganization court is just as much a court of equity as were its statutory and chancery antecedents. See *Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510, 527.[8]

In this case, where by order of the court interest was left unpaid, we do not think that imposition of interest on that unpaid interest can be justified by "an application of equitable principles." See *Dayton* v. *Stanard,* 241 U. S. 588, 590.[9] Prior to the beginning of the equity receiver-

[7] Analogous principles have been applied to the liquidation of national banks. *White* v. *Knox,* 111 U. S. 784, 786–87, relied on in *Sexton* v. *Dreyfus, supra,* 346; *Ticonic Nat'l Bank* v. *Sprague,* 303 U. S. 406, 412–13.

[8] Section 115 of Chapter X; 11 U. S. C. 515 authorizes a Chapter X court to exercise "all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor . . ." Former § 77B of the Bankruptcy Act, 48 Stat. 912, and § 77 (a), 11 U. S. C. § 205 (a) (Railroad Reorganization) contain similar provisions.

[9] Petitioner and the Circuit Court have cited non-bankruptcy cases which award interest on interest to support the award in this reorganization. *Town of Genoa* v. *Woodruff,* 92 U. S. 502; *Edwards* v. *Bates County,* 163 U. S. 269. Diversity of citizenship brought these cases to the federal courts. None of them presented to the courts the special bankruptcy problems of uniformity, ratable distribution and fairness and equity which grow out of the context of the bankruptcy law.

ship, Inland would have never owed interest on interest unless and until it had breached its obligation to pay simple interest promptly—on the date it was due. Before the receivership began, a failure by Inland to pay coupons on the date they were due might have breached an existing obligation. This breach would have imposed upon Inland, under the terms of the covenant, a duty to pay interest on the interest it had failed to pay.[10] But when the equity receivership intervened, these interrelated obligations were drastically changed. The obligation to make prompt payment of simple interest coupons was suspended. In fact, both Inland and the receiver were ordered by the court not to pay the coupons on the dates they were, on their face, supposed to have been paid. The contingency which might have created a present obligation to pay interest on interest—*i. e.*, a free decision by the debtor that it would not or could not pay simple interest promptly—was prohibited from occurring by order of the court. That order issued for a good cause, we may assume: to preserve and protect the debtor's estate pending a ratable distribution among all the creditors according to their interests as of the date the receivership began. The extra interest covenant may be deemed added compensation for the creditor or, what is more likely, something like a penalty to induce prompt payment of simple interest. In either event, first mortgage bondholders would have been enriched and subordinate creditors would have suffered a corresponding loss, because of a failure to pay when payment had been prohibited by a court order entered for the joint benefit of debtor, creditors, and the public. Such a result is not consistent with equitable principles. For legal suspen-

[10] Had a breach occurred and a suit been filed in state court prior to receivership or bankruptcy, that court would have been required to determine whether the covenant was valid under the controlling state law.

sion of an obligation to pay is an adequate reason why no added compensation or penalty should be enforced for failure to pay.

Affirmed.

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

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE JACKSON joins, concurring; MR. JUSTICE BURTON having concurred in the opinion of the Court also joins in this opinion.

In 1928 the Inland Gas Corporation, chartered by Delaware, floated a first mortgage bond issue covering property located in Kentucky where it had its principal place of business. The mortgage indenture was executed in New York, designated a New York corporation as trustee, and made the bonds and coupons payable in New York, or, at the option of the holder, in Chicago where the debtor had a paying agent. By an explicit clause in the indenture, the debtor agreed to pay interest on defaulted coupons at the rate which applied to the bonds themselves before maturity. The bonds were sold to the public in many States.

The debtor defaulted on coupons and also on the bonds when they became due. Reorganization proceedings under § 77 of the Bankruptcy Act were begun by creditors in the District Court for the Eastern District of Kentucky. Subsequently Chapter X of that Act was made applicable. In these proceedings a claim, based on the covenant in the indenture, was made by mortgage bondholders for interest on the defaulted interest coupons. The bankruptcy court allowed the claim, apparently because it concluded that the covenant is valid by the law of New York. The Circuit Court of Appeals for the Sixth Circuit

reversed. 151 F. 2d 470. That court, apparently deeming itself ultimately controlled by the local law of Kentucky which, in turn, looked to the law of New York, ruled that the claims should have been disallowed because the contract for the payment of interest on coupons was void under New York law. On the other hand, the Securities and Exchange Commission, a statutory party to the proceedings (§ 208 of the Bankruptcy Act, 11 U. S. C. 608), urges allowance of the claim if the covenant would, apart from bankruptcy, be upheld in the courts of any State having "a substantial relationship to the transaction." The Commission therefore supports allowance of the claim because it finds that two of the States related to the transaction would uphold the covenant: Delaware, the State of the debtor's incorporation, and Kentucky, its principal place of business and the site of the mortgage property. Finally another view suggests that whether interest should be allowed in this case is a matter of federal law to be fashioned by the bankruptcy court in the light of general, undefined notions of equity policy and of bankruptcy administration.

Of course, where rights are created by the Constitution, treaties or statutes of the United States and do not owe their origin to the laws of any State, the granting or withholding of interest as part of the remedy is also a function of federal law. That is the upshot of the decision in *Board of Commissioners* v. *United States,* 308 U. S. 343. The factors legally decisive of the present problem are the opposite of those which controlled our decision in that case. There we had a right created by federal law. In this case, it was beyond the power of federal law to create the right for which claim was made, although, if by State law such a right came into being, it might become a question whether the federal courts should recognize such a right when they are sought to be utilized as instruments for its enforcement.

Conflict-of-law problems have a beguiling tendency to be made even more complicated than they are. Therefore, they are often, as now, fitting occasions for observing the classic admonition to begin at the beginning. The business of bankruptcy administration is to determine how existing debts should be satisfied out of the bankrupt's estate so as to deal fairly with the various creditors. The existence of a debt between the parties to an alleged creditor-debtor relation is independent of bankruptcy and precedes it. Parties are in a bankruptcy court with their rights and duties already established, except insofar as they subsequently arise during the course of bankruptcy administration or as part of its conduct. Obligations to be satisfied out of the bankrupt's estate thus arise, if at all, out of tort or contract or other relationship created under applicable law. And the law that fixes legal consequences to transactions is the law of the several States. Except for the very limited obligations created by Congress, *e. g.*, *Holmberg* v. *Armbrecht*, 327 U. S. 392, a debt is not brought into being by federal law. Obligations exist or do not exist by force of State law though federal bankruptcy legislation is in force, just as State law determined whether they came into being or did not come into being between 1878 and 1898 when there was no bankruptcy law. The fact that subsequent to the creation of a debt a party comes into a bankruptcy court has no relevance to the rules concerning the creation of the obligation. Of course a State may affix to a transaction an obligation which the courts of other States or the federal courts need not enforce because of overriding considerations of policy. And so, in the proper adjustment of the rights of creditors and the desire to rehabilitate the debtor, Congress under its bankruptcy power may authorize its courts to refuse to allow existing debts to be proven. It may do so, for instance, where the recognition of such claims would undermine the fair administration of a debtor's

estate, even though before bankruptcy such a claim would have supported a valid judgment in the courts of the State which created the obligation, or even in the courts of the State where the bankruptcy court is sitting. But the threshold question for the allowance of a claim is whether a claim exists. And clarity of analysis justifies repetition that except where federal law, wholly apart from bankruptcy, has created obligations by the exercise of power granted to the federal government, a claim implies the existence of an obligation created by State law. If there was no valid claim before bankruptcy, there is no claim for a bankruptcy court either to recognize or to reject.

Such an analysis, however phrased, is indispensable to the solution of the problem now before us. Putting the wrong questions is not likely to beget right answers even in law. One way of putting our problem is to ask whether the bankruptcy court executing the policy of Congress could recognize a claim for interest on coupons and allow it to share in the distribution of the bankrupt's assets. But thus to frame the question is to avoid the crucial preliminary inquiry whether any obligation exists to be recognized. For nothing comes into a bankruptcy court to which congressional policy can apply unless it is an obligation created by applicable State law. And no obligation finds its way into a bankruptcy court unless, by the law of the State where the acts constituting a transaction occur, the legal consequence of such a transaction is an obligation to pay. See *Bryant* v. *Swofford Bros.*, 214 U. S. 279, 290–91; *Benedict* v. *Ratner*, 268 U. S. 353; *Security Mortgage Co.* v. *Powers*, 278 U. S. 149. Where a transaction in its entirety occurs in one State, it is clearly the law of that State that determines if an obligation is born, whether the question becomes relevant in a bankruptcy court or in any other court. But the mere fact that an agreement is made in one State by citizens of a second State for performance in a third and affecting individuals

in all forty-eight States does not change the principle inherent in our federal scheme, that the existence of a debt comes about not by federal law but by force of some State law, even though the right to enforce the debt, if it exists, may raise federal questions if bankruptcy ensues. Bankruptcy legislation is superimposed upon rights and obligations created by the laws of the States. Compare *Marshall* v. *New York,* 254 U. S. 380. We do not reach considerations of policy in bankruptcy administration until there are rights, created by applicable local law, to be recognized.

This brings us to the immediate situation. This is not a case where damages are claimed, in the form of interest, for the detention of monies due. In such a situation the right to interest and its measure become matters for judicial determination. The claim here asserted is based solely on the terms of the agreement. The covenant for interest on interest was entered into by the parties in New York. The dominant place of performance was also New York. In the circumstances, if the words of the indenture created an obligation, they did so only if the law of New York says they did. Williston, Contracts § 1792. If New York outlawed such a covenant, neither Kentucky nor Delaware nor the States in which bonds were sold or where bondholders reside could give effect to an obligation which never came into being. Compare *John Hancock Ins. Co.* v. *Yates,* 299 U. S. 178. And the ultimate voice of New York law, the New York Court of Appeals, speaking through Judge Cardozo, stated it as settled law that "a promise to pay interest upon interest is void . . ." *Newburger-Morris Co.* v. *Talcott,* 219 N. Y. 505, 510, 114 N. E. 846. This view of the New York law is supported by the great weight of Judge Mack's authority. *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.,* 11 F. Supp. 418, 419–420. But see *American Brake Shoe & Foundry Co.* v. *Interborough*

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Rapid Transit Co., 26 F. Supp. 954, *contra.* However, it is not for us to ascertain independently whether the law of New York deemed a nullity the agreement that was here sought to be made the basis of a claim. We would not have brought the case here on that issue. The Circuit Court of Appeals made such an investigation and concluded that in New York the undertaking to pay interest was void. We accept this finding and conclude that since no obligation was created there was no claim provable in bankruptcy. And so we are not now called upon to decide whether as a matter of bankruptcy administration an agreement to pay interest on interest, where it is an obligation enforceable by State law, is enforceable in bankruptcy. That is a question that can arise only where such an obligation arose under State law. The opposite is the assumption in the case before us.

It is argued, however, that this conclusion subjects the fate of a claim in bankruptcy to the whim of State law. We are told that this result is against the policy of Congress implied in measures for the protection of investors and contravenes the requirement of "uniform Laws on the subject of Bankruptcies." Art. I, § 8, Cl. 4. But this misconceives the purpose and settled understanding of the bankruptcy clause of the Constitution. The Constitutional requirement of uniformity is a requirement of geographic uniformity. It is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country, regardless of the State in which the bankruptcy court sits. See *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 190. To establish uniform laws of bankruptcy does not mean wiping out the differences among the forty-eight States in their laws governing commercial transactions. The Constitution did not intend that transactions that have different legal consequences because they took place in different States shall come out with the same result be-

cause they passed through a bankruptcy court. In the absence of bankruptcy such differences are the familiar results of a federal system having forty-eight diverse codes of local law. These differences inherent in our federal scheme the day before a bankruptcy are not wiped out or transmuted the day after.

CARTER *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 36. Argued November 15, 1946.—Decided December 9, 1946.

1. In reviewing on writ of error a conviction for murder in which it was claimed that the right to counsel had been denied contrary to the Fourteenth Amendment, a state supreme court, in accordance with local practice, whereby it could consider only the common law record, concluded that, after being fully advised of his rights, the accused had consciously chosen to dispense with counsel and to plead guilty. Factors such as racial handicap of the accused, his mental incapacity, his inability to make an intelligent choice, or precipitancy in the acceptance of a plea of guilty—which might show fundamental unfairness in the proceedings before the trial judge—were not before the state supreme court in this proceeding. *Held:* On this record, to which review in this Court is confined, there is no showing of a denial of due process under the Fourteenth Amendment. *Rice* v. *Olson*, 324 U. S. 786, distinguished. Pp. 177–180.
2. Designation of counsel to assist defendant at time of sentencing does not imply that he was not capable of intelligent self-protection when he pleaded guilty. Pp. 178–179.

391 Ill. 594, 63 N. E. 2d 763, affirmed.

The Supreme Court of Illinois sustained a conviction for murder. 391 Ill. 594, 63 N. E. 2d 763. This Court granted certiorari. 328 U. S. 827. *Affirmed*, p. 180.

Stephen A. Mitchell argued the cause and filed a brief for petitioner.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief was *George F. Barrett,* Attorney General.

Mr. Justice Frankfurter delivered the opinion of the Court.

In 1928 petitioner pleaded guilty to an indictment for murder and was sentenced to imprisonment for 99 years. In 1945 he brought a petition for his release on writ of error in the Supreme Court of Illinois claiming that the conviction on which his confinement was based was vitiated by the denial of his right under the Fourteenth Amendment to the assistance of counsel. The Supreme Court of Illinois affirmed the original judgment of conviction. 391 Ill. 594, 63 N. E. 2d 763. In view of the importance of the claim, if valid, we brought the case here. 328 U. S. 827.

In a series of cases of which *Moore* v. *Dempsey,* 261 U. S. 86, was the first, and *Ashcraft* v. *Tennessee,* 327 U. S. 274, the latest, we have sustained an appeal to the Due Process Clause of the Fourteenth Amendment for a fair ascertainment of guilt or innocence. Inherent in the notion of fairness is ample opportunity to meet an accusation. Under pertinent circumstances, the opportunity is ample only when an accused has the assistance of counsel for his defense. And the need for such assistance may exist at every stage of the prosecution, from arraignment to sentencing. This does not, however, mean that the accused may not make his own defense; nor does it prevent him from acknowledging guilt when fully advised of all its implications and capable of understanding them. Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt. Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all cir-

cumstances counsel be forced upon a defendant. *United States ex rel. McCann* v. *Adams,* 320 U. S. 220.

The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. *Mooney* v. *Holohan,* 294 U. S. 103. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, dehors the record.

But the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual States. The Constitution commands the States to assure fair judgment. Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures. *Brown* v. *New Jersey,* 175 U. S. 172, 175; *Missouri* v. *Lewis,* 101 U. S. 22, 31. Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. *McKane* v. *Durston,* 153 U. S. 684, 687. In respecting the duty laid upon them by *Mooney* v. *Holohan,* States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of *habeas corpus* or *coram nobis.*

It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention. See, *e. g.*, *New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688; *Matter of Lyons* v. *Goldstein,* 290 N. Y. 19, 25, 47 N. E. 2d 425; *Matter of Morhous* v. *N. Y. Supreme Court,* 293 N. Y. 131, 56 N. E. 2d 79; *People* v. *Gersewitz,* 294 N. Y. 163, 168, 61 N. E. 2d 427; *Matter of Hogan* v. *Court of General Sessions,* 296 N. Y. 1, 9, 68 N. E. 2d 849. So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated.

An accused may have been denied the assistance of counsel under circumstances which constitute an infringement of the United States Constitution. If the State affords no mode for redressing that wrong, he may come to the federal courts for relief. But where a remedy is provided by the State, a defendant must first exhaust it in the manner in which the State prescribes. *Ex parte Hawk,* 321 U. S. 114; *House* v. *Mayo,* 324 U. S. 42. For the relation of the United States and the courts of the United States to the States and the courts of the States is a very delicate matter. See *Ex parte Royall,* 117 U. S. 241, 251. When a defendant, as here, invokes a remedy provided by the State of Illinois, the decision of the local court must be judged on the basis of the scope of the remedy provided and what the court properly had before it in such a proceeding. *Woods* v. *Nierstheimer,* 328 U. S. 211. The only thing before the Illinois Supreme Court was what is known under Illinois practice as the common law record. That record, as certified in this case, included only the indictment, the judgment on plea of guilty, the minute entry bearing on sentence, and the sentence. And so the very narrow question now before us is whether this common law record establishes that the defendant's sentence is

void because in the proceedings that led to it he was denied the assistance of counsel.

This case is quite different from a case like *Rice* v. *Olson,* 324 U. S. 786. In that case the record properly before this Court contained specific allegations bearing on the disabilities of the defendant to stand prosecution without the aid of counsel. There was not, as we have here, an unchallenged finding by the trial court that the accused was duly apprised of his rights and, in awareness of them, chose to plead guilty. The judgment against Carter explicitly states:

> "And the said defendant Harice Leroy Carter commonly known as Roy Carter having been duly arraigned and being called upon to plead expresses a desire to plead guilty to the crime of murder as charged in the indictment. Thereupon the Court fully explained to the Defendant Harice Leroy Carter commonly known as Roy Carter the consequence of such plea and of all his rights in the premises including the right to have a lawyer appointed by the Court to defend him and also of his right to a trial before a jury of twelve jurors sworn in open Court and of the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant Harice Leroy Carter commonly known as Roy Carter persists in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment."

This, then, is not a case in which intelligent waiver of counsel is a tenuous inference from the mere fact of a plea of guilty. *Rice* v. *Olson, supra,* at 788. A fair reading of the judgment against Carter indicates a judicial attestation that the accused, with his rights fully explained to him, consciously chose to dispense with counsel. And there is nothing in the record to contradict the judicial

finding. From the common law record, we do not know what manner of man the defendant was. Facts bearing on his maturity or capacity of comprehension, or on the circumstances under which a plea of guilty was tendered and accepted, are wholly wanting. We have only the fact that the trial judge explained what the plea of guilty involved. To be sure, the record does not show that the trial court spelled out with laborious detail the various degrees of homicide under Illinois law and the various defenses open to one accused of murder. But the Constitution of the United States does not require of a judge that he recite with particularity that he performed his duty.

The only peg on which the defendant seeks to hang a claim that his right to counsel was denied is the fact that the judge did assign him counsel when it came to sentencing. From this fact alone, we are asked to draw the inference that the accused was not capable of understanding the proceedings which led to his plea of guilty, and was therefore deprived of the indispensable assistance of counsel. We cannot take such a jump in reasoning. A trial court may justifiably be convinced that a defendant knows what he is about when he pleads guilty and that he rightly believes that a trial is futile because a defense is wanting. But the imposition of sentence presents quite different considerations. There a judge usually moves within a large area of discretion and doubts. Such is the situation under Illinois law. The range of punishment which a judge in Illinois may impose for murder is between fourteen years and death. It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute. Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge. In any event, the designation of counsel to assist the accused at the sentencing stage of the

prosecution in no wise implies that the defendant was not capable of intelligent self-protection when he pleaded guilty. Cf. *Canizio* v. *New York,* 327 U. S. 82.

We conclude that on the record before the Supreme Court of Illinois there was no showing that Carter's plea of guilty was made under circumstances which cut the ground from under the resulting sentence. In restricting its review to that record the Supreme Court of Illinois followed local practice, and the practice constitutes allowable State appellate procedure. Factors that might suggest fundamental unfairness in the proceedings before the trial judge—*e. g.,* the racial handicap of the defendant, his mental incapacity, his inability to make an intelligent choice, precipitancy in the acceptance of a plea of guilty—are not before us because they were not in the common law record which was all that was before the Supreme Court of Illinois. Whether the defendant is entitled to press such claims to show a denial by the State of Illinois of a constitutional right, it will be time enough to consider when that issue is properly before us after being presented in a proceeding in the State courts appropriate to that purpose, or, if none is available, in a federal court. *Woods* v. *Nierstheimer, supra; Ex parte Hawk, supra.*

After indicating the restricted scope of review in this proceeding, the court below observed that under Illinois law a defendant who desires counsel must ask for it and show that he cannot afford one of his own choice. There are situations when justice cannot be administered unless persons charged with crime are defended by capable and responsible counsel. But there is nothing in the record before us to indicate that the circumstances made it necessary for Carter to have professional guidance other than that given by the trial court. There is therefore nothing in the statement of the Illinois Supreme Court alone from which we can infer that these normal requirements of

Illinois law prejudiced this defendant or made their observance in this case incongruous with his constitutional rights.

Judgment affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE concur, dissenting.

If, as the opinion of the Court suggests, the Illinois Supreme Court had ruled that petitioner could not raise the question of his right to counsel by reason of the abbreviated common law record, I would agree that the judgment should be affirmed. For then petitioner would be remitted to other state procedures for vindication of his constitutional right. The Illinois Supreme Court rested on that ground when it refused to consider his claim that he was deprived of due process of law by reason of the method of his arrest and the unfairness of the trial. But when it came to consider the question of his right to counsel, the inadequacy of the record was not the ground it gave for barring him from showing that he was unqualified to waive the constitutional right:

> "His first contention is that the court erred in not appointing an attorney to represent him during arraignment. The right to be represented by counsel is one which the defendant may waive or claim, as he shall determine. No duty rests upon the court to provide legal assistance for an accused, unless he states, under his oath, his inability to procure counsel, and expresses a desire to have the court appoint one for him. (*People* v. *Braner,* 389 Ill. 190; *People* v. *Corrie,* 387 Ill. 587; *People* v. *Childers,* 386 Ill. 312.) There being no bill of exceptions, and it not appearing that plaintiff in error sought to have an attorney appointed for him, this assignment of error cannot

be sustained. *People* v. *Stubblefield, post,* p. 609; *People* v. *Stack, ante,* p. 15; *People* v. *Braner,* 389 Ill. 190." 391 Ill. 594, 595; 63 N. E. 2d 763, 764.

By the rule there announced the record was inadequate only in one respect—the absence of a bill of exceptions showing that petitioner asked that an attorney be appointed for him. But that neglect by a defendant is not fatal, at least in a capital case. If a defendant is not capable of making his own defense, it is the duty of the court to appoint counsel, whether requested so to do or not. *Williams* v. *Kaiser,* 323 U. S. 471, 476. As we stated in that case, pp. 475–476:

> "The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. See *Glasser* v. *United States,* 315 U. S. 60, 75–76. Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

Therefore the least which we should do is to vacate this judgment and remand the case to the Illinois Supreme Court. For as MR. JUSTICE MURPHY points out, there is ample evidence in the record, certified to us from that court, to support petitioner's claim that he was not capable of making his defense. If that evidence may be considered in this proceeding, petitioner should prevail. Though

the basis of the action of the Illinois Supreme Court be deemed less clear than I have indicated, a remand to it would be appropriate so that any state procedural question may be untangled from the question arising under the Federal Constitution. See *State Tax Commission* v. *Van Cott,* 306 U. S. 511.

MR. JUSTICE MURPHY, dissenting.

The admitted facts of this case plainly reveal that the petitioner has not been convicted of murder and sentenced to 99 years in prison in accordance with due process of law. Rather he has been deprived of his freedom for life without the aid of an attorney to guide him along the complicated and twisting labyrinths of the law. And there is no affirmative indication that he intelligently waived his right to counsel or that he understood the intricate legal problems involved in his indictment and conviction. Due process cannot thrive in the absence of such evidence.

There is an initial problem as to what evidence is before this Court at this time. It is said that we are limited to the common law record before the Supreme Court of Illinois, a record that includes only the indictment, the judgment on the plea of guilty, the minute entry bearing on the sentence, and the sentence itself. We are asked to close our eyes to a transcript of testimony in connection with a hearing on mitigation of the offense. This testimony was taken after the conviction. It has been certified, presumably by the stenographer recording the testimony at the hearing, and notarized. It appears in the printed record before this Court. We are also asked to overlook certain information about the petitioner given to the Illinois State Penitentiary by the State's attorney and concurred in by the presiding judge. The State of Illinois does not deny any of these facts; it merely requests that we disregard them as did the Supreme Court of Illinois, that we blind ourselves to what is printed in the record before us.

Legal technicalities doubtless afford justification for our pretense of ignoring plain facts before us, facts upon which a man's very life or liberty conceivably could depend. Moreover, there probably is legal warrant for our not remanding the case to the Supreme Court of Illinois to allow those facts to be incorporated in the formal record before it and to reconsider its decision in light thereof. But the result certainly does not enhance the high traditions of the judicial process.

In my view, when undisputed facts appear in the record before us in a case involving a man's life or liberty, they should not be ignored if justice demands their use. Here the facts in question fortunately are not crucial, since the bare common law record alone reveals a lack of due process. But the additional facts do serve to emphasize the absence of an intelligent waiver of counsel and petitioner's failure to comprehend the legal problems placed in his path. They serve to make any decision on the issue in the case more intelligent and more just. The discussion that follows, therefore, is based on all the certified facts in the record before us.

Petitioner, a Negro, was 30 years of age at the time of the relevant events in 1928. He had no schooling, although he was able to read and write. He was of average mentality and had never before run afoul of the law. During the preceding eleven years he had worked as a cook and a mechanic. By reputation he was quiet and industrious.

While driving a car back from a fishing trip, petitioner became involved in a bitter and prolonged dispute with the driver of a horse-drawn gravel wagon over the right-of-way on a road. This driver, a white man, refused to give petitioner enough room to pass. A violent argument in racial terminology ensued; rocks and gravel were thrown at petitioner's car. Eventually, when the dispute was renewed after a short interval, the driver got off his

wagon and advanced toward petitioner's car. Petitioner claimed that he thought the driver was reaching into his shirt for a gun. Petitioner got out of his car and fired three times, killing the driver.

Petitioner was taken into custody that same evening and was questioned far into the night. He was taken to an adjoining town, allegedly to avoid mob violence. Twelve days later, on June 12, 1928, he was indicted. It was charged that he "did then and there unlawfully and feloniously, with malice aforethought, by shooting, kill" the named individual. On June 15 he was arraigned without the benefit of counsel, it being alleged by petitioner that he was held incommunicado from the time of his arrest. He was handed a copy of the five-page indictment, under which he could have been convicted of first-degree murder, lesser degrees of homicide, voluntary or involuntary manslaughter, assault with a deadly weapon, or lesser degrees of assault. Various considerations of defense, including self-defense, were accordingly raised. Upon being asked how he pleaded, he expressed a desire to plead guilty as charged in the indictment. The trial court's order, which bears striking resemblance to the Illinois statute on the subject (Ill. Rev. Stat., 1945, Ch. 38, par. 732), recited that the judge "fully explained" to petitioner "the consequence of such plea" and his rights to counsel and to jury trial, but that petitioner "persists in his desire to plead guilty" as charged. There is no affirmative evidence that petitioner understood the necessary consequences of his plea or that, fully appreciating all of his legal rights, he intelligently waived his rights to counsel or to jury trial. All that appears is that he "persisted" in his desire to plead guilty and that the court convicted him of murder, the statutory punishment for which was death by electrocution or imprisonment for any period from fourteen years to life.

A further hearing was held on the same day and an attorney was appointed, apparently not at petitioner's request, to represent petitioner at a hearing upon the "question of mitigation or aggravation of said crime of murder to which said defendant has pleaded guilty." Such a hearing was required by state law (Ill. Rev. Stat., 1945, Ch. 38, par. 732) where a guilty plea has been entered and where the court has discretion as to the extent of the punishment. A hearing on this matter was held three days later, on June 18, petitioner's appointed counsel being present. On June 29, in the absence of counsel, petitioner appeared in court and was sentenced to serve 99 years in prison.

I do not believe that these facts add up to due process of law. Petitioner, an uneducated, bewildered layman, was allegedly held incommunicado for fifteen days and was then called upon to make a vital decision upon the basis of his unintelligent understanding of the indictment—a legalistic, verbose document of five pages which would doubtless mean many things to many learned lawyers in light of the particular facts involved. Petitioner's very life and liberty depended upon his ability to comprehend the variety of crimes covered by the indictment and which one, if any, applied to the facts of his case. He was compelled to weigh the factors involved in a guilty plea against those resulting from the submission of his case to a jury. He was forced to judge the chances of setting up a successful defense. These are all complicated matters that only a man versed in the legal lore could hope to comprehend and to decide intelligently. Petitioner obviously was not of that type. Yet at this crucial juncture petitioner lacked the aid and guidance of such a person. In my view, it is a gross miscarriage of justice to condemn a man to death or to life imprisonment in such a manner. See *Powell* v. *Alabama,* 287 U. S. 45; *Williams* v. *Kaiser,* 323 U. S. 471; *Rice* v. *Olson,* 324 U. S. 786.

It is said, of course, that petitioner waived his right to counsel. My answer is that such action is immaterial in a capital case of this nature without affirmative evidence of an intelligent waiver. Such evidence is non-existent here, even looking solely at the common law record. Its absence becomes even more emphasized when we view the background of ignorance, racial antagonism and threats of mob violence. When the life of a man hangs in the balance, we should insist upon the fullest measure of due process. Society is here attempting to take away the life or liberty of one of its members. That attempt must be tested by the highest standards of justice and fairness that we know. It is no excuse that the individual is willing to forego certain basic rights, unless we are certain that he has a full and intelligent comprehension of what he is doing. Otherwise we take from due process of law a substantial part of its content.

Nor is it significant that counsel was appointed for petitioner to represent him at the hearing as to the mitigation of the offense. The error was done, the damage was committed, when petitioner was arraigned, compelled to plead and convicted without the assistance of counsel. The special hearing on mitigation held thereafter, for which counsel was provided, afforded no opportunity for undoing the effect of the unaided arraignment or plea of guilty. Cf. *Canizio* v. *New York*, 327 U. S. 82. The failure to have counsel in regard to those matters permeated the entire proceeding, with indelible effects that could not be removed at the special hearing. Due process of law still was lacking.

Insistence upon counsel at all stages of a capital case, where an intelligent waiver is lacking, imposes no intolerable burden upon the law enforcement process. It is merely a recognition of our attempt to be civilized, a recognition that the process of condemning human life is to be

judged by standards higher than those applied to a prosecution for violation of a minor ordinance or regulation.

I would therefore reverse the judgment below.

BALLARD ET AL. *v.* UNITED STATES.

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

No. 37. Argued October 15, 1946.—Decided December 9, 1946.

1. In a State where women are eligible for jury service under local law, a federal jury panel from which women are intentionally and systematically excluded is not properly constituted and this Court will exercise its power of supervision over the administration of justice in the federal courts to correct the error. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217. Pp. 190–196.

   (a) Sections 275–278 of the Judicial Code reflect a design to make the jury a cross-section of the community and truly representative of it. P. 191.

   (b) The system of jury selection which Congress has adopted contemplates that juries in federal courts sitting in States where women are eligible for jury service under local law will be representative of both sexes. P. 191.

   (c) The systematic and intentional exclusion of women, like the exclusion of a racial group or an economic or social class, deprives the jury system of the broad base it was designed by Congress to have. P. 195.

2. When a jury in a criminal case is drawn from a panel not properly constituted, reversible error does not depend on a showing of prejudice in an individual case; since the injury is not limited to the defendant but extends to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts. P. 195.

3. When this Court finds that a petit jury was drawn from an improper panel, it will remand the case for a new trial; but when it finds that the grand jury which returned an indictment was drawn from such a panel, the indictment must be dismissed. Pp. 195–196.

4. An issue properly raised on the record by defendants in a criminal case in a Federal District Court and assigned as error on appeal was not passed on by the Circuit Court of Appeals in reversing the

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conviction. On petition of the Government which did not raise that issue, this Court granted certiorari, reversed the judgment of the Circuit Court of Appeals, and remanded the case to that Court, which then passed on the issue adversely to defendants and affirmed the conviction. Defendants then petitioned for certiorari, which was granted. *Held*, defendants have not lost the right to urge that question here. P. 190.

152 F. 2d 941, reversed.

Petitioners were indicted and convicted in a District Court for using, and conspiring to use, the mails to defraud. The Circuit Court of Appeals reversed on the ground that the trial judge erred in withholding from the jury all questions concerning the truth or falsity of their religious beliefs or doctrines. 138 F. 2d 540. On petition of the Government, this Court granted certiorari, 320 U. S. 733, reversed the decision of the Circuit Court of Appeals, and remanded the case to that Court for further proceedings. 322 U. S. 78. The Circuit Court of Appeals then affirmed the conviction. 152 F. 2d 941. On petition of defendants, this Court granted certiorari to review questions reserved in its previous decision. 327 U. S. 773. *Reversed*, p. 196.

Roland Rich Woolley and *Ralph C. Curren* argued the cause for petitioners. With them on the brief was *Joseph F. Rank*.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General McGrath* and *Robert S. Erdahl*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case is here for the second time. It involves the indictment and conviction of petitioners for using, and conspiring to use, the mails to defraud. Criminal Code

§ 215, 18 U. S. C. § 338; Criminal Code § 37, 18 U. S. C. § 88. The fraudulent scheme charged was the promotion of the I Am movement, which was alleged to be a fraudulent religious organization, through the use of the mails. The nature of the movement and the facts surrounding its origin and growth are summarized in our prior opinion. 322 U. S. 78. It is sufficient here to say that petitioners were found guilty on a charge by the trial judge which withheld from the jury all questions concerning the truth or falsity of their religious beliefs or doctrines. The Circuit Court of Appeals reversed and granted a new trial, holding it was error to withhold those questions from the jury. 138 F. 2d 540. We, in turn, reversed the Circuit Court of Appeals and sustained the District Court in that ruling. Petitioners argued, however, that even though the Circuit Court of Appeals erred in reversing the judgment of conviction on that ground, its action was justified on other distinct grounds. But the Circuit Court of Appeals had not passed on those other questions; and we did not have the benefit of its views on them. We accordingly deemed it more appropriate to remand the cause to that court so that it might first pass on the questions reserved.

On the remand the Circuit Court of Appeals, one judge dissenting, affirmed the judgment of conviction without discussion of the issues raised. On a petition for rehearing, which was denied, the Circuit Court of Appeals filed an opinion which discussed some but not all of the questions which had been reserved. 152 F. 2d 941. We granted the petition for certiorari because of the serious questions concerning the administration of criminal justice which were raised.

We are met at the outset with the concession that women were not included in the panel of grand and petit jurors in the Southern District of California where the

indictment was returned and the trial had; that they were intentionally and systematically excluded from the panel.[1] This issue was raised by a motion to quash the indictment and by a challenge to the array of the petit jurors because of intentional and systematic exclusion of women from the panel. Both motions were denied and their denial was assigned as error on appeal. The jury question has been in issue at each stage of the proceedings, except the first time that the case was before us. At that time the point was not assigned or argued. But the case was here at the instance of the United States, not at the instance of the present petitioners. As we have said, there were other issues in the case obscured by the question brought here by the United States and which had not been passed upon below or argued before this Court. Consequently, when we remanded the case for consideration of the remaining issues by the Circuit Court of Appeals, the jury issue was argued. The Circuit Court of Appeals did not hold that it had been waived. That court passed upon the issue, concluding that there was no error in the exclusion of women from the panel. 152 F. 2d p. 944, and see dissent at p. 953. Under these circumstances we cannot say (and the Government does not suggest) that petitioners have lost the right to urge the question here. Moreover, in this case, as in *Reynolds* v. *United States,* 98 U. S. 145, 168–169, the error, though not presented here on the first argument, appears on the face of the record before us. And see *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 16.

Congress has provided that jurors in a federal court shall have the same qualifications as those of the highest court of law in the State. Judicial Code § 275, 28 U. S. C. § 411.

[1] Women have been members of both grand and petit juries in that district since the beginning of the February Term, 1944. See *United States* v. *Chaplin,* 54 F. Supp. 682.

This provision applies to grand as well as petit juries.[2] Congress also has prohibited disqualification of citizens from jury service "on account of race, color, or previous condition of servitude." [3] It has required that jurors shall be chosen "without reference to party affiliations." [4] It has provided that jurors shall be returned from such parts of the district as the court may direct "so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district." [5] None of the specific exemptions [6] which it has created is along the lines of sex.

These provisions reflect a design to make the jury "a cross-section of the community" and truly representative of it. *Glasser* v. *United States,* 315 U. S. 60, 86.

In California, as in most States,[7] women are eligible for jury service under local law. Code of Civil Procedure, § 198. The system of jury selection which Congress has adopted contemplated, therefore, that juries in the federal courts sitting in such States would be representative of both sexes. If women are excluded, only half of the available population is drawn upon for jury service. To put the

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[2] Thus Judicial Code § 276, 28 U. S. C. § 412 provides for the drawing of "All such jurors, grand and petit" from persons "possessing the qualifications prescribed" in § 411.

[3] Judicial Code § 278, 28 U. S. C. § 415.

[4] Judicial Code § 276, 28 U. S. C. § 412.

[5] Judicial Code § 277, 28 U. S. C. § 413.

[6] No person shall serve as a petit juror "more than one term in a year." Judicial Code § 286, 28 U. S. C. § 423.

Artificers and workmen employed in armories and arsenals of the United States are exempted from service as jurors. 50 U. S. C. § 57. Cf. Judicial Code § 288, 28 U. S. C. § 426, dealing with disqualifications of jurors in prosecutions for bigamy, polygamy or unlawful cohabitation.

[7] Report to the Judicial Conference of the Committee on Selection of Jurors (1942), p. 23.

matter another way, Congress has referred to state law merely to determine who is qualified to act as a juror. Whether the method of selecting a jury in the federal court from those qualified is or is not proper is a question of federal law.[8] *Glasser* v. *United States, supra,* pp. 85–86.

In *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, we were presented with a similar problem. It was a civil case which had been removed to the district court on the ground of diversity of citizenship and involved a question of the liability of a common carrier to a passenger. All persons who worked for a daily wage had been deliberately and intentionally excluded from the jury lists. We held, in the exercise of our power of supervision over the administration of justice in the federal courts, see *McNabb* v. *United States,* 318 U. S. 332, that the plaintiff's motion to strike the panel should have been granted. The gist of our ruling is contained in the following statement from the opinion in the *Thiel* case:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospec-

[8] An earlier indictment (subsequently dismissed) was returned against petitioners who moved to quash because of the exclusion of women from the panel of grand jurors. The motion was denied. *United States* v. *Ballard,* 35 F. Supp. 105. That ruling seems to have been influenced by the thought that California law determined whether the exclusion of women resulted in a proper jury. Under California law the inclusion of women on the panel is not obligatory, the statutory provisions which qualify them for jury service being directory only. *People* v. *Shannon,* 203 Cal. 139, 263 P. 522; *People* v. *Parman,* 14 Cal. 2d 17, 92 P. 2d 387.

> tive jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." 328 U. S. 220.

We conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that, as in the *Thiel* case, we should exercise our power of supervision over the administration of justice in the federal courts, *McNabb* v. *United States, supra,* to correct an error which permeated this proceeding.

It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex.[9] Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponder-

[9] See Miller, The Woman Juror, 2 Oregon L. Rev. 30; cf. Carson, Women Jurors (1928), p. 15.

ables.[10] To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

The present case involves a prosecution of a mother and her son for the promotion of an allegedly fraudulent religious program. Judge Denman in his dissent below stated:

> "In the average family from which jurors are drawn, the souls of children in their infant and early adolescent bodies receive the first and most lasting teaching of religious truths from their mothers. In the same families the major social function of men is concerned with the creation of material things, largely food and clothing and housing of the children's bodies.
>
> "In the public schools over ninety-five per cent of the primary and grammar school teachers are women. In the churches of all religions the numbers of women attendants on divine service vastly exceed men. The one large and vital religious group created in America since Joseph Smith is that of the Christian Scientists founded by a woman, Mary Baker Eddy.
>
> ". . . It matters not that from my viewpoint there is . . . testimony of a conspiracy so mean and vile that it warrants some of the strongest strictures of the prosecution. I am not a woman juror sitting in the Ballard trial, who is the mother of five children at whose knee have been instilled in them the teachings of Jesus as interpreted by Mrs. Eddy.

[10] The problem is reflected in the discussions of the androcentric theory and the gynaecocentric theory in scientific literature. See Ward, Pure Sociology (1903), Ch. XIV; Draper, Dupertuis and Caughey, Human Constitution in Clinical Medicine (1944), Ch. VI.

"Well could a sensitive woman, highly spiritual in character, rationalize all the money income acquired by Mrs. Ballard as being devoted to the teachings of the same Jesus as are the profits of the trust created by Mrs. Eddy for the Christian Science Monitor." 152 F. 2d pp. 951–52.

The point illustrates that the exclusion of women from jury panels may at times be highly prejudicial to the defendants. But reversible error does not depend on a showing of prejudice in an individual case.[11] The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, *Smith* v. *Texas,* 311 U. S. 128, or an economic or social class, *Thiel* v. *Southern Pacific Co., supra,* deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme. As well stated in *United States* v. *Roemig,* 52 F. Supp. 857, 862, "Such action is operative to destroy the basic democracy and classlessness of jury personnel." It "does not accord to the defendant the type of jury to which the law entitles him. It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him." Cf. *Kotteakos* v. *United States,* 328 U. S. 750, 764–765. The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

If, as in the *Thiel* case, we had merely an instance of a petit jury drawn from an improper panel, we would remand the cause for a new trial. But, as we have said, the grand jury was likewise drawn from a panel improperly

[11] Cf. *Wuichet* v. *United States,* 8 F. 2d 561–63.

chosen and therefore the indictment was not returned in accordance with the procedure established by Congress. Accordingly, the indictment must be dismissed. In disposing of the case on this ground we do not reach all the issues urged and it is suggested that in so limiting our opinion we prolong an already lengthy proceeding. We are told that these petitioners will again be before us for the determination of questions now left undecided. But we cannot know that this is so, and to assume it would be speculative. The United States may or may not present new charges framed within the limits of our earlier opinion. A properly constituted grand jury may or may not return new indictments. Petitioners may or may not be convicted a second time.

Reversed.

MR. JUSTICE JACKSON, concurring.

I concur in the result, but for quite different reasons. I join the opinions of MR. JUSTICE FRANKFURTER and of MR. JUSTICE BURTON to the effect that we should not now direct dismissal of the indictment upon the jury question. In my opinion, the point either was abandoned by the parties or if not, was ignored or silently rejected by the Court in its prior decision, 322 U. S. 78, and should not be revived now. I therefore reach the other issues in the case. I would direct dismissal of the indictment upon the grounds stated in dissent in *United States* v. *Ballard,* 322 U. S. 78 at 92, and a further ground. This Court previously ruled that it is improper for the trial court to inquire whether the religious professions and experiences as represented by defendants were true or false but that it can inquire only as to whether they were represented without belief in their truth. This leaves no statutory basis for conviction of fraud and especially no basis for conviction under this indictment. It requires, in my opinion, a provably false representation in addition to

knowledge of its falsity to make criminal mail fraud. Since the trial court is not allowed to make both findings, the indictment should be dismissed.

MR. JUSTICE FRANKFURTER, with whom MR. CHIEF JUSTICE VINSON, MR. JUSTICE JACKSON and MR. JUSTICE BURTON join.

In the exercise of its supervisory power over the lower federal courts, the Court is directing the dismissal of the indictment in this case, because, following the practice then prevailing in the federal district court in California, no women were included in the panel of the grand jury which found the indictment. My brother BURTON demonstrates, I believe, that under the circumstances the absence of women from the grand jury panel did not vitiate the indictment. But, in any event, this Court's authority to supervise practice in the lower federal courts should be exercised only to vindicate appropriate standards of judicial administration. In finding that the exclusion of women from the grand jury panel is fatal to the indictment, the Court embraces a claim for the benefit of the petitioners which they themselves abandoned more than four years ago. And since women have not been excluded from jury service in the California federal courts since 1944, the Court cannot justify its action as a means of emphasizing to the lower courts the duty of adopting a proper practice. Thus the Court directs the dismissal of an indictment under circumstances in which the Court's action does not advance the proper administration of criminal justice.

The defendants were fully cognizant of the facts and of the issues involved when they made their objection to the composition of the grand jury panel and when they abandoned it. They objected to the array before the district court, saved the point when their objection was overruled, and assigned it as one of the errors in their specifica-

tions on appeal to the Circuit Court of Appeals. In ample time for the defendants to rely on it in the Circuit Court of Appeals, this Court decided *Glasser* v. *United States,* 315 U. S. 60, which indicated that we deemed it important that a jury be selected on what may be described as a modern democratic basis. And yet the point made and overruled in the District Court was not argued in the briefs before the Circuit Court of Appeals, although the defendants vigorously urged other claims to reverse their convictions. The fact that the jury question was "in issue" before the Circuit Court of Appeals, in the sense of having been assigned as error, but was neither briefed nor argued there, only serves to emphasize the abandonment of the issue before that court. When on the Government's petition the case came before this Court, the defendants surely pressed every claim that seemed to them relevant to sustain the judgment which the Circuit Court of Appeals had entered in their favor. For it is too well settled to require citation of cases that the respondent here may urge and support any ground by which judgment in his favor can be sustained, whether or not it was argued in the court below. Their briefs and oral argument vigorously urged other issues going to the validity of the indictment. The exclusion of women was not even mentioned. And this Court, with the full record before it, took no notice of this question which now is found to undermine the entire proceedings. When we remanded the case to the Circuit Court of Appeals we plainly did so to have that court decide questions argued here which it had left undecided. We would hardly have invited its decision on questions which had been abandoned and not argued before it. If a procedural point can ever be abandoned, objection to the jury panels was here abandoned.

With the *Glasser* opinion before them and with the point properly preserved in their appeal papers, the abandonment of the issue by the petitioners, when the case came

before the Circuit Court of Appeals and later before us, can mean only that they had no confidence in the claim, and that, in any event, they had not been hurt by what is now deemed a fatal error. It hardly helps the proper administration of criminal justice to allow the defendants to resurrect a point which they had dropped four years earlier.*

Even now, this Court does not find that the exclusion of women constitutes an inroad on the vital safeguards for a criminal trial so as to involve a denial of due process.

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*The two cases invoked by the Court are inapposite. The circumstances in *Reynolds* v. *United States*, 98 U. S. 145, 168–69, are so different from those now before us that the Court's action in that case can afford no support for what is here done. In affirming the conviction the Court had not noticed that the sentence imposed after trial was imprisonment at hard labor, whereas the applicable statute authorized only sentence to ordinary imprisonment. It had not been called to the Court's attention, and it was not the kind of error that the Court would notice. But the error, which everybody had overlooked, would, if uncorrected, have subjected a defendant to punishment far more severe than any authorized by Congress. In the case before us the error, such as it may be, goes to a procedural point not bearing on the fairness of the trial, or the conviction, or the sentence. And the result of this Court's action as to this procedural point is to vitiate the entire proceeding, not merely to remand for formal resentencing, as in the *Reynolds* case. Also, in the *Reynolds* case the Court noted the error when indicated to it in a petition for rehearing at the same term of Court. It had not previously been indicated to any court and evidently had not previously been noted by anyone. It did not, as here, make its way to the surface after it had been duly and vigorously urged, had been assigned as error, then dropped, buried for three years, only to be resurrected as an afterthought and a makeweight to argument on the merits. Again, in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16, the District Court sought to punish for contempt action which was specifically exempt from such punishment. Error of a "fundamental nature" was apparently noticed and pressed by the defendants for the first time when the case came to this Court. And the Court considered the point while the case was before it, not, as here, when it reappears as tail to another issue three years after the record containing the alleged error first came before us.

The Court orders dismissal of an indictment because of a past practice pursued in good faith under misapprehension of relevant law. But that misconception has been corrected and the proper practice has been enforced since 1944. The Court's order cannot serve as a means of ensuring a change in federal practice when that change has already taken place.

Dismissal of this indictment will not put an end to prosecution for the offenses which it charges. And so it cannot in any event relieve the Court from the duty of deciding the central issue before us, namely, whether the mails may be used to obtain money by fraud when the fraud consists of a false claim of belief touching religion. Dismissal of this indictment does not terminate prosecution for these offenses because Congress by the Act of May 10, 1934 (48 Stat. 772, amended, July 10, 1940, 54 Stat. 747, 18 U. S. C. § 587) has expressly saved this prosecution. By that Act, Congress allowed reindictment where an indictment was found defective but the basis of the prosecution is left untouched. As amended it provides that

> "whenever an indictment is found defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned not later than the end of the next succeeding regular term of such court, following the term at which such indictment was found defective or insufficient, during which a grand jury thereof shall be in session."

Considering the history of this litigation, the reasonable assumption is that the Government will press this prosecution.

A conviction was had. The Circuit Court of Appeals reversed and ordered a new trial. On petition of the Government we brought the case here. The Government urged that the judgment of conviction be restored, while

the defendants challenged its very foundation by invoking the constitutional guaranty of freedom of religion. In April 1944, we reversed the Circuit Court of Appeals and found that the District Court had properly "withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents." 322 U. S. at 88. But the case was remanded to the Circuit Court of Appeals without considering the question whether the First Amendment affords immunity from criminal prosecution for the procurement of money by false statements as to one's religious experiences. Three Justices concluded that the verdict should stand, and, in an opinion by the late Chief Justice, denied that the First Amendment afforded immunity for fraudulent use of the mails simply because the false statements concerned religious beliefs. A fourth Justice likewise thought this issue had to be met. He concluded that the indictment should be dismissed because it raised issues inextricably bound up with traditional liberty and could not be sustained in view of the First Amendment. Upon remand the Circuit Court of Appeals, after considering the issues which impliedly were remitted to it by this Court, found no flaw in the jury's verdict and affirmed the conviction. After three years the case is again here, and the main issue urged, both in argument and in the extensive briefs, is the power of the Government to maintain this prosecution in view of the First Amendment. A decision by this Court merely directing the dismissal of the indictment because of error in the selection of the grand jury which found it will inevitably lead to curing of this defect by resubmission to a properly selected grand jury. It can hardly be believed that the Government will not feel under duty to do so. The whole machinery of criminal justice will again be set in motion. A trial will follow, and the District Court will naturally deem itself bound to entertain the prosecution

in view of the decision of its Circuit Court of Appeals, twice left undisturbed here, which rejected the claim based on religious liberty.

It is too much like playing with justice to await a third review, two or three years hence, before facing this issue explicitly. The doctrine that a constitutional claim should not be prematurely considered is a vital feature in the harmonious functioning of our scheme of government. But it is a rule founded in reason, not a mechanical formula for avoiding an aspect of a litigation which cannot be fairly decided without meeting the constitutional issue. If this controversy could really be disposed of merely by finding that the grand jury was improperly selected, abstention from a constitutional adjudication would be imperative. Such would be the case if further prosecution were barred by the statute of limitations. But the Act of 1934, as we have seen, removes the bar and sanctions a reindictment, which is to be anticipated in view of the circumstances of this litigation. We cannot escape our responsibility by dealing merely with the remediable invalidity of the indictment, leaving untouched the decision of the Circuit Court of Appeals that the prosecution is valid. Of course the defendants might be acquitted at a new trial. But a court which purports to exercise supervisory authority in the interests of the administration of criminal justice ought not to permit the waste and unfairness involved in a new trial if there is no foundation for it. Especially is this a claim on the proper administration of justice in a case which has been in the courts for almost six years, and which is now starting on a new round as a result of the Court's decision.

In short, the prosecution will continue unless we terminate it. We can terminate it only if this Court should deem beyond constitutional authority a prosecution of the charges upon which the jury found the defendants

guilty and which the Circuit Court of Appeals sustained. We ought not to give implied sanction to the continuance of this prosecution, if we do not mean to do so, by withholding our view on an issue inescapable in the full disposition of the controversy before the Court. Candor repels it and the requirements of constitutional adjudication do not justify it.

MR. JUSTICE BURTON, dissenting.

Although I concur in this Court's policy of requiring the inclusion in federal jury lists in California of women qualified for service as jurors of the highest court of law in that State, I believe that we are not justified in dismissing the indictment returned in this case in 1941 merely because women were not included in such lists at that time. In the absence of a binding statutory or court rule then requiring such inclusion of women, the District Court was compelled to exercise its own discretion in including or excluding them. Without depending on the breadth of the discretion which should be allowed to a District Court under those circumstances, I submit that the reasons for the District Court action strengthen the position that this Court should not now retroactively disapprove the established local federal practice which conformed almost exactly with the established state practice.

Ever since its first Judicature Act, Congress has subordinated federal practice to state law in determining the qualifications of federal jurors. In that Act it said: "the jurors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest courts of law of such State, . . ." Section 29, Act of September 24, 1789, 1 Stat. 73, 88. Similarly, the present law reads: "Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to

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the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned." Section 275, Judicial Code, 36 Stat. 1087, 1164, 28 U. S. C. § 411.[1]

There is no constitutional, statutory or court rule or policy requiring women to be placed on all federal jury lists. Congress might have required such a course and might have set up complete federal qualifications for federal jurors, but it never has done so. Instead, it has provided that state action shall determine most of the qualifications for federal jury service. As a result, it would be reversible error for the federal courts to include women on federal juries in those states which do not make women eligible for service as jurors of the highest court of law in such states. Cf. *Crowley* v. *United States,* 194 U. S. 461. This is an inescapable recognition by Congress that it sees nothing seriously prejudicial in the continued use of exclusively male federal juries in states where women are not eligible for state jury duty. The availability of appropriate accommodations for the two sexes has been treated as a material factor in determining whether women and men shall be called for jury duty. Acts and Resolves of R. I. (1939), c. 700, § 37; *People* v. *Shannon,* 203 Cal. 139, 263 P. 522. See Report to the Judicial Conference of the

[1] The federal courts, therefore, are bound by state definitions of jurors' qualifications subject to federal constitutional and statutory limitations. It has been argued that the Fifth and Sixth Amendments to the Constitution guarantee the continuance of the exclusively male common law federal juries, but it is now generally agreed that women are qualified to serve on federal juries wherever the states have declared them qualified as jurors of the highest court of law in their respective states. See *United States* v. *Wood,* 299 U. S. 123, 145; *Tynan* v. *United States,* 297 F. 177, 178–179, cert. denied, 266 U. S. 604; *Hoxie* v. *United States,* 15 F. 2d 762, cert. denied, 273 U. S. 755.

Committee on the Selection of Jurors (1942), p. 23. Subordination of the need for women on federal juries to the availability of physical accommodations for them is a tacit recognition that no fundamental infraction of the rights of litigants is involved in the continuance of exclusively male juries.

In some employments, women are distinguished from men, as a matter of law, in connection with their hours and conditions of work. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379. These distinctions are due to considerations not applicable to jury service. The general and increasing absence of sound reasons for distinctions between men and women in matters of suffrage, office holding, education, economic status, civil liberties, church membership, cultural activities, and even war service, emphasizes the lack of reason for making a point of the presence or absence of either sex, as such, on either grand or petit juries. See Miller, *The Woman Juror* (1922), 2 Ore. L. Rev. 30, 40.

By a general practice of not calling women for jury duty although eligible for such duty, the state courts of California, in effect, have granted women a substantial exemption from that duty. *People* v. *Parman,* 14 Cal. 2d 17, 92 P. 2d 387; *People* v. *Shannon, supra.* See *United States* v. *Ballard,* 35 F. Supp. 105, 107. The California courts thus have treated men and women as equally qualified and have assumed that litigants will have an adequate impartial jury, regardless of the sex of the jurors, provided the jurors otherwise are qualified to serve. Cf. *Hyde* v. *United States,* 225 U. S. 347, 374; *Agnew* v. *United States,* 165 U. S. 36, 44. While such a state practice is not binding upon the federal courts as a matter of law, yet it is persuasive as indicating that litigants need not be treated as having been prejudiced when a Federal District Court has conformed its practice to that of the state. For the

state rule see *People* v. *Parman, supra; In re Mana,* 178 Cal. 213, 172 P. 986; *People* v. *Manuel,* 41 Cal. App. 153, 182 P. 306.

The error in the federal practice cannot be the exclusion of women, as such, because such exclusion not only is permitted but is required by federal statute in states where they are not eligible for state jury duty. The error, if any, must consist of the *failure to require the listing of women,* as well as men, for all federal jury service *in a state which permits* such listing for state jury service, even though the state regards such listing as directory to and not mandatory upon the state courts.

There are ample grounds for distinguishing *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, from this case. For example, in the *Thiel* case, the Court acted in the absence of actual notice that the objectionable practice had been discontinued,[2] whereas, here, we have notice that the practice objected to was changed more than two years ago to conform, at least substantially, to the approved practice. Also, in the *Thiel* case, the procedure complained of consisted of the exclusion of an economic group, thereby detracting from the representative character of the jury list, in a manner contrary to the tradition and purpose of the jury system. Here the exclusion of women, as such, from jury service not only was in accordance with the traditional practice, but is in accordance with the congressionally approved future practice in the federal and state courts of about 40% of the states. This shows that the only objectionable practice here was that, after the State had established a directory system of eligibility of women for state

[2] It now appears, however, that, beginning in 1943, the practice objected to in the *Thiel* case has been discontinued. Louis E. Goodman, U. S. District Judge, N. D., Calif., Federal Jury Selections as Affected by *Thiel* v. *Southern Pacific Company,* 21 Journal of the State Bar of California 352, 357.

jury service, the federal court did not at once enlarge that policy into a mandatory requirement that all qualified women be placed upon all federal jury lists.

For these reasons, I am unable to concur in the judgment setting aside the indictment and verdict. The convictions in this case should be affirmed, and I concur in the statement by Mr. Chief Justice Stone: "Certainly none of respondents' constitutional rights are violated if they are prosecuted for the fraudulent procurement of money by false representations as to their beliefs, religious or otherwise." *United States* v. *Ballard,* 322 U. S. 78, 90.

MR. CHIEF JUSTICE VINSON and MR. JUSTICE FRANKFURTER join in this dissent. MR. JUSTICE JACKSON joins in it except in so far as the final paragraph relates to an affirmance of the convictions.

UNITED STATES *v.* BRUNO.

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

No. 67. Argued November 22, 1946.—Decided December 9, 1946.

In a criminal trial for selling waste paper at a price above the ceiling fixed by Maximum Price Regulation 30 pursuant to § 205 (b) of the Emergency Price Control Act of 1942, evidence that the defendant sold at a price above the ceiling by falsely describing the grade and that he accepted payment at the excessive price, *held* sufficient to support a conviction, although it also showed that the sales were subject to the right of customers to reject paper of lower grade than represented and that, in three out of five cases covered by a five-count information where customers objected and the Office of Price Administration had made an investigation, defendant subsequently adjusted the price to the ceiling price for the grade actually delivered. Pp. 210, 211.

153 F. 2d 843, reversed.

Petitioner was convicted of selling waste paper at a price above the ceiling fixed by Maximum Price Regulation 30 pursuant to § 205 (b) of the Emergency Price Control Act of 1942. The Circuit Court of Appeals reversed. 153 F. 2d 843. This Court granted certiorari. 328 U.S. 828. *Reversed,* p. 211.

Stanley M. Silverberg argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Robert L. Stern, George Moncharsh, David London, Irving M. Gruber* and *Albert J. Rosenthal.*

George R. Sommer argued the cause and filed a brief for respondent.

Mr. Justice Douglas delivered the opinion of the Court.

A criminal information was brought against Bruno for having wilfully sold [1] waste paper at prices higher than the ceilings established by Maximum Price Regulation 30.[2] The information contained five counts, each count charging a sale of a carload lot in 1944 at prices above the established ceilings. The jury found Bruno guilty on all five counts. He was sentenced to imprisonment for six months and fined $500. The judgment of conviction was reversed by the Circuit Court of Appeals. 153 F. 2d 843. The case is here on a petition for a writ of certiorari which we granted because of an asserted conflict in principle between the decision below and *United States* v. *Seidmon,* 154 F. 2d 228, in the Seventh Circuit Court of Appeals.

Bruno was in charge of a business, owned by a relative, which bought and sold waste paper. Carrano was a middleman who bought waste paper from Bruno on orders

[1] Section 205 (b), Emergency Price Control Act of 1942, 56 Stat. 23, 33, 50 U.S.C. App. Supp. III § 925 (b).

[2] See 7 Fed. Reg. 9732, 8 Fed. Reg. 13049, 17483.

from Carrano's customers. The paper was shipped by Bruno direct to the customers, Carrano paying Bruno the price.

In each of the five sales challenged here, Carrano ordered from Bruno a grade of paper known as No. 1 assorted kraft. In each, Bruno invoiced the shipment as such and charged the ceiling price for that grade of waste paper. Carrano paid Bruno the invoice price. It appears that the orders were subject to inspection and approval of the waste paper by the customers; that they customarily made the inspections on receipt of the shipments; and that if the paper was below the grade at which it had been invoiced, the customers would pay Carrano the lower ceiling price, Carrano debiting Bruno with the difference. Each of the five shipments in question was inspected by the customer on its arrival. It was discovered that each shipment was largely composed of corrugated paper, a grade carrying a lower ceiling price. In three cases, the customers paid Carrano only for the quality of waste paper received. Carrano thereupon debited Bruno with the difference. In two cases, the customer did not complain of the upgrading and Bruno retained the over-charges.[3] Moreover, the debits to Bruno in the three instances mentioned followed on the heels of an investigation by the Office of Price Administration. It also appears that the debits were not shown on Bruno's books. His ledger showed sales, not at the invoice price, but at lower prices. The concealed amounts were explained by Bruno as constituting his commissions on the sales.

The District Court charged the jury that "before you can find him guilty, there must have been in his mind an intention not to set a price and then have it adjusted afterwards according to the truth of the situation, but an intent

[3] The Circuit Court of Appeals seemed to proceed on the assumption that in no instance did the ultimate price which was paid exceed the ceiling price.

to fix this price and charge it and get away with it,—an intent to commit the crime, the formation of a purpose in his mind when he did this thing, to get more money for that paper than the ceiling price established by law." [4] The court also charged that there could be no conviction if Bruno did not sell the waste paper "with the intent of receiving higher than ceiling price, and did not actually receive higher than ceiling price."

We think it was proper to submit the case to the jury. The evidence seems to us ample to support the conviction. There was false grading in each invoice. The sales were not made at a price to be determined on the customers' inspection of the grade. They were made at specific invoice prices which were above the ceiling. The goods were delivered at those prices; and those were the prices

[4] The preceding part of the charge was:

"In order that there may be a crime here, there must have been an intent on the part of this defendant to commit that crime, which was to receive a price for the paper which he sold which was in excess of the ceiling price. Now, if actually there had been paid to him more than the ceiling price, but it was the intent and intention of all persons respecting it, not to accept that as the final price necessarily, but to accept it subject to adjustment which would be made upon the examination of the paper actually delivered and the establishment of the price set by law for that paper, that is, if they had the idea that the only price to be received was that which the law set for the paper actually delivered, and that actually was what was paid, then there was no intent on his part to break the law. But if he sold this paper to the dealer, the wholesale dealer for a price which was above the ceiling price, and that was the price that he intended to get, and if you find as a fact that the only reason he didn't get it was because he didn't get away with it and there was a discovery without his having intent to do the honest decent thing, and that was the only reason he didn't get it, still he would have had an intent to commit the crime and would have effectively committed it when he received above-ceiling price which he intended to receive, if he did so intend, and if the only reason that he didn't get the ceiling price was because he was found out."

actually paid. In some instances there was a subsequent adjustment of the price to conform to the price ceiling for the grade actually shipped. But in others there was not. And bearing on the integrity of the system were two other facts—(1) the debits made followed the OPA investigation; (2) the inflated prices were not disclosed on Bruno's books. In a seller's market upgrading may be a convenient device for black market operations. As the Circuit Court of Appeals noted, when paper is scarce the seller may send not what is ordered but what he has, on the assumption that manufacturers will be glad to take any kind of paper they can get. In view of the inadequacy of the supply, buyers cannot always be expected to reject upgraded shipments or insist upon price adjustments. The facts of this case sustain that theory, for in two instances no price adjustment was sought or made. In view of all the circumstances, the jury could well conclude that the system adopted by Bruno was designed to bring him more for the goods than was lawful.

Reversed.

FISWICK ET AL. *v.* UNITED STATES.

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

No. 51. Argued November 19, 20, 1946.—Decided December 9, 1946.

1. Petitioners and others were indicted for conspiracy to defraud the United States in violation of § 37 of the Criminal Code. The indictment charged that petitioners conspired with each other, and with others, to defraud the United States by concealing and misrepresenting their membership in the Nazi party. The last overt act alleged to have been committed by any of the petitioners was the filing by one of them of a registration statement under the Alien Registration Act of 1940, in which he falsely failed to disclose his connection with and activities in the Nazi party. *Held* that the conspiracy charged and proved did not extend beyond the date of the last overt act, and that admittance in evidence against all of the

petitioners of admissions made after that date by one of the petitioners was reversible error. Pp. 215–220.

(a) Though the result of a conspiracy may be continuing, the conspiracy is not a continuing one unless there is continuous cooperation of the conspirators to produce the unlawful result. P. 216.

(b) An overt act being necessary to complete the offense of conspiracy under § 37 of the Criminal Code, the overt acts averred and proved may mark the duration, as well as the scope, of the conspiracy. P. 216.

(c) The conspiracy charged and proved did not extend beyond the date of the last overt act (the filing of the false registration statement) and the subsequent admissions of each defendant were improperly employed against the others. P. 217.

(d) While the act of one conspirator is admissible against the others, if it is in furtherance of the criminal undertaking, all such responsibility ends when the conspiracy ends. P. 217.

(e) Confession or admission by one co-conspirator after he was apprehended was not in furtherance of the conspiracy to deceive the Government but had the effect of terminating the conspiracy, so far as he was concerned, and made his admissions inadmissible against his erstwhile fellow-conspirators. P. 217.

(f) It cannot be said with fair assurance in this case that the jury was not substantially swayed by the use of these admissions against all defendants and, therefore, it cannot be considered a "harmless error" within the contemplation of § 269 of the Judicial Code. *Kotteakos* v. *United States*, 328 U. S. 750. Pp. 217–220.

2. The fact that his sentence of imprisonment has been served does not render moot a review of the conviction of an alien under § 37 of the Criminal Code for conspiring to file a false registration statement under the Alien Registration Act and to conceal from the Government his membership in the Nazi party, since the conviction may weaken his defense to a deportation proceeding under 8 U. S. C. § 155, impair his chances of naturalization under 8 U. S. C. § 707 (a) (3), and subject him to the loss of certain civil rights. Pp. 220–223.

153 F. 2d 176, reversed.

Petitioners were convicted under § 37 of the Criminal Code of conspiring to defraud the United States in the exercise of its governmental functions by filing false registration statements under the Alien Registration Act of 1940, 54 Stat. 670, 8 U. S. C. § 451 *et seq.*, and concealing

their membership in the Nazi party. The Circuit Court of Appeals affirmed. 153 F. 2d 176. This Court granted certiorari. 327 U. S. 776. *Reversed,* p. 223.

Frederic M. P. Pearse argued the cause and filed a brief for petitioners.

Leon Ulman argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington* and *Robert S. Erdahl.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Alien Registration Act of 1940, 54 Stat. 670, 8 U. S. C. § 451 *et seq.,* required aliens, with certain exceptions, to register pursuant to regulations of the Commissioner of Immigration and Naturalization.[1] Among the disclosures required was whether during the preceding five years the alien had been "affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government." [2]

Petitioners are German nationals who registered under the Act, the last of the three, Mayer, registering on December 23, 1940. Each stated when he registered that he was not affiliated with or active in such an organization. Each failed to disclose, in answer to another question pertaining to "memberships or activities in clubs, organizations, or societies," that he was in any way connected with the Nazi party. They were indicted in 1944 with 28 others for conspiring to defraud the United States in the exercise of its governmental functions (see *Curley* v. *United States,* 130 F. 1, 4) in violation of § 37 of the Criminal Code, 18 U. S. C. § 88.

[1] See 5 Fed. Reg. 2836 for the regulations.

[2] Regulations, *supra,* note l, § 29.4 (l) (15).

The indictment charges that petitioners continuously between September 1, 1939, and the date the indictment was returned, September 13, 1944, conspired with each other and with Draeger, the German consul in New York City and leader of the Nazi party in this country, with Draeger's secretary, Vogel, and with other representatives of the Third Reich, to defraud the United States by concealing and misrepresenting their membership in the Nazi party. It charges that since 1933 the Nazi party was devoted to furthering the political activities and policy of the German Reich in this country, that each petitioner during the five years prior to his registration was a member of that party, that Draeger and Vogel directed petitioners in registering under the Act to conceal and falsify their connection with the Nazi party, that petitioners followed such directions, that after their registration they continued from day to day to misrepresent to the Government their connection with and activities in the Nazi party. The indictment alleges that, as a means of accomplishing the conspiracy, the petitioners appeared for registration and in registering falsely failed to disclose their connection with and activities in the Nazi party. The indictment sets forth forty overt acts. Many related to instructions given by Draeger and Vogel to various defendants from September to December 1940, in connection with their registration. Others related to the registering by petitioners in November and December, 1940. The last overt act alleged to have been committed by any of petitioners was the filing by Mayer of his registration statement on December 23, 1940.

Of the 31 indicted, only the three petitioners were convicted after a jury trial.[3] Fiswick and Rudolph were sen-

[3] Six entered pleas of guilty. There was a dismissal as to one, a severance as to fourteen. Ten were tried. The jury acquitted three and disagreed as to the other four.

tenced to imprisonment for eighteen months each. Mayer was sentenced to imprisonment for a year and a day. The judgments of conviction were affirmed by the Circuit Court of Appeals, one judge dissenting. 153 F. 2d 176. The case is here on a petition for a writ of certiorari which we granted because the rulings of the lower courts on the continuing nature of the conspiracy were apparently in conflict with decisions of this Court. See *United States* v. *Irvine,* 98 U. S. 450; *United States* v. *Kissel,* 218 U. S. 601.

First. The nature and duration of the conspiracy assumed great importance at the trial for the following reason. Each petitioner after he was apprehended made damaging statements to agents of the Federal Bureau of Investigation. Mayer, in November, 1943, stated that he had applied for membership in the Nazi party and had not disclosed the fact because Vogel told him not to. Fiswick's statement made in April, 1944, was to the same effect. Rudolph made substantially the same admissions in November, 1943, and then in September, 1944, retracted them insofar as he had said that in registering under the Act and in failing to disclose his Nazi party affiliation he had followed instructions. His later reason for non-disclosure was his asserted desire to protect his family. Each of these statements was admitted at the trial. At first, each was admitted only as against the maker. At the close of the Government's case, however, the District Court ruled that each of these statements was admissible against each of the other co-conspirators. It so charged the jury. Later the jury returned to the courtroom for further instructions. One of the questions on which the foreman stated that they desired instruction related to that part of the charge "where you said something about all of the defendants were bound by the act of one or something, something as a group, and the other said the individuals."

The judge then repeated that the admissions of each were admissible against all provided there was a conspiracy and they were all in it.

The Solicitor General now rightly concedes that that ruling was erroneous. Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one. See *United States* v. *Irvine, supra.* Continuity of action to produce the unlawful result, or as stated in *United States* v. *Kissel, supra,* p. 607, "continuous coöperation of the conspirators to keep it up," is necessary. A conspiracy is a partnership in crime. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 253. Under § 37 of the Criminal Code, the basis of the present indictment, an overt act is necessary to complete the offense.[4] The statute of limitations, unless suspended,[5] runs from the last overt act during the existence of the conspiracy. *Brown* v. *Elliott,* 225 U. S. 392, 401. The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy.

In this case the last overt act, as we have noted, was the filing by Mayer of his registration statement on December 23, 1940. That act was adequate as an overt act in furtherance of a conspiracy to make a false return. But there is difficulty in also making it serve the function of an overt act in furtherance of a conspiracy to conceal from 1940 to 1944 the fact that false returns had been

[4] At common law it was not necessary to aver or prove an overt act. See *Hyde* v. *United States,* 225 U. S. 347, 359. The same is true under the Sherman Act. *Nash* v. *United States,* 229 U. S. 373, 378; *United States* v. *Socony-Vacuum Oil Co., supra,* p. 252. But § 37 of the Criminal Code requires not only an agreement to do the unlawful act but also the doing of "any act to effect the object of the conspiracy." See *Hyde* v. *United States, supra,* p. 359.

[5] See, for example, § 1 of the Act of August 24, 1942, 56 Stat. 747, 18 U. S. C. Supp. II, § 590a, as amended by § 19 (b) of the Act of July 1, 1944, 58 Stat. 649, 667, 18 U. S. C. Supp. IV, § 590a.

made. All continuity of action ended with the last overt act in December, 1940. There was no overt act of concealment which followed the act of making false statements. If the latter is permitted to do double duty, then a continuing result becomes a continuing conspiracy. If, as we think, the conspiracy charged and proved did not extend beyond the date of the last overt act, the admissions of each petitioner were improperly employed against the others. While the act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking, *Pinkerton* v. *United States,* 328 U. S. 640, 646–647, and cases cited, all such responsibility is at an end when the conspiracy ends. *Logan* v. *United States,* 144 U. S. 263, 309; *Brown* v. *United States,* 150 U. S. 93, 98. Moreover, confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it. If, as the Circuit Court of Appeals thought, the maintenance of the plot to deceive the Government was the objective of this conspiracy, the admissions made to the officers ended it. So far as each conspirator who confessed was concerned, the plot was then terminated. He thereupon ceased to act in the role of a conspirator. His admissions were therefore not admissible against his erstwhile fellow-conspirators. *Gambino* v. *United States,* 108 F. 2d 140, 142–143.

It is earnestly argued, however, that the error was harmless. The "harmless error" statute (Judicial Code § 269, 28 U. S. C. § 391) provides that "On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." We have recently reviewed the history of this statute and the func-

tion it was designed to serve in criminal cases. *Kotteakos* v. *United States,* 328 U. S. 750. The Court there stated, pp. 764–765:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

We cannot say with fair assurance in this case that the jury was not substantially swayed by the use of these admissions against all petitioners. It is not enough to say that there may be a strong case made out against each petitioner. The indictment charges a conspiracy, not the substantive crime of falsely registering. The evidence that petitioners conspired with each other and with Draeger, Vogel, and others, is not strong. Though we assume there was enough evidence to go to the jury on the existence of that conspiracy, the case was one which a prosecutor would be anxious to bolster.

The prosecutor's case, apart from the admissions, may be briefly summarized. Draeger and Vogel were active in the affairs of the Nazi party in this country. Their stenographer, a government witness, testified that applications for membership in the party were received at their

office. Dues were paid there. A card file of members of the party and of applicants for membership was kept there. The name of each petitioner was on the list. A letter was sent to all on the list in August or September, 1940, over Draeger's signature, requesting them to discuss a matter with Draeger. Those who appeared in response to the letter were told to conceal their Nazi party membership or affiliation when they registered under the Act. Another witness for the Government—a defendant in the case who was granted a severance—also testified that Vogel gave instructions to party members not to disclose their affiliation with the Nazi party. And a clerk in Draeger's office testified for the Government that the party members who came to the consulate were told to say in their registration statements that they were members of an innocuous-sounding association of German nationals. There was no evidence that petitioners came to the consulate seeking advice. There was no *direct* evidence that petitioners had received the instructions from the consulate to conceal their party membership. There was no *direct* evidence that petitioners came to the consulate in response to the letter which was sent. They were not identified as being with any group which called there. There was no evidence that they conferred with Draeger or Vogel or with each other.

The Solicitor General states with commendable candor that in this state of the proof it was manifestly important for the prosecutor "to bring into the case against petitioners evidence of a character that might better convince the jury that when each failed to reveal his Party connection in registering he had done so upon Party instructions, and, hence, that he was a member of the conspiracy." The admissions served that purpose. They supplied the first direct evidence that petitioners acted pursuant to the instructions of the consulate. It is true,

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as respondent emphasizes, that none of these admissions implicates any petitioner except the maker. But since, if there was a conspiracy, Draeger and Vogel were its hub, evidence which brought each petitioner into the circle was the only evidence which cemented them together in the illegal project. And when the jury was told that the admissions of one, though not implicating the others, might be used against all, the element of concert of action was strongly bolstered, if not added. Without the admissions, the jury might well have concluded that there were three separate conspiracies, not one. Cf. *Kotteakos* v. *United States, supra.* With the admissions, the charge of conspiracy received powerful reinforcement. And the charge that each petitioner conspired with the others became appreciably stronger, not from what he said but from what the other two said. We therefore cannot say with any confidence that the error in admitting each of these statements against the other petitioners did not influence the jury or had only a slight effect. Indeed, the admissions may well have been crucial. The admissions apparently became of considerable importance in the deliberations of the jury, for, as we have noted, they asked for clarification of the instructions on that point. And the admissions so strongly bolstered a weak case that it is impossible for us to conclude the error can be disregarded under the "harmless error" statute. The use made of the admissions at the trial constituted reversible error.

Second. A further question remains. As we have noted, Fiswick was sentenced to imprisonment for 18 months. No fine was imposed. It now appears that he has served his sentence. Accordingly, it is suggested that the cause is moot and that the writ of certiorari should be dismissed as to him. We followed that procedure in *St. Pierre* v. *United States,* 319 U. S. 41, 42, saying that since the sentence had been served, "there was no longer a sub-

ject matter on which the judgment of this Court could operate." We added, however, that the petitioner had not shown that "under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied." P. 43.

The situation here is different. Fiswick is an alien. An alien sentenced to imprisonment for one year or more "because of conviction in this country of a crime involving moral turpitude" is, unless pardoned, subject to deportation if the crime was committed within five years after the alien's entry into the United States. 39 Stat. 874, 889, 8 U. S. C. § 155. The conspiracy with which Fiswick is charged was formed and executed within that five-year period, as his last entry was in 1937. The conspiracy of which he was convicted was one to impede the Government in one of its lawful functions, to prevent it from obtaining information which the Executive and Congress deemed vital to our internal security, to conceal by fraud, deceit, and perjury [6] the ramifications of an organization in our midst bent on our undoing. We need not determine in this collateral way whether conviction for such a crime would involve "moral turpitude" within the meaning of the deportation laws.[7] But the judgment, if undisturbed, stands as unimpeachable evidence that Fiswick com-

[6] The registration statements required by the Act were sworn statements. Regulations, *supra* note 1, § 29.4 (g), (j).

[7] Convictions for perjury, *Kaneda* v. *United States*, 278 F. 694, for frauds on the revenues, *Guarneri* v. *Kessler*, 98 F. 2d 580, *United States* v. *Reimer*, 113 F. 2d 429, for frauds with respect to property, *United States* v. *Burmaster*, 24 F. 2d 57, have been held by the lower courts to meet that test. And counterfeiting was so classified by the Court in *United States* v. *Smith*, 289 U. S. 422. As to deportation for violations of the Alien Registration Act of 1940 see § 20 (b) (4) and (5). See also Alien Enemy Act of 1798, Rev. Stat. 4067–4070, as amended 40 Stat. 531, 50 U. S. C. §§ 21–24; Presidential Proclamation No. 2655, 10 Fed. Reg. 8947.

mitted the crime charged. The hazards of deportation because of that fact are real.[8] To leave him to defend a deportation order on the ground that the crime of which he was convicted did not involve "moral turpitude" is to add to his burdens by depriving him of his best defense—that he was not properly convicted.

Moreover, other disabilities or burdens may flow from the judgment, improperly obtained, if we dismiss this case as moot and let the conviction stand. If Fiswick seeks naturalization, he must establish that during the five years immediately preceding the date of filing his petition for naturalization he "has been and still is a person of good moral character." 54 Stat. 1137, 1142, 8 U. S. C. § 707 (a) (3). An outstanding judgment of conviction for this crime stands as ominous proof that he did what was charged and puts beyond his reach any showing of ameliorating circumstances or explanatory matter that might remove part or all of the curse. And, even though he succeeded in being naturalized, he would, unless pardoned, carry through life the disability of a felon;[9] and by reason of that fact he might lose certain civil rights.[10] Thus Fiswick has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him. In no practical sense, therefore, can Fiswick's case be said to be moot.

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[8] Although deportation is not technically a criminal punishment, it may visit great hardship on the alien. *Bridges* v. *Wixon*, 326 U. S. 135, 147. As stated by the Court, speaking through Mr. Justice Brandeis, in *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, deportation may result in the loss "of all that makes life worth living."

[9] "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies." Criminal Code § 335, 18 U. S. C. § 541.

[10] Thus Mo. Rev. Stats. Ann. § 4561 renders such person incompetent to serve on a jury and forever disqualifies him from voting or holding office, unless pardoned.

It is said, however, that, having served his sentence, Fiswick may not be resentenced on a new trial and that, if his conviction is reversed, he thereby escapes deportation. The argument is that he thwarts the deportation policy by electing to serve his sentence. We cannot assume, however, that Fiswick is guilty of the conspiracy charged. He was not accorded the trial to which he is entitled under our system of government. The conviction which he suffered was not in accordance with law. The errors in the trial impeach the conviction; and he must stand in the position of any man who has been accused of a crime but not yet shown to have committed it. To dismiss his case as moot would permit the Government to compound its error at Fiswick's expense. That course does not comport with our standards of law enforcement.

Reversed.

FEDERAL COMMUNICATIONS COMMISSION *v.* WOKO, INC.

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

No. 65. Argued November 22, 1946.—Decided December 9, 1946.

A corporation, which had operated a radio station for some years and appeared to have rendered public service of acceptable quality and to be able to continue, was denied a renewal of its license by the Federal Communications Commission on the ground that it could not be entrusted with the responsibilities of a licensee, because the Commission found that it had misrepresented the true ownership of its capital stock in applications and testimony before the Commission over a period of years. *Held:*

1. The denial of the license was not unlawful, arbitrary or capricious within the meaning of 47 U. S. C. § 402 (e), providing for judicial review, even though the Commission failed to find that the concealment was of material facts or had influenced the Commission in making any decision or that it would have acted differently had it known the true facts. Pp. 226, 227.

2. The fact that stockholders owning slightly more than 50% of its stock were not found to have had any part in or knowledge of the deception cannot immunize the corporation from the consequences of the deception, though it may be a proper consideration for the Commission in determining just and appropriate action. P. 227.

3. That its action in this case constitutes a departure from the course which the Commission has taken in dealing with misstatements and applications in other cases is a consideration appropriate for the Commission in determining whether its action in this case is too drastic; but the Commission is not bound to deal with all cases at all times as it has dealt with some that seem comparable. Pp. 227–228.

4. A denial of a license because of the insufficiency or deliberate falsity of the information lawfully required to be furnished is not a penalty and is not illegal, arbitrary or capricious within the meaning of 47 U. S. C. § 402 (e). P. 228.

5. The fact that the Commission failed to make findings as to the quality of the station's service in the past and its equipment for good service in the future did not make its action arbitrary or capricious in the circumstances of this case. Pp. 228–229.

6. The Commission is not required to grant a license on a deliberately false application. P. 229.

7. It is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing a license. P. 229.

153 F. 2d 623, reversed.

The Federal Communications Commission refused to renew the license of a radio station because of wilful misrepresentations to the Commission as to the ownership of its stock. The United States Court of Appeals for the District of Columbia reversed. 153 F. 2d 623. This Court granted certiorari. 327 U. S. 776. *Reversed* and remanded to the Court of Appeals with direction to remand to the Commission. P. 229.

Harry M. Plotkin argued the cause for petitioner. With him on the brief were *Solicitor General McGrath, Stanley M. Silverberg, Benedict P. Cottone* and *Max Goldman.*

William J. Dempsey argued the cause for respondent. With him on the brief was *William C. Koplovitz.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

WOKO, Incorporated, for some years has operated a radio station at Albany, New York, and appears to have rendered public service of acceptable quality and to be able to continue. The Federal Communications Commission refused to renew its license because of misrepresentations made to the Commission and its predecessor as to the ownership of the applicant's capital stock. Two hundred and forty shares, being twenty-four per cent of its outstanding capital stock, was owned by one Pickard and his family. For some twelve years they received all dividends paid on the stock and Pickard took an active interest in the Company's affairs. He also was a vice-president of the Columbia Broadcasting Company and had obtained the stock on the assurance that he would help to secure Columbia affiliation for Station WOKO, would furnish, without charge, Columbia engineers to construct the station at Albany, and would supply a grand piano and certain newspaper publicity.

The company, however, in reporting to the Federal Radio Commission and to the Federal Communications Commission the names of its stockholders as it was required to do for many years and in many applications, concealed the fact that the Pickards held this stock interest and represented that the shares were held by others. Its general manager appeared on behalf of the applicant at various hearings and furnished false testimony to both Commissions regarding the identity of the corporation stockholders and the shares held by each so as to conceal the Pickard holdings. The purpose of the concealment

was to prevent the facts from becoming known to Pickard's Columbia colleagues.

The Court of Appeals for the District of Columbia reversed the Commission's decision denying renewal of the license, a majority for the various reasons that we will consider. The dissenting Chief Justice noted that he did "very heartily agree with the view that this is a hard case. The Commission's drastic order, terminating the life of the station, punishes the innocent equally with the guilty, and in its results is contrary to the Commission's action in several other comparable cases. But that the making of the order was within the discretion of the Commission, I think is reasonably clear." 153 F. 2d 623, 633. We granted certiorari because of the importance of the issue to the administration of the Act.

We come to a consideration of the reasons which led the Court of Appeals to reverse the order of the Commission under the admonition that "review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious." 48 Stat. 1094, 47 U. S. C. § 402 (e).

The Act provides as to applications such as WOKO filed that "All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station . . . and such other information as it may require." It requires such statements to be under oath or affirmation. 48 Stat. 1085, 47 U. S. C. § 308 (b). It provides, too, that any station license may be revoked for false statements in the application. 48 Stat. 1086, 47 U. S. C. § 312 (a).

It is said that in this case the Commission failed to find that the concealment was of material facts or had influ-

enced the Commission in making any decision, or that it would have acted differently had it known that the Pickards were the beneficial owners of the stock. We think this is beside the point. The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose. If the applicant had forthrightly refused to supply the information on the ground that it was not material, we should expect the Commission would have rejected the application and would have been sustained in so doing. If we would hold it not unlawful, arbitrary or capricious to require the information before granting a renewal, it seems difficult to say that it is unlawful, arbitrary or capricious to refuse a renewal where true information is withheld and false information is substituted.

We are told that stockholders owning slightly more than 50 per cent of the stock are not found to have had any part in or knowledge of the concealment or deception of the Commission. This may be a very proper consideration for the Commission in determining just and appropriate action. But as matter of law, the fact that there are innocent stockholders can not immunize the corporation from the consequences of such deception. If officers of the corporation by such mismanagement waste its assets, presumably the State law affords adequate remedies against the wrongdoers. But in this as in other matters, stockholders entrust their interests to their chosen officers and often suffer for their dereliction. Consequences of such acts cannot be escaped by a corporation merely because not all of its stockholders participated.

Respondent complains that the present case constitutes a departure from the course which the Commission has taken in dealing with misstatements and applications in

other cases. Much is made in argument of the fact that deceptions of this character have not been uncommon and it is claimed that they have not been dealt with so severely as in this case. *Cf. Navarro Broadcasting Association,* 8 F. C. C. 198. But the very fact that temporizing and compromising with deception seemed not to discourage it, may have led the Commission to the drastic measures here taken to preserve the integrity of its own system of reports. The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.

It also is contended that this order inflicts a penalty, that the motive is punishment and that since the Commission is given no powers to penalize persons, its order must fall. We think it unnecessary to indulge in the exposition of what a penalty is. It is enough to decide this case to know what a penalty is not. A denial of an application for a license because of the insufficiency or deliberate falsity of the information lawfully required to be furnished is not a penal measure. It may hurt and it may cause loss, but it is not made illegal, arbitrary or capricious by that fact.

Lastly, and more importantly, the Court of Appeals suggested that in order to justify refusal to renew, the Commission should have made findings with respect to the quality of the station's service in the past and its equipment for good service in the future. Evidence of the station's adequate service was introduced at the hearing. The Commission on the other hand insists that in administering the Act it must rely upon the reports of licensees. It points out that this concealment was not caused by slight inadvertence nor was it an isolated instance, but that

the Station carried on the course of deception for approximately twelve years. It says that in deciding whether the proposed operations would serve public interest, convenience or necessity, consideration must be given to the character, background and training of all parties having an interest in the proposed license, and that it cannot be required to exercise the discretion vested in it to entrust the responsibilities of a licensee to an applicant guilty of a systematic course of deception.

We cannot say that the Commission is required as a matter of law to grant a license on a deliberately false application even if the falsity were not of this duration and character, nor can we say that refusal to renew the license is arbitrary and capricious under such circumstances. It may very well be that this Station has established such a standard of public service that the Commission would be justified in considering that its deception was not a matter that affected its qualifications to serve the public. But it is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license. And the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter. We agree that this is a hard case, but we cannot agree that it should be allowed to make bad law.

The judgment of the Court of Appeals is reversed and the case remanded to that court with direction to remand to the Commission.

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

UNITED STATES *v.* CARMACK.

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

No. 40. Argued October 18, 1946.—Decided December 9, 1946.

1. Under § 1 of the Condemnation Act of August 1, 1888, authorizing any officer of the Government authorized to procure real estate for the erection of a public building to acquire the same for the United States by condemnation "whenever in his opinion it is necessary or advantageous to the Government to do so," and the Public Buildings Act of May 25, 1926, as amended, authorizing the Federal Works Administrator to acquire by condemnation "such sites . . . as he may deem necessary" for post offices and other public buildings, the Federal Works Administrator was authorized to acquire by condemnation land held in trust and used by a city for such public purposes as those of a local park, courthouse, city hall and public library—after it had been selected jointly by him and the Postmaster General as a site for a post office. Pp. 242, 247–248.
2. Far removed from the time and circumstances that led to the enactment of these statutes in 1888 and 1926, this Court must be slow to read into them today unexpressed limitations restricting the authority of the officials named in the Acts as the ones upon whom Congress chose to rely. P. 236.
3. The fact that the site in question is held in trust instead of in fee and is already being used by a governmental subdivision of a State for public purposes impressed upon it by private owners over a century ago cannot prevent its condemnation by the United States as a means of carrying out an admittedly federal governmental function. *Kohl* v. *United States,* 91 U. S. 367. Pp. 236–242.

   (a) If the United States has determined its need for certain lands for a public use that is within its federal sovereign powers, it must have the right to appropriate that land. P. 236.

   (b) Decisions of federal representatives as to the means of carrying out an admittedly federal governmental function cannot be subordinated to those of individual grantors or local officials. P. 239.

   (c) A decree of condemnation will dispose of any defects in the title which otherwise might exist because of the fact that the land is now held in trust for other purposes than that for which the Government acquires it. P. 239.

4. The considerations that made it appropriate for the Constitution to declare that the Constitution of the United States and the laws of the United States made in pursuance thereof shall be the supreme law of the land make it appropriate to recognize that the power of eminent domain, when exercised by Congress within its constitutional powers, be equally supreme. *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 19. P. 240.
5. The officials designated by Congress have been authorized by Congress to use their best judgment in selecting post office sites. P. 242.
6. If the officials so designated have used such judgment, in good faith, in selecting the proposed park site in spite of its conflicting local uses, the Federal Works Administrator has express authority to direct the condemnation of that site. P. 242.
7. The judgment exercised by the designated officials in selecting this site out of 22 sites suggested, and out of two closely balanced alternatives, constituted an administrative and legislative decision not subject to judicial review on its merits. Pp. 242, 243.
8. The Acts do not exclude from the consideration of the designated officials this or other sites, the selection of which might interfere with local governmental functions. P. 243.
9. The procedure followed in making the selection of the site in this case showed extraordinary effort to arrive at a fair and reasoned conclusion and the record contains no basis for a finding that the designated officials acted in bad faith or so "capriciously and arbitrarily" that their action was without adequate determining principle or was unreasoned, in any sense which would invalidate the selection made under any construction of the Acts here involved. Pp. 243–248.
10. The comparative desirability of and necessity for the site were matters for legislative or administrative determination rather than for a judicial finding. Pp. 247, 248.

151 F. 2d 881, reversed.

The United States petitioned a District Court to condemn as a site for a post office and customhouse certain land in a city which the city held in trust and used for public purposes as a local park, courthouse, city hall, and public library. An heir of the grantor in trust contested the petition. The District Court found that she had no interest permitting her to do so and entered a preliminary decree in favor of the United States. The Circuit

Court of Appeals held that she did have a special interest entitling her to object to the property being taken for a purpose destructive of the public use to which it had been dedicated by her ancestors, and remanded the case for further proceedings. 135 F. 2d 196. On retrial, the District Court held that the selection of the site amounted to an "arbitrary and unnecessary act" and dismissed the petition. 55 F. Supp. 555. The Circuit Court of Appeals affirmed on the ground that the Federal Works Administrator and the Postmaster General lacked authority "to take the particular land sought to be condemned." 151 F. 2d 881. This Court granted certiorari. 327 U. S. 775. *Reversed,* p. 248.

John J. Cooney argued the cause for the United States. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Bazelon, Roger P. Marquis* and *Dwight D. Doty.*

I. R. Kelso argued the cause for respondent. With him on the brief were *Homer Hall* and *Robt. D. Abbott.*

Mr. Justice Burton delivered the opinion of the Court.

This proceeding was instituted by the United States to condemn land as a site for a post office and customhouse in the City of Cape Girardeau, Missouri, in reliance upon several federal statutes, including the general Condemnation Act of August 1, 1888, and the Public Buildings Act of May 25, 1926.[1] The City and site were selected by the Federal Works Administrator and the Postmaster General acting jointly under the Public Buildings Act. The principal

[1] ". . . in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Gov-

issue is: Was the Federal Works Administrator authorized by the foregoing statutes to acquire by condemnation land held in trust and used by the City for such public purposes as those of a local park, courthouse, city hall and public library?

In 1941, the United States petitioned the United States District Court for the Eastern District of Missouri to condemn as a site for a United States post office and customhouse about one and one-half acres, near the center of the City of Cape Girardeau, together with the improvements thereon except a public library building. This site was part of a four-acre public park and the improvements to be condemned included a building used as the county

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ernment to do so, ..." Sec. 1, Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. § 257.

"To enable the Federal Works Administrator to provide suitable accommodations . . . for courthouses, post offices, immigration stations, customhouses, marine hospitals, quarantine stations, and other public buildings of the classes under the control of the Federal Works Agency in the States, Territories, and possessions of the United States, he is hereby authorized and directed to acquire, by purchase, condemnation, or otherwise, such sites and additions to sites as he may deem necessary, . . . *Provided*, That . . . insofar as relates to buildings to be used in whole or in part for post-office purposes, the Federal Works Administrator, under regulations to be prescribed by him, shall act jointly with the Postmaster General in the selection of towns or cities in which buildings are to be constructed and the selection of sites therein: . . . ." 40 U. S. C. § 341. This is codified from § 1 of the Public Buildings Act of May 25, 1926, 44 Stat. 630–631, as modified by Reorganization Plan I, §§ 301–303, 53 Stat. 1426–1427, 5 U. S. C. following § 133t. See also, 40 U. S. C. §§ 342–350 and the balance of the original Act.

The petition likewise relied upon the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. §§ 258a–258e; Third Deficiency Appropriation Act, fiscal year 1937, 50 Stat. 755, 773; Federal Public Buildings Appropriation Act of 1938, 52 Stat. 818; and the Reorganization Act of 1939, 53 Stat. 561, 5 U. S. C. § 133, *et seq.*, under which Reorganization Plan I was submitted to Congress and made effective July 1, 1939, 53 Stat. 813, 5 U. S. C. § 133s.

courthouse and city hall, a memorial fountain, a small memorial monument and a portion of a bandstand. The library building apparently was to be removed by its owners on 30 days' notice from the United States.

The petition included as parties defendant the City and County, numerous officials and all known and unknown heirs or others who might claim an interest in this site especially through those who conveyed it, in trust, in 1807 to the Commissioners of the District or, in trust, in 1820 to the inhabitants of the Town of Cape Girardeau. Respondent was the only defendant to file an answer. Finding that she had no interest permitting her to maintain the defenses she asserted, the District Court entered a preliminary decree in favor of the United States. On respondent's appeal the Circuit Court of Appeals remanded the cause for further proceedings consistent with its opinion holding that the respondent had a special interest entitling her to object to the property being taken for a purpose destructive of the public use to which it had been dedicated by her ancestors. *Carmack* v. *United States,* 135 F. 2d 196.

In 1944, on retrial before a different judge, the District Court recognized the respondent as entitled to contest the condemnation and, at the direction of the Circuit Court of Appeals, heard evidence as to whether or not the officials of the United States acted capriciously and arbitrarily in selecting this site. It held that "the selection of the site described in the petition, under all the facts referred to, amounts in law to an arbitrary and unnecessary act" and dismissed the petition. *United States* v. *Certain Land, Etc.,* 55 F. Supp. 555, 564. The Circuit Court of Appeals affirmed the judgment on the ground that the Federal Works Administrator and the Postmaster General did not have sufficient statutory authority "to take the particular land sought to be condemned." It then expressly found it unnecessary to consider whether or not the

federal officials had acted "capriciously and arbitrarily." *United States* v. *Carmack*, 151 F. 2d 881, 882. Because of the importance of the construction of the statutes authorizing the condemnation of land for federal uses, we granted certiorari. 327 U. S. 775.[2]

Both the general Condemnation Act and the Public Buildings Act [3] expressly authorized the acquisition of land by the United States by condemnation as a site for a United States post office, customhouse or courthouse. Neither Act expressly named the City or designated the site to be condemned in this case. Neither expressly stated whether or not sites already in use for conflicting federal, state or local public purposes were subject to condemnation. The Condemnation Act supplemented the federal right "to procure real estate for the erection of a public building or for other public uses," by adding to it a general federal power of condemnation under judicial process to be exercised by an officer of the Government "whenever in his opinion it is necessary or advantageous to the Government to do so." The Public Buildings Act, as an incident to an original $150,000,000 program, gave authority and direction to the Secretary of the Treasury (later substituting the Federal Works Administrator) "to acquire, by purchase, condemnation, or otherwise, such

[2] The right of the respondent to contest the condemnation turns upon the effect of the deeds, executed by certain of her ancestors in 1807 and 1820, pursuant to which this site long has been put to local public use. Her interest, turning largely on Missouri law, was upheld by the Circuit Court of Appeals, following the first trial, *Carmack* v. *United States*, 135 F. 2d 196, and, as we do not have to question that interest in order to reach our decision, we do not reexamine it. *Bd. of Regents, Normal School Dist. No. 3* v. *Painter*, 102 Mo. 464, 14 S. W. 938; *Mott* v. *Morris*, 249 Mo. 137, 155 S. W. 434; and 25 Stat. 357, 40 U. S. C. § 258. The proceeding to condemn the land being *in rem*, the jurisdiction of the court does not turn upon her participation in the case. Cf. *United States* v. *Dunnington*, 146 U. S. 338, 352; *In re Condemnation Suits by United States*, 234 F. 443, 445.

[3] See note 1, *supra*.

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sites . . . as he may deem necessary, ..." It specified that as to "buildings to be used in whole or in part for post-office purposes, the Federal Works Administrator, under regulations to be prescribed by him, shall act jointly with the Postmaster General in the selection of towns or cities in which buildings are to be constructed and the selection of sites therein: . . . ."[4] These Acts were natural means for Congress to adopt in putting its constitutional powers into use on a scale commensurate with the size of the nation and the need of the time. Neither Act imposed expressly any limitations upon the authority of the officials designated by Congress to exercise its power of condemnation in procuring sites for public buildings deemed necessary by such officials to enable the Government to perform certain specified functions.[5] Far removed from the time and circumstances that led to the enactment of these statutes in 1888 and 1926, this Court must be slow to read into them today unexpressed limitations restricting the authority of the very officials named in the Acts as the ones upon whom Congress chose to rely.

The power of eminent domain is essential to a sovereign government. If the United States has determined its need for certain land for a public use that is within its federal sovereign powers, it must have the right to appropriate that land. Otherwise, the owner of the land, by refusing to sell it or by consenting to do so only at an unreasonably high price, is enabled to subordinate the constitutional powers of Congress to his personal will. The Fifth Amendment, in turn, provides him with important

[4] For the three foregoing quotations, see note 1, *supra*.

[5] Nothing has been found in the legislative history of these Acts to indicate that Congress intended to give its agents less than the fullest possible authority of Congress in selecting cities and sites. See H. R. Rep. No. 132, 69th Cong., 1st Sess., especially minority views at pp. 6–7, 10, and H. R. Rep. No. 1223, 69th Cong., 1st Sess.; S. Rep. No. 197, 69th Cong., 1st Sess.; 67 Cong. Rec. 4023–4028, 8356–8357, 8359, 8494, 8567.

protection against abuse of the power of eminent domain by the Federal Government.[6]

While in its early days the Federal Government filed its condemnation cases in the state courts, this Court, in *Kohl* v. *United States,* 91 U. S. 367, disposed of the idea that this was necessary. In that case, which has become the leading case on the federal power of eminent domain, Mr. Justice Strong also said:

> "It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, *or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed.* The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, *or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.* No one doubts the existence in the State governments of the right of eminent domain,—a

[6] "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U. S. Const., Amend. V.

right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. . . . But *it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends.* . . .

. . . . .

"If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment." (Italics supplied.) *Kohl* v. *United States, supra,* 371–372, 374.

The *Kohl* case approved the condemnation of privately owned land, then subject to a perpetual leasehold, for a post office site in Cincinnati, Ohio, under an Act of Congress expressly naming that City but not expressly naming the site. The respondent here seeks, by judicial interpretation of the general Condemnation Act and the Public Buildings Act, to exclude from condemnation a particular site in Cape Girardeau selected for a post office by the appropriate federal officials. She depends upon the fact

that the site already is being used by a governmental subdivision of Missouri for other public purposes impressed upon it by its private owners over a century ago. The principle of federal supremacy, so well expressed in the *Kohl* case, argues against such a subordination of the decisions of federal representatives to those of individual grantors or local officials as to the means of carrying out an admittedly federal governmental function.[7]

It makes little difference that the site here sought to be condemned is held by the City in trust instead of in fee. The city government is not resisting the condemnation. The Federal Government can obtain, by voluntary conveyance, whatever title the City can convey. The weakness in the City's right to sell or exchange this site arises from restrictions in the conveyance to it. Through the inclusion, as defendants, of all claimants who might rely upon such restrictions or might claim an interest through the grantors of this site, a decree of condemnation will dispose of the suggested defects. By giving notice to all claimants to a disputed title, condemnation proceedings provide a judicial process for securing better title against all the world than may be obtained by voluntary conveyance.

Both in themselves and from the relation of these Acts to the Constitution, we find substantial reason for making their broad language effective to its full constitutional limit. While the federal power of eminent domain is limited to taking property for federal public uses, the question of the existence of a federal public use presents no difficulty here because the constitutional power of Congress to establish post offices is express.[8]

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[7] See also, *Hanson Co.* v. *United States*, 261 U. S. 581, 587, for emphasis on the all-inclusiveness of the general Condemnation Act of August 1, 1888.

[8] U. S. Const., Art. I, § 8, Cls. 7 and 18.

The considerations that made it appropriate for the Constitution to declare that the Constitution of the United States, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land [9] make it appropriate to recognize that the power of eminent domain, when exercised by Congress within its constitutional powers, is equally supreme. Mr. Justice Bradley stated this principle clearly, while on circuit, in *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 19:

> "The argument based upon the doctrine that the states have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes." [10]

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[9] U. S. Const., Art. VI.

[10] An appeal in *Stockton* v. *Baltimore & N. Y. R. Co., supra,* was dismissed in this Court, 140 U. S. 699, and, in the meantime, Mr. Justice Bradley's statement was quoted with approval in *Cherokee Nation* v. *Kansas Ry. Co.,* 135 U. S. 641, 656. See also, *United States* v. *Gettysburg Electric Ry.,* 160 U. S. 668, 681; *Luxton* v. *North River Bridge Co.,* 153 U. S. 525, 529–530.

When Congress has wished to subordinate its selection of state lands to state approval it has done so by express provision. In the Weeks

The Fifth Amendment to the Constitution says "nor shall private property be taken for public use, without just compensation." This is a tacit recognition of a preexisting power to take private property for public use, rather

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Forestry Act of March 1, 1911, 36 Stat. 961, 962; 43 Stat. 1215; 45 Stat. 1010; 48 Stat. 955; 16 U. S. C. § 516, and the Migratory Bird Conservation Act of February 18, 1929, 45 Stat. 1222, 1223; 16 U. S. C. § 715f, the consent of the state legislature to the federal acquisition of land is made an express condition of the acceptance of such land. Such consent does not deprive the state of civil or criminal jurisdiction over the land. 36 Stat. 963, 16 U. S. C. § 480, and 45 Stat. 1224, 16 U. S. C. § 715g. See also, The Upper Mississippi River Wild Life and Fish Refuge Act of June 7, 1924, 43 Stat. 650, 16 U. S. C. § 724.

The acquisition of federal legislative jurisdiction, as distinguished from federal title to the land, is a different matter. If the Federal Government desires exclusive legislative jurisdiction over land acquired by it, the Constitution indicates that the consent of the state in which the land is located is necessary. Art. I, § 8, Cl. 17, provides that "The Congress shall have Power . . . To exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . . ." See *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 18, appeal dismissed, 140 U. S. 699. See also, Joint Resolution of September 11, 1841, 5 Stat. 468, and Rev. Stat. § 355, which formerly required the consent of state legislatures to federal purchases of certain sites as a condition of expending federal funds to pay for them. Since February 1, 1940, such consent has not been required except where the United States has sought "exclusive or partial" legislative jurisdiction. Unless and until the United States accepts such jurisdiction over lands acquired since February 1, 1940, it is presumed conclusively that no such jurisdiction has been accepted. 54 Stat. 19; 54 Stat. 1083; 40 U. S. C. § 255. The exercise of exclusive legislative jurisdiction is not an issue in this case and, in any event, Missouri has consented to it. "The consent of the State of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Ccnstitution of the United States to the acquisition by the United States by purchase or grant of any land in this State which has been or may hereafter be acquired, for the purpose of establishing and maintaining postoffices, ..." Mo. Rev. Stat. Ann. (1939), § 12691.

than a grant of new power.[11] It imposes on the Federal Government the obligation to pay just compensation when it takes another's property for public use in accordance with the federal sovereign power to appropriate it. Accordingly, when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned.[12]

The foregoing establishes the principle of the supremacy of a federal public use over all other uses in a clearly designated field such as that of establishing post offices. The Government here contends that the officials designated by Congress have been authorized by Congress to use their best judgment in selecting post office sites. It contends also that if the officials so designated have used such judgment, in good faith, in selecting the proposed park site in spite of its conflicting local public uses, the Federal Works Administrator has express authority to direct the condemnation of that site. We agree with those contentions. We find in the broad terms of the Public Buildings Act authority for the designated officials to select the site they did. We find, in both Acts, authority for them to acquire by condemnation the site thus lawfully selected. The judgment exercised by the designated officials in se-

[11] See *United States* v. *Cooper*, 20 D. C. 104, 116, affirmed *sub nom.*, *Shoemaker* v. *United States*, 147 U. S. 282; *In re Rugheimer*, 36 F. 369, 371.

[12] When, however, a sovereign state transfers its own public property from one governmental use to another, or when the Federal Government takes property from state ownership merely so as to put it to a federal public use for which the state already holds it in trust, a like obligation does not arise to pay just compensation for it. See *In re Certain Land in Lawrence*, 119 F. 453; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 19, appeal dismissed, 140 U. S. 699.

lecting this site out of 22 sites suggested, and out of two closely balanced alternatives, constituted an administrative and legislative decision not subject to judicial review on its merits. It was within the legislative power of Congress to choose or reject this site by direct action. It would have been within its legislative power to exclude from the consideration of its representatives this or other sites, the selection of which might interfere with local governmental functions. Such an exclusion would have been an act of legislative policy. We find no such express or necessarily implied exclusion in the broad language of these Acts.[13]

In this case, it is unnecessary to determine whether or not this selection could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so "capriciously and arbitrarily" that their action was without adequate determining principle or was unreasoned.[14] The record presents no such issue

[13] In the instant case, we deal with broad language employed to authorize officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself. This is a general authorization which carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication. A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority. See *United States* v. *Jotham Bixby Co.*, 55 F. 2d 317, 319, affirmed *sub nom.*, *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970, decree vacated as moot, 289 U. S. 705; *In re Condemnations for Improvement of Rouge River*, 266 F. 105; *United States* v. *City of Tiffin*, 190 F. 279, 281.

[14] "Arbitrary" is defined by Funk & Wagnalls New Standard Dictionary of the English Language (1944), as "1. . . .; without adequate determining principle; . . ." and by Webster's New International

here. The procedure followed in making the selection of the site showed extraordinary effort to arrive at a fair and reasoned conclusion.[15] The site inspector, in his original

Dictionary, 2d Ed. (1945), as "2. Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned; . . . ."

"Capricious" is defined by Webster's New International Dictionary, 2d Ed. (1945), as "2. . . .; apt to change suddenly; freakish; whimsical; humorsome." Cf. *Fox Film Corp.* v. *Trumbull*, 7 F. 2d 715, 727; *Puget Sound Power & L. Co.* v. *Public Utility Dist. No. 1*, 123 F. 2d 286, 290, cert. denied, 315 U. S. 814; *United States* v. *Eighty Acres of Land*, 26 F. Supp. 315, 319.

See also, *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 379; *United States* v. *Parcel of Land*, 32 F. Supp. 718, 721.

[15] It apparently followed regulations of the Federal Works Agency and Post Office Department as authorized by 5 U. S. C. §§ 22, 369; 40 U. S. C. §§ 341, 347. Among its principal steps were the following: June 12, 1940, approval of the general project for Cape Girardeau by Federal Works Administrator and Acting Postmaster General based upon the recommendation of the Commissioner of Public Buildings and the Fourth Assistant Postmaster General; July 23–26, 29–31, 1940, Post Office Inspector and Site Agent visited Cape Girardeau; August 20, 1940, he submitted his recommendations, showing that he inspected 22 proposals, eliminated all but 6 on general grounds, carefully considered the remainder and submitted full report on 3. His first choice was to enlarge the present post office site; his second, to acquire the site here in controversy; his third, to acquire a site between the two. Further studies were made in Cape Girardeau or in Washington by the Associate Architect for the Federal Works Agency, the Fiscal Manager of the Public Buildings Administration and the Superintendent of the Division of Post Office Quarters in the Post Office Department. All wishing to be heard were heard. February 11, 1941, the City Council passed an ordinance proposing an exchange of the park site for the present post office site and submitting this proposal to a special election. March 4, 1941, a majority of those voting in 8 of the 10 wards approved the exchange, the city-wide vote being 1612 to 1344. May 26, 1941, the Acting Commissioner of Public Buildings notified the Mayor of the Government's acceptance of the proposed exchange. September 25, 1941, the Acting Administrator of the Federal Works Agency advised the Attorney General that, under authority of the Pub-

report, recommended the park site as his second choice and demonstrated the reasonableness of a choice, by his superiors, of either of his first two selections.[16] His esti-

lic Buildings Act, the Agency had contracted for the exchange. After referring to his failure to secure title by voluntary conveyance from the City in spite of the willingness of the City officials to make the exchange if they had legal authority to do so, he asked the Attorney General to file this condemnation proceeding. It was done November 22, 1941. In accordance with the opinion of the Circuit Court of Appeals after the first trial, the Government, on June 10, 1943, secured evidence of a formal joint action, signed personally by the Federal Works Administrator and the Postmaster General, expressly selecting the site in suit. This was included in the record of the second trial. The actions of June 12, 1940, and June 10, 1943, refer to the project as one for a post office and courthouse, whereas the petition for condemnation refers to it as one for a post office and customhouse. This variation was not pressed in the litigation and is not material to the main issue of statutory construction.

The foregoing narration of the steps taken in this instance is not intended as an indication that all or any of them are essential to the exercise of the statutory authority to select sites in other cases. They are set forth to help demonstrate that, in the face of them, the selection here cannot be classed as "capricious and arbitrary," under any appropriate definition of those words.

[16] "For First Choice I recommend that the present government-owned site be retained and that the adjoining property, Site 2 offered by H. Bermermann be purchased for $15,000, and that a counter offer be made to the owner of Site 3, Ella M. Drum to purchase this site for $600.

"This recommendation is made because it is believed that the present location is the most outstanding site in this city, and because of the numerous limitations on all of the other competing sites which would prevent an advantageous or desirable transaction.

"For Second Choice I have selected Site No. 1, the city-owned park, which could be developed into an attractive setting for the new building, and which could no doubt be secured in an exchange resulting in mutual benefit to the city and Government. The bid submitted by the City is not intended to be a final offer, and it is expected that after a review of the facts by the Site Committee a counter-offer could be made with respect to a definite area of about 175′ x 215′ within the park grounds and with respect to improvements in surrounding

mate of divided community sentiment, with apparent community preference for the park site, indicates the absence of capriciousness and arbitrariness in the Government's final selection of the park site.[17] The popular referendum vote of 1612 to 1344 in favor of the transfer of the park site by the City to the Federal Government, in exchange for the Government's transfer of its present post office site to the City, confirms his estimate. These federal officials had the right, if not the obligation, to consider at this time the necessity of disposing of the present post office site and of the single-purpose governmental building thereon. That issue inevitably would confront the Government at some time if a new site were chosen. The opportunity to exchange or sell the present site to the City in connection with the acquisition of the park site for a new post office was, therefore, a reasonable rather than a capricious consideration.

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approaches, removal of trees and fountain, and demolition of present city building. The mayor and city council verbally agreed to favor any reasonable counter-offer to be made by the Government. It is my opinion that the government-owned site is valued at approximately $225 per front foot, whereas the park site has a value of about $100 per front foot, and this must be taken into consideration in submitting a counter-offer. The question of the City Council's authority to make an exchange of this property is in dispute, but this could no doubt be settled by friendly condemnation proceedings, as the city officials are willing and desirous for the trade."

[17] ". . . the city park property, is actively favored by the City Council, and almost unanimously favored by the business men on Main Street. . . .

"Because of the divergence of opinion, the Chamber of Commerce in a recent meeting decided not to make any official comment as to a certain location. . . .

"The postmaster, who has no financial or personal interest in any of the locations, but who is conscientiously interested in civic development, regards the government-owned site as an outstanding location but recommends the city park as first choice because this trade would allow the city to retain a good improvement and allow the Federal Government to secure a site with attractive surroundings."

On the present record, the petitioner was entitled to a preliminary judgment of condemnation. The finding of the District Court on the second trial that the selection of the park site "amounts in law to an arbitrary and unnecessary act" appears, from the context, to have been a finding largely of the comparative undesirability and lack of necessity for the selection of that site and not to have been a finding that the selection had been made without adequate determining principle and without reason.[18] The comparative desirability and necessity for the site were matters for legislative or administrative determination rather than for a judicial finding.[19] Even if the word

[18] The District Court said:

"The right of plaintiff to condemn the land must stand or fall on the determination by this court of the question, Did the Acting Administrator of Federal Works Agency and the Postmaster General, under the circumstances here presented, act arbitrarily and capriciously in selecting the site—*was the act necessary?* The term 'arbitrarily and capriciously' has been defined to mean an act done 'without adequate determining principle; not founded in the nature of things; not done or acting according to reason or judgment'; *an unnecessary act.* . . . .

. . . . . .

"That this action was taken by the Joint Committee, with information in their possession with respect to availability of other sites which shows unquestionably that the action of the plaintiff is *unnecessary and the site selected is not now, nor was it when selected, the most desirable and available.*" (Italics supplied.) *United States* v. *Certain Land, Etc.*, 55 F. Supp. 555, 557, 563.

[19] *United States ex rel. T. V. A.* v. *Welch*, 327 U. S. 546; *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, 708–710; *Joslin Co.* v. *Providence*, 262 U. S. 668, 678; *Bragg* v. *Weaver*, 251 U. S. 57, 58; *Sears* v. *City of Akron*, 246 U. S. 242, 251; *Adirondack Ry.* v. *New York State*, 176 U. S. 335, 349; *Shoemaker* v. *United States*, 147 U. S. 282, 298; *Boom Co.* v. *Patterson*, 98 U. S. 403, 406. See also: "The federal statute . . . does not require proof of 'necessity,' but makes that question depend solely on the 'opinion' of the federal officer. It is controlling here." *United States* v. *Montana*, 134 F. 2d 194, 197, cert. denied, 319 U. S. 772.

"arbitrary," as used by the District Court, was intended by it to have the ordinary meaning which that word has when used alone, we are unable to conclude on the record before us that the selection of the park site for a post office in Cape Girardeau was, as a matter of law, capricious and arbitrary in any sense that, under any construction of the Acts before us, would invalidate the selection here made.

The judgment of the Circuit Court of Appeals, therefore, is reversed and the cause remanded to the District Court for further proceedings consistent with this opinion.

Reversed.

MR. JUSTICE DOUGLAS concurs in the result and substantially agrees with the opinion of the Court. But he reserves judgment as to the circumstances under which authority to condemn land owned by a city or a state should be inferred from a general condemnation statute, if the local government challenged the taking.

Counsel for Parties.

FREEMAN, TRUSTEE, *v.* HEWIT, DIRECTOR OF GROSS INCOME TAX DIVISION.

APPEAL FROM THE SUPREME COURT OF INDIANA.

No. 3. Argued November 8, 1944. Reargued October 14, 1946.—Decided December 16, 1946.

A trustee of an estate created by the will of a decedent domiciled in Indiana at the time of his death instructed his Indiana broker to arrange for the sale of certain securities at stated prices. They were offered for sale on the New York Stock Exchange through the Indiana broker's New York correspondents. When a purchaser was found, the trustee delivered the securities in Indiana to his Indiana broker, who mailed them to New York. The New York brokers made delivery, received the purchase price, and remitted the proceeds (less expense and commission) to the Indiana broker, who delivered the proceeds (less commission) to the trustee in Indiana. *Held:*

1. The Indiana Gross Income Tax Act of 1933 cannot constitutionally be applied to the gross receipts from these sales, since it would constitute a direct burden on interstate commerce in violation of the Commerce Clause. Pp. 252–259.

2. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33; *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459; *Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, differentiated. Pp. 257, 258.

3. The Commerce Clause protects interstate sales of intangibles as well as interstate sales of tangibles. P. 258.

221 Ind. 675, 51 N. E. 2d 6, reversed.

Appeal from a decision of the Supreme Court of Indiana sustaining application of the Indiana Gross Income Tax Act of 1933 to gross receipts from interstate sales of securities. 221 Ind. 675, 51 N. E. 2d 6. *Reversed*, p. 259.

Gath P. Freeman argued the cause for appellant and filed a brief on the original argument, and also filed a brief on the reargument.

Harry T. Ice reargued the cause and filed a brief for appellant.

Winslow Van Horne, Deputy Attorney General of Indiana, argued the cause on the original argument for appellee. With him on the brief were *James A. Emmert,* Attorney General, *John J. McShane,* Deputy Attorney General, *Robert Hollowell, Jr., Cleon H. Foust, John H. Fetterhoff* and *Fred C. McClurg.*

John J. McShane, Deputy Attorney General, reargued the cause for appellee. With him on the brief were *James A. Emmert,* Attorney General, *John H. Fetterhoff* and *Fred C. McClurg,* Deputy Attorneys General.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case presents another phase of the Indiana Gross Income Tax Act of 1933, which has been before this Court in a series of cases beginning with *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307. The Act imposes a tax upon "the receipt of the entire gross income" of residents and domiciliaries of Indiana but excepts from its scope "such gross income as is derived from business conducted in commerce between this state and other states of the United States . . . to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States." Indiana Laws 1933, pp. 388, 392, as amended, Laws 1937, pp. 611, 615, Burns' Ind. Stat. Anno. § 64–2601 *et seq.*

Appellant's predecessor, domiciled in Indiana, was trustee of an estate created by the will of a decedent domiciled in Indiana at the time of his death. During 1940, the trustee instructed his Indiana broker to arrange for the sale at stated prices of securities forming part of the trust estate. Through the broker's New York correspondents the securities were offered for sale on the New York Stock Exchange. When a purchaser was found, the New York brokers

notified the Indiana broker who in turn informed the trustee, and the latter brought the securities to his broker for mailing to New York. Upon their delivery to the purchasers, the New York brokers received the purchase price, which, after deducting expenses and commission, they transmitted to the Indiana broker. The latter delivered the proceeds less his commission to the trustee. On the gross receipts of these sales, amounting to $65,214.20, Indiana, under the Act of 1933, imposed a tax of 1%. Having paid the tax under protest, the trustee brought this suit for its recovery. The Supreme Court of Indiana, reversing a court of first instance, sustained the tax on the ground that the *situs* of the securities was in Indiana. 221 Ind. 675, 51 N. E. 2d 6. The case is here on appeal under § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a), and has had the consideration which two arguments afford.

The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and the constituent States.[1]

[1] Compare Report of the (Australian) Royal Commission on the Constitution (1929) pp. 260, 322–24, and Report of the (Canadian) Royal Commission on Dominion-Provincial Relations (1940), bk. II, pp. 62–67, 111–21, 150–62, 216–19. See Australia, Act No. 1, 1946, repealing Act No. 20, 1942, and Act No. 43, 1942; *South Australia* v. *Commonwealth*, 65 C. L. R. 373; also Proposals of the Government of Canada, Dominion-Provincial Conference on Reconstruction, pp. 47–49; Proceedings of the Dominion-Provincial Conference (1945) *passim*, particularly the statement of Prime Minister Mackenzie King, p. 388, and the discussion following. And see Maxwell, The Fiscal Impact of Federalism in the United States (1946) cc. II, XIII, XIV.

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The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts.

Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761; *Morgan* v. *Virginia,* 328 U. S. 373. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.

These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it

is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense. But, in the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State. *The Minnesota Rate Cases,* 230 U. S. 352, 402 *et seq.; S. C. Hwy. Dept.* v. *Barnwell Bros.,* 303 U. S. 177; *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 209–12. State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. But revenue serves as well no matter what its source. To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function. Moreover, the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. The task of scrutinizing is a task of drawing lines. This is the historic duty of the

Court so long as Congress does not undertake to make specific arrangements between the National Government and the States in regard to revenues from interstate commerce. See Act of July 3, 1944, 58 Stat. 723; H. Doc. 141, 79th Cong., 1st Sess., "Multiple Taxation of Air Commerce"; and compare 54 Stat. 1059, 4 U. S. C. § 13 *et seq.* (permission to States to extend taxing power to Federal areas). Considerations of proximity and degree are here, as so often in the law, decisive.

It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across States lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce. The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied. Language alters, and there is a fashion in judicial writing as in other things.

This case, like *Adams Mfg. Co.* v. *Storen, supra,* involves a tax imposed by the State of the seller on the proceeds of interstate sales. To extract a fair tithe from interstate commerce for the local protection afforded to it, a seller State need not impose the kind of tax which Indiana here levied. As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale. Thus, it can tax local manufacture even if the products are destined for other States. For some purposes, manufacture and the shipment of its products beyond a State may be looked upon as an integral transaction. But when accommodation must be made between state and national interests, manufacture within a State, though destined for shipment outside, is not a seamless web so as to prevent a State from giving the manufacturing part detached relevance for purposes of local taxation. *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165. It can impose license taxes on domestic and foreign corporations who would do business in the State, *Cheney Brothers Co.* v. *Massachusetts,* 246 U. S. 147; *St. Louis S. W. Ry.* v. *Arkansas,* 235 U. S. 350, 364, though it cannot, even under the guise of such excises, "hamper" interstate commerce. *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56 (particularly White, J. concurring at p. 63); Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) 118–23, 128–31. It can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce. *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321; *cf. Atlantic Coast Line* v. *Daughton,* 262 U. S. 413. And where, as in this case, the commodities subsequently sold interstate are securities, they can be reached by a property tax by the State of domicil of the owner. *Virginia* v. *Imperial*

Sales Co., 293 U. S. 15, 19; and see *Citizens National Bank* v. *Durr*, 257 U. S. 99.

These illustrative instances show that a seller State has various means of obtaining legitimate contribution to the costs of its government, without imposing a direct tax on interstate sales. While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause.

It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the

fact that there is interference by a State with the freedom of interstate commerce. Such a tax by the seller State alone must be judged burdensome in the context of the circumstances in which the tax takes effect. Trade being a sensitive plant, a direct tax upon it to some extent at least deters trade even if its effect is not precisely calculable. Many States, for instance, impose taxes on the consumption of goods, and such taxes have been sustained regardless of the extra-State origin of the goods, or whether a tax on their sale had been imposed by the seller State. Such potential taxation by consumer States is but one factor pointing to the deterrent effect on commerce by a superimposed gross receipts tax.

It has been urged that the force of the decision in the *Adams* case has been sapped by *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33. The decision in *McGoldrick* v. *Berwind-White* was found not to impinge upon "the rationale of the *Adams Manufacturing Co.* case," and the tax was sustained because it was "conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption." 309 U. S. at 58. Compare *McLeod* v. *Dilworth Co.*, 322 U. S. 327. Taxes which have the same effect as consumption taxes are properly differentiated from a direct imposition on interstate commerce, such as was before the Court in the *Adams* case and is now before us. The tax on the sale itself cannot be differentiated from a direct unapportioned tax on gross receipts which has been definitely held beyond the State taxing power ever since *Fargo* v. *Michigan*, 121 U. S. 230, and *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326. See also, *e. g.*, *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217; *Kansas City, Ft. S. & M. R. Co.* v. *Kansas*, 240 U. S. 227, 231; *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90, 94; and compare *Wallace* v. *Hines*, 253 U. S. 66. For not even an "internal regulation" by a

State will be allowed if it directly affects interstate commerce. *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 494.

Nor is *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, or *Harvester Co.* v. *Dept. of Treasury,* 322 U. S. 340, any justification for the present tax. The *American Mfg. Co.* case involved an imposition by St. Louis of a license fee upon the conduct of manufacturing within that city. It has long been settled that a State can levy such an occupation tax graduated according to the volume of manufacture. In that case, to lighten the manufacturer's burden, the imposition of the occupation tax was made contingent upon the actual sale of the goods locally manufactured. Sales in St. Louis of goods made elsewhere were not taken into account in measuring the license fee. That tax, then, unlike this, was not in fact a tax on gross receipts. Cf. *Cornell* v. *Coyne,* 192 U. S. 418. And, if words are to correspond to things, the tax now here is not "a tax on the transfer of property" within the State, which was the basis for sustaining the tax in *Harvester Co.* v. *Dept. of Treasury, supra,* at 348.

There remains only the claim that an interstate sale of intangibles differs from an interstate sale of tangibles in respects material to the issue in this case. It was by this distinction that the Supreme Court of Indiana sought to escape the authority of *Adams Mfg. Co.* v. *Storen, supra.* Latin tags like *mobilia sequuntur personam* often do service for legal analysis, but they ought not to confound constitutional issues. What Mr. Justice Holmes said about that phrase is relevant here. "It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam.* But being a fiction it is not allowed to obscure the facts, when the facts become important." *Blackstone* v. *Miller,* 188 U. S. 189, 204.

Of course this is an interstate sale. And constitutionally it is commerce no less and no different because the subject was pieces of paper worth $65,214.20, rather than machines.

Reversed.

MR. JUSTICE BLACK dissents.

MR. JUSTICE RUTLEDGE, concurring.

This is a case in which the grounding of the decision is more important than the decision itself. Whether the Court now intends simply to qualify or to repudiate entirely, except in result, *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, I am unable to determine from its opinion. But that one or the other consequence is intended seems obvious from its refusal to rest the present decision squarely on that case, together with the wholly different foundation on which it now relies. In either event, the matter is important and calls for discussion.

I.

The *Adams* case held the Indiana tax now in issue to be invalid when applied, *without apportionment*, to gross receipts derived from interstate sales of goods made by Indiana manufacturers who sold and shipped them to purchasers in other states. "The vice of the statute" as thus applied, it was held, was "that the tax includes in its measure, *without apportionment*, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid *to the fullest extent* by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to *the risk of a double tax burden* to which intrastate commerce is

not exposed, and which the commerce clause forbids." (Emphasis added.) 304 U. S. 307, 311.[1]

Today's opinion refuses to rest squarely on the *Adams* case, although that case would be completely controlling if no change in the law were intended. No basis for distinguishing the cases on the facts or the ultimate questions is found or stated. The Court takes them as identical.[2] Yet it places no emphasis upon apportionment, the absence of which the *Adams* opinion held crucial. The Court also puts to one side as irrelevant the factor there most stressed, namely, the danger of multiple taxation, that is, of similar taxation by other states, if the Indiana tax should be upheld in the attempted application.

Those matters were the very essence of the *Adams* decision. They were in its words "the vice" of the statute as applied. The *Adams* opinion gives no reason for believing that the application of the tax would not have been sustained if either of the two elements vitiating it had been absent. On the contrary, the fair, indeed the necessary, inference from the language and reasons given is that the tax would not have been voided if there had been no danger of multiple state taxation or if the tax had been apportioned so as to eliminate that risk. Moreover those

[1] The Court added: "We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, § 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce." 304 U. S. 307, 311–312. Cf. notes 5 and 16.

[2] The only factual difference is that here the sales were of securities, there of goods. It was this upon which Indiana has relied to distinguish the *Adams* case, asserting originally that it gave domiciliary foundation for sustaining the tax. This claim disappeared, in effect, at the second oral argument, and the Court does not rest on it. I agree that, for present purposes, sales of intangibles should be treated identically with sales of goods.

groundings were strictly in accord with long lines of previous decisions rendered here,[3] were intended to conform to them and to preserve them unimpaired.

Yet now they are put to one side, either as irrelevant or as not controlling and therefore presumably as insufficient,[4] in favor of another rationalization which ignores them completely. Shortly, this is, in reiterated forms, that the tax as applied is laid "directly on" interstate commerce, is a levy "on the very sale" or "the very process" of such commerce, is therefore and solely thereby a "burden" on it, and consequently is an exaction the commerce clause forbids. What outlaws it is neither comparative disadvantage with local trade nor any actual or probable clogging or impeding effect in fact.[5] It is simply the "direct" bearing and "incidence" of the tax on interstate commerce and this alone. Stripped of any discriminatory element and of any actual or probable tendency to block or impede the commerce in fact, this "direct incidence" is itself enough without more to invalidate the tax, although it is one of general application singling out the commerce neither for separate nor for distinct or invidious treatment.

If this ever was the law, it has not been such for many years. In a sense it is a reversion to ideas once preva-

[3] See, *e. g. Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450; *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335. And see especially discussion in *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 255–257.

[4] Compare the opinion of MR. JUSTICE FRANKFURTER in *Northwest Airlines* v. *Minnesota,* 322 U. S. 292.

[5] As the Court says, "An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce." The only "interference" held to be important is the direct incidence of the tax on the commerce, not the double burden or risk of it. Cf. notes 1 and 16.

lent, but long since repudiated,[6] about the "exclusiveness" of Congress' power over interstate commerce which, if now resurrected for general application, will strike down state taxes in a great variety of forms sustained consistently of late. Not since *Cooley* v. *Board of Wardens,* 12 How. 299, has the notion prevailed that the mere existence of power in Congress to regulate commerce excludes the states from exacting revenue from it through exercise of their powers of taxation.[7] Yet if a general tax, applying to all commerce alike, is to be outlawed, regardless of discriminatory consequences or actual or probable impeding effect in fact, simply because it bears "directly" on the commerce and for no other reason, not only will there be a resurrection of Marshall's "exclusive" idea, never prevailing after the *Cooley* case. The effect will be to knock down many types of state taxes held valid since that landmark decision.[8]

That consequence must follow if the presently asserted basis for decision is to be taken as a principle fit for general application and intended to be so used. We cannot assume that the Court intends it to be used otherwise, for that would be to make of it an arbitrary formula applied to dispose of the present case alone and having no validity for any other situation. But the ground relied upon is broad enough to include many other types of situation and of tax, and cannot be restricted logically or in reason to these narrow facts. If discrimination and real risk, in

[6] See *e. g.* Ribble, State and National Power Over Commerce (1937) 204; Dowling, Interstate Commerce and State Power (1940) 27 Va. L. Rev. 1, 3–10. See also Frankfurter, The Commerce Clause (1937) 53: "Had Marshall's theory of the 'dormant' commerce power prevailed, the taxable resources of the states would have been greatly confined. The full implications of his theory, if logically pursued, might well have profoundly altered the relations between the states and the central government."

[7] See note 6. See also Wechsler, Stone and the Constitution (1946) 46 Col. L. Rev. 764, 785, quoted in note 10 *infra.*

[8] Cf. text *infra* at notes 14 to 16, also 21, and authorities cited.

the sense of practical effect to clog or impede trade, are irrelevant to the validity of this type of tax, they are equally irrelevant to many others, unless sheer fiction and arbitrary distinction based on inconsequential factors are to be controlling. If the grounding which disregards them is adequate for disposing of this case, it is adequate also for disposing of many others involving it in which the Court has been at great pains to rest on other factors, unnecessarily it now would seem.

It will be appropriate, before turning to further consideration of the more pertinent decisions, to note the only basis upon which the Court grounds its ruling that "direct" state taxes on "the very process" of interstate commerce are void. This is because, in the words of the opinion, the commerce clause "by its own force created an area of trade free from interference by the States." Although this is stated as grounding for the long-established conclusion that even without implementing legislation by Congress the clause is a limitation upon state power, it also is quite obviously the foundation of the further conclusion that "direct" taxes laid by the states within that area are outlawed regardless of any other factor than their direct incidence upon it.

II.

I agree that the commerce clause "of its own force" places restrictions upon state power to tax, as well as to regulate, interstate commerce. This has been held through various lines of decision extending back to *Gibbons* v. *Ogden*, 9 Wheat. 1, some of them unbroken.[9] I also agree that this construction is consonant with the great purpose of the commerce clause to maintain our dis-

[9] See *e. g.*, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325; *Nippert* v. *Richmond*, 327 U. S. 416, and authorities cited.

tinctively national trade free from state restrictions and barriers against it which the clause was adopted to prevent. But, at any rate since *Cooley* v. *Board of Wardens, supra,* this has not meant that the clause was intended to or could secure "by its own force" that vast area of commercial activity wholly free from "interference," that is, from taxation and regulation, by the states.[10] Nor for many years has it meant that the field of interstate commerce is to be free from such "interference," simply because it is "direct" or has immediate incidence upon it.[11] True, language frequently appears in the cases, especially the earlier ones, to the effect that "direct" taxation and regulation by the states are forbidden. But apart from its inconsistency with both language and results in other cases,[12] in most of those where it has appeared there were other invalidating factors, such as singling out the commerce for special treatment, other types of discrimination, or failure to

[10] See Ribble, *supra,* at 72 ff.; Frankfurter, *supra,* at 24, 56; Wechsler, Stone and the Constitution (1946) 46 Col. L. Rev. 764, 785: "It will summarize his basic conception to say that as the issues were framed in the long debate the position taken by the Court in *Cooley* v. *Board of Wardens* comes closest to according with his thought."

[11] "Experience has taught that the opposing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought." *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 259. See also the dissenting opinion of Mr. Justice Stone in *Di Santo* v. *Pennsylvania,* 273 U. S. 34, 44 (overruled by *California* v. *Thompson,* 313 U. S. 109), "In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."

[12] See, *e. g., McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434; *Nippert* v. *Richmond,* 327 U. S. 416.

apportion where multiple state taxation could result if the tax were sustained.[13]

The fact is that "direct incidence" of a state tax or regulation, apart from the presence of such a factor, has long

[13] Gross receipts taxes which have been sustained fall into the following groups: (a) Those which were fairly apportioned. See, *e. g., Illinois Cent. R.* v. *Minnesota,* 309 U. S. 157; *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18; *Wisconsin & Michigan Ry.* v. *Powers,* 191 U. S. 379; *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335; *Ficklen* v. *Taxing District,* 145 U. S. 1. (b) Those which have been justified on a "local incidence" theory. See, *e. g., Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, with which compare *Fisher's Blend Station* v. *Tax Comm'n,* 297 U. S. 650; *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33; *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459. See also cases cited in note 21. In many cases apportioned gross receipts taxes have been sustained not on the ground that they were apportioned but that they were local in nature. See, *e. g., Maine* v. *Grand Trunk Ry.,* 142 U. S. 217; *New York, L. E. & W. R. Co.* v. *Pennsylvania,* 158 U. S. 431; *Wisconsin & Michigan Ry.* v. *Powers, supra; U. S. Express Co.* v. *Minnesota, supra.*

Gross receipts taxes which have not been sustained fall into the following groups: (a) Those which were not fairly apportioned. See, *e. g., Oklahoma* v. *Wells Fargo Co.,* 223 U. S. 298. (b) Those which were not apportioned and subjected interstate commerce to the risk of multiple taxation. *Philadelphia & So. S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Ratterman* v. *Western Union Telegraph Co.,* 127 U. S. 411; *Western Union Telegraph Co.* v. *Alabama,* 132 U. S. 472; *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434, 439. Cf. *Fargo* v. *Michigan,* 121 U. S. 230, as explained in *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 256. (c) Those in which there was a discriminatory element in that they were directed exclusively "at transportation and communication," Lockhart, Gross Receipts Taxes on Transportation (1943) 57 Harv. L. Rev. 40, 65–66. *Galveston, H. & S. A. Ry.* v. *Texas,* 210 U. S. 217, and cf. *New Jersey Tel. Co.* v. *Tax Board,* 280 U. S. 338. But see *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U. S. 362. In both the *Galveston* and *New Jersey Telephone Company* cases, although the taxable events all occurred within the taxing state, the possibility of multiple taxation was nevertheless present. (d) Those in which there

since been discarded as being in itself sufficient to outlaw state legislation. "Local" regulations, under the *Cooley* formula, bear directly on the commerce itself.[14] But they are not outlawed for that reason. Calling them "incidental," where this is done, does not make them "indirect," except in judicial perspective. Police regulations bear no more indirectly or remotely upon the interstate commerce which must observe them than upon the local commerce falling equally within their incidence.

Again, an apportioned tax on interstate commerce is a "direct" tax bearing immediately upon it in incidence. But such a tax is not for that reason invalid. Decisions have sustained such taxes repeatedly, regardless of their direct bearing, provided the apportionment were fairly made and no other vitiating element were present, such as those above mentioned.[15] It was this fact, without question, which the Court had in mind in the *Adams* case, when it carefully saved from its ban any question concerning such a tax as Indiana's if properly apportioned in a situation like the ones presented there and now.[16]

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was no discrimination but a possible multiple burden. *Fisher's Blend Station* v. *Tax Comm'n, supra,* as explained in *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. at 260–261. (e) Those in which there was no discrimination, no apportionment and no possibility of multiple burden. *Puget Sound Stevedoring Co.* v. *Tax Commission,* 302 U. S. 90. This decision, it may be noted, might have been rested upon the clause of the Constitution forbidding the states to tax exports. Cf. *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69.

[14] Cf. *California* v. *Thompson,* 313 U. S. 109; *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202; *Robertson* v. *California,* 328 U. S. 440. Indeed, sometimes police regulations bear more heavily on interstate commerce. Cf. *Robertson* v. *California, supra,* and cases cited at note 28 therein.

[15] See cases cited in note 13, *supra.*

[16] The Court said, in answer to the Indiana Supreme Court's emphasis upon the "generality and nondiscriminatory character" of the levy, "but it is settled that this will not save the tax if it directly burdens interstate commerce." 304 U. S. at 312; cf. note 1, *supra.* The same statement is now made in this case not to support the

III.

The language purporting to outlaw "direct" taxes because they are direct has appeared more frequently perhaps in relation to gross receipts taxes than any other, including both "direct" taxes, apportioned and unapportioned, and others considered "indirect" because purporting to be laid not "on the commerce itself" but upon some "local incident." We have recently held that a tax having effects forbidden by the commerce clause will not be saved merely because it is cast in terms of bearing upon some "local incident." [17] As we then said, all interstate commerce takes place within the states and the consequences forbidden by the commerce clause cannot be achieved legally simply by the device of hooking the tax or other forbidden regulation to some selected "local incident." That such a factor may be chosen for bearing the "direct"

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conclusion that these features cannot save a tax where the risk of multiple state taxation would outlaw it, as in the *Adams* case, but to support the vastly broader grounding that the tax is invalid simply because it is "direct" in its incidence. The quoted *Adams* statement had no such significance, as appears not only from its immediate context but also from the further statement, made apropos of *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, in an effort to distinguish it: "It is because the tax, forbidden as to interstate commerce, reaches *indiscriminately and without apportionment*, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate." (Emphasis added.) 304 U. S. at 314. Not "direct" taxation simply, but taxing the entire proceeds without apportionment in the face of threatened or possible multiple state taxation was the "direct burden" found and outlawed in the *Adams* case.

[17] "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce." *Nippert* v. *Richmond*, 327 U. S. 416, 423.

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incidence of the tax may be a consideration to be taken into account in determining its validity. But it cannot validate a tax or regulation which produces the forbidden consequences, any more than a "direct tax" which does not produce them can be outlawed because it is direct. Not "directness" or "immediacy" of incidence *per se,* whether "upon the commerce itself" or upon a "local incident," is the outlawing factor, but whether the tax, regardless of the special point of incidence, has the consequences for interstate trade intended to be outlawed by the commerce clause.

The difficulty of any other rule or approach is disclosed most clearly perhaps by contrasting the decision in *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, with the *Adams* decision and this one, in both of which efforts are made, unsuccessfully in my opinion, to distinguish the *American* case. There the tax was laid upon the manufacture, locally done, of goods sold locally and out of state. But the tax was "measured by" the gross receipts from sales of the goods manufactured, including those sold interstate.[18]

[18] To say that this was not in substance a tax on gross receipts, because sales in St. Louis *of goods made elsewhere* were not taken into account in measuring the tax, is simply to ignore the fact that the tax did include all interstate sales of goods manufactured and all returns from them. That the local sales of goods brought in from other states were excepted does not mean either that those sales were interstate transactions (which it was not necessary to decide in view of their exemption) or that the sales out of state included in the measure were not interstate transactions; or that they were not, in substantial effect, taxed upon their gross returns by the measure, notwithstanding the tax was made legally to fall upon the privilege of manufacturing.

The *Adams* decision purported to distinguish *American Mfg. Co.* v. *St. Louis* simply on the ground that the tax was not one laid on the taxpayer's sales or the income derived from them, but was a license fee for engaging in the manufacture which could be measured "by the sales price of the goods produced rather than by their value at the date of manufacture."

A tax upon a local privilege *measured by* the volume of gross receipts from both local and interstate trade [19] would seem to have, in practical effect, the same consequences for blocking or impeding the commerce as one laid "directly" upon it, in any situation where no multiple levy is made, likewise in any where more than one state might find such a local privilege for pegging the tax.[20] And a tax upon gross receipts "in lieu of" property or other taxes [21] cannot be said either to be less "direct" in its incidence upon the commerce than the application of the Indiana tax now in issue or to afford protection against multiple levies the risk of which was held in *Adams Mfg. Co.* v. *Storen* to make the Indiana tax inherently vicious in that application.[22]

Unless we are to return to the formalism of another day, neither the "directness" of the incidence of a tax "upon the commerce itself" nor the fact that its incidence is manipulated to rest upon some "local incident" of the interstate transaction can be used as a criterion or, many times, as a consideration of first importance in determining the validity of a state tax bearing upon or affecting interstate commerce. Not the words "direct" and "indirect" or "local incident" can fulfill the function of judgment in deciding

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[19] In addition to *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, see *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165.

[20] Cf. *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 227; Morrison, State Taxation of Interstate Commerce (1942) 36 Ill. L. Rev. 727, 738.

[21] See *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688; *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335; *Pullman Co.* v. *Richardson,* 261 U. S. 330. See also discussion in *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 226–227.

[22] This is true, though concededly such a tax might work to prevent cumulative or higher tax burdens imposed by a single taxing state. Cf. Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication (1943) 57 Harv. L. Rev. 40.

whether the tax brings the forbidden results. See the dissenting opinion of Mr. Justice Stone in *Di Santo* v. *Pennsylvania,* 273 U. S. 34, 44, quoted in note 11. That can be done only by taking account of the specific effects of state legislation the clause was intended to outlaw, and of the consequences actual or probable of the legislation called in question to create them.

IV.

Judgments of this character and magnitude cannot be made by labels or formulae. They require much more than pointing to a word. It is for this reason that increasingly with the years emphasis has been placed upon practical consequences and effects, either actual or threatened, of questioned legislation to block or impede interstate commerce or place it at practical disadvantage with the local trade.[23] Formulae and adjectives have been retained at times in intermixture with the effective practical considerations. But proportionately the stress upon them has been greatly reduced, until the present decision; and the trend of recent decisions to sustain state taxes formerly regarded as invalid has been due in large part to this fact.

The commerce clause was not designed or intended to outlaw all state taxes bearing "directly" on interstate commerce. Its design was only to exclude those having the effects to block or impede it which called it and the Constitution itself into being. Not all state taxes, nor indeed all *direct* state taxes, can be said to produce those effects. On the other hand, many "indirect" forms of state taxation, that is, "indirect" as related to "incidence," do in fact produce such consequences and for that reason are invalid.

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[23] See *Nippert* v. *Richmond,* 327 U. S. 416; *Best & Co.* v. *Maxwell,* 311 U. S. 454. Cf. *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408. See also Wechsler, Stone and the Constitution (1946) 46 Col. L. Rev. 764, 785–787.

It is for this reason that selection of a "local incident" for hanging the tax will not save it, if also the exaction does not in fact avoid the outlawed interferences with the free flow of commerce. Selection of a local incident for pegging the tax has two functions relevant to determination of its validity. One is to make plain that the state has sufficient factual connections with the transaction to comply with due process requirements.[24] The other is to act as a safeguard, to some extent, against repetition of the same or a similar tax by another state.[25] These matters are often interrelated, cf. *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, though in other situations they may be entirely separate. The important difference is between situations where it is essential to show minimal factual connections of the transaction with the taxing state in order to sustain the levy as against due process objections for "want of jurisdiction to tax"; [26] and other situations where, although such connections clearly are present, the necessity is for showing that the tax, if sustained, will create a multiple tax load or other consequences having the forbidden effects.

This case is not one of the former sort. The transactions were as closely connected in fact with Indiana as with any other state.[27] But the case is one of the latter

[24] See dissenting opinion in *McLeod* v. *Dilworth Co.*, 322 U. S. 327, at 356–357. See also *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444–445.

[25] See McNamara, Jurisdictional and Interstate Commerce Problems in the Imposition of Excises on Sales (1941) 8 Law & Contemp. Prob. 482, 491. Compare the discussion of a proposed federal statute to give the buyer's state the right to impose nondiscriminatory sales taxes. Proc. 27th Ann. Conf. Nat. Tax Assn. (1934) 136–160. See also Perkins, The Sales Tax and Transactions in Interstate Commerce (1934) 12 N. C. L. Rev. 99.

[26] Cf. note 25.

[27] Indiana was the state by whose law the trust was created. It was the *situs* of the trust's administration. It was the place where the

type, that is, where, despite those connections, there were equally close and important ones in another state, New York; and therefore, as the *Adams* case declared, the risk of multiple state taxation would be incurred, unless one or the other or both states were forbidden to tax the transaction as such, or were required to apportion the tax. Not the "directness" of the tax in its bearing upon the commerce, but this danger is the crucial issue in this case, as it was in the *Adams* case. In other words, but for the possibility that more states than one would levy the same or a similar tax, such an application as was made of Indiana's tax in the *Adams* case and here would be no more burdensome or objectionable than other applications of the same tax this Court has sustained or of other taxes likewise held valid.[28]

V.

This Court in recent years has gone far in sustaining state taxes laid upon local incidents of interstate transactions by both the state of origin and the state of the mar-

securities were kept prior to mailing for delivery in accordance with the terms of their sale. Cf. *Curry* v. *McCanless,* 307 U. S. 357. The directions for sale were given there. The proceeds were forwarded to Indiana and there received into the corpus of the trust. The state's connections with the trust, and with the property which was the subject of the sale, more than satisfy any due process requirement for exercise of the power to tax either the property or transactions relating to its disposition taking place as largely within Indiana's borders as did the sales in this case.

[28] The cases, aside from *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, which involve the Indiana gross receipts tax are: *Department of Treasury* v. *Wood Preserving Corp.,* 313 U. S. 62; *Department of Treasury* v. *Ingram-Richardson Mfg. Co.,* 313 U. S. 252; *International Harvester Co.* v. *Dept. of Treasury,* 322 U. S. 340; *Ford Motor Co.* v. *Dept. of Treasury,* 323 U. S. 459. See also *General Trading Co.* v. *State Tax Commission,* 322 U. S. 335; cf. *Northwest Airlines* v. *Minnesota,* 322 U. S. 292.

ket.[29] Perhaps it may be said, in view of such decisions, that it has more clearly sustained such taxes at the marketing end than by the state of origin,[30] although this may be matter for debate. In any event, the factual connections of the taxing state with the interstate transaction in the cases where the tax has been sustained hardly can be regarded as greater or more important than those of Indiana with the transactions involved in the *Adams* case and here. Nor could it be shown in fact that in some of them, at any rate, the danger of multiple state taxation was appreciably less, if it be assumed that the forwarding state has the same power to tax the transaction, by pegging the tax upon a local incident, as has been recognized for the state of market.

Such taxes, whether in one state or the other, may in fact block or impede interstate commerce as much as, or more than, one placed directly upon the commerce itself. They have been sustained, nevertheless, not simply because of their bearing upon a local incident, but because in the circumstances of their application they were considered to have neither discriminatory effects upon interstate trade as compared with local commerce nor to impose upon it the blocking or impeding effects which the commerce clause was taken to forbid.[31]

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[29] See, *e. g.*, *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *General Trading Co.* v. *Tax Commission*, 322 U. S. 335; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604; *Department of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252.

[30] Compare *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, with *McLeod* v. *Dilworth Co.*, 322 U. S. 327. See Powell, New Light on Gross Receipts Taxes (1940) 53 Harv. L. Rev. 909.

[31] See *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 58, quoted *infra* Part VI.

This in my judgment is the appropriate criterion to be applied, rather than any mere question of "direct" or "indirect" incidence upon a "local incident." The absence of any such connection with the taxing state is highly material.[32] Its presence cannot be the controlling consideration for validating the tax. *Nippert* v. *Richmond*, 327 U. S. 416. In this view it would seem clear that the validity of such a tax as Indiana's, applied to situations like those presented in the *Adams* case and now, should be determined by reference not merely to the "direct incidence" of the tax, but by whether those forbidden consequences would be produced, either through the actual incidence of multiple taxes laid by different states or by the threat of them, with resulting uncertainties producing the same impeding consequences.[33]

Thus, it is highly doubtful that the levy in this case, or in the *Adams* case, actually had any impeding effect whatever upon the transactions or the free flow interstate of such commerce.[34] But the *Adams* case found the impediment in the assumption that if one state could tax, so also could the other, and in that event, a double burden would result for interstate commerce not borne by local

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[32] As a matter of minimal due process requirements. Cf. text *infra* at notes 24 to 27.

[33] The danger of an impending burden or barrier from multiple state taxation could be real and substantial in a particular case if the threat of such taxation were actual or probable or if its threatened incidence were involved in such actual uncertainty that this uncertainty itself would constitute, in practical effect, a substantial clog.

[34] The Indiana tax was only one per cent of the proceeds of the sales. The record indicates, too, that the New York Stock Transfer tax was collected from the proceeds of the sale in New York. The amount of the tax was three cents per share sold for less than twenty dollars, and four cents per share sold for more than twenty dollars. Tax Law §§ 270, 270a; *O'Kane* v. *New York*, 283 N. Y. 439, 28 N. E. 2d 905. The tax did not apply to the transfer of bonds. Cf. Op. Atty. Gen. N. Y. 1939, p. 208.

trade. This danger, it was said, was inherent in the type of the tax, since it was not apportioned, and in consequence the tax as applied must fall.

The basic assumption was not true as a universally or even a generally resulting consequence, for two reasons. One is that it would not follow necessarily as a matter of fact that both states would tax or, if they did so, that the combined effects of the taxes would be either to clog or to impede the commerce.[35] The other, it no more follows, as a matter of law, that because one state may tax the other may do likewise.

The *Adams* decision did not take account of any difference, as regards the risk of multiple state taxation, between situations where the multiple burden would actually or probably be incurred in fact and others in which no such risk would be involved. It rather disregarded such differences, so that "the risk of a double tax burden" on which the Court relied to invalidate the levy was not one actually, probably, or even doubtfully imposed in fact by another state.[36] It rather was one which resulted only from an assumed, and an unexercised, power in that state to impose a similar tax.

The Court was not concerned with whether the forbidden consequences had been incurred in the particular situation or might not be incurred in others covered by its ruling. The motivating fear was more general. The

[35] Cf. note 31. Whether such a tax would in fact produce the forbidden results or not would depend upon the incidence or likelihood of the incidence of a like tax in the other, or another, jurisdiction having similar power. Frequently this likelihood will be, in fact, either nil or small.

[36] The opinion discloses no consideration of any question or suggestion whether a like or other tax had been or was likely to be imposed by the state of destination, or even that such a tax by that state was doubtfully incident. Such an inquiry would have been inconsistent with the Court's thesis.

ultimate risk which the Court sought to avoid was the danger that gross income or gross receipts tax legislation, without apportionment, might be widely adopted if the door were once opened and, if adopted and applied to interstate sales by all or many of the states, would result generally in bringing such sales within the incidence of multiple state taxation of that nature. Rather than incur this risk, with the anticipated consequent widespread creation of multiple levies, the Court in effect forestalled them at the source. Its action was prophylactic and the prophylaxis was made absolute.

By thus relieving interstate commerce from liability to pay taxes in either state, without any showing that both had laid them, the effect was, not simply to relieve that commerce from multiple burden, but to give it exemption from taxes all other trade must bear.[37] Local trade was thus placed at disadvantage with interstate trade, by the amount of the tax, and the commerce clause thereby became a refuge for tax exemption, not simply a means of protection against unequal or undue taxation. Certainly its object was not to create for interstate trade such a specially privileged position.

But the alternatives to such a ruling were not themselves free from difficulty. They may be stated shortly. But preliminarily I accept the view, frequently declared,[38] that a state runs afoul the commerce clause when it singles out interstate commerce for special taxation not applied to other trade or otherwise discriminates against it or treats it invidiously. Moreover, all other things being equal,

[37] It is assumed, of course, that a nondiscriminatory tax of general applicability laid by the taxing state would be involved.

[38] See *Best & Co.* v. *Maxwell,* 311 U. S. 454; *Hale* v. *Bimco Trading Co.,* 306 U. S. 375; *Guy* v. *Baltimore,* 100 U. S. 434; *Webber* v. *Virginia,* 103 U. S. 344; *Welton* v. *Missouri,* 91 U. S. 275; *Voight* v. *Wright,* 141 U. S. 62; *Brimmer* v. *Rebman,* 138 U. S. 78.

multiple state taxation of gross receipts, although by nondiscriminatory taxes of general applicability, does compel the latter to bear a heavier tax burden than local trade in either state. The cumulative tax burden is in effect discriminatory, involving in any practical view the exact effects of a single discriminatory tax. Although the difference in total tax load may not be sufficient actually to block or impede the free flow of interstate trade,[39] discrimination alone, without regard to showing of further consequences, has been held consistently to be sufficient for outlawing the tax.

This too I accept. For discrimination not only is ordinarily itself invidious treatment, but has an obvious tendency toward blocking or impeding the commerce, if not always the actual effect of doing so. Nor is the discriminatory tendency or effect lessened because it results from cumulation of tax burdens rather than from a single tax producing the same consequence. To allow both states to tax "to the fullest extent" would produce the invidious sort of barrier or impediment the commerce clause was designed to stop. But the bare unexercised power of another state to tax does not produce such results. It only opens the way for them to be produced. This danger is not fanciful but real, more especially in a time when new sources of revenue constantly are being sought. Accordingly, I agree that this door should not be opened.

But it is not necessary to go as far as the *Adams* case went, or as the decision now rendered goes, in order to prevent the anticipated deluge. There is no need to give interstate commerce a haven of refuge from taxation, albeit of gross receipts or from "direct" incidence, in order

[39] For a variety of reasons, among which might be the larger capacity of such trade to absorb the difference, by reason of greater volume, without sustaining loss of profit, in the particular sort of commerce or type of transaction. See also note 34.

to safeguard it from evils against which the commerce clause is designedly protective. Less broad and absolute alternatives are available and are adequate for the purpose of protection without creating the evils of total exemption.

The alternative methods available for avoiding the multiple state tax burden may now be stated. They are: (1) To apply the *Adams* ruling, stopping such taxes at the source, unless the tax is apportioned, thus eliminating the cumulative burdens; [40] (2) To rule that either the state of origin or the state of market, but not both, can levy the exaction; (3) To determine factually in each case whether application of the tax can be made by one state without incurring actual danger of its being made in another or the risk of real uncertainty whether in fact it will be so made.

The *Adams* solution is not unobjectionable, for reasons already set forth. To deprive either state, whether of origin or of market, of the power to lay the tax, permitting the other to do so, has the vice of allowing one state to tax but denying this power to the other when neither may be as much affected by the deprivation as would be the one allowed to tax and, in any event, both may have equal or substantial due process connections with the transaction. The solution by factual determination in particular cases of the actual or probable incidence of both taxes is open to two objections. One is that to some extent it would make the taxing power of one or both states depend upon whether the other had exercised, or probably would

[40] The *Adams* decision, of course, made no direct ruling upon an actual tax laid by the state of destination. But the basic premise of its rationalization would be altogether without substance if it were taken to mean that such a tax could be levied there without meeting the same barrier, and for the same reason, as the tax levied by Indiana, the state of origin, encountered.

exercise, the same power. The other would lie in the volume of litigation such a rule would incite and the difficulties, in some cases at least, of making the factual determination.

VI.

The problem of multiple state taxation, absent other factors making for prohibition, is therefore one of choosing among evils. There is no ideal solution. To leave the matter to Congress, allowing both states to tax "to the fullest extent" until it intervenes, would run counter not only to the long-established rules requiring apportionment where incidence of multiple taxes would be likely, but also in substance and effect to those forbidding discrimination, without the consent of Congress, cf. *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, as well as the long-settled rule that the clause is "of its own force" a prohibition upon the states. To require factual determination of forbidden effects in each case would be to invite costly litigation, make decision turn in some cases, perhaps many, on doubtful facts or conclusions, and encourage the enactment of legislation involving those consequences. The *Adams* ruling, as I have said, creates for many situations a tax refuge for interstate commerce and does this in both states.

As among the various possibilities, I think the solution most nearly in accord with the commerce clause, at once most consistent with its purpose and least objectionable for producing either evils it had no design to bring or practical difficulties in administration, would be to vest the power to tax in the state of the market, subject to power in the forwarding state also to tax by allowing credit to the full amount of any tax paid or due at the destination. This too is more nearly consonant with what the more recent decisions have allowed, if full account is taken of their effects.

In *McLeod* v. *Dilworth Co.*, 322 U. S. 327, 361, I have set forth the reasons leading to this conclusion.[41] It may be added that such a result would avoid altogether the undesirable features of factual determination in each case; would prevent the multiple and, in effect, discriminatory burden which would follow from allowing both states to tax until Congress should intervene; and would reduce by half, at least, the tax refuge created by the *Adams* ruling, without incurring other outlawed effects.

It is true this view logically would deny the state of origin power to tax, notwithstanding its adequate due process connections, except by giving credit for taxes due at the destination.[42] But the forwarding state has no greater power under the *Adams* ruling and none at all under the present one if it is to be applied consistently and, as I think, this can be taken to outlaw both unapportioned and apportioned taxes.

I have no doubt that under the law prevailing until now this tax would have been sustained, if apportioned, under the *Adams* decision and others.[43] Nor have I any question that such a tax laid by New York would be upheld under

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[41] "If in this case it were necessary to choose between the state of origin and that of market for the exercise of exclusive power to tax, or for requiring allowance of credit in order to avoid the cumulative burden, in my opinion the choice should lie in favor of the state of market rather than the state of origin. The former is the state where the goods must come in competition with those sold locally. It is the one where the burden of the tax necessarily will fall equally on both classes of trade. To choose the tax of the state of origin presents at least some possibilities that the burden it imposes on its local trade, with which the interstate traffic does not compete, at any rate directly, will be heavier than that placed by the consuming state on its local business of the same character."

[42] Credit allowed for taxes paid elsewhere, see *Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *General Trading Co.* v. *Tax Commission*, 322 U. S. 335, is a form of apportionment, though not the only one.

[43] See also *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434.

those decisions. Indeed, in my opinion, the necessary effect of *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, as appellee asserts, is to sustain power in the state of the market to tax "to the fullest extent" without apportionment by nondiscriminatory taxes of general applicability, transactions essentially no different from the ones involved in this case and in the *Adams* case.

It is true the *Berwind-White* case purported to distinguish the *Adams* case. But it did so by pointing out that the *New York* tax was "conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption" and that "the effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce." 309 U. S. 33, 58.

This comes down to sustaining the tax, as was done in *American Mfg. Co.* v. *St. Louis, supra,* relied upon to distinguish the *Adams* case, simply because the tax was pegged upon the "local incident" of delivery. Apart from the reasons I have set forth above for regarding this as not being controlling, that basis was flatly repudiated in *Nippert* v. *Richmond,* 327 U. S. 416, as adequate for sustaining a tax having otherwise the forbidden effects and features. So here, in my opinion, it is hardly adequate to distinguish the *Adams* case, leaving it unimpaired, or to differentiate consistently the broader ruling made in this case.

I therefore agree with the appellee that the effect of the *Berwind-White* ruling was in substance, though not in words, to qualify the *Adams* decision, and that the combined effect of the two cases, taken together, was to permit the state of the market to tax the interstate transaction,

but to deny this power to the forwarding state, unless by credit or otherwise it should make provision for apportionment. See Powell, New Light on Gross Receipts Taxes (1940) 53 Harv. L. Rev. 909, 939. Whether or not such a provision would save the Indiana tax as now applied, in view of what I think was the effect of *Berwind-White* on any basis other than sheer formalism, need not now be considered.[44]

Whether or not acknowledgment of this effect of the *Berwind-White* decision would require reconsideration of the validity of apportioned taxes otherwise than by full credit, laid by the forwarding state,[45] neither that fact nor the effect of *Berwind-White* in qualifying the *Adams* ruling justifies the broader ruling now made to reach the same result as the *Adams* case reached. The trend of recent decisions has been toward sustaining state taxes formerly regarded as outlawed by the commerce clause. The present decision, by its reversion to the formal and discarded grounding in the "direct incidence" of the tax, is a reversal of that trend. It is one, moreover, unnecessary for sustaining the result the Court has reached. Its consequence, if followed in logical application to apportioned taxes, will be to outlaw them, for they bear as "directly" on "the commerce itself" as does the tax now stricken down in its

[44] It is obvious that an apportioned tax laid by the forwarding state, taken in conjunction with an unapportioned one levied by the state of the market, would produce the effect of multiple state levies to the extent of the apportioned tax unless the apportionment were made by giving full credit for the other tax. In the latter event, of course, there would be no effect of multiple burden in the sense forbidden by the rule requiring apportionment and sustaining properly apportioned taxes. In the absence of a credit to the full amount of the marketing state's tax, the apportioned tax of the forwarding state, although making a cumulative burden, would impose only a reduced one as compared with an unapportioned tax by that state.

[45] Cf. note 44.

present application. So also does the type of tax sustained in the *Berwind-White* case, in everything but verbalism.

I think the result now reached is justified, as necessary to prevent the cumulative and therefore discriminatory tax burden which would rest on or seriously threaten interstate commerce if more than one state is allowed to impose the tax, as does Indiana, upon the gross receipts from the sale without apportionment or credit for taxes validly imposed elsewhere. This result would follow in view of the *Berwind-White* decision and others like it,[46] if not only the state of the market but also the forwarding state could tax the sale "to the fullest extent" upon the gross receipts. For this reason I concur in the result.

But in doing so I dissent from grounding the decision upon a foundation which not only will outlaw properly apportioned taxes, thus going beyond the *Adams* decision, unless the Court is merely to reiterate the rule forbidding "direct" taxation of interstate sales only to recall it when a case involving a properly apportioned tax shall arise; but also will require outlawing many other types of tax heretofore sustained, unless a similar retreat is made.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MURPHY concurs, dissenting.

I think the Court confuses a gross receipts tax on the Indiana broker with a gross receipts tax on his Indiana customer. *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434, would hold invalid a gross receipts tax, unappor-

[46] See the "use tax" cases: *General Trading Co.* v. *Tax Commission,* 322 U. S. 335; *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.,* 312 U. S. 373. See also *Jagels* v. *Taylor,* 309 U. S. 619, discussed in *McNamara, supra,* note 25, at 487.

727731 O—47——24

tioned, on the broker. In that case the taxpayer was a marketing agent for fruit growers in the State of Washington. The agent made sales and deliveries of the fruit in other States and in foreign countries, collected the sales prices, and remitted the proceeds, less charges, to the customers. The Court held that the gross receipts tax, being unapportioned, was invalid. There are two reasons why that result followed. In the first place, as the Court stated at p. 437, "the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise" in interstate or foreign commerce. "Such services are within the protection of the commerce clause." In the second place, as the Court stated at p. 439, "If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."

Under that view a tax on the commissions of the Indiana broker would be invalid. But I see no more reason for giving the customer immunity than I would for giving immunity to the fruit growers who sold their fruit through the broker in *Gwin, White & Prince, Inc.* v. *Henneford, supra.*

Concededly almost any local activity could, if integrated with earlier or subsequent transactions, be treated as parts of an interstate whole. In that view *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, would find survival difficult. For in that case a state tax on a manufacturer was upheld though the tax was measured by the value of the goods

manufactured within the State and thereafter sold in interstate commerce. In *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, a tax laid on the gross receipts of a trade journal published in New Mexico was sustained although out-of-state advertisements were included in the journal and there was interstate distribution of it. The Court treated the local business as separate and distinct from the transportation and intercourse which are interstate commerce and which were employed to conduct the business.

I think the least that can be said is that the local transactions or activities of this taxpayer can be as easily untangled from the interstate activities of his broker.

Any receipt of income in Indiana from out-of-state sources involves, of course, the use of interstate agencies of communication. That alone, however, is no barrier to its taxation by Indiana. *Western Live Stock* v. *Bureau of Revenue, supra.* Cf. *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308. The receipt of income in Indiana, like the delivery of property there, *International Harvester Co.* v. *Dept. of Treasury,* 322 U. S. 340, is a local transaction which constitutionally can be made a taxable event. For a local activity which is separate and distinct from interstate commerce may be taxed though interstate activity is induced or occasioned by it. *Western Live Stock* v. *Bureau of Revenue, supra,* p. 253. The management of an investment portfolio with income from out-of-state sources is as much a local activity as the manufacture of goods destined for interstate commerce, *American Mfg. Co.* v. *St. Louis, supra,* the publication of a trade journal with interstate revenues, *Western Live Stock* v. *Bureau of Revenue, supra,* or the growing of fruit for interstate markets, *Gwin, White & Prince, Inc.* v. *Henneford, supra.* All such taxes affect in some measure interstate commerce or increase the cost of doing it. But, as we pointed out in *McGoldrick* v. *Ber-*

wind-White Coal Mining Co., 309 U. S. 33, 48, that is no constitutional obstacle.

Adams Mfg. Co. v. *Storen*, 304 U. S. 307, is different. In that case the taxpayer had its factory and place of business in Indiana and sold its products in other States on orders taken subject to approval at the home office. The Court thought the risk of multiple taxation was real, because of the interstate reach of the taxpayer's business activities. The fact is that the incidence of that tax was comparable to the incidence of an unapportioned tax on interstate freight revenues.

The present tax is not aimed at interstate commerce and does not discriminate against it. It is not imposed as a levy for the privilege of doing it. It is not a tax on interstate transportation or communication. It is not an exaction on property in its interstate journey. It is not a tax on interstate selling. The tax is on the proceeds of the sales less the brokerage commissions and therefore does not reach the revenues from the only interstate activities involved in these transactions. It is therefore essentially no different, so far as the Commerce Clause is concerned, from a tax by Indiana on the proceeds of the sale of a farm or other property in New York where the mails are used to authorize it, to transmit the deed, and to receive the proceeds.

I would adhere to the philosophy of our recent cases[1] and affirm the judgment below.

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[1] Of which *Gwin, White & Prince, Inc.* v. *Henneford, supra, Western Live Stock* v. *Bureau of Revenue, supra,* and *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* are illustrative.

Counsel for Parties.

UNITED STATES *v.* RUZICKA ET AL., TRADING AS SEELEY DAIRY.

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

No. 54. Argued November 20, 21, 1946.—Decided December 16, 1946.

In a suit by the Government under § 8a (6) of the Agricultural Marketing Agreement Act to enforce an order issued by the Secretary of Agriculture under § 8c, requiring handlers of milk to pay money into a Producer-settlement Fund, the defendants sought to justify their failure to pay on the ground that the demand was based upon faulty inspection of their accounts and improper tests of their milk and milk products. *Held:* They can not assert this defense in an enforcement proceeding under § 8a (6) but are left to the administrative remedy specifically provided by § 8c (15). *Stark* v. *Wickard,* 321 U. S. 288, differentiated. Pp. 290–296.
152 F. 2d 167, reversed.

In a suit by the Government under § 8a (6) of the Agricultural Marketing Agreement Act of 1937 against certain handlers of milk to enforce their obligation to make payments into a Producer-settlement Fund, the District Court gave judgment for the Government. The Circuit Court of Appeals reversed. 152 F. 2d 167. This Court granted certiorari. 327 U. S. 776. *Reversed,* p. 296.

Acting Solicitor General Washington argued the cause for the United States. With him on the brief were *Assistant Attorney General Berge, Robert L. Stern, J. Stephen Doyle, Jr.* and *W. Carroll Hunter.*

William Parker Ward argued the cause and filed a brief for respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We brought this case here, 327 U. S. 776, because it raises questions of importance in the administration of the Agricultural Marketing Agreement Act of 1937. 50 Stat. 246, 7 U. S. C. § 601 *et seq.* The general scheme of the Act and its operation have been before us in a series of cases. *United States* v. *Rock Royal Co-op.,* 307 U. S. 533; *United States* v. *Wrightwood Dairy Co.,* 315 U. S. 110; *Stark* v. *Wickard,* 321 U. S. 288. Our immediate concern is with the provisions of the Act that distribute enforcing authority between the courts and the Secretary of Agriculture. These become relevant to the enforcement of Milk Order No. 41, an "Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area," and more particularly the portion of that elaborate Order which defines the rights and obligations of "handlers" of milk. Section 941.1 (5). The Order was issued under the powers delegated to the Secretary of Agriculture to effectuate the purposes of the Act. Section 8c of the Act.

Order No. 41 classifies milk received into the Chicago area according to its uses. To milk in each of the four classes the market administrator assigns a uniform "use value." All handlers are required to report to the market administrator the quantity of milk purchased and put to its classified uses. On the basis of these reports, the administrator, taking into account the total quantity of milk produced and the amount devoted to each classification, as well as the balance in the Producer-settlement Fund, and making authorized adjustments, announces monthly a uniform minimum price to be paid by handlers to producers. Since a handler's receipts from the re-sale of milk, or the sale of milk products, vary with the amount of the milk distributed in each class, the uniform price paid by

handlers will create inequities unless adjustment is made, based on the comparative use value of the milk distributed by a particular handler. The mechanism for adjustment is the Producer-settlement Fund. Handlers are required to contribute to this Fund whenever the use value of the milk handled by them during the month is greater than the norm on which the uniform price is based. Conversely, handlers whose milk distribution is of low use value and whose fixed minimum costs are therefore out of line with their receipts, are recompensed from this Fund. Effective enforcement of such a marketing scheme rests on proper accounting, reliable reports and alert inspection. At best, however, errors are inevitable, which may call for payments by handlers into the Fund. The reliance of the industry upon that Fund makes prompt payments into it imperative.

An order for payment into the Fund and its resistance led to this litigation. The Ruzickas, handlers of milk, filed with the market administrator required reports and received from him a transcript of their account with the Fund for the period in controversy. Deficiencies were disclosed which the Ruzickas refused to pay, in disregard of § 941.8 (e) and (g) of Order 41 requiring a handler to pay within five days "the amount so billed." Under § 8 (6) of the Agricultural Marketing Agreement Act this suit was begun in the Northern District of Illinois for enforcement. The Government prayed for a mandatory injunction commanding compliance with Order 41 by payment of the sums alleged to be due to the Fund. If it be relevant, it was not alleged that there was danger of irreparable loss because of insolvency of the Fund. By their answer the Ruzickas justified their failure to pay, chiefly on the ground that the demand was based upon faulty inspection of their accounts and improper tests of their milk and milk products. The District Court ruled that "the defend-

ants having failed to avail themselves of the administrative remedy provided by said Act, may not raise such issues of fact before this court." On the issue in the suit thus limited, the District Court granted the Government's motion for judgment on the pleadings. The Circuit Court of Appeals for the Seventh Circuit, one judge dissenting, reversed the District Court, ruling that the validity of the demand by the Secretary of Agriculture may be contested in an enforcement proceeding under § 8a (6). 152 F. 2d 167.

Thus the question before us is whether a handler may resist a claim against him by the Secretary of Agriculture, made according to the procedure defined in the Act, without previously having sought to challenge the claim in a proceeding, also defined in the Act, before the Secretary of Agriculture. The answer is found on a fair reading of the Agricultural Marketing Agreement Act in the context of its purposes and of the scheme designed by Congress for their realization.

The sections of the statute directly relevant to our problem are set out in the margin.[1] Briefly, the district courts

[1] "8a (6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

"8c (15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

"8c (15) (B) The District Courts of the United States (including the District Court of the United States for the District of Columbia)

of the United States are "vested with jurisdiction specifically to enforce" orders issued pursuant to the Act.[2] The Act authorizes a handler to challenge before the Secretary of Agriculture his order "or any obligation imposed in connection therewith" as "not in accordance with law," and to ask to have it modified or to be exempted from it. When the order is so challenged, the determination of the Secretary of Agriculture, after hearing, is final but only "if in accordance with law." Section 8c (15) (A). To test whether such ruling is "in accordance with law," the handler may bring the Secretary's action for review before the appropriate district court. Section 8c (15) (B). But the very subsection, (15), which gives the handler access to the Secretary of Agriculture for administrative relief and opportunity for judicial review of his determination, provides that the pendency of the procedings before

in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)."

[2] Section 8a (8) is also invoked by petitioner. But that section adds to the Government's remedies. It implies no judicial review in favor of handlers.

the Secretary, or in the district court to review the Secretary's ruling, "shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief" under § 8a (6). It is only when "a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)" that proceedings brought for enforcement under § 8a (6) "shall abate." Section 8c (15) (B).

To be sure, Congress did not say in words that, in a proceeding under § 8a (6) to enforce an order, a handler may not question an obligation which flows from it. But meaning, though not explicitly stated in words, may be imbedded in a coherent scheme. And such we find to be the provisions taken in their entirety, as a means for attaining the purposes of the Act while at the same time protecting adequately the interests of individual handlers.

The procedure devised by Congress explicitly gave to an aggrieved handler an appropriate opportunity for the correction of errors or abuses by the agency charged with the intricate business of milk control. In addition, if the Secretary fails to make amends called for by law the handler may challenge the legality of the Secretary's ruling in court. Handlers are thus assured opportunity to establish claims of grievances while steps for the protection of the industry as a whole may go forward. Sections 8a (6) and 8c (15) thus form a complementary procedural scheme. Contrariwise, it would make for disharmony to extrapolate from these provisions of the statute the right to consider independently, in a proceeding by the Government for the enforcement of the Secretary's order, questions for which Congress explicitly furnished the handler an expert forum for contest with ultimate review by a district court.

The situation before us indicates how disruptive it would be to allow issues that may properly come before a

district court in a proceeding under § 8c (15) to be open for independent adjudication in a suit for enforcement under § 8a (6). After a presumably careful study by those technically equipped, a program was devised for the dairy farmers in one of the large areas of the country. The success of the operation of such Congressionally authorized milk control must depend on the efficiency of its administration. Promptness of compliance by those subject to the scheme is the presupposition of Order No. 41. Thus, definite monthly deadlines are fixed by the Order for every step in the program. In large measure, the success of this scheme revolves around a "producers" fund which is solvent and to which all contribute in accordance with a formula equitably determined and of uniform applicability. Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements. To make the vitality of the whole arrangement depend on the contingencies and inevitable delays of litigation, no matter how alertly pursued, is not a result to be attributed to Congress unless support for it is much more manifest than we here find. That Congress avoided such hazards for its policy is persuasively indicated by the procedure it devised for the careful administrative and judicial consideration of a handler's grievance. It thereby safeguarded individual as well as collective interests. In the case before us, administrative proceedings were instituted before the Secretary of Agriculture and, apparently, are awaiting his action. Presumably the Secretary of Agriculture will give the respondents the rights to which Congress said they were entitled. If they are dissatisfied with his ruling, they may question it in a district court. The

interests of the entire industry need not be disturbed in order to do justice to an individual case.[3]

It is suggested that Congress did not authorize a district court to enforce an order not "in accordance with law." The short answer to this rather dialectic point is that whether such an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find. Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of his ruling, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts. Congress seems to have emphasized the different functions in the enforcement of the Act that § 8a and § 8c serve by explicitly directing that the proceedings for relief instituted by a handler under § 8c shall not "impede, hinder, or delay" enforcement proceedings by the United States under § 8a.

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[3] "During the period while any such petition is pending before the Secretary and until notice of the Secretary's ruling is given to the petitioner, the penalties imposed by the act for violation of an order cannot be imposed upon the petitioner if the court finds that the petition was filed in good faith and not for delay. The Secretary may, nevertheless, during this period proceed to obtain an injunction against the petitioner pursuant to section 8a (6) of the Agricultural Adjustment Act. . . . It is believed that these provisions establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." S. Rep. No. 1011, 74th Cong., 1st Sess., p. 14.

We are dealing here solely with the rights of handlers. This is not *Stark* v. *Wickard,* 321 U. S. 288. In that case it was concluded that since Congress had provided no administrative remedy for a producer to review the legality of an order against him, presumably the courts were not closed to him. But by § 8c (15) Congress has made precisely such provisions for handlers. As to them the procedural scheme is complete.

The Agricultural Marketing Agreement Act is one of many enactments by which Congress in regulating economic enterprise has divided the duty of enforcement between courts and administrative agencies. But there is the greatest variety in the manner in which Congress has distributed this responsibility. Those who are entitled to speak tell us that the development of the natural sciences has often suffered from premature generalization. Certainly the recent growth of administrative law counsels against generalizations regarding what is compendiously called judicial review of administrative action. And so we deem it desirable, in a case like this, to hug the shore of the precise problem before us in relation to the provisions of the particular Act immediately relevant. One general observation may, however, be permitted. Both courts and administrative bodies are law-enforcing agencies, utilized by Congress as such. In construing the enforcement provisions of legislation like the Marketing Act, it is important to remember that courts and administrative agencies are collaborative "instrumentalities of justice," and not business rivals. See *United States* v. *Morgan,* 307 U. S. 183, 191; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 141 *et seq.* And so we are not called upon to decide what powers inhere in a court of equity, exercising due judicial discretion, even in a suit such as was here brought by the United States for the enforcement of an order under § 8a. We say this because it appears that at a stage in the pro-

ceedings in the District Court a motion for a stay, pending disposition of the petition by the Ruzickas before the Secretary of Agriculture, was made by the respondents. With the court's leave, this motion was subsequently withdrawn. The power of the District Court to have acted on it is therefore not before us. Compare *Scripps-Howard Radio* v. *Comm'n,* 316 U. S. 4; *Hecht Co.* v. *Bowles,* 321 U. S. 321.

Judgment reversed.

MR. JUSTICE DOUGLAS concurs in the result.

ROTHENSIES, COLLECTOR OF INTERNAL REVENUE, *v.* ELECTRIC STORAGE BATTERY CO.

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

No. 48. Argued November 15, 18, 1946.—Decided December 16, 1946.

From April 1919 to April 1926, a taxpayer paid excise taxes on certain sales and deducted the tax from income before calculation of its income tax. In July 1926, it filed a claim for refund of the excise taxes paid between 1922 and 1926 (refund of those paid earlier being barred by the statute of limitations), brought suit, obtained judgment, and received settlement in 1935. The Commissioner treated the refund as income for 1935 and assessed additional income and excess profits taxes. The taxpayer paid the deficiency so assessed and sued for a refund, contending that the refund of the excise taxes was not income, but that, if it were so considered, the taxpayer should be permitted, as against the additional tax caused by its inclusion, to recoup the amount of the barred excise taxes which it had paid between 1919 and 1922. *Held:*

1. The refund of the excise taxes was properly assessed as income for 1935. P. 298.

2. Refund of the excise taxes improperly paid between 1919 and 1922 being barred by the statute of limitations, they may not be recouped in this proceeding against the income tax liability for 1935. Pp. 299–303.

(a) Recoupment is in the nature of a defense arising out of some feature of the transaction upon which a plaintiff's action is grounded. It does not allow one transaction to be offset against another, but only permits a transaction which is made the subject of a suit by a plaintiff to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole. P. 299.

(b) *Bull* v. *United States,* 295 U. S. 247; *Stone* v. *White,* 301 U. S. 532, distinguished. P. 300.

(c) To give the doctrine of recoupment the breadth here claimed would seriously undermine the statute of limitations in tax matters. P. 302.

152 F. 2d 521, reversed.

A taxpayer sued to recover income and excess profits taxes assessed and paid on a refund in 1935 of excise taxes erroneously paid between 1922 and 1926, claiming that the refund was not income and that, if it were, he should be permitted to recoup other excise taxes erroneously paid between 1919 and 1922. The District Court gave judgment for the taxpayer. 57 F. Supp. 731. The Circuit Court of Appeals affirmed. 152 F. 2d 521. This Court granted certiorari. 327 U. S. 774. *Reversed,* p. 303.

Arnold Raum argued the cause for petitioner. With him on the brief were *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Helen R. Carloss* and *Lee A. Jackson.*

Laurence H. Eldredge argued the cause for respondent. With him on the brief were *Charles C. Norris, Jr.* and *William P. Cairo.*

Mr. Justice Jackson delivered the opinion of the Court.

This case represents an effort, thus far successful, to obtain advantage by way of recoupment of a claim for tax refund long since barred by the statute of limitations. The

facts of this singular situation are not in dispute. From April 1919 to April 1926 the Electric Storage Battery Company paid excise taxes on the sale of storage batteries in the belief, shared by the Government, that such sales were subject to tax. In July of 1926 the company asserted otherwise and filed a refund claim. It asked refund only of that part of the taxes which it had paid between 1922 and 1926. Refund of the taxes paid earlier which the company now seeks to recoup was then barred by the statute of limitations and no claim ever has been filed for their refund and no action ever was begun for their recovery. Suit was brought, however, against the Collector for refund of the taxes paid after July 1922; judgment therefor was obtained in the District Court and affirmed by the Circuit Court of Appeals. The Government finally settled by refund of $1,395,515.35, of which $825,151.52 represented tax and the balance interest.

During the years that the refunded excise tax was being collected, the taxpayer deducted it from income before calculation of its income tax, thereby deriving substantial benefits. The Commissioner, therefore, treated the refund as income for 1935, the year in which it was received, and because of it assessed additional income and excess profits taxes which with interest thereon totaled $229,805.34. The taxpayer paid the deficiency, filed claim for refund, and after it was rejected sued the Collector. It contended that the refund from the Government was not income to the taxpayer but that if it were so considered taxpayer should be permitted, as against the additional tax caused by its inclusion, to recoup the amount of the barred excise taxes which it had paid between 1919 and 1922. Both courts below correctly held that the refund was properly assessed as income. *Cf. Security Flour Mills Co.* v. *Commissioner,* 321 U. S. 281; *Freihofer Baking Co.* v. *Commissioner,* 151 F. 2d 383. Both have

held, however, that the income tax liability for 1935 should be extinguished by recoupment of the 1919 to 1922 excise taxes. The gravity of this holding to the administration of the tax laws led us to grant certiorari. *Rothensies* v. *Electric Storage Battery Co.*, 327 U. S. 774.

It is not contended that there is any statutory warrant for allowing barred tax refund claims by way of recoupment or otherwise.[1] Authority for it is said to be found in case law and taxpayer relies chiefly on two decisions of this Court, *Bull* v. *United States*, 295 U. S. 247, and *Stone* v. *White*, 301 U. S. 532. The essence of the doctrine of recoupment is stated in the *Bull* case: "recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded." 295 U. S. 247, 262. It has never been thought to allow one transaction to be offset against another, but only to permit a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole.

The application of this general principle to concrete cases in both of the cited decisions is instructive as to the limited scope given to recoupment in tax litigation. In both cases a single transaction constituted the taxable event claimed upon and the one considered in recoupment.

[1] Indeed, the applicable provisions of the Revenue Act of 1928 seem to direct a result opposite to that asked by respondent. Section 608 provides that "A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous— (a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; . . ." Section 609 (b) provides, "A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608." 45 Stat. 874, 875. And *cf. McEachern* v. *Rose*, 302 U. S. 56.

727731 O—47——25

In both, the single transaction or taxable event had been subjected to two taxes on inconsistent legal theories, and what was mistakenly paid was recouped against what was correctly due. In *Bull* v. *United States,* the one taxable event was receipt by executors of a sum of money. An effort was made to tax it twice—once under the Income Tax Act as income to the estate after decedent's death and once under the Estate Tax Act as part of decedent's gross estate. This Court held that the amount of the tax collected on a wrong theory should be allowed in recoupment against an assessment under the correct theory.[2] In *Stone* v. *White,* likewise, both the claim and recoupment involved a single taxable event, which was receipt by an estate of income for a period. The trustees had paid the income tax on it but this Court held it was taxable to the beneficiary. Assessment against the beneficiary had meanwhile become barred. Then the trustees sued for a refund, which would inure to the beneficiary. The Court treated the transaction as a whole and allowed recoupment of the tax which the beneficiary should have paid against the tax the Government should not have collected from the trustees. Whatever may have been said indicating a broader scope to the doctrine of recoupment, these facts are the only ones in which it has been applied by this Court in tax cases.

The Government has argued that allowance of the claim of recoupment involved here would expand the holding in the *Bull* case. The Circuit Court of Appeals agreed that in the *Bull* case "the main claim and recoupment claim were more closely connected than they are here." *Electric Storage Battery Co.* v. *Rothensies,* 152 F. 2d 521, 524. But the court nevertheless allowed the claim because it

[2] But the Court emphasized that refund of the incorrect tax was not barred by the statute at the time the Government proceeded for collection of the correct tax.

considered that this Court had introduced the doctrine of recoupment into tax law and that it was "based on concepts of fairness." 152 F. 2d 521, 524. It said it saw no reason for narrowly construing the requirement that both claims originate in the same transaction. We think this misapprehends the limitations on the doctrine of recoupment as applied to tax law and it leads us to state more fully reasons for declining to expand the doctrine beyond the facts of the cited cases.

It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there never would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence, a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.

We have had recent occasion to point out the reason and the character of such limitation statutes. "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, 348–9. "They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable [avoidable] and unavoidable delay. They have come into

the law not through the judicial process but through legislation." *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304, 314.

As statutes of limitation are applied in the field of taxation, the taxpayer sometimes gets advantages and at other times the Government gets them. Both hardships to the taxpayers and losses to the revenues may be pointed out.[3] They tempt the equity-minded judge to seek for ways of relief in individual cases.

But if we should approve a doctrine of recoupment of the breadth here applied we would seriously undermine the statute of limitations in tax matters. In many, if not most, cases of asserted deficiency the items which occasion it relate to past years closed by statute, at least as closely as does the item involved here. *Cf. Hall* v. *United States,* 43 F. Supp. 130. The same is true of items which form the basis of refund claims. Every assessment of deficiency and each claim for refund would invite a search of the taxpayer's entire tax history for items to recoup. This case provides evidence of the extent to which this would go. When this suit was brought in 1943, the claim pleaded as a recoupment was for taxes collected over twenty years before and for over sixteen years barred by the statute.

[3] In *American Light & Traction Co.* v. *Harrison,* 142 F. 2d 639, the court did not allow recoupment to the Government. But, judiciously, it said, "Although here a hardship on the Government results from the taxpayer's inconsistency, the correlative provisions of this same statute will, in the converse of the instant situation, work an equal hardship on the taxpayer." 142 F. 2d 639, 643. Whether or not the statute, §§ 608 and 609 of the Revenue Act of 1928, be taken to compel the conclusion we reach in this case, the court's recognition that both parties to taxation are affected impartially, though perhaps harshly, by policy of repose has application here. It may easily be overlooked, when the unfairness of the Government's retaining incorrectly collected monies of respondent is stressed, that the statute of limitations is primarily an instrument of fairness.

That claims dead so long can be resurrected under this doctrine, is enough to show its menace to the statute of limitations—at least as to those taxpayers whose affairs by accident or design take such shape that they can avail themselves of recoupment remedies. Moreover, we have held that the Tax Court has no jurisdiction to consider recoupment. *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U. S. 418. Hence, the availability of the remedy would depend on diverting the litigation to the district courts.

We cannot approve such encroachments on the policy of the statute out of consideration for a taxpayer who for many years failed to file or prosecute its refund claim. If there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them.

The judgment below is

Reversed.

MR. JUSTICE MURPHY is of the opinion, in which MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE join, that the judgment below should be affirmed. He believes that the claims for refund of the illegal assessments exacted from 1919 to 1922 arise out of the same subject matter as was involved in the Government's demand for additional taxes for 1935, thereby making applicable the rule of *Bull* v. *United States*, 295 U. S. 247.

EAGLES, POST COMMANDING OFFICER, *v.* UNITED STATES EX REL. SAMUELS.

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

No. 59. Argued November 21, 1946.—Decided December 23, 1946.

Respondent registered under the Selective Training and Service Act of 1940 and was classified IV–D under § 5 (d), which exempts "students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year" prior to the Act. Subsequently, he appeared before an advisory panel on theological classifications established by the New York City Director of Selective Service pursuant to § 10 (a) (2), which consisted of prominent laymen and rabbis of respondent's faith. After hearing respondent, the panel concluded that he was not "preparing in good faith for a career of service in the practicing rabbinate" and so reported to the City Director, who transmitted this report and the transcript of the hearing to the local board with a request that respondent's classification be reopened but with the statement that, while the local board should give careful consideration to the recommendation of the panel, the determination of the classification must be made by the board itself or by an appeal agency. The local board reclassified respondent I–A. After respondent submitted additional evidence and had two hearings before the local board and one before the board of appeal, his classification as I–A was sustained and he was inducted into the Army. He petitioned for a writ of *habeas corpus* and was released unconditionally from military custody. *Held:*

1. The fact that respondent had been released unconditionally from military custody under a writ of *habeas corpus* does not make the case moot in this Court, since a reversal would make lawful a resumption of the custody. Pp. 306–308.

2. *Habeas corpus* may not be used as a writ of error and its function is exhausted when it is ascertained that the agency under whose order the petitioner is being held had jurisdiction to act. Pp. 311, 315.

3. The use of the theological panel was authorized by § 10 (a) (2) of the Act, authorizing the establishment of "civilian local boards, civilian appeal boards, and such other agencies . . . as may be necessary to carry out the provisions of this Act." Pp. 308, 312–313.

4. Failure of the statement filed by the panel to disclose the names of its members did not render the administrative proceedings invalid *per se*, where the registrant appeared before them, saw them face to face, recognized one of them, and made no effort, either at the time or subsequently, to ascertain who the others were. P. 314.

5. Nor are the administrative proceedings invalidated by the fact that, in addition to answering ecclesiastical questions, the panel rendered an advisory opinion on the *bona fides* of his claim. P. 316.

6. The fact that there was a two-year interruption in respondent's education, that he returned to the day session of the seminary in the month when his selective service questionnaire was returned, and that the seminary was not preparing men exclusively for the rabbinate, makes it impossible to say that the final classification made by the board of appeal was without evidence to support it. Pp. 316–317.

151 F. 2d 801, reversed.

The District Court dismissed a writ of *habeas corpus* sought by respondent on the ground that he had been illegally inducted into military service. The Circuit Court of Appeals reversed, 151 F. 2d 801, and he was released unconditionally. This Court granted certiorari. 328 U. S. 830. *Reversed*, p. 317.

Irving S. Shapiro argued the cause for petitioner. With him on the brief were *Solicitor General McGrath* and *Robert S. Erdahl.*

Meyer Kreeger argued the cause and filed a brief for respondent.

Mr. Justice Douglas delivered the opinion of the Court.

Samuels registered under the Selective Training and Service Act of 1940,[1] as amended, and thereafter claimed

[1] 54 Stat. 885, 55 Stat. 211, 621, 845, 56 Stat. 386, 50 U. S. C. App., 50 U. S. C. App. Supp. I, and 50 U. S. C. App. Supp. II, § 301 *et seq.*

Our citations of the Act and the regulations throughout the opinion refer to the provisions applicable at the times relevant here.

exemption from military service under § 5 (d) of the Act. That exemption includes not only regular or duly ordained ministers of religion but also "students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior" to the Act. He was classified I–A and inducted into the Army. Thereafter he filed a petition for a writ of *habeas corpus* in the District Court, seeking release from military custody on the ground that he was entitled to an exemption under § 5 (d) of the Act and that his classification as I–A was unlawful. There was a return and a hearing, and the District Court ordered the writ dismissed. On appeal the Circuit Court of Appeals, in reliance on *United States* v. *Cain,* 149 F. 2d 338, reversed and remanded the cause to the District Court with directions to "discharge" Samuels "from military custody, without prejudice to further lawful proceedings under the Selective Service Act." 151 F. 2d 801, 802.

The case is here on a petition for a writ of certiorari which we granted in order to resolve the conflict between the decision below and *United States* v. *Hearn,* 153 F. 2d 186, in the Fifth Circuit Court of Appeals.

First. A question of mootness lies at the threshold of the case presented here. We are advised that after remand of the cause the District Court ordered the release of Samuels and that he was thereupon unconditionally released from military custody. Samuels contends that the case is moot since he is no longer in custody of the military or of any one else but is free to come and go as he pleases.

Under our decisions the case would be moot if the writ of *habeas corpus* had been denied below and, pending disposition of the petition here, Samuels had received a discharge from the army. *Zimmerman* v. *Walker,* 319 U. S. 744. And see *Weber* v. *Squier,* 315 U. S. 810; *Tornello* v. *Hudspeth,* 318 U. S. 792. That situation, like

the case of a prisoner who, pending an appeal from denial of a writ of *habeas corpus,* is granted bail, *Johnson* v. *Hoy,* 227 U. S. 245; *Wales* v. *Whitney,* 114 U. S. 564, 572–574, would present no existing controversy. *Habeas corpus* is the means of making a judicial "inquiry into the cause of restraint of liberty." R. S. § 752, 28 U. S. C. § 452. As stated in *McNally* v. *Hill,* 293 U. S. 131, 137, "There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention." If the custody or restraint of liberty is terminated without use of the writ, the case is finished. Different considerations are brought into play if custody is ended through the writ itself.

Our rules recognize the beneficent function of the writ, *Bowen* v. *Johnston,* 306 U. S. 19, 26–27; *People* v. *Jennings,* 246 N. Y. 258, 158 N. E. 613,[2] by providing that a prisoner to whom the writ has been granted may, pending appeal, be enlarged on a recognizance. Rule 45. The fact that he has been so enlarged does not render the appeal of the custodian moot. *Carr* v. *Zaja,* 283 U. S. 52, 53.[3] In such a case the release is obtained through the assertion of judicial power. It is the propriety of the exercise of that power which is in issue in the appellate court, whether the prisoner is discharged or remanded to custody. Though the writ has been granted and the prisoner released, the appellate court by what it does is not rendering

[2] In that case Mr. Justice Cardozo, then Chief Judge of the New York Court of Appeals, said, "It would be intolerable that a custodian adjudged to be at fault, placed by the judgment of the court in the position of a wrongdoer, should automatically, by a mere notice of appeal, prolong the term of imprisonment, and frustrate the operation of the historic writ of liberty." 246 N. Y. p. 260, 158 N. E. 613.

[3] It appears from the briefs in that case that after the writ had issued in the lower court the petitioner had been discharged, pending appeal, on a recognizance.

an opinion and issuing an order which cannot affect the litigants in the case before it. Cf. *St. Pierre* v. *United States,* 319 U. S. 41, 42, and cases cited. Affirmance makes the prisoner's release final and unconditional. Reversal undoes what the *habeas corpus* court did and makes lawful a resumption of the custody. *Knewel* v. *Egan,* 268 U. S. 442, 448; *Haddox* v. *Richardson,* 168 F. 635; *James* v. *Amrine,* 157 Kan. 397, 140 P. 2d 362; *State* v. *Langum,* 135 Minn. 320, 160 N. W. 858.

Second. On the merits the case involves primarily the use by the Selective Service System in New York City of advisory panels on theological classifications. Under the Act the President is authorized to establish "civilian local boards, civilian appeal boards, and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act." Section 10 (a) (2), 57 Stat. 597, 598, 50 U. S. C. App. Supp. III, § 310 (a) (2). With exceptions not material here, the President is authorized to delegate to the Director of Selective Service any authority vested in him under the Act. Section 10 (b), 57 Stat. 597, 598, 50 U. S. C. App. Supp. III, § 310 (b). And the Director may redelegate that authority. *Id.* The administration of the system in each State is delegated under the regulations to a state director. Sections 603.11, 603.12, 6 Fed. Reg. 6827. In New York City, however, a city director has been appointed who performs within that area the functions of the state director. Section 603.12–1, 8 Fed. Reg. 3514. The city director supervises the local boards and boards of appeal in New York City. He may require a local board to reopen and consider anew the classification of a registrant. Section 626.2 (b), 9 Fed. Reg. 11619, § 626.2–1, 10 Fed. Reg. 9210. He may appeal to a board of appeal any determination of a local board. Section 627.1, 8 Fed. Reg. 16720, 10 Fed. Reg. 9210. He may require a board of appeal to reconsider its decision,

§ 627.61, 8 Fed. Reg. 6017, or appeal from it to the President. Section 628.1, 7 Fed. Reg. 10521.

It appears that the city director, in aid of these functions, established theological panels. It was thought desirable to give the selective service personnel the benefit of the advice of those familiar with the educational practices of various religious groups so that Selective Service might exercise a more informed judgment in evaluating claims to classifications in IV–D. Accordingly, theological panels were constituted, one of which consisted of prominent laymen and rabbis of the Jewish faith who gave advisory opinions on those who sought a IV–D classification on the grounds that they were either rabbis or students preparing for the ministry in the Jewish religion. The members of the panel were volunteers, as permitted by the regulations. Section 602.2, 6 Fed. Reg. 6826. And pursuant to the regulations each took the oath of office. Section 602.4 (a), 6 Fed. Reg. 6826.

Samuels registered under the Act in February, 1942. In May and July, 1942, he filed with his local board questionnaires stating that he had had two years of high school education; that he was a student at the Mesifta Theological Seminary preparing for the rabbinate; that since 1940 his regular occupation was that of a clerk; that for the past two years he had been employed by a textile company; and that the job for which he was best fitted was that of a spiritual leader and a teacher of Hebrew or rabbinical duties. The local board was advised by the seminary that Samuels had attended there since he was six years old, that he had finished the eight-year elementary course and the four-year pre-rabbinical course, that he had been admitted to the rabbinical division in 1937, that he left the school in 1939 to seek employment, that he returned to the evening school in September, 1941, and that he was transferred to the day session in July, 1942,

which, as later appeared, was a few days before the school closed for the summer.

In August, 1942, the local board classified him IV–D. Section 622.44 (a), 6 Fed. Reg. 6607, 6610. In May, 1944, he was given a physical examination and found acceptable for military service. Thereafter the city director requested that he appear before the theological panel in respect to his claim to a IV–D classification. He appeared before the panel in June, 1944, stating, *inter alia,* that he expected to graduate from the seminary in 1945, that ill health caused him to leave the school in 1939, that between 1940 and 1942 he worked as a clerk, and that he returned to the seminary as a full-time student at about the time he filed his selective service questionnaire.

The panel reported that the seminary which Samuels attended was not preparing men exclusively for the rabbinate, that orthodox tradition encouraged advanced study of the subjects in which students for the ministry were trained, and that students ultimately intending to enter business or a profession or some non-rabbinic activity in the field of religion may be enrolled in the same classes as those preparing for the rabbinate. The panel stated that it therefore seemed essential to determine in each case what the registrant had in mind in pursuing his course of study; that to make that determination the character of the seminary, the sincerity of the registrant's declared purpose, his demeanor, and the impression as to his candor and honesty should be considered. It concluded that Samuels was not "preparing in good faith for a career of service in the practicing rabbinate." Its recommendation and the transcript of the hearing before it were sent to the city director who forwarded them to the local board with a request that Samuels' classification be reopened and with the statement that "while the Local Board should give careful consideration to the recommendation of the advisory panel, the responsibility of determining the registrant's classi-

fication must rest with the Local Board itself, or the appropriate agency of appeal."

The local board reclassified Samuels I–A in August, 1944. He submitted additional evidence and requested a hearing. One was had in September, 1944 and another in October, 1944. There is no showing that the recommendation of the panel or the transcript of the hearing before it was kept from Samuels. They were not marked confidential in the file. The local board, indeed, allowed Samuels to correct alleged inaccuracies in the transcript. The local board ordered him continued in I–A and, on appeal, the board of appeal also classified him as I–A. A few days later Samuels filed additional information with the local board and requested that his classification be reopened. Another hearing was held, Samuels being present. He advised the board that he had appeared of his own volition before a committee representing the Union of Orthodox Rabbis (but not connected with the selective service system) and that the committee concluded he was a student preparing in good faith for the ministry. What facts that committee may have acted upon do not appear. In any event, the local board denied Samuels' request to reopen the classification by a divided vote; and shortly thereafter he was inducted into the army.

Congress made the decisions of the local boards and of the boards of appeal "final," except as appeals from them may be authorized, § 10 (a) (2), withholding from the courts the customary power of review of administrative action. See *Estep* v. *United States,* 327 U. S. 114.

It is elementary that *habeas corpus* may not be used as a writ of error. *Tisi* v. *Tod,* 264 U. S. 131; *Woolsey* v. *Best,* 299 U. S. 1. The function of *habeas corpus* is exhausted when it is ascertained that the agency under whose order the petitioner is being held had jurisdiction to act. If the writ is to issue, mere error in the proceeding which resulted in the detention is not sufficient. *Tisi* v. *Tod,*

supra. Deprivation of petitioner of basic and fundamental procedural safeguards, an assertion of power to act beyond the authority granted the agency, and action without evidence to support its order, are familiar examples of the showing which is necessary. See *Johnson* v. *Zerbst,* 304 U. S. 458; *Bridges* v. *Wixon,* 326 U. S. 135, 149. But it is not enough to show that the decision was wrong, *Tisi* v. *Tod, supra,* or that incompetent evidence was admitted and considered. *Vajtauer* v. *Commissioner,* 273 U. S. 103. If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, *Bridges* v. *Wixon, supra,* p. 156, or that there was no evidence to support the order, *Vajtauer* v. *Commissioner, supra,* the inquiry is at an end.

We do not think that the use of the theological panel *per se* infected the whole administrative proceeding and rendered it so unfair as to be nugatory. The task of the local boards in evaluating claims to exemption is almost certain to raise perplexing problems, especially in large centers where the status and activities of registrants are not so well known in the community. The local boards will frequently have to make inquiries on their own. And when it comes to exemptions claimed under § 5 (d), the variety of religious faiths and the differing educational practices of the churches or of sects within one faith may create difficult questions for the boards.

We agree with the court in *United States* v. *Hearn, supra,* p. 188, that advice from well-informed members of the faith in question may "both help and speed just classification." Congress wrote into the Act a comparable procedure for the handling of claims for exemption by conscientious objectors. Where such claims are denied by the local board and appealed, they are referred to the Department of Justice for a hearing and an advisory report. Section 5 (g). But the fact that there is no specific statutory provision for the creation of theo-

logical panels does not make their use improper. Wise administration may call for the expert advice which they alone can offer. And we see no difference in principle if they are formally constituted and regularly used in lieu of inquiry to members of the particular faith as individual cases arise. The administrative function entrusted to the Selective Service is an enormous one. The Act contemplates an administrative organization highly decentralized so as to operate effectively at the local level. More than the director, local boards, and boards of appeal were authorized. For § 10 (a) (2), as we have noted, authorized the creation of "other agencies" as well. A theological advisory panel, serving solely in an advisory capacity, would seem to be included in that category. The information received by the board from the panel, like information from any other source, must be put in writing in the file so that the registrant may examine it, explain or correct it, or deny it.[4] There is, moreover, no confidential information which can be kept from the registrant under the regulations.[5] With those safeguards a truly expert panel might serve a most useful function without the administrative process being corrupted by any unfair procedure.

Distinct questions would be raised if a registrant of one faith were referred to a theological panel on which his faith was not represented. See *United States* v. *Balogh,* 157 F. 2d 939. But it has not been shown that such a condition obtained here.

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[4] The regulations provide that in classifying a registrant, "Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." Section 623.2, 9 Fed. Reg. 437, 10 Fed. Reg. 8541.

[5] See § 605.32 (a), 9 Fed. Reg. 9190.

The court in *United States* v. *Cain, supra,* p. 341, held that though the propriety of the use of a theological panel be assumed, it must be limited by two conditions: the names of the members of the panel must be disclosed to the registrant so that he may be in a position to challenge it; the advice or answers which it gives must be limited to ecclesiastical questions.

In the statement which the panel filed in this case the names are not disclosed. But we do not think that fact rendered the administrative proceedings invalid *per se.* This is not a case of a registrant being passed upon by a secret group. He appeared before them, saw them face to face, and indeed recognized one of them. There is no showing that Samuels tried to ascertain who the panel members were, either at the time or subsequently, and was denied the information. Though we assume that the regulations require the file to disclose the names and affiliations of the panel members, the mere absence of a formal disclosure is not, without more, so grave an omission as to undermine the whole administrative proceeding.

The question is not whether the allegations of the petition are sufficient to justify the grant of the writ or the issuance of a rule to show cause, so that the facts can be ascertained in accord with the procedure outlined in *Walker* v. *Johnston,* 312 U. S. 275. In this case there was a return to the writ, a full hearing was had, and all evidence offered was received. Samuels had the burden of showing that he was unlawfully detained. *Walker* v. *Johnston, supra.* Not every procedural error, but only those so flagrant as to result in an unfair hearing render the proceedings vulnerable in a collateral attack. *Tisi* v. *Tod, supra,* p. 133; *Bridges* v. *Wixon, supra,* pp. 152–156. On the case Samuels has made out, the most that has been shown is that the use of the theological panel might result in a hearing so unfair as to deprive the administrative proceedings of vitality. Samuels has failed to show that in his case it

had that effect. He has therefore failed to sustain the burden of proof which was on him.

Secrecy and anonymity are not congenial to our traditions of procedure, nor in keeping with the regulations under this Act. But as we have said, the range of inquiry in a *habeas corpus* proceeding is limited. We are not sitting in review of action of federal agencies over which we have the power of supervision. Cf. *McNabb* v. *United States,* 318 U. S. 332. The function of *habeas corpus* is not to correct a practice but only to ascertain whether the procedure complained of has resulted in an unlawful detention. It is the impact of the procedure on the person seeking the writ that is crucial. Whatever potentialities of abuse a particular procedure may have, the case is at an end if the challenged proceeding cannot be said to have been so corrupted as to have made it unfair. Samuels points to possibilities of abuse. But he fails to establish prejudice in his case.

If, as was held in *United States* v. *Cain, supra,* the panel must be restricted to answering ecclesiastical questions, Samuels should prevail. For the panel in question not only gave the board information concerning the seminary which Samuels attended but also rendered an advisory opinion on the *bona fides* of his claim. The argument for restricting the panel to ecclesiastical questions is based on the thought that it is only on such subjects that the board needs specialized information, while if the board relies on a general advisory opinion of the panel, it is devolving its administrative responsibility. See *United States* v. *Cain, supra,* pp. 341–342.

It is plain that the local boards and the boards of appeal may not abdicate their duty by delegating to others the responsibility for making classifications. That is their statutory function. Section 10 (a) (2). But no such case is made out in this record. The city director submitted the panel's report with the admonition that it

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was advisory only and that it was the board's responsibility to make the classification. The recommendation of the panel was followed. But Samuels was subsequently given not only one but two hearings before the local board and a hearing before the board of appeal. There is no indication that either board relied solely on the panel's report or considered itself bound by it. In fact both boards received additional evidence submitted by Samuels and considered it. The record does not bear out the suggestion that either board was a rubber stamp for the panel.

Nor do we think that the range of inquiry and recommendation of the panel was too broad. If a panel is truly expert in the field, its expertness is not necessarily limited to knowledge of the theological schools, the course of training, and the educational practices and traditions. Its acquaintance with the ministry of that faith and with the norms of the profession may well give it special insight into the claims of those seeking exemption. To draw the line at questions technically ecclesiastical is to make a distinction which may be wholly arbitrary in terms of the panel's expertness. A panel might act on irrelevancies; it might usurp the functions of a board. We discover nothing of the kind here. The fact that the board follows the advice of the panel does not necessarily mean that it functions in a subservient way. The fact is that the local board and the board of appeal gave Samuels further hearings and received and considered all evidence submitted. We find no procedural error of such magnitude as to warrant an uprooting of the entire administrative proceeding in this collateral attack upon it.

Nor can we say there was no evidence to support the final classification made by the board of appeal. Samuels' statement that he was best fitted to be a Hebrew school teacher and spiritual leader, the two-year interruption in his education, his return to the day session of the seminary

in the month when his selective service questionnaire was returned, and the fact that the seminary in question was apparently not preparing men exclusively for the rabbinate make questionable his claim that he was preparing in good faith for the rabbinate. A registrant might seek a theological school as a refuge for the duration of the war. Congress did not create the exemption in § 5 (d) for him. There was some evidence that this was Samuels' plan; and that evidence, coupled with his demeanor and attitude, might have seemed more persuasive to the boards than it does in the cold record. Our inquiry is ended when we are unable to say that the board flouted the command of Congress in denying Samuels the exemption.

Reversed.

EAGLES, POST COMMANDING OFFICER, *v.* UNITED STATES EX REL. HOROWITZ.

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

No. 58. Argued November 21, 1946.—Decided December 23, 1946.

This is a companion case to *Eagles* v. *U. S. ex rel. Samuels, ante,* p. 304, in which most of the questions raised here were ruled upon. The principal differences in the facts are that the advisory panel was composed entirely of laymen, its report was marked "confidential," and respondent was enlarged upon a recognizance. *Held:*

1. The case is not moot, for the reasons stated in the *Samuels* case. P. 318.

2. The fact that the panel was composed entirely of laymen does not require a different result from that reached in the *Samuels* case. Pp. 322–323.

3. The fact that its report was marked "confidential" contrary to the applicable regulations does not require a different result, because the local board was not required to keep the report confidential and there is no showing that it did. P. 323.

151 F. 2d 801, reversed.

Respondent, having been inducted into the Army, was released on a writ of *habeas corpus* after the Circuit Court of Appeals had reversed, 151 F. 2d 801, a decision by the District Court adverse to him. This Court granted certiorari. 328 U. S. 830. *Reversed,* p. 323.

Irving S. Shapiro argued the cause for petitioner. With him on the brief were *Solicitor General McGrath* and *Robert S. Erdahl.*

Meyer Kreeger argued the cause and filed a brief for respondent.

Mr. Justice Douglas delivered the opinion of the Court.

This is a companion case to *Eagles* v. *Samuels,* No. 59, decided this day, *ante* p. 304. Certiorari also brings it here from the Third Circuit Court of Appeals. That court followed the same procedure here as it did in *Samuels'* case; it reversed the District Court which had dismissed the writ of *habeas corpus* brought on behalf of Horowitz, and remanded the cause to the District Court with directions to discharge him from military custody. 151 F. 2d 801.

It appears that after the remand Horowitz was enlarged upon a recognizance as permitted under our rules. Rule 45. The suggestion that the case is therefore moot is without merit for the reasons stated in Samuels' case.

Horowitz registered pursuant to the Selective Training and Service Act of 1940, as amended, early in 1941 and filed a questionnaire stating he was a college student preparing for a career as a psychiatric social worker. At the time, he asked for a deferment in induction until February, 1943, saying that "if you take me now, you practically negate my possibilities to attain the position I seek in life, namely, a psychiatric social worker." Shortly after he was physically examined and found qualified for military

service, he advised the local board that he had been enrolled in the Rabbinical Seminary of America, a recognized theological school. On July 1, 1941, he was classified I–A. The board of appeal likewise gave him that classification in August, 1941.

Meanwhile, he claimed exemption under § 5 (d) of the Act. The basis of his claim was the representation that he was a student in a recognized theological school for rabbis and was preparing for the rabbinate. In an affidavit he stated that he had not disclosed his intention to become a rabbi because he had no "concrete facts" to present, only "hopes." In November, 1941, the local board classified him IV–D, which classification he retained until May, 1944. In 1942 he filed an occupational questionnaire with the local board, stating that he was taking a course in rabbinical studies at the seminary and also a bachelor of social science course at another institution which he hoped to complete in 1944. He listed himself as a social worker.

In April, 1944, the city director of Selective Service reviewed the file and requested Horowitz to appear before an advisory theological panel. He appeared before a panel and there was a hearing. The panel stated that all students in this seminary were not necessarily preparing for the ministry and that each individual case should be separately appraised.[1] It concluded that his attendance at the seminary had been motivated by a desire to secure a basis for exemption under the Act. This was based on his declared intention early in 1941 to be a social

[1] The approach of the panel to the question is shown as follows in its statement:

> "Orthodox tradition has always encouraged advanced study of talmudic literature, both privately and at academies instituted for that purpose, irrespective of the specific occupational objectives of those engaged in such study, and all courses offered by these academies are open to qualified students without regard

worker, inconsistencies in his explanation of his failure to refer to the rabbinate at that time, his indifferent and unsystematic manner in preparing for that professed objective, and an appraisal of his reliability and candor. The transcript of proceedings before the panel and later the report were transmitted to the local board by the office of the city director of Selective Service with a request to the board to reopen and reconsider his classification. The report made by the panel was not signed. Moreover, the report was headed "Confidential Statement for the Record." The local board was advised by the city director's office that, while it should give careful consideration to the recommendation of the panel, determination of the classification must be made by the board itself or by an appeal agency.

Horowitz was immediately reclassified as I–A. He asked for a hearing which was granted. It appears that the panel which interviewed him and rendered the report

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to the individual student's specific intention to prepare for a career of service in the rabbinate.

"Thus, a student ultimately intending to enter business or a profession, or some non-rabbinic activity in the field of religion, may be enrolled in the same courses attended by other students who are specifically concerned with preparation for the rabbinate. It is, therefore, essential for purposes of Selective Service classification to determine in each individual case the purpose which the registrant has in mind in pursuing his course of study.

"Moreover, the fact that the religious tradition in question does not attempt to distinguish between the serious student of talmudic literature and the student preparing for a professional career in the rabbinate, tends to make it extremely difficult for school officials, ministers, and others identified with that tradition, to have and express an objective judgment in such matters.

"To the extent that the distinction is understood, there is a tendency to accept at face value assertions made by the registrant and members of his family and to resolve any doubt in his favor, where it is at least apparent that he is a serious and pious talmudic student."

was composed of three prominent Jewish laymen but no rabbi. Whether that was the cause does not appear, but the board, as a result of the hearing, referred the file to a rabbi for another advisory recommendation. The rabbi recommended that Horowitz be classified IV–D. The local board gave him that classification in June, 1944. In August, 1944, the local board held another hearing. Horowitz was present and was examined. The board concluded that he should be in I–A and so classified him, stating as its reason that he became a student in the rabbinical school after he had registered under the Act. He requested and was granted another hearing, at which he submitted additional evidence. The local board refused to change the classification. On appeal the board of appeal classified him as I–A.

On two subsequent occasions Horowitz asked that his classification be reopened and submitted additional evidence. The board was unpersuaded and refused to reopen the classification. The office of the city director advised the boards that the panel which interviewed Horowitz was composed solely of laymen and that, if by virtue of that fact the board of appeal desired to reconsider the case, to inform the office. Both the local board and the board of appeal replied that there was no occasion for reopening the classification. The board of appeal stated that it had "once again unanimously agreed that the registrant's status does not warrant a IV–D classification." Early in 1945 Horowitz was inducted into the Army.

Horowitz relies upon affidavits and statements from various people concerning the *bona fides* of his professed desire to become a rabbi, on a statement made when he graduated from the public schools in 1932 that that was his ambition in life, on the fact that he stated in 1936 that his first vocational choice was the rabbinate, and on

all of his subsequent activities which, he asserted, fitted into that pattern. On the other hand, it does appear that in 1937 his first vocational choice was teaching, his second the rabbinate. Furthermore, as already noted, his professed objective stated to the local board early in 1941 was social work. And he in fact entered the seminary shortly after he had passed his physical examination and qualified for military service. These circumstances alone make his claim to exemption colorable. Certainly we cannot say that the action of the board of appeal in finally classifying him as I–A was without any support in the evidence.

The question remains whether there was anything in the administrative procedure which vitiated Horowitz' classification. What we have said about the use of a theological panel and the range of its inquiry in *Eagles* v. *Samuels, supra,* need not be repeated here. There is nothing in the present case which makes for a different result. We can no more conclude here, than in Samuels' case, that the board abdicated its function. It first followed the panel's recommendation. But its mind was not closed, as evidenced by the fact that it later sought the advice of a rabbi and followed his recommendation. And when it returned to its earlier position, it proceeded on the ground that the basic defect in Horowitz' case was the shift in his position in 1941 after he had registered. The record shows indecision by the board but no subservience to the panel. As respects the fact that the panel's report was unsigned, only a word need be added. Horowitz, like Samuels, appeared in person before the panel and saw its members face to face. At no time does it appear that he sought the identity of the members and was refused the information.

The essential procedural differences between this case and *Samuels'* are two—it appears that this panel was composed entirely of laymen; and its report was not only

unsigned but marked confidential for the file. The first objection carries little weight. These laymen were prominent citizens of the Jewish faith. There is no showing that they were of a sect hostile to Horowitz. There is nothing to impeach their integrity or to suggest that they were not qualified to serve in the expert role assigned to them.

The fact that their report was marked confidential is given great emphasis. It is argued that although the use of a theological panel may be authorized, there is no warrant for clothing its action in such secrecy.

The regulations, indeed, prescribe that no information in a registrant's file shall be confidential as to him or any one having written authority from him. Section 605.32 (a), 8 Fed. Reg. 2641, 9 Fed. Reg. 9190. But the difficulty here is that it is not shown that the panel's report was in fact treated as confidential by the local board. It is not shown that Horowitz sought and was denied access to the report. Nor is it shown that when Horowitz examined the file the report was not made available to him. If those were the facts, we do not doubt that Horowitz' counsel would have established them at the *habeas corpus* hearing. We find no command to the local board to keep the report confidential. We cannot presume that the board violated the regulations. Yet that is in effect what we are asked to hold. Horowitz, like Samuels, points to possibilities of abuse in the use of the panel. But like Samuels he fails to establish prejudice in his case. The judgment below must therefore be

Reversed.

NATIONAL LABOR RELATIONS BOARD *v.* A. J. TOWER CO.

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

No. 60. Argued November 21, 1946.—Decided December 23, 1946.

A consent election of a collective bargaining agent under the National Labor Relations Act was held pursuant to an agreement between the employer and the union providing that the regional director of the National Labor Relations Board should supervise the election and that his determination on any question of eligibility of voters should be final. The employer provided a list of eligible employees and had observers at the polls with the right to challenge the eligibility of voters. After the union had been elected by a close vote and the results had been announced, the employer sought to challenge the eligibility of a voter included in the list it had furnished and whose eligibility was unchallenged at the polls. This, together with a vote challenged by the union and not counted, might have changed the result. The regional director found that the employer had waived its right to challenge the vote or to object to the election on this ground and that the union had received a majority of the valid votes cast. The employer refused to bargain with the union on the ground that it had not been validly elected. The Board sustained the regional director's finding as being in accord with its established policy and ordered the employer to bargain with the union. *Held:*

1. The Board's order is sustained. P. 335.

2. A proper application of the rule prohibiting post-election challenges, even though the result of the election might have been different had the challenge been made and sustained, did not deprive the Board of jurisdiction to find the employer guilty of an unfair labor practice in refusing to bargain with the union. P. 333.

3. The rule forbidding the eligibility of a voter to be challenged after the votes have been cast is in accordance with the National Labor Relations Act and the principle of majority rule and is justified by practical considerations. Pp. 330–333.

4. The fact that the employer may have been honestly mistaken as to the eligibility of the voter is no justification for disregarding the rule. P. 333.

5. A provision in the agreement for the election as to the filing of objections "to the conduct of the ballot" and "to a determination of representatives based on the results thereof" within five days after issuance of the "Tally of Ballots" did not constitute a waiver of the rule, since there is a clear distinction between objections and challenges in electoral parlance. P. 334.

6. In the absence of evidence that the representatives of the Board and the employer discriminated against anti-union employees in preparing the eligibility list or in raising timely eligibility issues, it cannot be said that the interests of anti-union employees were inadequately represented. Pp. 334–335.

152 F. 2d 275, reversed.

The National Labor Relations Board sustained the validity of the election of a union as a collective bargaining representative and ordered the employer to bargain with it. 60 N. L. R. B. 1414. The Circuit Court of Appeals set aside the order. 152 F. 2d 275. This Court granted certiorari. 328 U. S. 827. *Reversed*, p. 335.

Gerhard P. Van Arkel argued the cause for petitioner. With him on the briefs were *Solicitor General McGrath, Assistant Solicitor General Washington, Morris P. Glushien, Ruth Weyand* and *Joseph B. Robison.*

John T. Noonan argued the cause for respondent. With him on the brief was *Malcolm Donald.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

The issue here concerns the procedure used in elections under the National Labor Relations Act[1] in which employees choose a statutory representative for purposes of collective bargaining. Specifically, we must determine the propriety of the National Labor Relations Board's refusal to accept an employer's post-election challenge to

[1] 49 Stat. 449, 29 U. S. C. § 151, *et seq.*

the eligibility of a voter who participated in a consent election.

The respondent and a union entered into an agreement to conduct an election by secret ballot on May 5, 1944, under the supervision of the Board's regional director, to determine whether the employees at respondent's Roxbury plant in the unit defined in the agreement desired to be represented by the union. The agreement was approved by the regional director and provided that the election was to be held "in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board."

The agreement set forth the qualifications for participation in the election. Only those who appeared on the pay-roll on April 21, 1944, were eligible; included were those employees who did not work at the time because they were ill, or on vacation, or temporarily laid off, or in the armed forces. The respondent had the duty of furnishing the regional director with an accurate list of the eligible voters, together with a list of the ineligible employees.[2] The list of eligible voters was duly submitted on May 1, 1944.

The agreement further provided that both the union and the respondent could have observers at the polling places to assist in the handling of the election, to challenge the eligibility of voters and to verify the tally. If challenges were made and if they were determinative of the results of the election, the regional director was to investigate the challenges and issue a report thereon. All objections "to the conduct of the ballot" or "to a determination of representatives based on the results thereof" were to be filed with the regional director within five days after issuance of the "Tally of Ballots." If the regional direc-

[2] Among the ineligible persons were those who had quit or been discharged for cause and had not been rehired or reinstated prior to the date of the election.

tor sustained the objections, he had the power to void the results and order a new election. The determination of the regional director was to be final and binding upon any question, "including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election." Cf. Article III, §§ 10 and 12, of the Board's Rules and Regulations (Series 3, effective Nov. 26, 1943).

The balloting took place on May 5 in accordance with this agreement. After the ballots were counted, the union and the respondent signed a "Tally of Ballots," in which the regional director certified that, of the 230 valid votes counted, 116 were cast for the union and 114 against it, with one other ballot being challenged by the union.[3] Four days later, on May 9, respondent's counsel wrote the regional director that subsequent to the election "it came to the attention of the management of the Company that Mrs. Jennie A. Kane, one of the persons who voted at the election, was not at the time an employee of the Company."[4] The letter explained that Mrs. Kane was employed by respondent from March 16, 1943, through March 24, 1944, but that after the latter date she had never reported again for work and had never appeared at the plant except for purposes of voting on May 5. It

[3] It was unnecessary to rule on the challenged ballot since it could not affect the result of the election, even though the ballot proved to be against the union.

[4] The letter recited that "It has now come to their attention, however, that on April 28, 1944, Mrs. Kane filed with the Division of Employment Security of the Commonwealth of Massachusetts a claim for unemployment benefits stating, in connection with that claim, that she had left the employ of the A. J. Tower Company in March, 1944, and that her reason for leaving was that she 'could not continue to do heavy work of carrying bundles which was part of her job.' The Company has also learned that on the same day, April 28, 1944, Mrs. Kane visited the United States Employment Office and was placed on its list of persons available for employment."

was admitted that the respondent, "not being advised by Mrs. Kane of any intention on her part to leave their employ, assumed that she was ill and continued her among their list of employees and, therefore, did not exclude her from the list of employees they believed eligible to vote." The letter accordingly challenged Mrs. Kane's right to vote, as well as the ballot cast by her. A hearing was requested for the purpose of passing upon the one ballot challenged by the union. If that challenge were not sustained and the ballot proved to be a vote against the union, Mrs. Kane's ballot would become material to the result of the election; on that condition, the respondent requested a hearing on its challenge to Mrs. Kane's vote.

A hearing on the matters raised by this letter was held before the regional director. He subsequently made a report in which he found that respondent included Mrs. Kane's name on the list of eligible voters submitted on May 1 on the assumption that she was ill and had not quit her job; that respondent made no attempt between May 1 and May 5 to remove Mrs. Kane's name from the list, although prior to the election respondent received by mail a notice of Mrs. Kane's claim for unemployment compensation; that respondent's observers at the polls had not challenged Mrs. Kane when she voted in their presence; and that these observers certified before the ballots were counted that the election had been properly conducted. The regional director also found that the evidence was conflicting as to Mrs. Kane's actual status.[5] But he concluded that under the circumstances the respondent had

[5] An agent of the Board interviewed Mrs. Kane and was told by her that: "On April 28, 1944, I applied for Unemployment Compensation benefits, thinking I was entitled to such because of my illness. At no time, prior or since, have I considered myself not an employee of the A. J. Tower Co. I have never requested my release of the A. J. Tower Co. and in fact I intend to return to the Company when I have regained my strength. I did not think that my application for

waived its right to challenge her vote or to object to the election on this ground. This determination made it unnecessary for him to rule on the ballot previously challenged by the union, since it could not affect the result. He thus found that the union had received a majority of the valid votes cast and was the exclusive representative of the employees in the appropriate unit.

The respondent thereafter refused to bargain with the union in question. Upon a complaint issued by the Board, the respondent admitted its refusal but denied that the union had ever been designated by a majority of the employees in the appropriate unit. It asserted that the election of May 5 was inconclusive on the subject because if Mrs. Kane's ballot were subtracted from the union's total and if the ballot challenged by the union were opened upon overruling the challenge and proved to be against the union, the outcome of the election would be a tie vote. The Board, after the usual proceedings, held that it would not disturb the rulings of a regional director on questions arising out of a consent election "unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious" and that no such grounds for disturbing the ruling were present in the instant case. As an alternative ground for its action, the Board held that the regional director's refusal under the circumstances to permit an attack on Mrs. Kane's status as a voter after the results

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unemployment benefits would be considered a termination from the Company. . . . On May 5, 1944, when I presented myself at the election polls at the A. J. Tower Co., I considered myself an employee of the Company and therefore entitled to cast a ballot. I still consider myself an employee of the A. J. Tower Co."

But the regional director pointed out that, despite this statement, subsequent investigation confirmed the fact that Mrs. Kane advised the Division of Employment Security on April 28, 1944, that she had left her employment with the respondent in March because of the heavy work in carrying bundles. See note 4, *supra*.

of the election had been announced "is in complete accord with the established principles and policy of the Board"—which excluded post-election challenges "because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result." See also *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 512. The Board accordingly ordered respondent to cease and desist from its unfair labor practice and to take the affirmative action of bargaining collectively with the union. 60 N. L. R. B. 1414.

The First Circuit Court of Appeals, however, set aside the Board's order. 152 F. 2d 275. It construed the Act as making it a jurisdictional prerequisite to a determination that an employer has committed the unfair labor practice of refusing to bargain collectively that the union with which he has refused to deal should have been chosen by a majority of those voting who were in fact employees. It held that since the vote challenged by the union may have been cast against it and since Mrs. Kane was not found to have been an employee on the crucial date, there may have been a tie vote and the Board was without jurisdiction to find the respondent guilty of a violation of § 8 (5). We granted certiorari because of the importance of the matter in the administration of the Act and because of a conflict between the result below and that reached by the Sixth Circuit Court of Appeals in *Labor Board* v. *Capitol Greyhound Lines*, 140 F. 2d 754.

As we have noted before, Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. *Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31, 37; *Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 226; *Labor Board* v. *Falk Corp.*, 308 U. S. 453, 458. Section 9 (c) of the Act authorizes the Board to "take a secret ballot of

employees, or utilize any other suitable method to ascertain such representatives." In carrying out this task, of course, the Board must act so as to give effect to the principle of majority rule set forth in § 9 (a), a rule that "is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions." S. Rep. No. 573, 74th Cong., 1st Sess., p. 13. It is within this democratic framework that the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.

The principle of majority rule, however, does not foreclose practical adjustments designed to protect the election machinery from the ever-present dangers of abuse and fraud. Indeed, unless such adjustments are made, the democratic process may be perverted and the election may fail to reflect the will of the majority of the electorate. One of the commonest protective devices is to require that challenges to the eligibility of voters be made prior to the actual casting of ballots, so that all uncontested votes are given absolute finality. In political elections, this device often involves registration lists which are closed some time prior to election day; all challenges as to registrants must be made during the intervening period or at the polls. Thereafter it is too late. The fact that cutting off the right to challenge conceivably may result in the counting of some ineligible votes is thought to be far outweighed by the dangers attendant upon the allowance of indiscriminate challenges after the election. To permit such challenges, it is said, would invade the secrecy of the ballot, destroy the finality of the election result, invite unwarranted and dilatory claims by defeated candidates and "keep perpetually before the courts the same excitements, strifes, and animosities which characterize the hustings, and which ought, for the peace of the community, and the safety and stability of our institutions, to terminate with

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the close of the polls." Cooley, Constitutional Limitations (8th ed., 1927), p. 1416.

Long experience has demonstrated the fairness and efficaciousness of the general rule that once a ballot has been cast without challenge and its identity has been lost, its validity cannot later be challenged. This rule is universally recognized as consistent with the democratic process. And it is generally followed in corporate elections. The Board's adoption of the rule in elections under the National Labor Relations Act is therefore in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives.

Moreover, the rule in question is one that is peculiarly appropriate to the situations confronting the Board in these elections. In an atmosphere that may be charged with animosity, post-election challenges would tempt a losing union or an employer to make undue attacks on the eligibility of voters so as to delay the finality and statutory effect of the election results. Such challenges would also extend an opportunity for the inclusion of ineligible pro-union or anti-union men on the pay-roll list in the hope that they might escape challenge before voting, thereafter giving rise to a charge that the election was void because of their ineligibility and the possibility that they had voted with the majority and were a decisive factor. The privacy of the voting process, which is of great importance in the industrial world, would frequently be destroyed by post-election challenges. And voters would often incur union or employer disfavor through their reaction to the inquiries.

We are unable to say, therefore, that the Board's prohibition of post-election challenges is without justification in law or in reason. It gives a desirable and necessary finality to elections, yet affords all interested parties a reasonable period in which to challenge the eligibility of

any voter. And an exception to the rule is recognized where the Board's agents or the parties benefiting from the Board's refusal to entertain the issue know of the voter's ineligibility and suppress the facts.[6] The Board thus appears to apply the prohibition fairly and equitably in light of the realities involved.

The reliance of the court below upon the asserted jurisdictional requirement was misplaced. It is true that it is an unfair labor practice for an employer to refuse to bargain with a union only if that union was chosen by a majority of the voting employees. But the determination of whether a majority in fact voted for the union must be made in accordance with such formal rules of procedure as the Board may find necessary to adopt in the sound exercise of its discretion. The rule prohibiting post-election challenges is one of those rules. When it is applied properly, it cannot deprive the Board of jurisdiction to find an unlawful failure to bargain collectively. That is true even where it subsequently is ascertainable that some of the votes cast were in fact ineligible and that the result of the election might have been different had the truth previously been known. The rule does not pretend to be an absolute guarantee that only those votes will be counted which are in fact eligible. It is simply a justifiable and reasonable adjustment of the democratic process.

There is no basis in the instant case for disregarding the Board's policy in this respect. The fact that the respondent may have been honestly mistaken as to the status of Mrs. Kane has no relevance whatever to the justification for the use of the policy. And nothing in the consent agreement constituted a waiver of the policy by the Board. On the contrary, the agreement expressly stated that the election was to be held in accordance with "the customary

[6] See *Matter of Hale*, 62 N. L. R. B. 1393; *Matter of Beggs & Cobb, Inc.*, 62 N. L. R. B. 193.

procedures and policies of the Board," which would include the policy prohibiting post-election challenges. The provision as to the filing of objections "to the conduct of the ballot" and "to a determination of representatives based on the results thereof" within five days after issuance of the "Tally of Ballots," a provision which was quite separate from that relating to challenges, obviously has no application here. Objections and challenges are two different things in electoral parlance. Objections relate to the working of the election mechanism and to the process of counting the ballots accurately and fairly. Challenges, on the other hand, concern the eligibility of prospective voters. The Board uses this clear distinction as a matter of policy and we are not free to disregard it.[7]

Neither the record in this case nor the past history of the policy against post-election challenges justifies an assumption that the interests of the anti-union employees in this election were inadequately protected. Due notice of the manner and conduct of the election was given to all employees; and, despite the lack of any affirmative provisions in the consent agreement, there was no indication that any of the employees were prohibited from examining the eligibility list or from challenging any prospective voter. Nor was there competent evidence that any anti-union employee made any objection, either before or after the election, to the procedure adopted or to the casting of any ballots.[8] Moreover, the representatives of the

[7] "The Board follows a policy of differentiating between objections to the conduct of an election and challenges [to] the eligibility of voters and it does not ordinarily permit challenges under the guise of objections after the election." *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 512. Cf. *Matter of Great Lakes Steel Corporation*, 15 N. L. R. B. 510.

[8] The respondent's factory superintendent testified that an unidentified employee came to him and "objected to the vote of this Jennie Kane" several days after the election and even longer after the receipt by respondent of the notice of Mrs. Kane's unemployment compensa-

Board, as well as those of the respondent, were bound to perform their electoral functions on behalf of all employees, including those with anti-union sentiments. In the absence of any evidence that such representatives discriminated against the anti-union employees in preparing the eligibility list or in raising timely eligibility issues, we cannot say that the interests of those employees were inadequately represented.

Since we rest our decision solely on the propriety of the Board's policy against post-election challenges, it is unnecessary to discuss the effect to be given by the Board to the regional director's ruling that the respondent waived its right to challenge Mrs. Kane's vote or the effect to be given to the terms of the consent election agreement apart from the general policy.

It follows that the court below erred in refusing to enforce the Board's order in full.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE JACKSON, dissenting.

If the only interests affected were the complaining employer and the victorious union, I should agree with the Court's decision. But there is a third and, as usual, a forgotten interest here—those employees who did not want to be represented by the union.

The election was held by agreement between the employer and the union which was seeking to organize the plant. The Company was to furnish a list of eligible

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tion claim, which had been mailed to respondent before the election. This testimony was admitted merely to show "how the company became interested in the question" of Mrs. Kane's eligibility. The Board, of course, was not compelled to accept this testimony as proof of an objection to Mrs. Kane's vote by an anti-union employee or as an indication that the interests of anti-union employees may have been inadequately represented.

voters. The Company and the union were each to have observers attend, with the right to challenge the voters. The agreement did not give anti-organization employees either observers or the right to challenge. The certified result of 116 union against 114 anti-union votes was reached by not counting a ballot which the union challenged and by counting the ballot which the Company now points out was probably invalid. Mrs. Kane's vote, no matter whether valid or invalid, is thus allowed to decide the election.

It is in evidence and undisputed that, after the election an employee—presumably anti-union, from the circumstance that he was objecting—raised the question that Mrs. Kane, who was carried on the Company's eligible list because the Company believed she was absent for illness, had, in fact, left the employ of the Company with no intention to return. If that is true, she was not a qualified voter.

But because there was no challenge at the time her ballot was cast, the Court holds there can be no inquiry into its validity. Comparison with the practice at general public elections is specious, for in those elections every citizen has a right of challenge and registration lists usually are made up and available in advance. No comparable safeguards for the employees opposed to the union appear to exist here, though both the employer and the union were protected.

The Court takes the position that although every other interest has affirmative protection, there is no necessity for similar affirmative protection to the anti-union employees. Despite the fact that both of the contracting parties were careful to provide such protection for themselves, the Court assumes it is unnecessary for the third interest. The Court says that, in the absence of evidence, it will assume that such interests were adequately represented, at the same time closing the door to hearing evi-

dence as to whether those interests were prejudiced unless those who are denied affirmative representation or challenge rights should have made affirmative objection before the wrong was consummated by casting the illegal ballot. And, of course, the members of such a minority have no standing to bring their problems either to the Board or to the Court. We hear of their grievance, if at all, only through its being identical with some complaint which the employer raises.

The Court fears that to permit inquiry into the validity of Mrs. Kane's vote would "extend an opportunity for the inclusion of ineligible pro-union or anti-union men on the pay-roll list" who would be challenged after the election in the hope of voiding an unwanted result. Of course, there are opportunities for manipulation of such a list, for collusion between employer and favored groups, for fraud, and for honest mistakes.

But if the Court is concerned to keep the elections pure, why close the door to proof of such corruption or mistake when it operates against an anti-union group, because it has not been challenged by one of the parties to it: to wit, the employer? In the usual election, it may be desirable to put an end to challenges at the time when the ballots become intermingled and indistinguishable. But to justify cutting off inquiry, it should appear that all persons interested in the election have had adequate opportunity to question the ballots cast. As long as no such provision is made for employees who are opposed to organization, I would protect their rights by allowing post-election challenges on such grounds as are urged here.

Of course the protection this gives is far from satisfactory. The challenge must be initiated by the parties the Board recognizes, the employer or the union. But there will be some instances in which their interest coincides with that of the anti-union employees. On the other hand, I can scarcely think of a more perfect device for

encouraging unscrupulousness, than to invest it with finality against all inquiry either by the Board or the courts. Here half the employees are forced to accept union representation as the result of an election in which they were not allowed to protect the ballot, and those who were, failed to do so. If I really wanted to discourage fraud, collusion, and mistakes, and protect the integrity of elections and the rights of both minority and majority, I should hold that such elections can be looked into whenever irregularity appears to have affected the result.

GIBSON *v.* UNITED STATES.

NO. 23. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

Argued January 2, 3, 1946. Reargued October 23, 1946.—Decided December 23, 1946.

1. Having been denied classification as a minister of religion under the Selective Training and Service Act, classified as a conscientious objector and ordered to report to a civilian camp for work of national importance, and having exhausted his administrative remedies up to that point, Dodez refused to go to camp. The regulations then applicable provided for a preinduction physical examination before issuance of the order to report for induction but not after reporting to camp, so that there was no possibility that he would be rejected after reporting to camp. He was indicted for violating § 11 of the Act and defended on the ground that his classification was invalid. *Held:* He was not required to report to camp in order to complete the administrative process and is not foreclosed from making the defense that his classification was invalid. Pp. 343–350.

(a) *Falbo* v. *United States*, 320 U. S. 549, distinguished on the ground that, under the regulations governing Falbo, he might have been rejected upon a physical examination after reporting to camp. Pp. 343–350.

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*Together with No. 86, *Dodez* v. *United States*, on certiorari to the Circuit Court of Appeals for the Sixth Circuit, argued October 23, 1946.

2. Having been denied classification as a minister of religion under the Selective Training and Service Act, classified as a conscientious objector and ordered to report to a civilian camp for work of national importance, and having exhausted his administrative remedies, Gibson reported to camp, remained five days, and departed without leave. The regulations then applicable provided for a physical examination after the registrant reported to camp but required the camp director to note the fact of acceptance of the registrant "irrespective of the determination made as the result of" this examination. He was indicted for violating § 11 of the Act and defended on the ground that his classification was invalid: *Held:* By reporting to a civilian camp, he did not forfeit the right to defend against a charge of desertion on the ground that his classification was invalid, since he remained a civilian and was not subject to military jurisdiction. Pp. 351–361.

   (a) No analogy exists between a selectee inducted into military service who may thereafter obtain his release only by resort to habeas corpus and a selectee reporting to a civilian camp for whom the availability of the remedy of habeas corpus is doubtful. Pp. 356–361.

3. On review of a conviction in a criminal case, the Government's confession of error does not relieve this Court of the duty to examine independently the errors confessed. P. 344, n. 9.

4. This Court is not required to determine these cases finally on their merits but remands them for further proceedings in the trial court. Pp. 350–351, 361–362.

149 F. 2d 751 and 154 F. 2d 637, reversed.

No. 23. Petitioner was convicted for violating § 11 of the Selective Training and Service Act by unlawfully deserting camp. The Circuit Court of Appeals affirmed. 149 F. 2d 751. This Court granted certiorari, 326 U. S. 708, and, after hearing argument, restored the case to the docket for reargument before a full bench. *Reversed,* p. 362.

No. 86. Petitioner was convicted for violating § 11 of the Selective Training and Service Act by failing to report to camp. The Circuit Court of Appeals affirmed. 154 F. 2d 637. This Court granted certiorari. 328 U. S. 828. *Reversed,* p. 362.

Hayden C. Covington argued the cause and filed briefs for petitioners. With him on a joint brief was *Victor F. Schmidt.*

Irving S. Shapiro argued the cause for the United States. With him on the briefs were *Solicitor General McGrath* and *Robert S. Erdahl. Walter J. Cummings, Jr.* was also on the brief on the original argument.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

These cases carry forward another step the sequence in decision represented by *Falbo, Billings, Estep* and *Smith.*[1] Each petitioner has been convicted for violating § 11 of the Selective Training and Service Act (54 Stat. 894, 50 U. S. C. App. § 311), Dodez for failing to report for work of national importance after being ordered to do so and Gibson for having unlawfully deserted the camp to which he had been assigned for such work.[2]

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[1] *Falbo* v. *United States,* 320 U. S. 549; *Billings* v. *Truesdell,* 321 U. S. 542; *Estep* v. *United States,* 327 U. S. 114; *Smith* v. *United States, ibid.*

[2] Section 11 provides, in part: "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

Section 652.11 (a) of the regulations imposes the duty on persons classified IV–E to comply with the order to report for work of national importance; and by § 653.12 assignees are required to report to the camp to which they are assigned and to remain therein until released or transferred elsewhere by proper authority, except when on authorized missions or leave.

In each instance the conviction was sustained on appeal [3] and certiorari was granted because of the importance of the questions presented for the administration of the Act. No. 23, 326 U. S. 708, restored to the docket for reargument before a full bench; No. 86, 328 U. S. 828.

The principal issues relate to the time of completing the administrative selective process and the effect in each case of what was done in this respect upon the petitioner's right to make defense in the criminal proceedings on various grounds going to the validity of the classification.

In both cases tendered defenses of this character were excluded in the trial court and the exclusion was sustained on appeal. The effect was, in Gibson's case, to rule that although he had completed the administrative process by reporting to the camp, pursuant to the requirement of the *Falbo* decision, nevertheless his remedy, if any, on account of the alleged misclassification was by habeas corpus, not by defense in the criminal cause. 149 F. 2d 751. In Dodez' case it was held that by refusing to report for service at the camp he had failed to exhaust his administrative remedies and therefore under the *Falbo* doctrine he could not question his classification in the criminal suit. 154 F. 2d 637.[4]

I.

Both petitioners are Jehovah's Witnesses. Each has claimed consistently since the time of his registration that he is a minister of religion and therefore exempt from

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[3] 149 F. 2d 751 (C. C. A. 8); 154 F. 2d 637 (C. C. A. 6).

[4] Apparently in both cases the important changes in the applicable regulations made after the *Falbo* decision were not called to the attention of the trial courts or the Circuit Courts of Appeals.

training and service under the Act.[5] Each was denied this classification (IV–D), being classified instead as a conscientious objector (IV–E).[6] Administrative appeals were exhausted. Pursuant to the classifications given and the applicable statutory provisions and regulations, Dodez and Gibson were assigned to work of national importance and ordered to report for such work at designated camps.

Dodez refused to go to the camp. But Gibson, thinking the *Falbo* decision required him to report there in order to exhaust his administrative remedies, went to the camp, remained for five days, and then departed without leave. It is undisputed that he intended at no time to submit to the camp's jurisdiction or authority and that he at all times made this intent clear. Everything he did was done solely to make sure that the administrative process had been finished and with a view to avoiding the barrier Falbo encountered in his trial when he sought to question his classification.

Obviously the petitioners have sought to reach the same point, namely, the place at which the selective process is exhausted administratively, but have differed concerning its exact location. Dodez maintains that the point was reached, under the applicable regulations,[7] when his preinduction physical examination had been given and he was found acceptable for service by the Selective Serv-

[5] The exemption is provided by § 5 (d) of the Act, 54 Stat. 885, 888, as follows: "Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

[6] Pursuant to § 5 (g) of the Act, which provides that persons so classified shall be assigned to noncombatant service or, if conscientiously opposed to this, then to "work of national importance under civilian direction."

[7] See text Part II *infra* at note 19; also note 13.

ice System. This was on February 21, 1944, two months prior to the date (April 21, 1944) when he was ordered to report for work and refused to go.

On the other hand, Gibson argues that until the preliminaries to actual service, including physical examination, were completed at the camp, he was not foreclosed by going through with them from exercising his choice not to submit to the camp's jurisdiction, cf. *Billings* v. *Truesdell,* 321 U. S. 542, or, upon doing so, from asserting the invalidity of his classification in a criminal trial either for failing to report for service or for desertion from the camp. Cf. *Estep* v. *United States,* 327 U. S. 114; *Smith* v. *United States, ibid.* Clearly, on the facts and the issues, the question as to Dodez, like that in Falbo's case, is whether he went far enough to exhaust the administrative process; while as to Gibson it is said that he went too far, that is, beyond the point of completing that process, and that this cut off the right of defense concededly available to him at that point.

II.

If these cases were controlled in all respects by the regulations effective when Falbo's case was decided, Dodez would seem clearly to fall within the decision's proscription. The Court there said: "Completion of the functions of the local boards and appellate agencies, important as are these functions, is not the end of the selective service process. The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp. The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army, navy, or civilian public service camp. Thus a board order to report is no more than a necessary intermediate step in a united and continuous process designed to

raise an army speedily and efficiently." 320 U. S. at 553. Since acceptability for service was not finally determined under the regulations then applicable until the registrant had reached camp, had there undergone or waived the specified physical examinations, and thereupon had been found acceptable,[8] and since Falbo had not taken those steps, the Court held he was not entitled to question his classification and therefore sustained his conviction.

However, intermediate the *Falbo* decision and issuance of the order to Dodez to report, the regulations governing the procedure relating to selection for service were changed and in a manner which Dodez says relieved him from the necessity of going to the camp in order to complete the administrative process. The Government now concedes, we think properly,[9] that Dodez is right in this view.

It is not necessary to review in detail the regulations which were governing in Falbo's case, since they are

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[8] At that time § 653.11 (c) of the Selective Service Regulations provided: "If the assignee indicates that his physical condition has changed since his final-type physical examination for registrants in Class IV–E, the camp physician shall examine him with reference thereto. If the assignee is not accepted for work of national importance, the Camp Director will indicate the reason therefor, and the assignee, pending instructions from the Director of Selective Service, will be retained in the camp or hospitalized where necessary." Cf. note 10.

This provision, effective by Amendment No. 40 on March 16, 1942 (7 F. R. 2093), was eliminated entirely by Amendment No. 210 (9 F. R. 1416), effective February 2, 1944, a little more than two months prior to the date specified for Dodez to report for work, namely, April 21, 1944; but was restored in modified form on June 7, 1944, by Amendment No. 236 (9 F. R. 6207), nearly two months before Gibson was ordered to report on August 21 of that year.

[9] A confession of error on the part of the United States "does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed." *Young* v. *United States,* 315 U. S. 257, 258–259.

not controlling in either of the present ones. Although it is now argued that the Court misconceived their effect,[10] we need only to note that it was within the registrant's power to secure a physical examination by the camp physician by indicating a change in his physical condition, it could not be known in advance in any case whether he would demand it, and until this was determined it could not be known finally and irrevocably whether he would be "accepted for work of national importance." [11] The decision therefore correctly ruled that "the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp" and that the board's order to report there for service was "no more than a necessary intermediate step" in the continuous selective process, which was not ended until the last possibility for rejection had been exhausted. Under those regulations there was no final and conclusive acceptance for service until after those procedures at the camp were completed.

It was exactly in this respect, however, that the changes made in the regulations immediately after the *Falbo* decision [12] and shortly prior to issuance of Dodez' order to

[10] The contention is that § 653.11 (c) of the regulations as it then stood, see note 8, provided for physical examination at the camp and possible rejection there only if the registrant on reporting indicated a change in his physical condition and that this was effective only as to persons sustaining such a change, not to others, of whom Falbo was one. The argument assumes that the registrant's actual condition, not the possibility that a change might occur and be found in any case, was controlling not only to determine the outcome of the examination, but to foreclose the possibility that change might be "indicated" and, in that event, final determination of acceptability would be made after the examination.

[11] The regulation clearly contemplated that, upon receipt of such instructions from the Director of Selective Service, the registrant might be rejected or released.

[12] The decision was rendered January 3, 1944. The basic changes in the regulations were made January 10, 1944. See text *infra* at notes 13–17.

report, together with still others made later but prior to the order to Gibson, were effective. The changes were extensive and important. The altered regulations are lengthy. We therefore give a summary in the margin, noting the more important differences between those applicable to Dodez and those in effect as to Gibson.[13]

It is of some importance to note that the changes affecting both registrants were made in consequence of the enactment of § 5 of Public Law 197, 78th Congress, approved December 5, 1943. 57 Stat. 596, 599, 50 U. S. C. App. § 304a. This required preinduction physical examinations to be given before the registrant was ordered to

[13] After a registrant has been classified IV–E he is given a preinduction physical examination. Reg. §§ 629.1, 629.2. If found acceptable for service he is issued a certificate of fitness. Reg. § 629.32. Thereafter the local board notifies the Director of Selective Service that the registrant is available for assignment to work of national importance, Reg. § 652.1, and such an assignment is sent to the local board. Upon receipt thereof, the local board issues to the registrant an order to report for work of national importance, commanding him to report at a designated time and place, Reg. § 652.11. When the registrant reports, transportation to a camp for work of national importance is furnished, Reg. § 652.12. Thereafter he "is under the jurisdiction of the camp to which he is assigned." The local board then can take no further steps with regard to such registrant without instructions from the Director of Selective Service, but should report any information to the Director of Selective Service which might affect the registrant's status, Reg. § 652.13.

Upon arrival at the camp the registrant (now called assignee in the regulations) is given a physical examination, although at the time the case of Dodez arose specific provision for such an examination was not made in the regulations. See note 8. It was merely provided that "the camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned." Reg. § 653.11 (b). However, this regulation subsequently was amended in the form applicable to the case of Gibson. See note 28 *infra*.

report for induction and service.[14] Previously he first had been ordered to report for induction, was then given his preinduction examination by the armed forces and, on being found acceptable, was inducted at once.[15] The major changes in the regulations giving effect to § 5 were made on January 10, 1944, one week after the *Falbo* decision came down, some taking effect on that date,[16] others on February 2d following. These applied to Dodez. Still others not applicable to him but operative as to Gibson took effect on June 7, 1944.[17]

The changed regulations, following out the command of § 5 of Public Act 197, provided for a preinduction physical examination to be given before issuance of the order to report for induction, rather than afterward. Section 629.1 of Amendment No. 200 (9 F. R. 440–442), effective January 10, 1944.[18] This was the basic amendment. It applied to all registrants subject to call for service, includ-

[14] The statute, in so far as is now material, provided: "Any registrant within the categories herein defined when it appears that his induction will shortly occur shall, upon request, be ordered by his local board in accordance with schedules authorized by the Secretary of War, the Secretary of the Navy, and the Director of Selective Service, to any regularly established induction station for a preinduction physical examination, subject to reexaminations.

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexamination. Those registrants who are classified as I–A at the time of such physical examination and who are found physically qualified for military service as a result thereof, shall remain so classified and report for induction in regular order."

[15] Compare the procedure outlined in *Billings* v. *Truesdell,* 321 U. S. 542.

[16] See notes 18, 19, *infra,* and text for the principal changes.

[17] These are noted specifically *infra* at note 28 and text.

[18] Pertinently the basic regulation provided: "Every registrant, before he is ordered to report for induction, shall be given a pre-induc-

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ing those classified IV–E. Moreover, by Amendment No. 210 (9 F. R. 1416), effective February 2, 1944, § 653.11 of the regulations applicable to men so classified was changed to eliminate the previously effective paragraph (c) providing for physical examination by the camp physician on indication of changed condition and consequent possible rejection at the camp. Instead the amended regulation stated simply that (a), when the "assignee" had reported to the camp, the camp director should "*complete the Order to Report* for Work of National Importance (Form 50)"; and (b) place, as specified, on the assignee's papers, "a statement that [the] registrant *is accepted*" for work at the designated camp, stating also the date and place of acceptance; (c) the local board, "upon receiving notice that a registrant *has been accepted for work*," should not "change his classification but shall note the fact *of his acceptance*" on Form 100; and (d), if the assignee failed to report when required, the camp director was to notify the Director of Selective Service.[19] (Emphasis added.)

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tion physical examination under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent. . . ."

[19] Because § 653.11 as changed by Amendment No. 210 is crucial in Dodez' case, the exact language is quoted: "(a) When the assignee has reported to camp, the camp director *shall complete the Order to Report* for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).

"(b) *The camp director shall,* on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and

The effect of the statute and the amended regulation was to place the order to report for service nearer the end of the administrative process than it had been previously, so far as concerned the power of the registrant to take action which might result in his rejection. The elimination of the provision permitting medical examination at the camp, by Amendment No. 210, removed any chance the registrant formerly had to secure rejection by demanding examination there, and left to be performed at the camp only the formal entries of "completing the Order to Report" and noting the fact, time and place of "acceptance" upon the assignee's papers, together with the duties of notifying the local board of acceptance or the Director of Selective Service of failure to report.

Although the amended regulations thus speak of "completing the Order to Report" and of placing on his papers "a statement that a registrant is accepted," we agree that these were only formal matters to be performed by camp officials, and left nothing to be done by them or by the applicant after reaching the camp which might result in his being rejected or released from the duty to remain and perform the further duties imposed on him. To construe

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Induction (Form 221), *place a statement that a registrant is accepted* for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement *shall specify the date and place of such acceptance* and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

"(c) Upon receiving notice that a registrant *has been accepted* for work of national importance, the local board shall not change his classification *but shall note the fact of his acceptance* for such work in the Classification Record (Form 100).

"(d) In the event an assignee does not report to the camp at the time prescribed in his Order to Report for Work of National Importance (Form 50) or pursuant to the instructions of the local board, the camp director will report such fact to the Director of Selective Service." (Emphasis added.)

the regulations otherwise would be to force the registrant not only to perform all requirements affording possibility of relief but also to go through with purely formal steps to be taken by camp officials offering no such possibility. Exacting this would stretch the requirement of exhausting the administrative process beyond any reason supporting it. Cf. *Levers* v. *Anderson,* 326 U. S. 219. And, as appears from Gibson's experience, by going through with those formalities Dodez would have found himself confronted with the Government's contention that he had gone too far.

We hold therefore, in accordance with Dodez' view and the Government's concession, that he was not required to report to the camp, under the regulations effective when his order to report became operative, in order to complete the administrative process; and that he therefore was not foreclosed by the *Falbo* decision from making any defense open to him in his criminal trial under the statute or the Constitution aside from the effect of that decision. *Estep* v. *United States,* 327 U. S. 114; *Smith* v. *United States, ibid.;* cf. *Billings* v. *Truesdell,* 321 U. S. 542.

This view requires reversal of the judgment in No. 86 and remanding the cause to the District Court for a further trial. Dodez insists however that we should go further and determine the case finally upon the merits. He urges that the evidence properly tendered and admissible upon the excluded defenses, as well as that adduced,[20] would support no other verdict than one of acquittal and that therefore the trial court should have sustained his motion to dismiss the cause.[21] Accordingly

[20] The trial court permitted Dodez to introduce *de novo* evidence intended to show that as of the time of the trial he was a minister. But the court, over objection, declined to allow this evidence to go to the jury.

[21] The question was also raised by motion for a directed verdict, which was overruled.

he asks for a judgment here directing that such relief be given.

In the *Estep* and *Smith* cases, after holding that the petitioners had been wrongfully denied opportunity to defend by attacking the validity of their classifications, this Court reversed the convictions and remanded the causes for new trials, stating: "We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case." 327 U. S. at 125. Dodez' situation is identical, in this respect, with those of Estep and Smith.[22] Accordingly we remand the cause, as was done in the *Smith* and *Estep* cases, for further proceedings in the trial court, without expressing opinion upon those further issues.

III.

The Government urges that the conclusion we have accepted for Dodez forces the contrary result in Gibson's case No. 23. The argument, as we have pointed out, is

[22] In each case the tendered defenses were substantially two, namely, (1) that a full and fair hearing had been denied in the selective service proceedings, particularly before the local board; and (2) that the undisputed evidence would sustain no other conclusion than that the registrant was a minister of religion. In each case also evidence was tendered and excluded in the trial court to sustain the first of these defenses. Appropriate determination of that defense would require not only reception and consideration of evidence properly tendered upon the issue, but also in consequence thereof determination of issues of fact, including credibility and inferential conclusions, properly to be made in the trial court rather than by an appellate tribunal. Since issues of credibility also may be involved in determining whether the evidence would support no other conclusion than that the registrant was a minister, that question too is more appropriately determinable in the first instance in the trial court. Moreover, it is not certain that another trial will be had or that the identical issues will be presented if one is held.

not that Gibson fell short of exhausting the administrative process, for he clearly had done this. It is rather that he went beyond what was required for that purpose, thereby became subject to the camp's jurisdiction, and in doing this irrevocably foreclosed himself from defending against the charge of desertion on the ground that his classification was invalid.

The Government's position is founded upon analogy to the cases which hold that one who has been inducted into the armed forces, although wrongfully, becomes subject to military jurisdiction, is thereafter amenable to its processes,[23] and can secure his release from service or military custody only by resort to habeas corpus.[24]

Applying the analogy, the Government insists that when Gibson went to the camp and there went through the preliminary formalities for becoming a member, he became "inducted" as a camp member, just as one becomes a member of the armed forces by undergoing the induction ceremony, cf. *Billings* v. *Truesdell, supra,* even though the induction is in violation of his rights. Thereafter, the argument continues, Gibson became subject to the camp's "jurisdiction," just as the wrongfully inducted soldier would become subject to military jurisdiction; and, like the latter, cannot raise the illegality of his induction as a defense to a charge of violating any duty imposed upon inducted members; but must seek his relief, if any, by the

[23] See, e. g., *In re Morrissey,* 137 U. S. 157; *In re Miller,* 114 F. 838; *United States* v. *Reaves,* 126 F. 127; *In re Carver,* 142 F. 623; *In re Scott,* 144 F. 79; *Moore* v. *United States,* 159 F. 701; *Dillingham* v. *Booker,* 163 F. 696; *United States ex rel. Laikund* v. *Williford,* 220 F. 291; *Ex parte Romano,* 251 F. 762; *Ex parte Tinkoff,* 254 F. 912; *Ex parte Kerekes,* 274 F. 870. But cf. *Ver Mehren* v. *Sirmyer,* 36 F. 2d 876; *Ex parte Beck,* 245 F. 967. Cf. *Kurtz* v. *Moffitt,* 115 U. S. 487.

[24] See *In re Grimley,* 137 U. S. 147; *Stingle's Case,* Fed. Cas. No. 13,458; *United States ex rel. Turner* v. *Wright,* Fed. Cas. No. 16,778. See also cases cited in note 23.

writ of habeas corpus. Since the Act and the regulations laid upon camp members a duty to remain and perform the further duties prescribed for them,[25] Gibson's departure without leave amounted to desertion; his defense of wrongful classification is no more open to him than a defense of illegal induction would be open to a wrongfully inducted soldier violating a military order; and his remedy, if any, is to apply for release from the camp through habeas corpus.

The argument is supported by extensive reference to the regulations in force when Gibson was ordered to report, including the changes affecting Dodez and the others which became effective June 7, 1944, by Amendment No. 236 (9 F. R. 6207). The important changes this amendment made were two, namely: (1) to reintroduce into § 653.11 the provision applicable in Falbo's case but eliminated as to Dodez by Amendment No. 210, effective February 2, 1944,[26] for medical examinations to be given at the camp to determine change in condition; and (2) to add to the preexisting requirement for the camp director's noting the fact of acceptance on the registrant's papers [27] the explicit new provision that this should be done "irrespective of the determination which is made as a result of the examination." [28]

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[25] See note 2.

[26] See text at notes 18, 19. Under § 653.11, as reintroduced, the physical examination at the camp was given to all "assignees," regardless of whether they indicated a change in physical condition. Cf. note 8.

[27] Cf. note 19, § 653.11 (b).

[28] The alterations made in § 653.11 by Amendment No. 236 will appear from comparing the text of the section prior to the amendment, see note 19, with the following quoted portions, following the amendment:

"(b) As soon as possible after the assignee has reported to camp, the camp physician *shall give him a physical examination and shall*

The Government also emphasizes two other regulations. One is § 652.12, requiring the local board to provide transportation for registrants reporting to it for transportation to the camp. The other, § 652.13, providing that a Class IV–E registrant *"after he has left the local board in accordance with § 652.12* for work of national importance under civilian direction *is under the jurisdiction of the camp* to which he is assigned." [29] (Emphasis added.)

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determine whether there has been any change in the assignee's physical or mental condition since his preinduction physical examination. If a camp physician is not available, the camp director, to the extent that he is capable of doing so, shall, by observing and questioning the assignee, make such determination. The camp physician or the camp director, as the case may be, shall, on the bottom of page 4 of the original and first copy of the Report of Physical Examination and Induction (Form 221), make a record of such determination.

"(c) *Irrespective of the determination which is made as a result of the examination of an assignee made under the provisions of paragraph (b)* of this section, the camp director *shall*, on the bottom of page 4 of the original and first copy of the Report of Physical Examination and Induction (Form 221), *place a statement* that a registrant *is accepted* for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement *shall specify the date and place of such acceptance* and shall be signed by the camp director who shall retain the first copy of the Report of Physical Examination and Induction (Form 221) and shall forward the original to the Director of Selective Service." (Emphasis added.)

The reintroduced provision of § 653.11 became subsection (b) of the amended section and the former subsection (b) became subsection (c) with the added initial provision, "Irrespective of the determination . . . ," etc.

[29] The regulation, § 652.13, reads as follows: "A registrant in Class IV–E who has reported for work of national importance pursuant to this part shall be retained in Class IV–E by the local board. *Such registrant after he has left the local board in accordance with § 652.12 for work of national importance under civilian direction is under the jurisdiction of the camp to which he is assigned.* The local board shall take no further steps with regard to such registrant without instructions from the Director of Selective Service, but should report

The short effect of § 653.11, as altered at the time of Gibson's order to report, was to retain the requirements for formal entries of "acceptance" and giving notice, at the camp, which applied to Dodez; to reintroduce the provision for physical examination there; but at the same time to nullify the possibility this presented in Falbo's case for giving relief, by providing that the camp director should note the fact of acceptance "irrespective of the determination which is made as the result of" this examination.

Taking account of revised § 653.11 as precluding any possibility for securing administrative relief at the camp, the Government regards § 652.13 as marking the precise and crucial line for crossing from the board's jurisdiction into that of the camp, namely, at the point where the registrant begins his journey to the camp. To take this step, it says, is equivalent to the oath in the induction ceremony prescribed for men entering the armed forces, cf. *Billings* v. *Truesdell, supra;* and produces the same consequences for foreclosing the defense of illegal classification, regardless of intention to submit to the camp's jurisdiction, indeed in spite of Gibson's unwavering manifestation of intention not to submit.[30]

Much of the argument was devoted to whether, on the basis of the Government's analogy, § 652.13 could be

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any information to the Director of Selective Service which might affect the registrant's status." (Emphasis added.) 7 F. R. 112.

Section 652.13 was adopted December 24, 1941, became effective February 1, 1942, and therefore was in effect as to Falbo as well as to Estep, Smith, Dodez and Gibson.

[30] The Government does not urge that Gibson waived his rights by submitting to "induction," in the sense of voluntarily surrendering them; it is rather that he acted at his peril in taking steps beyond those required to complete the administrative remedial process, even though he mistakenly thought them necessary for that purpose. The argument is essentially one of forfeiture rather than of waiver. The facts would sustain no implication of intention to submit to "induction" or to surrender any rights.

taken to fix the end of the "interval of choice," cf. *Billings* v. *Truesdell, supra,* in view of the constantly changing character of the regulations, the absence of any prescribed induction ceremony such as the *Billings* case involved, and the consequent difficulty confronting one seeking to comply with the *Falbo* decision in ascertaining the exact location of such a line.[31] We do not find it necessary to consider the conflicting contentions in this respect, or therefore to scrutinize the regulations with a view to locating such a point. More fundamental considerations are controlling.

We have said that the Government's argument is founded entirely upon analogy, because no case has ruled that one who becomes subject to the "jurisdiction" of a work camp under the Selective Service procedure thereby forfeits his right to defend against a charge of desertion or other breach of duty, on the ground that his classification was invalid. Nor has it been held that his only recourse for release from the camp is by way of habeas corpus. Furthermore, we think there are compelling reasons why the analogy does not hold true.

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[31] It is Gibson's position that had he not gone to the civilian public service camp and subjected himself to the physical examination given by the camp physician, see note 29, the courts might subsequently have held that in a prosecution under § 11 he was foreclosed by the *Falbo* doctrine from making the defense that his classification was illegal. He says further that the regulations applicable to Falbo and those applicable to him were so similar that no reasonable person reading them could have determined that under the latter it was not necessary to undergo the physical examination given at the camp in order to complete the administrative process. Indeed, he asserts that in some ways the later regulations were more compelling than those applicable to Falbo, since at the time Falbo was ordered to report the physical examination was required only for those who indicated a change in their physical condition, whereas when he was ordered to report all assignees were required to be given physical examinations. Cf. notes 8, 26.

In the first place, there are obvious and important differences between the two situations which it is sought to connect by the claimed resemblance. Not the least is that in the one instance the person concerned crosses the vast gulf between civil and military jurisdiction, with all the attendant consequences for change in status and rights, whereas in the other no such chasm is traversed. The alleged transfer of "jurisdiction" is only from one civilian agency to another, both branches of the Selective Service System, and there is none at all from the authority of the civilian courts as agencies for the enforcement of obligations imposed by the law. There is in fact no change in "jurisdiction" whatsoever, except in the sense that from the time he becomes a camp member the registrant's duties are different and his orders come through different channels of the same agency.

Unlike the man "actually inducted," the person classified IV–E remains a civilian; his duties are not military in character; he is not subject to military discipline or authority; and for violation of duties or orders he cannot be tried by court martial or military tribunal. On the contrary, the Selective Service Act expressly provides the same civil penalties and mode of trial for violating duties arising when he enters the camp as for those arising before that time.[32]

There is therefore no such profound change in rights, duties and status as occurs when one crosses the line between civil and military jurisdiction by being "actually inducted" under the rule of *Billings* v. *Truesdell, supra.* It was this change and the consequences it entailed, together with the statute's command that no one should be tried by military or naval court martial in any case arising under the Act until he had been actually inducted,[33] which

[32] See § 11, note 2 *supra.*

[33] Section 11 of the Selective Training and Service Act reads in part: "No person shall be tried by any military or naval court martial in

we there held to require placing the line precisely, not only for exhausting administrative remedies under the *Falbo* rule, but also for marking the point of actual induction at which the registrant's right ends to choose between going forward into the service and incurring the civil liability for breach of that duty.

The person classified as conscientious objector is never confronted with that choice. He is relieved by the Act from any duty to perform military service. He is not threatened with induction. He is in fact farther removed from military status or jurisdiction after he is finally assigned to civilian public service of national importance, and for this reason is rejected for military service, than he was before that time. His choice is not between going into service and taking the civil penalty laid for violating that duty. It is between performing civilian service under civilian authority and incurring the civil penalty for refusing to do so.

Moreover, in the case of one entering the armed forces, the loss of civil rights, including those of recourse to the civil courts other than by way of habeas corpus,[34] results altogether by virtue of the change from civilian to military status. The reasons underlying those rulings do not apply in the case of one who does not undergo that change, remains at all times a civilian, subject only to civilian duties and to civil penalties for violating them. There is not the

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any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act." It was held in the *Billings* case that in view of the legislative history Congress could not be presumed "to have restored by the second 'unless' clause in § 11 what it took away by the first 'unless' clause." Section 11 rather indicated "a purpose to vest in the civil courts exclusive jurisdiction over all violations of the Act prior to actual induction." 321 U.S. at 547.

[34] See notes 23, 24, *supra*, and text.

same necessity or compulsion in such a case for bringing about forfeiture of civilian rights, including remedies for questioning the validity of the order the registrant is charged with violating. That compulsion arises from the necessity for preventing interruption of military processes by intrusion of the civil courts beyond the essential minimum of keeping open the habeas corpus channel to show that the military authority has exceeded its jurisdiction in dealing with the individual.[35] It is on this foundation that the forfeiture of other civil remedies is held to take place.

But there is no such necessity, or therefore any such foundation for forfeiture, in the case of one classified as a conscientious objector and assigned for work of national importance. Serious as are the consequences of his refusal to perform that work, dealing with such breaches of duty by the civil courts does not involve, in the remotest sense, interruption or interference by civilian authority with military processes or jurisdiction. Entirely wanting therefore is any such foundation for forfeiture of civil rights as exists in the case of one inducted into the armed services. Without such a foundation the analogy dissolves and with it the asserted forfeiture.

This becomes even more clear when it is recalled that one basis for the forfeiture, which the Government has maintained, is that habeas corpus is available for the person classified IV–E and wrongfully denied classification and exemption as a minister of religion. This remedy, it was asserted originally, is adequate and exclusive, and therefore should be held to foreclose resort to other forms of relief.

But here again the asserted analogy fails. It has been clearly established that the remedy by way of habeas corpus is open to the wrongfully inducted member of the

[35] *Ibid.*

armed forces to secure his release.[36] But at the argument it was conceded that neither the camp director nor other officials of the Selective Service System are authorized to use force to arrest or restrain one who refuses to remain in the camp. And this, it was also admitted, would make doubtful the availability of relief by way of habeas corpus.[37] Indeed it might well be urged that the remedy is not available for one charged with violation of any duty, whether failure to report to the camp, to remain there, or to perform other obligations, since the only compulsion laid upon such a person by the Act or otherwise is the force of the legal command plus the provision for criminal penalty in case of disobedience.

We need not decide this question, however, and we express no opinion upon it. For it is enough to destroy the analogy the Government seeks to draw that the remedy by habeas corpus is an uncertain one. Should it be found unavailable and at the same time we should rule that petitioner's defense could not be made in the criminal proceeding, he would be left entirely without remedy, a result consistent neither with our decision in the cases of *Estep* and *Smith, supra,* nor with the statute. No more, we think, is it consistent with the Act or those rulings to foreclose the right of defense upon the basis of uncertainty whether the habeas corpus remedy might be had.

Finally, Congress has provided expressly for enforcing the duty to report to the camp for work and duties arising thereafter through the criminal proceedings and penalties

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[36] *Billings* v. *Truesdell,* 321 U. S. 542; and see the authorities cited in note 24, *supra.*

[37] Cf. *Wales* v. *Whitney,* 114 U. S. 564; *Stallings* v. *Splain,* 253 U. S. 339; *McNally* v. *Hill,* 293 U. S. 131, 137–138; *Weber* v. *Squier,* 315 U. S. 810; *Tornello* v. *Hudspeth,* 318 U. S. 792; *Zimmerman* v. *Walker,* 319 U. S. 744; *United States ex rel. Innes* v. *Crystal,* 319 U. S. 755; *United States ex rel. Lynn* v. *Downer,* 322 U. S. 756; *Baker* v. *Hunter,* 323 U. S. 740.

prescribed by § 11. In its view these were adequate for the purpose. Nothing in the section or the statute, in the light of our prior decisions, can be taken to indicate that Congress intended persons charged with violating such duties to be deprived of their rights of defense on the ground of invalid classification, either absolutely should habeas corpus prove unavailable or contingently depending upon how the doubt concerning that remedy's availability might be resolved. The Government concedes that Congress intended some remedy to be available. We know of no way by which this can be assured, in such a case as Gibson's, otherwise than by permitting the defense to be raised in the criminal trial.

The analogy failing, for both of the reasons we have stated, by which it is sought to confine the remedy to habeas corpus, we think the defense has been left open for presentation in this case and should have been allowed. *Estep* v. *United States,* 327 U. S. 114; *Smith* v. *United States, ibid.*[38]

Gibson, like Dodez, and for similar reasons, insists that we should dispose of the case upon the merits, by examining and sustaining his defense. The same course should be followed for Gibson in this respect as was directed for Dodez.

We express no opinion concerning whether a different result might follow for one in Gibson's position if he should

[38] In this case, as in the *Estep* and *Smith* cases, the United States in a criminal prosecution is asking judicial enforcement of a draft board's command or order. In the *Estep* case, though the Act provided that the order of the draft board should be "final," limited judicial review was permitted. Section 11 of the Selective Training and Service Act does not distinguish between one order of a board and another. Provided that he has exhausted his administrative remedies, the registrant who has not been actually inducted into the armed forces may in defense to a criminal prosecution attack a board's order as arbitrary and illegal.

remain at the camp for a substantially longer period and then depart without leave.[39]

The question raised concerning venue has been determined adversely to Gibson's contention by our decision in *United States* v. *Anderson,* 328 U. S. 699.

The judgments are reversed and the causes are remanded to the District Courts from which they came, for further proceedings consistent with this opinion.

Reversed.

MR. JUSTICE MURPHY joins in the opinion of the Court for the reasons stated therein and for the additional reasons set forth in his dissenting opinion in *Falbo* v. *United States,* 320 U. S. 549, 555, and in his concurring opinion in *Estep* v. *United States,* 327 U. S. 114, 125.

ILLINOIS EX REL. GORDON, DIRECTOR OF LABOR, *v.* CAMPBELL, COLLECTOR OF INTERNAL REVENUE.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 35. Argued March 28, 1946. Reargued November 19, 1946.—Decided December 23, 1946.

Having filed notice of a lien for state unemployment compensation taxes under Jones Ill. Stat. Ann., 1944, § 45.154, creating a lien "upon all the personal property" of an employer "used by him in connection with his . . . business," the state Director of Labor brought suit in a state court to enforce the lien, alleging that the employer was insolvent and that a creditor had obtained judgment and execution against him subsequent to the filing of notice of the lien. The court enjoined all creditors from interfering with the employer's property and appointed a receiver, who took charge of all his assets. Thereafter, the Collector of Internal Revenue filed claims on behalf of the United States for federal social security taxes

[39] See note 30.

under § 1400 of the Internal Revenue Code and an intervening petition alleging that the debtor was insolvent and claiming priority of payment. The receiver liquidated all of the debtor's assets and realized less than enough to satisfy the claims of creditors. *Held:*

1. Under R. S. § 3466, a claim of the United States for social security taxes under § 1400 of the Internal Revenue Code takes priority over a claim of a State for taxes under a state Unemployment Compensation Act. *Illinois* v. *United States,* 328 U. S. 8. Pp. 366–367.

2. The receiver having been placed in control of all the debtor's assets and having liquidated all of them, and another creditor having intervened, the proceeding must be treated as a general equity receivership. Pp. 368–369.

3. The debtor being insolvent and a receiver having been appointed to take charge of his property, an act of bankruptcy was committed within the meaning of § 3 of the Bankruptcy Act, thus entitling the United States to the priority given by R. S. § 3466. Pp. 367–370.

4. Under Jones Ill. Stat. Ann., 1944, § 45.154 (e), making it unnecessary for the Director of Labor to describe the property to which the lien is to attach and requiring the employer to file a schedule of "all personal property . . . used in connection with his . . . business," the Illinois lien was not sufficiently specific or perfected to defeat the priority of the United States, since neither the notice of lien nor the appointment of the receiver made definite and certain the property to which the lien was to attach. Pp. 370–376.

391 Ill. 29, 62 N. E. 2d 537, affirmed.

In a suit by the Director of Labor of Illinois to enforce a lien for unemployment compensation contributions due the State, a general equity receiver was appointed and the Collector of Internal Revenue intervened and filed a claim for social security taxes due the United States, claiming priority of payment under R. S. § 3466. The Illinois Supreme Court held that the United States was entitled to priority. 391 Ill. 29, 62 N. E. 2d 537. This Court granted certiorari, 327 U. S. 772, and, after hearing argument and disposing of a companion case (*Illinois* v. *United States,* 328 U. S. 8), restored the case to the docket for reargument before a full bench. *Affirmed,* p. 376.

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Albert E. Hallett, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the brief was *George F. Barrett,* Attorney General.

J. Louis Monarch argued the cause for respondent. With him on the brief were *Solicitor General McGrath, Sewall Key* and *Helen Goodner.*

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This case was companion to *Illinois ex rel. Gordon* v. *United States,* 328 U. S. 8, decided last term, but brings for settlement other problems raised by a conflict of claims between the United States and the State of Illinois. The conflict concerns whether one or the other claimant is entitled to priority of payment from assets of a common debtor. The Illinois Supreme Court dealt with both cases in a single opinion. 391 Ill. 29, 62 N. E. 2d 537. Certiorari was granted in each. 327 U. S. 771; 327 U. S. 772. On the same day that *Illinois ex rel. Gordon* v. *United States, supra,* was decided, this case was restored to the docket and assigned for reargument before a full bench, because of the presence of the questions not determined by that decision.

The controversy arose on June 29, 1942, when the Director of Labor of Illinois brought suit in the Circuit Court of Cook County, Illinois, to enforce against the Chicago Waste and Textile Company a statutory lien for unemployment compensation contributions due the state. Associated Agencies, Inc.,[1] was a creditor of the Chicago Waste and Textile Company. In his complaint the Director alleged that Associated Agencies had obtained a judgment against its debtor in the Municipal Court of Chicago

[1] Associated Agencies was made a defendant in the suit brought by the Director of Labor.

and that execution had issued on this judgment June 3, 1942, but that the interest of Associated Agencies was subordinate to that of the lien sought to be foreclosed. This, "for the reason that the execution upon said judgment was issued long after notice of the lien of the Director of Labor was recorded with the Recorder of Deeds." [2] The Director alleged further, upon information and belief, that the Chicago Waste and Textile Company was insolvent and that "the personal property subject to the lien herein being foreclosed, is scant security for the debt due the Director of Labor . . . and that unless a receiver be appointed for all of the said property, pending a full and complete hearing upon the issues herein, the plaintiff will suffer financial loss and said property will be wasted."

Granting the immediate relief requested, the Circuit Court enjoined all creditors of the Chicago Waste and Textile Company from interfering with the property of the company, whether by judicial action [3] or otherwise, and also appointed a receiver "for the property of the Chicago Waste and Textile Company."

Subsequently respondent, the Collector of Internal Revenue for the First District of Illinois, filed claims on behalf of the United States amounting to $1,954.07 plus interest. Of this amount, $522.91 was for federal insurance contribution taxes and $1,431.16 was for federal unemployment taxes. Of the federal insurance contribution taxes, $229.91 represented employees' taxes, see *Helvering* v. *Davis*, 301 U. S. 619, collected by the employer under stat-

[2] As exhibits to the Director's complaint three notices of lien were filed, one for $225.51, one for $303.29, and one for $259.65. Although these aggregate $788.45, the lien sought to be foreclosed was for $767.29. See note 12.

[3] The property of the Chicago Waste and Textile Company was to be sold at public auction at the behest of Associated Agencies. The injunction prevented this sale.

utory withholding provisions. I. R. C. §§ 1400, 1401. The Collector also filed an intervening petition, alleging that the debtor was insolvent and asking that the claims of the United States be allowed as claims entitled to priority of payment immediately after costs of administration and before payment of other creditors. The Director of Labor answered, denying that the claims of the United States were entitled to priority over the claims of Illinois.

The receiver realized $677.81 from sale of the debtor's property and this amount was deposited with the clerk of the Circuit Court. A hearing was held, and the court ordered that ninety per cent of the funds on deposit be given to the Director of Labor and the other ten per cent to the United States. The Collector appealed to the Appellate Court for the First District. On motion of the appellee, the cause was transferred to the Supreme Court of Illinois on jurisdictional grounds.

The state Supreme Court held that the United States was entitled to priority over the State of Illinois as to its claim for federal insurance contribution taxes.[4] Whether it was correct to award this priority is the issue we now have to decide.

Illinois ex rel. Gordon v. *United States*, 328 U. S. 8, held that in circumstances which called into application Rev. Stat. § 3466, 31 U. S. C. § 191, the claims of the United States for federal insurance contributions taxes under Title 8 of the Social Security Act, 49 Stat. 620, 636, and for federal unemployment compensation taxes under Title 9 of the Social Security Act, 49 Stat. at 639, had priority over claims of Illinois for taxes under its Unemploy-

[4] This did not exhaust the fund, and the court awarded the balance to the Director of Labor, instead of to the United States in part payment of its claim for federal unemployment taxes. 391 Ill. 29, 32–34. See also *United States* v. *Spencer*, 65 F. Supp. 763. The United States has not petitioned for certiorari, and therefore the correctness of this disposition of the balance of the fund is not now in controversy.

ment Compensation Act.[5] That decision is controlling, of course, upon the same feature of this case, although the federal insurance contributions taxes claimed by the United States arise under the 1939 amendments of the Social Security Act, rather than, as in the case last term, under the original act itself. Compare §§ 801, 802, 804, 807 (c) of the original Social Security Act, 49 Stat. 620, with §§ 1400, 1401, 1410, and 1430 of the Internal Revenue Code, 53 Stat. 175, as amended by 53 Stat. 1381.

I.

But the state urges that § 3466 does not apply in the facts of this case. This argument, as well as another, that the lien of the state was so specific and perfected as to defeat the priority, if any, of the United States under Rev. Stat. § 3466, must be met before the case can be affirmed on the authority of *Illinois ex rel. Gordon* v. *United States, supra.*

Rev. Stat. § 3466 provides:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or

[5] Jones Ill. Stat. Ann. (1944) §§ 45.128–45.161. The argument of the state in that case was that, since Title 9 contained "provisions intended to induce states to set up sound unemployment compensation in accordance with congressionally prescribed standards" and "to this end" permitted the states "to build up their own funds by collection from employers within the state of 90% of the tax those employers would otherwise have to pay to the Federal Government," it was Congress' intention to give states priority over the United States for their unemployment compensation claims. This argument was applicable, it may be noted, only to federal unemployment compensation taxes and not to federal insurance contributions taxes, which are the only ones involved in this case, since as to federal insurance contributions taxes there are no provisions for federal-state cooperation as there are in Title 9. Compare *Helvering* v. *Davis,* 301 U. S. 619, with *Steward Machine Co.* v. *Davis,* 301 U. S. 548. See also *Rivard* v. *Bijou Furniture Co.,* 68 R. I. 358, 361, 27 A. 2d 853.

administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The fifth act of bankruptcy, which is the one on which the Government relies as having brought § 3466 into operation, consists of a person's [6] having,

"(5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property . . . ." 52 Stat. 844, 11 U. S. C. § 21 (a).

The state contends, first, that the receiver appointed at its instance was not a receiver within the meaning of this provision and, second, that the Chicago Waste and Textile Company was not shown by the record to be insolvent.

This Court has noted that the view has been expressed that to satisfy the fifth act of bankruptcy "the receivership must be general, as contrasted with a receivership incidental to the enforcement of a lien." *Duparquet Huot & Moneuse Co.* v. *Evans,* 297 U. S. 216, 224.[7] It has

[6] The Bankruptcy Act uses the term "person," 11 U. S. C. § 21 (a), but the Act defines "persons" as including "corporations, except where otherwise specified, and officers, partnerships, and women . . . ." 52 Stat. 841, 11 U. S. C. § 1 (23).

[7] Since decision of the *Evans* case, the fifth act of bankruptcy has been amended to include appointment of a receiver when there is insolvency in the equity sense as well as in the bankruptcy sense. See

not determined the correctness of that view, *Emil* v. *Hanley,* 318 U. S. 515, 521, n. 5, nor need we do so now. For, though the receiver was appointed at the instance of a secured creditor, as in *United States* v. *Texas,* 314 U. S. 480, 483–484, "any limitations upon the operation of § 3466 [which] might otherwise have flowed from this circumstance . . . were removed by the subsequent character of the proceeding." The receiver was placed in control of all the assets of the Chicago Waste and Textile Company, and all of the assets were liquidated. At least one party other than the secured creditor which had instituted the proceeding, namely, the United States, was allowed to intervene and was heard. "We think that realities require us to treat the proceeding as a general equity receivership within the scope of § 3466." *United States* v. *Texas, supra.*

Moreover, it is questionable whether the fact of insolvency is properly contestable by the State of Illinois. The receiver was appointed upon the allegations of its complaint, which included insolvency, and the state admitted in its answer to the Government's intervening petition that the debtor was insolvent. Although ordinarily the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states,[8] in the present litigation Illinois is in the position of any lien creditor.

It would seem therefore that in these circumstances the state should be held estopped to contest insolvency. But in any event the record demonstrates that the debtor was insolvent at the time of the appointment of the receiver,

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1 Collier on Bankruptcy (14th ed.) 475. But under the amended statute the same view has been expressed. *Elfast* v. *Lamb,* 111 F. 2d 434, 436.

[8] See Note (1946) 59 Harv. L. Rev. 1132, 1136.

for when its property was liquidated there was not enough to satisfy the claims of the two contesting creditors at the bar.

Thus, the fifth act of bankruptcy was committed and in consequence the United States has the benefit of the priority given it by Rev. Stat. § 3466. We therefore turn to the argument of the state that the specificity of its lien defeated this priority.

II.

The United States was given the priority, now incorporated in Rev. Stat. § 3466, in 1797. 1 Stat. 515.[9] See also the discussion in *Price* v. *United States,* 269 U. S. 492, 500–501. Yet the Court has never decided whether the priority is overcome by a fully perfected and specific lien. See Rogge, The Differences in the Priority of the United States in Bankruptcy and in Equity Receiverships (1929) 43 Harv. L. Rev. 251, 267–270. The question, however, has been reserved many times in express terms. See *Conard* v. *Atlantic Insurance Co.,* 1 Pet. 386, 442; *Brent* v. *Bank of Washington,* 10 Pet. 596, 611–612; *Spokane County* v. *United States,* 279 U. S. 80, 95; *New York* v. *Maclay,* 288 U. S. 290, 294; *United States* v. *Texas,* 314 U. S. 480, 485–486; *United States* v. *Waddill Co.,* 323 U. S. 353, 355.[10] And again we need not decide it,

[9] There are minor differences in phraseology between 1 Stat. 515 and Rev. Stat. § 3466, which "did not work any change in the purpose or meaning . . . ." *Price* v. *United States,* 269 U. S. 492, 501.

[10] The statement in *United States* v. *Knott,* 298 U. S. 544, 551, that "such an interest [an inchoate general lien created by the laws of Florida] lacks the characteristics of a specific perfected lien which alone bars the priority of the United States" was not intended to settle the problem and may be taken to have been made with reference to the early mortgage lien cases discussed and distinguished in *United States* v. *Texas,* 314 U. S. at 484–485, and *New York* v. *Maclay,* 288 U. S. at 293–294.

for we are of the opinion that the Illinois lien was not sufficiently specific or perfected, in the purview of controlling decisions, to defeat the Government's priority.

The effect and operation of a lien in relation to the claim of priority by the United States under Rev. Stat. § 3466 is always a federal question. "The priority given the United States cannot be impaired or superseded by state law." *United States* v. *Oklahoma,* 261 U. S. 253, 260. Hence a state court's characterization of a lien as specific and perfected is not conclusive. *United States* v. *Waddill Co.,* 323 U. S. 353, 357. The state characterization, though entitled to weight, is always subject to reexamination by this Court.

On the other hand, if the state court itself characterizes the lien as inchoate, this characterization is practically conclusive. "Whatever might have been the effect of more completed procedure in the perfecting of the liens under the law of the State, upon the priority of the United States herein, the attitude of the state court relieves us of consideration of it." *Spokane County* v. *United States,* 279 U. S. 80, 95; cf. *United States* v. *Knott,* 298 U. S. 544.

In this case the United States argues that the Illinois Supreme Court judged the lien of the state inchoate and that therefore we may affirm its judgment on this basis. Illinois, however, disputes this reading. It states that the Illinois court did not consider the nature of the lien in relation to the facts presented by this case, but merely determined that under the facts of *Illinois ex rel. Gordon* v. *United States, supra,* the lien had not become choate. We can hardly accept this view in the face of the judgment rendered and the opinion's statement of the facts of this case at the outset, together with the later explicit reference to it in holding the lien not of a sort to defeat the federal priority. But we do not stop to analyze the opinion of the Supreme Court of Illinois in detail. For it is clear, quite

apart from the opinion, that the lien was not so specific and perfected as to defeat the priority of the United States, if that is at all possible.

The statute under which the Illinois lien arises is set out in the margin.[11] The state asserts that the lien became specific and perfected when notice of lien had been filed and recorded [12] and when the receiver had been appointed. In its view, upon appointment of the receiver "all substantial aids to the enforcement of the State's lien had been utilized."

With this conclusion we do not agree. It is true that the filing of notice of lien determined the amount of the lien, though the state may have computed wrongly the

[11] "A lien is hereby created in favor of the Director *upon all the personal property or rights thereto owned or thereafter acquired by any employer and used by him in connection with his trade, occupation, profession or business*, from whom contributions, interest or penalties are or may hereafter become due. Such lien shall be *for a sum equal to the amount at any time due* from such employer to the Director *on account of contributions, interest and penalties* thereon. Such lien shall attach to such property at the time such contributions, interest or penalties became, or shall hereafter become, due. In all cases where a report setting forth the amount of such contributions has been filed with the Director, no action to enforce such lien shall be brought after three years from the date of the filing of such report and in all other cases no action to enforce such lien shall be brought after three years from the date that the determination and assessment of the Director made pursuant to the provisions of this Act became final." Jones Ill. Stat. Ann. (1944) § 45.154 (a). (Emphasis added.) See also note 2.

[12] "Such lien shall be invalid only as to any innocent purchaser for value of stock in trade of any employer in the usual course of such employer's business, and shall be invalid as to any innocent purchaser for value of any of the other assets to which such lien has attached, unless notice thereof has been filed by the Director in the office of the Recorder of Deeds of the county within which the property subject to the lien is situated. . . ." Jones Ill. Stat. Ann. (1944) § 45.154 (b) (1). See note 2.

amount of taxes owed it.[13] See *United States* v. *Waddill Co.*, 323 U. S. at 357–358. But it is not enough that the amount of the lien be known. The lien must attach to specific property of the debtor. This the Illinois lien had not done at the time the receiver was appointed.[14] Indeed, as was stated at the argument, not only was the property not in the hands of the bailiff, but so far as appears the amount or type of property belonging to the debtor was not known to the state.

Under the Illinois law, where it is sought to foreclose a lien for unemployment compensation taxes it is not necessary for the Director in his complaint to describe the property to which said lien has attached.[15] On the contrary by express provision,

> ". . . it shall be the duty of the employer against whom such petition has been filed to file in said proceedings, a full and complete schedule, under oath, *of all personal property and rights thereto which he owned at the time the contributions,* upon which the lien sought to be foreclosed is based, *become due, or which he subsequently acquired, indicating* upon such schedule the property so owned by such employer *which was, or is used* by such employer *in connection with his trade, occupation, profession or business,* and if such employer shall so fail to do after having been

[13] Cf. note 2.

[14] The priority of the United States attaches upon appointment of the receiver. *United States* v. *Oklahoma*, 261 U. S. 253, 260; *Spokane County* v. *United States*, 279 U. S. 80, 93.

[15] Jones Ill. Stat. Ann. (1944) § 45.154 (e) provides for enforcement of the lien by judicial proceedings for foreclosure. The section states: "In all such cases, it shall not be necessary that said petition describe the property to which said lien has attached"; and continues with the further language quoted in the text.

> so ordered by the court, he may be punished as in other cases of contempt of court." Jones Ill. Stat. Ann. (1944) § 45.154 (e). (Emphasis added.)

Not until the debtor has filed the required schedules[16] would the state know the amount of property in the debtor's possession or, more important, the property to which the lien attached. For the lien attaches only to personal property used by the employer "in connection with his trade, occupation, profession or business . . . ."

The appointment of a receiver, then, was only an initial step in the perfection of the lien. It, together with the injunction, protected whatever rights in the property the state might have. But it was not a final assertion or attachment of rights to specific property, as is, for example, the enforcement of a judgment by execution and levy. *Conard* v. *Atlantic Ins. Co.,* 1 Pet. 386, 443–444.

The state has not relied merely upon the recording of the notices of lien but has rested on this together with the receiver's appointment as accomplishing the required specificity and perfection. But now it is said the filing of the notices alone achieved this result. Neither view is correct. Both have been repudiated by repeated decisions of this Court, the latest being *United States* v. *Waddill Co., supra.*

It has never been sufficient to show merely a general lien, effective to protect the lienor against others than the Government, but contingently on taking subsequent steps either for giving public notice of the lien or for enforcing

[16] In his complaint the Director of Labor prayed, "that an order be entered by this Honorable Court commanding that the defendant, Chicago Waste & Textile Co., a corporation, file within a short day to be fixed by the Court, a full and complete schedule under oath, of all personal property and rights thereto, which it owned on the 1st day of May, 1941, or thereafter acquired, and to indicate upon such schedule the property so owned by it which was or is used by it in connection with its trade, occupation, profession or business."

it.[17] *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 444; *United States* v. *Waddill Co., supra.* The federal priority is not destroyed by state recording acts any more than by state statutes creating or otherwise affecting liens, if the lien as recorded or otherwise executed does not have the required degree of specificity and perfection. Under the decisions the test is not, and cannot be, simply whether by his taking further steps the lienor's rights will be enforced against others than the Government.

The long-established rule requires that the lien must be definite, and not merely ascertainable in the future by taking further steps, in at least three respects as of the crucial time. These are: (1) the identity of the lienor, *United States* v. *Knott*, 298 U. S. 544, 549–551; (2) the amount of the lien, *United States* v. *Waddill Co.*, 323 U. S. at 357–358; and (3) the property to which it attaches, *United States* v. *Waddill Co., supra; United States* v. *Texas, supra; New York* v. *Maclay, supra.* It is not enough that the lienor has power to bring these elements, or any of them, down from broad generality to the earth of specific identity.

In this case the identity of the lienor was made certain, before the Government's priority attached, both by the statute and by the notices of lien. The latter also fixed the amounts of the liens, though miscalculated. But neither the notices of lien nor the appointment of the receiver made definite and certain the property, as we have shown.

Here, as in *United States* v. *Texas*, 314 U. S. at 487, ". . . 'property devoted to or used in his business . . .' is neither specific nor constant." As in *United States* v. *Waddill Co.*, 323 U. S. at 359, the goods subject to the lien had not "severed themselves from the general and free assets of the tenant [owner] from which the claims of the United

[17] See the authorities cited in the text at the beginning of Part II of this opinion.

States were entitled to priority of payment." Here, as in that and other cases, there was merely "a *caveat* of a more perfect lien to come," *New York* v. *Maclay,* 288 U. S. at 294, whether tested by state law, 323 U. S. at 357, or by perfection "as a matter of actual fact, regardless of how complete it [the lien] may have been as a matter of state law." *Ibid.,* 358. The state has acquired neither title nor possession, *Thelusson* v. *Smith,* 2 Wheat. 396; *New York* v. *Maclay,* 288 U. S. 290, since the receiver's possession was that of the court, not of the state, and did not sever the property from the debtor's general assets as of the crucial date.

To permit the recording of the notices or the receiver's appointment, or both, in circumstances like these, to overcome the Government's priority would be in substance to overrule the numerous decisions cited in which liens no less "specific and perfected" have been held impotent for that purpose. It would open the door, too, we think, to substantial nullification of the Government's priority. For then this could be accomplished simply by recorded notices of lien, disclosing claims to property not segregated from the debtor's general estate; designated only by general words of classification, including after-acquired property as here; and ascertainable definitively only by further procedures. Congress alone should make such a change, if it should be made at all.

The judgment is affirmed.[18]

MR. JUSTICE REED, dissenting.

In my opinion the notices of lien caused to be duly recorded by Illinois on April 3, May 8 and May 20, 1942,

[18] As we affirm the judgment on the ground that the United States under Rev. Stat. § 3466 has priority over Illinois as to all federal insurance contributions taxes owing it, we do not consider the argument that, even if this general priority did not exist, the United States would be entitled to the amount of the fund which represents employees' taxes.

with the Recorder of Deeds of Cook County, Illinois, perfected and made specific the state's claim under its unemployment compensation statute. These notices named the creditor and gave his precise address. They stated the amount of the claim and asserted a lien for the aggregate sum upon all the personal property owned and used by the lienee in connection with its business. Under any view of chattel lien law, such a legally recorded instrument would create a lien in the lienor on the personal property owned and used by the taxpayer at his place of business superior to the rights of general creditors or subsequent innocent purchasers for value. This is true by statute in Illinois. Jones Ill. Stat. Ann. (1944) § 45.154 (b) (1), Unemployment Compensation Act of Illinois.

The Court deems that the lien attaches to specific and ascertainable property of the taxpayer only when the taxpayer files his schedule of property in proceedings to enforce the lien.[1] I deem the recorded notice as the inci-

[1] Jones Ill. Stat. Ann. (1944) § 45.154 (e):

"Foreclosure of lien. In addition and as an alternative to any other remedy provided by this Act, or by the laws of the State of Illinois the Director may enforce the lien herein created by petition in the name of the People of the State of Illinois to the Circuit Court of the county wherein the property subject to the lien is situated, praying that the lien which has attached to said property, be foreclosed and the aforesaid property be sold in the same manner as in cases of foreclosure of mortgages upon personal property in courts of record. In all such cases, it shall not be necessary that said petition describe the property to which said lien has attached and it shall be the duty of the employer against whom such petition has been filed to file in said proceedings, a full and complete schedule, under oath, of all personal property and rights thereto which he owned at the time the contributions, upon which the lien sought to be foreclosed in [is] based, become due, or which he subsequently acquired, indicating upon such schedule the property so owned by such employer which was, or is used by such employer in connection with his trade, occupation, profession or business, and if such employer shall so fail to do after having been so ordered by the court, he may be punished as in other cases of contempt of court."

dent that consummates the lien upon the specific and ascertainable property. The enforcement proceedings after that recordation are only an enforcement of a lien already fixed upon the specific property adequately described in the recorded notice.

The Court suggests that the ruling in *United States* v. *Texas,* 314 U. S. 480, that the statutory lien on "property devoted to or used in his business" is not a specific and fixed lien entitled to priority over the United States, is persuasive that similar words in the Illinois statute are not specific and constant. But in the *Texas* case, no steps had been taken to fix the amount of the lien on the property devoted to the business, p. 487. Of course, therefore, the lien could not be fixed and certain. This final step to perfect the lien had been taken in the present case.

As the Court concludes no specific lien attaches to ascertainable property, I content myself with adding, as to the respective priorities of the United States and a lienor with a specific lien on ascertainable property, that in my opinion such a lienor has priority for his lien despite Rev. Stat. § 3466. See *Thelusson* v. *Smith,* 2 Wheat. 396, 424; *Conard* v. *Atlantic Insurance Co.,* 1 Pet. 386, 441; *United States* v. *Waddill Co.,* 323 U. S. 353, 355.

MR. JUSTICE JACKSON joins in this dissent.

UNITED STATES *v.* SHERIDAN.

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

No. 53. Argued November 12, 13, 1946.—Decided December 23, 1946.

1. A person who cashes in one State a forged check drawn on a bank in another State, knowing it to have been forged and that it would be forwarded across state lines to the drawee bank, and the check actually being so forwarded, is guilty of a violation of § 3 of the National Stolen Property Act, which forbids any person to "cause to be transported in interstate . . . commerce" any forged check "with unlawful or fraudulent intent." *Kann* v. *United States*, 323 U. S. 88, distinguished. Pp. 381–391.
2. Proof that a defendant cashed certain checks, receiving cash, goods or services, that they were drawn on a bank in another State, that they were forwarded to the drawee bank for payment, that they purported to be signed by an agent of the Government, that the Government had no such agent, and that the checks were returned unpaid and marked "no account," *held* sufficient to sustain a conviction for fraudulently causing the transportation in interstate commerce of forged checks, knowing them to have been forged, in violation of § 3 of the National Stolen Property Act. Pp. 391–392.
3. Since the Circuit Court of Appeals, having reversed the conviction on other grounds, did not pass upon respondent's contention that certain evidence was inadmissible, the case is remanded for consideration of that question. Pp. 391–393.
4. The record contains neither the instructions given nor the rulings on instructions requested. In the circumstances of this case, taking any corrective action in order to obtain a complete record may be left to the judgment of the Circuit Court of Appeals upon the remand. Pp. 392–393.

152 F. 2d 57, reversed.

Respondent was convicted of a violation of § 3 of the National Stolen Property Act. The Circuit Court of Appeals reversed. 152 F. 2d 57. This Court granted certiorari. 328 U. S. 829. *Reversed*, p. 393.

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Leon Ulman argued the cause for the United States. With him on the brief were *Solicitor General McGrath, John R. Benney, Robert S. Erdahl* and *Sheldon E. Bernstein.*

John H. Pickering argued the cause and filed a brief for respondent.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

Sheridan was indicted on three counts for having violated § 3 of the National Stolen Property Act, as amended, 48 Stat. 794, 53 Stat. 1178, 18 U. S. C. §§ 413–419. A jury found him guilty on all counts.[1] On the authority of *Kann* v. *United States,* 323 U. S. 88, the Circuit Court of Appeals for the Sixth Circuit reversed the conviction. 152 F. 2d 57. Because of doubt as to the applicability of the *Kann* case, we granted certiorari.[2] 328 U. S. 829.

Each count charged that Sheridan, with fraudulent intent, caused the transportation in interstate commerce of a specified forged check, knowing it to have been forged. The proof[3] offered to support these counts showed that on July 19, 1943, in Jackson, Michigan, Sheridan cashed three checks, receiving for them either cash or cash and hotel service or goods. Two, which were made the basis

[1] The record states that respondent "having been fully informed of his constitutional right to counsel, and having been asked whether he desired counsel assigned, . . . stated he did not desire the assistance of counsel."

[2] Since certiorari was granted *Clarke* v. *Sanford,* 156 F. 2d 115, has been decided by the Fifth Circuit. It appears to be in conflict with the case at bar. See also *Tolle* v. *Sanford,* 58 F. Supp. 695.

[3] The proceedings at trial were not stenographically reported. Hence the parties prepared a statement of evidence from memory and from notes made during the course of the trial, and stipulated that it "substantially sets forth the testimony and evidence" presented by the Government. Upon approval of the District Court, the statement was made part of the record.

of counts one and two, were drawn on a bank in Cape Girardeau, Missouri, were payable to the order of "P. H. D. Sheridan," and purported to be drawn by "U. S. E. F. C. 14A A. J. Davis, Commissioner." As will be seen, it is not necessary to consider the third count, involving the other check.

From the endorsements it was clear that each check had been cashed by or deposited in banks at Jackson, Michigan. They forwarded the two checks drawn on the Missouri bank to it for payment. Both were marked "no account" and returned unpaid to the forwarding bank. An agent of the Federal Bureau of Investigation testified that his office had conducted an investigation in Washington, D. C., and that the United States Department of Commerce had no agent "U. S. E. F. C. 14A," nor one "A. J. Davis, Commissioner."

Sheridan was sentenced to five years' imprisonment on each count, the sentences to run concurrently. Hence, if the conviction on any is valid, it is unnecessary to consider the convictions on the other two. *Hirabayashi* v. *United States,* 320 U. S. 81, 85; *Pinkerton* v. *United States,* 328 U. S. 640, 641, n. 1. Accordingly, for the purposes of this decision it may be taken that only the convictions on counts one and two are in issue.[4]

I.

The pertinent part of amended § 3 is set out in the margin.[5] Whether or not Sheridan's situation is within

[4] Count two is identical in effect with count one for the purposes of the argument made here. Count 3, however, involves a check signed by respondent in his own name as maker, and the Government—apparently of the view that such a check is not "altered" or "counterfeited"—states: "It is not clear that such a check is falsely made or forged within the general law."

[5] The pertinent text of § 3 is as follows: "Whoever shall transport or cause to be transported in interstate or foreign commerce any goods

the intended coverage depends upon the answer to be given to two questions, namely: (1) Did he *cause* to be transported in interstate commerce any forged security; [6] (2) if so, did he do this "with unlawful or fraudulent intent"? It is in these respects that the section's meaning must be determined.

It is not questioned that the checks were "securities," that they were "forged," or that they were transported in interstate commerce.[7] It is urged, however, that Sheridan did not "cause" the transportation, since his objective was attained when he cashed the checks and what happened to them later was of no consequence to him or his plan. Hence it is concluded that he can be said to have "caused" the transportation only in the sense that it would not have occurred if he had not cashed the checks. This "but for" relation is considered insufficient since the statute is thought not simply to forbid use of interstate

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wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, *or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate* or foreign *commerce any falsely made, forged,* altered, or *counterfeited securities, knowing the same to have been falsely made, forged,* altered, or counterfeited, or whoever with unlawful or fraudulent intent shall transport, or cause to be transported in interstate or foreign commerce, any bed piece, bed plate, roll, plate, die, seal, stone, type, or other tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both . . . ." 48 Stat. 794, 795, as amended by 53 Stat. 1178. (Emphasis added.)

[6] The Act, § 2 (b), defines the term "securities" as including checks.

[7] The sufficiency of the evidence to prove the fact of forgery is challenged, cf. Part III, but for the purposes of the principal contentions, it is conceded *arguendo*.

commerce for transportation of forged securities without more, but to outlaw such use only when it contributes to or is an essential part of carrying out the intended specific fraud.

The second contention, though stated differently, comes substantially to the same thing. It is that, upon the assumption Sheridan may be held to have "caused" the transportation, still he did not do so with the requisite "unlawful or fraudulent intent," namely, to aid in completing the fraud. These views are bolstered by strong reliance on the *Kann* decision.

The Government answers with essentially two arguments. One is drawn primarily from the embodiment of amended § 3 in the National Stolen Property Act. It is shortly that the offense takes color and character from the other offenses with which it is associated in the context of § 3. Broadly, therefore, the Government says that the section as amended excludes forged securities from interstate transportation just as it does stolen goods,[8] money or securities, counterfeited securities and counterfeiting tools; or, for that matter, just as diseased cattle, lottery tickets, adulterated foods, etc., are excluded under various statutes related to the National Stolen Property Act.[9] More narrowly the Government argues that the

[8] See Hearings before the Committee on the Judiciary on H. R. 10287, 70th Cong., 1st Sess.; H. Rep. 2528, 70th Cong., 2d Sess.; H. Rep. 1462, 73d Cong., 2d Sess.; S. Rep. 538, 73d Cong., 2d Sess.; H. Rep. 1599, 73d Cong., 2d Sess.; H. Rep. 422, 76th Cong., 1st Sess.; S. Rep. 674, 76th Cong., 1st Sess.

See note 5 for pertinent text of § 3.

[9] The National Stolen Property Act is said to be modeled after the National Motor Vehicle Theft Act, 41 Stat. 324. H. Rep. 2528, 70th Cong., 2d Sess., 4; H. Rep. 1462, 73d Cong., 2d Sess., 2.

See also the Animal Industry Act of 1884, 23 Stat. 31; the Act for the Suppression of Lottery Traffic of 1895, 28 Stat. 963; the Pure Food and Drug Act of 1906, 34 Stat. 768; the White Slave Traffic Act of 1910, 36 Stat. 825; the Webb-Kenyon Act of 1913, 37 Stat. 699.

transportation here necessarily aided or contributed to the perpetration of the fraud, if not by enabling respondent to secure possession originally of its fruits, then by giving him the necessary interval to make his escape and thus to avoid either prosecution or restitution of the amount which early detection would make probable.

As an entirely fresh matter, we should have difficulty in avoiding the force of the Government's views. The setting of the offense in amended § 3, together with the complete absence of anything in the legislative history to indicate that causing interstate transportation of forged securities was designed to be treated differently from causing the transportation of stolen goods, counterfeited securities, counterfeiting tools, etc., indicates plainly that transporting all these articles is to be treated in the same manner and, moreover, not in the limited sense for which respondent argues.

Congress had in mind preventing further frauds or the completion of frauds partially executed. But it also contemplated coming to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent.[10] This was indeed one of the most effective ways of preventing further frauds as well as irrevocable completion of partially executed ones. In the light of this purpose, we do not believe that Congress intended to restrict the pro-

[10] See H. Rep. 2528, 70th Cong., 2d Sess., 2: "Most of the States have laws covering the underlying principle of this proposed legislation, but it must be remembered that the jurisdiction of the State court does not reach into all of the States, especially when the matter of producing witnesses and bringing to the court the proof is concerned." See also Hearings before the Committee on the Judiciary on H. R. 10287, *supra* note 8, *passim*.

hibited transportation of stolen goods, securities and money, or of counterfeited securities and counterfeiting tools, to situations where it would be effective to complete a specific fraud, in the sense of enabling the defrauder to secure possession initially of what he seeks. The intent was more general.

It is true that amended § 3 forbids the interstate transportation of forged and counterfeited securities, and forging and counterfeiting tools, "with unlawful or fraudulent intent," while the earlier-proscribed transportation of stolen goods, securities and money is not required in terms to be done with such an intent, but only with knowledge that they have been stolen. This difference would seem to be entirely procedural, not substantive in character.[11] But, in any event, it is not controlling here. For the question remains whether the *Kann* case requires us to hold that "with unlawful or fraudulent intent" must be taken as restricting the forbidden transportation to cases where that element aids in originally securing the fruits of the fraud.

[11] One who knowingly transports stolen goods would do so for one of three sorts of objects, namely: (1) to dispose of them or use them unlawfully; (2) to aid in concealing the theft, thus avoiding prosecution for himself or another; or (3) for some purpose wholly innocent, such as to turn them over to the police or the rightful owner.

In the first two instances there would be inherent in the act "unlawful intent" or "fraudulent intent," though proof of this might not be required apart from the proof of knowledge and absence of any showing of innocent purpose. Congress obviously did not intend to make criminal such an instance as the third. However, proof of the innocent intent might be required as matter of defense, the other elements being made out. In other words, it may well be doubted that adding the requirement "with unlawful or fraudulent intent" in the amended part of the section added anything to the substantive crime; for its effect is apparently only to require the state to allege and prove the unlawful or fraudulent intent, rather than to require the defendant to allege and prove his innocent purpose.

II.

That case held that one alleged to be party to a fraudulent scheme could not be convicted under § 215 of the Criminal Code, 18 U. S. C. § 338, for using the mails *"for the purpose of executing such scheme,"* by proving that he or his associates cashed checks, receiving the proceeds at forwarding banks, which in turn mailed them to the drawee banks for collection, the checks being neither forged nor dishonored by the banks on which they were drawn. We think the case is distinguishable both on the statutes applied and on the facts. In order that comparison may be exact, we set forth the applicable wording of the two sections.

Section 215 of the Criminal Code, involved in the *Kann* case, is as follows: "Whoever, *having devised . . . any scheme* or artifice *to defraud,* or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . *shall, for the purpose of executing such scheme* or artifice or attempting so to do, place, or cause to be placed, any letter . . . in any post office, or . . . cause to be delivered by mail according to the direction thereon . . . any such letter, . . . shall be fined not more than $1,000, or imprisoned not more than five years, or both." (Emphasis added.)

Amended § 3 of the Stolen Property Act reads pertinently, except for its important contextual coloring: [12] ". . . whoever *with unlawful or fraudulent intent* shall transport or cause to be transported in interstate . . . commerce any *falsely made, forged,* altered, or counterfeited securities, *knowing the same to have been falsely made, forged,* altered, or counterfeited, . . . shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both . . ." (Emphasis added.)

[12] See note 5.

Under § 215 the express requirement is that the mailing or causing to be delivered by mail shall be "for the purpose of executing such scheme or artifice or attempting so to do." There is no such explicit requirement in amended § 3. The wording there is that the interstate transportation shall be done "with unlawful or fraudulent intent." This different wording and the difference in the contextual settings of the proscriptions have meaning, we think, to make their effects distinct. We emphasize at the outset that amended § 3 is part of a scheme of federal-state cooperation in apprehending and punishing criminals, while § 215 deals only with a distinctly federal crime.

The language of amended § 3 is broader and less specific than that of § 215. The word "unlawful" in the former is not to be ignored. Nor is it to be rendered meaningless by identifying it with "fraudulent," more especially if the latter is to be endowed with the restrictive connotation, not expressly stated, of "for the purpose of executing such scheme." The word "unlawful" has no such narrow meaning. Literally it is broad enough to include any unlawful purpose, such as to aid in concealing what has been done and thus in avoiding prosecution and restoration.

Moreover, in the *Kann* setting, the quoted wording now sought to be read into amended § 3 was restricted to significance in relation to getting the proceeds of the checks *irrevocably,* and the subsequent mailing was held to have no significant influence in producing that effect or, therefore, upon completing the scheme; [13] or, moreover, toward concealing the crime.

Whether or not in those circumstances the mailing had concealing effects, the situation in this respect was very different from the one now presented. The checks there

[13] It was as to this conclusion that four members of the Court dissented. 323 U. S. at 95.

were not forged or altered. Here they were. There the checks were honored by the drawees after the mailing. Here they were dishonored after the transportation. There the payee-indorsers knew they would not be. In that case the mailing was much less likely to produce disclosure than was the transportation in this one. Accordingly the irrevocable completion of the scheme was much less affected by the mailing than it was by the transportation here. So also with any concealing effect of the transportation and, therefore, with any unlawful or fraudulent intent concerning it.

Indeed the *Kann* opinion recognized that in other circumstances a different result might be called for, even under the explicit and restricted purposive requirement of § 215. For in putting aside the cases sustaining convictions where use of the mails was "a means of concealment so that further frauds which are part of the scheme may be perpetrated," [14] the Court said: "In these the mailing has ordinarily had a much closer relation to further fraudulent conduct than has the mere clearing of a check, although it is conceivable that this alone, in some settings, would be enough." 323 U.S. at 95.

The Court was not dealing with the transmission of a forged check, certain to be dishonored after the mailing or transportation, or therefore with a situation in which the forbidden transmission was either so likely to result in disclosure of the crime or so obviously intended to provide an interval for escape before that disclosure would be made.[15] We cannot say that in circumstances such as are now here the same result would have been reached in applying § 215, in view of these differences and the express

[14] *United States* v. *Lowe*, 115 F. 2d 596; *Dunham* v. *United States*, 125 F. 2d 895; *United States* v. *Riedel*, 126 F. 2d 81.

[15] The discovery of the scheme resulted from an examination of the allegedly defrauded corporation's books by a Government examiner, not as here from return of the checks unpaid by the forwarding bank.

reservation made for other situations involving greater possibilities for concealment.

This is enough to distinguish the *Kann* case. But we think, in addition, we would be altogether unjustified to rewrite the words "with unlawful or fraudulent intent" to mean "for the purpose of executing such scheme or artifice" in the sense of aiding to secure possession of the proceeds of the checks irrevocably, which was the meaning given that phrase in the *Kann* decision. Apart from the absence here of irrevocability in the legal sense, to do this would be to disregard what we think was Congress' clear purpose to make amended § 3, like the section in its original form, a means of apprehension and of punishment substantially, though not strictly in the legal sense, for past crimes of the sort specified in situations where interstate commerce was used as a method of defeating the state's exercise of those functions.

We cannot thus tear the transportation of forged checks from its setting and give it the distinct status, with reference to intent, as compared with the other forbidden transportations, which we think would result from respondent's reading. In amending § 3 Congress was extending the federal law enforcement arm to reach primarily the larger dealers in forged and counterfeited securities.[16] Not only forged checks, but forged or counterfeited bonds and coupons, as well as other forms of securities, and the instruments with which these are made, were the target. The legislative history shows that the purpose was to bring operators in these false securities into substantially the same reach of federal power as applied to others dealing in stolen goods, securities and money.[17] In one respect the object was to make their apprehension

[16] See the letter from the Attorney General to Senator Ashurst, Chairman of the Senate Committee on the Judiciary, set out in S. Rep. 674, 76th Cong., 1st Sess., 2.

[17] *Ibid.*

and conviction more easy, for the $5,000 minimum in value was intentionally omitted. The amendment was thus an extension, not a contraction of the preexisting provisions.

The purpose however was not to reach persons innocently, but knowingly, transporting the forbidden articles. Hence it was necessary to introduce safeguarding language. This was done by inserting "with unlawful or fraudulent intent." Broad as this was, it was sufficient for the purpose of excluding innocent transportation. We do not think it was also intended to safeguard the counterfeiter or professional forger, simply because the transportation alleged and proved does not aid him initially in securing the possession of the proceeds of his fraudulent dispositions. To take this view would nullify much of the amendment's intended effectiveness.

Nor can we treat forged checks differently from other securities, either because they are forged or because the forgery is done by "little fellows" who perhaps were not the primary aim of the congressional fire. The statute expressly includes checks.[18] It makes no distinction between large and small operators. There is no room for implying such a distinction in view of the absence of the $5,000 limitation with respect to the transportation of forged checks. Whether or not Congress had in mind primarily such small scale transactions as Sheridan's, his operation was covered literally and we think purposively. Had this not been intended, appropriate exception could easily have been made.

If it is assumed that the evidence supports the conclusions on which the case has come here,[19] Sheridan perpetrated three frauds, including two forgeries, in one day. Forgery, thus repeated, is not amateurish, though the

[18] See note 6.

[19] See Part III.

amounts obtained are small. Notoriously the crime done once becomes habitual. And forgers are notoriously itinerant. Drawing the check upon an out-of-state bank, knowing it must be sent there for presentation, is an obviously facile way to delay and often to defeat apprehension, conviction and restoration of the ill-gotten gain. There are sound reasons therefore why Congress would wish not to exclude such persons, among them the very ease with which they may escape the state's grasp.

A word will dispose of the idea that Sheridan did not "cause" the transportation. Certainly he knew the checks would have to be sent to the Missouri bank for collection. Given the proven forgery and uttering, no other conclusion would be possible. Necessarily, too, it would follow he intended the paying bank to send the checks there for that purpose. He knew they must cross state lines to be presented. One who induces another to do exactly what he intends, and does so by defrauding him, hardly can be held not to "cause" what is so done. The *Kann* case itself is authority for the Government on this point, in fact goes farther than is necessary here. For, as respected the same contention there advanced, the opinion said: ". . . we think it a fair inference that those defendants who drew, or those who cashed, the checks believed that the banks which took them would mail them to the banks on which they were drawn, and, assuming the petitioner participated in the scheme, their knowledge was his knowledge." 323 U. S. at 93. The statement was in answer to argument that Kann had not "caused" the mailing.

III.

Since the Circuit Court of Appeals reversed the conviction on all counts on its view that the *Kann* case was controlling, it did not discuss respondent's other contentions. These are renewed here. They are, first, that the evidence was insufficient to support the verdict; and, second, that

certain testimony was inadmissible, including that of the federal agent to the effect that the Department of Commerce had no agency "U. S. E. F. C. 14A" nor one "A. J. Davis, Commissioner." On the facts the two contentions are closely related.[20]

We express no opinion as to the admissibility of the evidence. It is desirable that the litigants and this Court, if the case is again before us, have the benefit of the views of the Circuit Court of Appeals. See *United States* v. *Ballard,* 322 U. S. 78, 88. However, with respect to the first contention, upon the assumption that the record, as stipulated, correctly sets forth the evidence introduced by the Government and also that all the evidence was admissible, it follows from our discussion of the statute that the evidence was sufficient to send the case to the jury. The jury properly could have inferred that respondent had forged the checks in question; [21] that he therefore had knowledge of their spurious character; and, furthermore, that the checks were negotiated and caused to be transported with unlawful or fraudulent intent.

However, counsel assigned here for respondent calls our attention to the fact that the instructions given and the rulings on instructions requested do not appear in the record. He suggests that, if the cause should be remanded to the Circuit Court of Appeals for further proceedings, it would be appropriate for us to suggest to that court in the remand that it exercise its powers to secure a complete bill of exceptions, including the instructions given and all pertinent rulings in connection therewith.

That course has been followed in unusual circumstances. See *Miller* v. *United States,* 317 U. S. 192, 199–200; *Hel-*

[20] It is argued that excluding the evidence regarded as inadmissible would render the remaining evidence insufficient.

[21] That is, the checks which form the basis of counts 1 and 2. We express no opinion concerning the check on which count 3 was based. See note 4.

wig v. *United States,* 328 U. S. 820. Such circumstances are presented on this record. Respondent defended himself at the trial. He did not have counsel on the appeal. The case is here *in forma pauperis,* and it is stated in his brief that "respondent is now confined in a Michigan state prison, is without funds and is unable to employ counsel of his own choice." Since the decision in *Miller* v. *United States, supra,* the Federal Rules of Criminal Procedure have taken effect [22] and expressly provide that they shall govern all proceedings pending at the effective date "so far as just and practicable." [23] Rule 59. Bills of exception are abolished.[24] Since the record contains a statement of the evidence, apparently the only serious deficiency is in the matters relating to the instructions, noted above. In these circumstances we think taking any corrective action, in this respect or otherwise, in the interest of seeing that substantial justice is done, well may be left to the judgment of the Court of Appeals.

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

THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS dissent.

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[22] 18 U. S. C. following § 687, effective March 21, 1946.

[23] In this case the indictment was filed on October 27, 1944; the jury verdict and judgment were filed on November 30, 1944; the judgment of the Circuit Court of Appeals was entered on November 19, 1945; and a Government petition for rehearing was denied on January 28, 1946. Certiorari was granted on May 13, 1946.

[24] See Rule 39 (c) and the note prepared under the direction of the Advisory Committee on Rules for Criminal Procedure. "The new rule supersedes Rules VII, VIII, and IX of the Criminal Appeals Rules of 1933, 292 U. S. 661. One of the results of the change is the abolition of bills of exceptions." S. Doc. 175, 79th Cong., 2d Sess., 62–63.

EDWARD KATZINGER CO. *v.* CHICAGO METALLIC MANUFACTURING CO.

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

Nos. 70 and 71. Argued November 14, 15, 1946.—Decided January 6, 1947.

A patent-licensing agreement provided that the licensee should sell the licensed products at prices fixed by the licensor and should be estopped from denying the validity of the patent. The products were sold widely in interstate commerce. A controversy having arisen as to the coverage of certain products by the patent, the licensing agreement was terminated, the licensee sued for a declaratory judgment declaring the patent invalid, and the licensor counterclaimed for unpaid royalties or damages for infringement. The patent was held invalid. *Held:*

1. In these circumstances, the licensee is not estopped to challenge the validity of the patent. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U. S. 249. Pp. 398–401.

2. The licensee's obligations to pay royalties and to sell at prices fixed by the licensor are not severable. P. 401.

3. Since the royalties here claimed accrued, if they accrued at all, prior to the time the licensing agreement terminated, the fact of subsequent termination does not free the promise to pay royalties from the taint of the price-fixing provision. P. 401.

4. The alleged fact that the licensee suggested the price-fixing provision in the licensing agreement does not estop him from challenging its validity as being in violation of the anti-trust laws. P. 401.

5. The specific contract not to challenge the validity of the patent cannot override congressional policy against contracts in restraint of interstate trade any more than can an implied estoppel. P. 402.

153 F. 2d 149, affirmed.

In a suit by a licensee for a declaratory judgment declaring a patent invalid, the licensor counterclaimed for unpaid royalties or damages for infringement. The District

Court held that the licensee was estopped to challenge the validity of the patent. The Circuit Court of Appeals reversed and remanded to the District Court to pass on the validity of the patent. 139 F. 2d 291. The District Court held the patent invalid. The Circuit Court of Appeals affirmed. 153 F. 2d 149. This Court granted certiorari. 328 U. S. 826. *Affirmed,* p. 402.

Charles J. Merriam argued the cause for petitioner. With him on the brief was *Stanley Hoods.*

Max W. Zabel argued the cause for respondent. With him on the brief was *Ephraim Banning.*

Acting Solicitor General Washington, Assistant Attorney General Berge, Charles H. Weston and *Philip Marcus* filed a brief for the United States, as *amicus curiae.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The question here is whether the defendant, in a suit to recover royalties only under a terminated patent license agreement containing price-fixing provisions, can challenge the validity of the patent despite a covenant in the license contract that he would not do so.

The petitioner, Edward Katzinger Company, and the respondent, Chicago Metallic Mfg. Company, make and sell tin baking pans. The undenied testimony was that Metallic sold its pans over a large part of the United States, probably in every state in the country. Katzinger became owner of Jackson patent No. 2,077,757 on a certain type of pan.[1] Metallic, accused of infringing, entered into a licensing contract under which, upon payment of stipulated royalties, it was authorized to manufacture and sell pans made in accordance with the claimed invention.

[1] Other patents, originally in suit, are not involved in this case.

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Sections 3 and 11 of the license contract, set out below,[2] provided that Metallic, like all other licensees, should sell these pans at prices fixed by Katzinger. Royalties were to be computed on the basis of "net sales" of articles "made in accordance with any of the patents or applications under this license." Section 14 provided that if Metallic elected to terminate the contract, without ceasing to manufacture the pans, Metallic should "be estopped from denying the validity of said patent . . . and be deemed

[2] "3. Licensor agrees that while this agreement remains in force and effect, if it permits others under license or other agreement to manufacture or sell articles or devices embodying or made in accordance with any of the patents or applications hereinbefore described, upon terms more favorable than those granted the Licensee hereunder, the Licensor shall immediately notify the Licensee hereunder and grant the same terms to the Licensee."

. . . . . .

"11. Licensor reserves the right to establish a minimum sales price for the articles or products which Licensee is licensed to manufacture hereunder and to modify or change such minimum prices from time to time during the life of this agreement. The Licensor, as well as Licensee and any other person, persons or corporation licensed by Licensor, shall not, with the consent of Licensor, sell or offer for sale, or otherwise dispose of any of the licensed devices or products below said minimum sales price, or on more favorable terms of sale than those set forth in any such scale of prices so established by Licensor. Contemporaneously with the execution and delivery of this license agreement, Licensee has received from Licensor a schedule of minimum prices, effective as of the date hereof, below which none of the products or devices made under this license shall be sold. Licensor reserves the right, upon thirty (30) days' notice in writing given by Licensor to Licensee, to change said minimum prices from time to time during the life hereof. On such articles or devices made and sold by Licensee as to which Licensor shall have failed or neglected to establish a minimum sales price, the royalty shall likewise be computed on the net sales price received by Licensee from its customers. Licensee or its duly authorized representatives shall have access from time to time to the books of account of Licensor during ordinary business hours for the purpose of determining whether or not Licensor has complied with the provisions of this paragraph."

an infringer thereof." Metallic maintained the patentee-fixed prices and paid royalties on pans deemed by it to be covered by the patent.[3]

A controversy later arose as to whether certain types of pans manufactured by Metallic were covered. Declining to pay royalties on this type of pan, Metallic gave notice of termination of the contract and initiated this action for a declaratory judgment praying that the court declare that the patent was invalid for want of invention and that the controversial pans were not covered by, and did not infringe, any of Katzinger's patents. Katzinger in an answer and counterclaim alleged, so far as material here, that the patent covered all the Metallic pans, that Metallic was estopped to challenge validity of the patent by § 14 of the contract, and that Metallic either owed royalties or was liable for infringement. It prayed, among other things, for an accounting for unpaid royalties which were to be computed at 2.5% to 5% of the sales price which was governed by the minimum price list attached to the license.[4] In the alternative it prayed that Metallic be required to account for profits and damages as an infringer. The District Court held that Metallic was estopped to challenge the validity of the patents, and, treating them as valid, found that the patent claims did cover all the pans. Accord-

[3] Of course it is the unlawful agreement, whether it is executed or not, which violates the anti-trust laws. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809. In the cases here the parties stipulated that "in pursuance of this license agreement Metallic did, for a period of two years more or less, exercise the license therein given by making certain tinware products," maintaining "minimum prices and paying therefor the applicable royalties." While the court originally made findings to the effect that Metallic did not attempt to carry out the price-fixing agreement and was willing to have it removed from the contract, these findings were expressly vacated on remand.

[4] The schedule of minimum prices incorporated by reference into the license agreement was set out as an exhibit in Katzinger's counterclaim.

ingly, it ordered an accounting to determine royalties due for the period prior to termination of the license contract, and for infringement damages thereafter.

Relying upon our decision in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, the Circuit Court of Appeals reversed. It held that the agreement to fix prices was inseparably connected with the agreement to pay royalties; that if the patent was invalid, the price-fixing provision violated the federal anti-trust laws; that conflict of the price-fixing provision with the anti-trust laws would make the agreement to pay royalties unenforceable; and that the District Court had erred in barring Metallic from challenging the patent's validity as a predicate to establishing the illegality and consequent unenforceability of the royalty covenant. The cause was remanded to the District Court to pass upon validity of the patent. 139 F. 2d 291. That Court then held the patent invalid and rendered judgment for Metallic. The Circuit Court of Appeals affirmed. 153 F. 2d 149. We granted certiorari because of a conflicting decision in *Westinghouse Electric & Mfg. Co.* v. *MacGregor*, 350 Pa. 333, 38 A. 2d 244. The Pennsylvania Supreme Court in the *MacGregor* case ruled that price-fixing provisions in a license agreement such as the one before us were severable from the agreement to pay royalties, and read our *Sola* case as though it were a holding that a licensee was estopped to challenge a patent's validity except in cases where a licensor sought affirmative relief to enforce price-fixing provisions of a license.

We need not consider whether under the ruling of *Bement* v. *National Harrow Co.*, 186 U. S. 70, 87–91, these price-fixing provisions would be lawful if the patent were valid. The question here is entirely different. Nor need we, as it has been suggested, discuss this Court's opinions in *Kinsman* v. *Parkhurst*, 18 How. 289, and *United States*

v. *Harvey Steel Co.*, 196 U. S. 310, which were concerned with particular circumstances there involved. In the *Sola* case we declined to examine these prior decisions, holding that neither of them was relevant because "no price-fixing stipulation was involved in the license contract" at issue in those cases. So here, it would be inappropriate to re-examine those decisions now. Under what other circumstances a federal rule of estoppel might be applied is a question which can be met when particular facts present it.

The *Sola* case reaffirmed past decisions holding that price-fixing agreements such as those here involved are unenforceable because of violations of the Sherman Act save as they may be within the protection of a lawful patent. That case held further that local rules of estoppel cannot screen such agreements from court scrutiny, and that federal courts must, in the public interest, keep the way open for the challenge of patents which are utilized for price-fixing of interstate goods. It is true that the licensor there not only sought a recovery of royalties, but prayed generally for an injunction to require observance of all the provisions of the license agreement, one of which provisions was for price-fixing. But that the chief object of that suit was to recover royalties and not to require observance of the price-fixing provisions is indicated by the fact that, while breaches of other covenants of the contract were alleged in the petition, and specific prayers for their observance were included, there was no charge that the licensee had breached the price-fixing covenant and there was no specific prayer to require observance of it. Nor did this Court indicate that the patent would have been immune from challenge had the licensor sued for royalties only. This would have permitted a licensor to be protected on an illegal contract merely because he chose one remedy rather than another on the same sub-

stantive issue. If we had intended to draw such a fine line, it is hard to believe that such a careful writer as the late Chief Justice would have failed to indicate in the opinion or the mandate of the Court in the *Sola* case that on remand the trial court, while permitting challenge of the patent to defeat the injunction, must treat the price-fixing provision as severable, and forbid challenge for the purpose of defeating the claim for recovery of royalties.[5] That decision, instead of resting on such a narrow procedural base, was firmly grounded upon the broad public interest in freeing our competitive economy from the trade restraints which might be imposed by price-fixing agreements stemming from narrow or invalid patents. *Sola Electric Co.* v. *Jefferson Electric Co., supra* at 177.

In *Scott Paper Co.* v. *Marcalus Co.*, 326 U. S. 249, it was held that even an assignor who had sold a patent issued to itself was free to challenge the validity of the patent and thereby defeat an action for infringement by showing that the invention had been described in an expired patent. In thus emphasizing the necessity of protecting our competitive economy by keeping open the way for interested persons to challenge the validity of patents which might be shown to be invalid, the Court was but stating an often

[5] The cases cited in the *Sola* decision rejected contentions that the offending price-fixing provisions should be considered severable from the rest of the contract and therefore enforceable. See *e. g., Bement* v. *National Harrow Co.*, 186 U. S. 70, 88; *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 230, 266.

That this Court's attention was called in the *Sola* case to this question is shown by examination of the brief filed here for *Sola* which cited decisions of this Court to support a contention that the provisions for royalties and price-fixing were inseparable and that royalties must be denied if the price-fixing provision were illegal. *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488; *Loud* v. *Pomona Land & Water Co.*, 153 U. S. 564, 576; *Williams* v. *Bank of the United States*, 2 Pet. 96.

expressed policy that "It is the public interest which is dominant in the patent system," *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 665, and that the right to challenge "is not only a private right to the individual, but it is founded on public policy which is promoted by his making the defence, and contravened by his refusal to make it." *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224, 235.[6]

If the question of severability, urged by the petitioner here, were a new one, we should again arrive at the conclusion we reached in the *Sola* case. Metallic's obligation to pay royalties and its agreement to sell at prices fixed by Katzinger constituted an integrated consideration for the license grant. Consequently, when one part of the consideration is unenforceable because in violation of law, its integrated companion must go with it. See *Hazelton* v. *Sheckells*, 202 U. S. 71, 78. Moreover, solicitude for the interest of the public fostered by freedom from invalid patents and from restraints of trade, which has been manifest by the line of decisions of which the *Scott Paper Co.* and *Sola* cases are two of the latest examples, requires that there should be no departure from the guiding principles they announced.

The royalties here claimed accrued, if they accrued at all, prior to the time the license agreement terminated. Consequently, the fact of subsequent termination does not free the promise to pay royalties from the taint of the price-fixing provision. Nor does the fact, if it be a fact, that Metallic itself suggested the price-fixing provision, bar Metallic's challenge to the patent's validity. For the contract was still illegal, whoever suggested it, so that there is no less reason for leaving the way open to challenge the patent as a service to the public interest than if Katzinger had suggested price-fixing. Finally, Metallic's

[6] See *Morton Salt Co.* v. *Suppiger Co.*, *supra* at 492.

specific contract not to challenge the validity of Katzinger's patent can no more override congressional policy than can an implied estoppel. See *Scott Paper Co.* v. *Marcalus Mfg. Co., supra,* at 257 and cases cited.

Affirmed.

[For dissenting opinion of MR. JUSTICE FRANKFURTER, concurred in by MR. JUSTICE REED, MR. JUSTICE JACKSON and MR. JUSTICE BURTON, in this case and in *MacGregor* v. *Westinghouse Mfg. Co.,* see *post,* p. 408.]

MACGREGOR *v.* WESTINGHOUSE ELECTRIC & MANUFACTURING CO.

ON REHEARING.

No. 28. Reargued November 14, 1946.—Decided January 6, 1947.

A patent-licensing agreement authorized the licensee to make, use and sell brazing solder containing copper and phosphorus and required him to pay royalties and not to sell the product at prices lower than those charged by the licensor. After paying royalties on this product and also on solders containing tin or silver in addition to copper and phosphorus, the licensee obtained patents on the solders containing tin and silver and refused to pay royalties on them. The licensor sued in a state court for royalties. In his answer, the licensee challenged the validity and coverage of the licensor's patent, the validity of the price-fixing agreement and the validity of the licensor's exercise of its monopoly. He counterclaimed for refund of the royalties paid and for damages on account of the restraint imposed on him by the agreement. *Held:*

1. In these circumstances, the licensee was not estopped to challenge the validity of the licensor's patent. *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173; *Scott Paper Co.* v. *Marcalus Mfg. Co.,* 326 U. S. 249; *Katzinger Co.* v. *Chicago Metallic Co., ante,* p. 394. P. 407.

2. The covenant to pay royalties was not severable from the price-fixing covenant. *Katzinger Co.* v. *Chicago Metallic Co., ante,* p. 394. P. 407.

3. The licensee's challenge to the validity of the patent, its alleged misuse, and the price-fixing covenant raised federal questions not governed by state rules as to estoppel or contract severability. P. 407.

4. If the patent is invalid, the price-fixing agreement violates the anti-trust laws. P. 407.

5. Since the case is remanded for a new trial, this Court will not now pass on the validity of the patent, the licensing agreement, or the licensor's alleged misuse of its patent. Pp. 407–408.

352 Pa. 443, 43 A. 2d 332, reversed.

In a suit brought by a licensor of a patent in a state court for royalties under a licensing agreement, the licensee challenged the validity of the patent, a price-fixing covenant in the agreement, and the licensor's exercise of its monopoly, and counterclaimed for refund of royalties already paid and for damages resulting from the restraint imposed on him by the licensing agreement. The trial court gave judgment for the licensor. The Supreme Court of Pennsylvania affirmed. 352 Pa. 443, 43 A. 2d 332. This Court granted certiorari, 326 U. S. 708, affirmed the judgment below in a *per curiam* decision by an equally divided Court, 327 U. S. 758, and later granted a rehearing. 327 U. S. 812. *Reversed and remanded,* p. 408.

William B. Jaspert reargued the cause and filed a brief for petitioner.

Jo. Baily Brown reargued the cause and filed a brief for respondent.

Acting Solicitor General Washington, Assistant Attorney General Berge, Charles H. Weston and *Philip Marcus* filed a brief for the United States, as *amicus curiae.*

Mr. Justice Black delivered the opinion of the Court.

This case, like that of *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co., ante,* p. 394, this day decided, involves

the right of a patent licensee to defend a suit for royalties only under a licensing agreement which contains a price-fixing provision. Certain subsidiary questions are also raised.

Westinghouse Electric & Manufacturing Company owned Jones' Patent No. 1,651,709. The invention claimed was a brazing "solder comprising copper and phosphorus as the main and essential constituents." Westinghouse sued MacGregor for infringement. The litigation was settled, and MacGregor took a license from Westinghouse authorizing MacGregor to make, use, and sell solder containing the constituents described in Westinghouse's patent claim. MacGregor agreed to pay 10% royalties on the net selling price of the solder. Sections 5 and 6 of the license agreement, set out below,[1] required MacGregor to sell the solder for no less than the price Westinghouse

[1] "5. Westinghouse grants this license on the express condition that the prices, terms and conditions of sale for use or sale in the United States of America, its territories and possessions of brazing solders embodying the invention covered by said Letters Patent and so long as such brazing solders continue to be covered by said patent, shall be no more favorable to the customer than those which from time to time Westinghouse establishes and maintains for its own sales of similar or competing brazing solders under such patent to such or other similarly situated customer purchasing in like quantities. MacGregor shall be notified of all such prices, terms and conditions of sale fixed by Westinghouse.

"The prices, terms and conditions of sale of Westinghouse may be changed by Westinghouse from time to time, notice being given MacGregor, but not less than five days' notice shall be given before any such change shall go into effect.

"6. It is agreed that it shall be regarded as an evasion of this agreement amounting to a breach thereof for MacGregor to reduce Westinghouse's sale price or alter Westinghouse's selling terms and conditions of sale directly or indirectly either through its own organization, its agents or others by any device, subterfuge or evasion or by any means whatever or to make the prices lower or the terms or conditions more favorable than those set forth by Westinghouse."

charged its own customers. MacGregor paid royalties on solder he made and sold which contained only phosphorus and copper. Later he began to make and sell solders composed of phosphorus, copper, and tin, or phosphorus, copper, and silver. For a time he paid royalties on these. But he also applied for and obtained patents on these two latter solders which added tin and silver respectively to the phosphorus-copper combination.[2] MacGregor then declined to pay royalties on these solders on the ground that they were not covered by Westinghouse's patent. Westinghouse brought this suit for an accounting and payment of unpaid royalties in a Pennsylvania state court. MacGregor filed an answer denying liability and asserting a counterclaim. His answer asserted that the solders which were described in his patents were not covered by Westinghouse's patent. He alleged that the effort of Westinghouse to make him pay royalties on these solders constituted an unlawful exercise of Westinghouse's patent monopoly and that Westinghouse should not be allowed to recover in the courts for this reason. In a counterclaim, he maintained that by inadvertence and mistake he had paid royalties on solders covered by his own patents. He charged that if the Westinghouse patent should be construed to cover these latter solders, it was invalid. He further contended that the price-fixing provision was a violation of the Sherman Act and the Clayton Act and constituted an unlawful use of Westinghouse's patent monopoly which rendered the whole license agreement illegal.[3] In his counterclaim MacGregor asked, not

[2] Copper, phosphorus and tin solder is Patent No. 2,125,680; copper, phosphorus and silver solder is Patent No. 2,162,627.

[3] The agreement to fix prices, if unlawful at all, was so whether it was executed or not. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 810. But this agreement by MacGregor to sell at fixed prices was no mere token, for the trial court found that on July 11, 1940, Westinghouse

only for judgment for refund of the royalties alleged to have been inadvertently paid, but also for damages on account of the illegal restraint imposed upon him by the agreement.

The state trial court declined to consider the validity of the patent, holding that it was presumed to be valid, and that MacGregor as a licensee had no right to challenge it. Assuming the patent and all the claims in it to be valid on this theory, the state court found the claims broad enough in scope to cover all the solders manufactured and sold by MacGregor. The trial court did not give a like presumption to the validity of the patents issued to MacGregor, but held that the solders covered by those patents infringed the presumptively valid patents of Westinghouse.[4] The state supreme court affirmed. 350 Pa. 333, 38 A. 2d 244. It agreed with the trial court that MacGregor was estopped to attack the validity of Westinghouse's patent. It recognized that there could be no estoppel in the present case under our decision in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, but for its interpretation of the *Sola* decision as applying only to suits in which the licensor

called MacGregor's attention to his obligation to observe user and distributor prices, and that on October 23, 1940, Westinghouse, through one of its attorneys, wrote MacGregor's attorney that "if MacGregor sells direct to the user, he should conform to the user prices established, and when he sells direct to the dealer, he should conform to the dealer prices established." The oral testimony of Westinghouse's representatives construed the contract as requiring MacGregor to maintain the prices. Moreover, the record before us shows that MacGregor positively testified that he had maintained the Westinghouse prices on the copper-phosphorus combination because he considered himself bound to do so under the license contract.

[4] Since the case is to be remanded for trial of the validity of the patent, we find it unnecessary to consider the propriety in any event of indulging a presumption of validity in favor of Westinghouse's patent without giving a presumption of a patentable difference to those of MacGregor. See *Miller* v. *Eagle Manufacturing Co.*, 151 U. S. 186, 208.

sought affirmative relief to enforce compliance with the price-fixing provision. Since no such relief was asked in this case, the state supreme court felt that there was no existing controversy which involved the price-fixing provision—that the questions of their effect and validity were "moot." Thus it assumed, as did the petitioner in *Katzinger Co.* v. *Chicago Metallic Mfg. Co., supra,* that a royalty agreement was severable from price-fixing covenants.

For the reasons stated in today's *Katzinger* opinion we hold that the covenant to pay royalties was not severable from the covenant to sell at fixed prices. Since MacGregor invoked federal law to sustain his challenge to the validity of the patent, the alleged misuse of the patent, and the price-fixing covenant, his contentions raised federal questions not governed by state estoppel or contract severability rules. *Sola Electric Co.* v. *Jefferson Electric Co., supra,* 176–177; *Scott Paper Co.* v. *Marcalus Co.,* 326 U. S. 249. Accordingly, we hold as a matter of federal law that the state supreme court was wrong in affirming the judgment in this cause on the ground that the licensee, MacGregor, was estopped to offer proof of his allegation of invalidity. This error will require, as the state court anticipated, that the cause be remanded for a new trial to determine the validity of Westinghouse's patent. For we do not think that the present state of this record justifies acceptance of MacGregor's contention that we should now pass on validity of the patent. If it be determined on remand that the patent is invalid, there is no question but that, as MacGregor contends, the price-fixing agreement violates the anti-trust laws. *Katzinger Co.* v. *Chicago Metallic Co., supra; Sola Electric Co.* v. *Jefferson Electric Co., supra,* at 175; *Scott Paper Co.* v. *Marcalus Co., supra.*

But there are alternative federal questions raised here by MacGregor upon which decision might turn even

though Westinghouse's patent be held valid. MacGregor pleaded that the price-fixing agreement so effectively wiped out all competition to Westinghouse in the manufacture and sale of these solders that the whole license contract should be held illegal as a violation of the Sherman and Clayton Acts. MacGregor also contended that the license contract should be held unenforceable in the courts on the ground that Westinghouse had attempted to use it to extend the patent's scope beyond its lawful coverage. But since the cause must again be tried in the state court we shall not pass on either of these contentions at this time.

The judgment is reversed and the case remanded to the Supreme Court of Pennsylvania for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER, with whom concur MR. JUSTICE REED, MR. JUSTICE JACKSON and MR. JUSTICE BURTON, dissenting.*

The Court deems the issues in these cases to be controlled by our decision in *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173. Such is not my understanding of the *Sola* decision. These cases cannot be properly decided, I believe, without consideration of one of the oldest doctrines of the patent law, namely, that a licensee cannot challenge the validity of the patent though everyone else may.

(1) Ninety years ago this Court unanimously announced the doctrine that a licensee under a patent is estopped from challenging the validity of that patent. *Kinsman* v. *Parkhurst,* 18 How. 289. The case may perhaps be explained, or even explained away. But the rule it expressed had become so much part of our law that fifty

*[This is also a dissent from the decision in *Katzinger Co.* v. *Chicago Metallic Co., ante,* p. 394.]

years later the Court deemed it unnecessary to discuss it and unanimously applied it even against the United States as licensee. *United States* v. *Harvey Steel Co.*, 196 U. S. 310. It is significant that the licensee in that case, while vigorously contesting its liability upon the particular facts, conceded that the doctrine of estoppel was law "as a general proposition."

(2) Before those cases and since, in all English-speaking jurisdictions, in the courts of England, of the Dominions and of the various States, as well as in the lower federal courts, where most patent litigation originates and stops, a weighty body of cases affirmed and applied that doctrine with rare unanimity.[1] This Court has never questioned the rule.[2] The principle has withstood judicial scrutiny for nearly a century.

(3) Nor has the operation of the rule revealed inroads upon the public interest so as to stir efforts for its abrogation or restriction by Congress. Patent policy has been frequently reconsidered, and some rules formulated by courts were eliminated or modified. Yet in none of the four major patent statutes nor in any of the other numerous amendatory enactments was attempt made to abolish or limit estoppel in favor of the licensor.[3] The Patent

[1] The early cases are collected in 14 Ann. Cas. 1184. Note also the unanimity among the authors of treatises. Amdur, Patent Law and Practice 598; Ellis, Patent Assignments and Licenses § 692 *et seq.*; 2 Frost, Patent Law and Practice 201; Moulton, Patents 244; Rivise and Caesar, Patentability and Validity § 10; 2 Robinson, Patents § 820; 2 Walker, Patents (Deller's ed.) § 383. And see the cases cited, especially in Walker, Patents, *supra*.

[2] *Cf. Eureka Company* v. *Bailey Company*, 11 Wall. 488, 492; *Eclipse Bicycle Company* v. *Farrow*, 199 U. S. 581, 587.

[3] See Patent Act of 1790, 1 Stat. 109; Patent Act of 1793, 1 Stat. 318; Patent Act of 1836, 5 Stat. 117; Patent Act of 1870, 16 Stat. 198. See also the subsequent minor enactments, summarized, J. Pat. Off. Soc., July 1936, pp. 103–22. And see 1 Walker, Patents (Deller's ed.) Appendix.

Office, charged by Congress with supervision of the patent system and the source of many suggestions enacted into law, has never included among its proposals recommendation to alter that doctrine.

(4) Not until 1942, apparently, was legislative correction invoked, and even then only partially. Several bills were introduced to permit contest of the validity of a patent in anti-trust suits. See S. 2730, Aug. 20, 1942; H. R. 7713, Oct. 15, 1942; H. R. 109, Jan. 6, 1943; H. R. 1371, Jan. 20, 1943. Only in the latest bills to be introduced is it proposed that "In any proceeding involving a violation of the antitrust laws or involving a patent or any interest therein, a party shall be entitled to show the invalidity or the limited scope of any patent or patent rights involved." H. R. 3874, Dec. 18, 1943; H. R. 97, Jan. 3, 1945; H. R. 3462, June 13, 1945; S. 2482, July 26, 1946. Not one of these bills has yet reached the floor of Congress.

(5) If ever a doctrine has established itself as part of our law to be respected by the judiciary, this is it. If it is to be changed, Congress is there to change it. Perhaps Congress will see fit to reexamine the doctrine in all its ramifications in the light of its history and the experience under it, and with due regard to all factors relevant to our patent system. We cannot do that. We can only adhere to the doctrine or overrule it. Until Congress does undo a principle so embedded in our law, we should leave it where we find it.

(6) But, in any event, if we are to wipe out so settled a phase of our law it should be done explicitly, not cryptically. In my judgment the *Sola* decision does not give adequate support for the Court's opinion. The cases before us necessarily involve the estoppel doctrine and cannot be disposed of without appearing to overrule a settled course of decision.

(7) No doubt the *Sola* case, like these two, arose out of a claim for royalties under a patent license. But that there was a claim for royalties was hardly mentioned in the Court's opinion in the *Sola* case. The sole issue to which our attention was directed was a prayer that the licensee be enjoined from breach of his promise to abide by the prices fixed by the licensor for the sale of articles manufactured under the patent. Ever since the decision in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, this Court, as a matter of judicial policy reflected in legislation, has denied enforcement of agreements not to sell goods below a fixed price. And so this Court has been on the alert not to allow an exception to what is a Congressional as well as a judicial policy unless the basis for it is clean and clear.

The precise issue which we decided in the *Sola* case is not a matter for inference or conjecture. It was explicitly defined and delimited. "The question for our decision," the late Chief Justice wrote, "is whether a patent licensee, by virtue of his license agreement, is estopped to challenge a price-fixing clause in the agreement by showing that the patent is invalid, and that the price restriction is accordingly unlawful because not protected by the patent monopoly." 317 U. S. at 173. That was the issue in the *Sola* case. It was not whether a licensee may challenge the validity of a patent when sued for royalties. It was not whether a provision for price-fixing undermined rights under estoppel against a licensee. It was whether the licensor could show the special dispensation pertaining to the holder of a valid patent, which entitles him to fix the price of a commodity manufactured under his patent, although such a pricing agreement would be unenforceable in the generality of cases. What was sought and what was denied in *Sola* was the active benefit of a price-fixing clause.

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(8) In the cases before us price-fixing is not in issue.[4] We are not asked to allow the licensor to have the benefit of a practice available only under a valid patent. To grant relief here will not, unlike the *Sola* case, approve a

[4] "In the instant case the court has not been requested either directly or indirectly to require MacGregor to maintain Westinghouse prices. By his own testimony he has not maintained them. The price-fixing clause is not in issue. It is raised merely as a defense to a suit for accounting and payment of accrued royalties." Discussion of findings by trial court in the *MacGregor* case.

As to the *Katzinger* case the District Court opinion found that "no price fixing by the respondent has been proved by the petitioner. . . . At no time did the respondent attempt to carry it out and the respondent was at all times willing to have same removed from the contract." Further, a specific finding of fact was that "Respondent was always willing to eliminate the price fixing provisions of the license agreement, and these provisions terminated *ipso facto* upon termination of the license by petitioner." It was on the basis of the facts so found by the District Court that the Circuit Court of Appeals held, when the estoppel issue was before it, that the mere presence of a price-fixing clause in the licensing agreement, whatever its setting and however inoperative, precluded estoppel against the licensee. 139 F. 2d 291. With the estoppel issue thus eliminated, the case was returned to the District Court to pass on the validity of the patent. Inasmuch as the Circuit Court of Appeals had found that the District Court had erred in its decree enforcing estoppel, the previous findings regarding estoppel became irrelevant and fell with the reversed decree. These findings, however, did not cease to be part of the record before the Circuit Court of Appeals on the first appeal. It is that decision, with the record on which it is based, that is now before us. If the Circuit Court of Appeals had enforced estoppel, the decree of the District Court and the findings on which it is based would not have been vacated. The findings that were before the Circuit Court of Appeals on the first appeal are now before us on review of that court's decision.

The license agreement provided for royalties based on a percentage of the net sales. The amount of the net sales was not fixed by agreement except insofar as certain scheduled articles called for a minimum price. The record does not show the prices at which the sales were made. Not only that, the claim of the licensee was that the articles for which royalties were claimed were outside the license. Plainly

practice *prima facie* in restraint of trade. What we here have to decide is whether we shall allow the licensee to repudiate an agreement for the payment of money made in an arm's length transaction. For nearly a hundred years this Court has uniformly answered that question by using the legal shorthand of estoppel.

(9) But if all the cases which have recognized and applied the doctrine of estoppel have been reduced, as apparently they have been, to derelicts, they should not be allowed to remain as obstructions on the stream of law. And not merely out of regard for the proper administration of law. The matter has practical consequences for all whose concern is patents. It is not questioned that a price-fixing clause in a license to manufacture under a valid patent falls outside the interdict of the anti-trust acts. *Bement* v. *National Harrow Co.*, 186 U. S. 70.[5] The power to fix the price of patented articles is part of the patent grant. It is a mode of maintaining the integrity of a patent and as such is sanctioned by public policy. All that the *Sola* case held, and the only thing it held, was that a valid patent is indispensable to this right to fix prices.

But whether an inventor has a valid patent is a matter of increasing uncertainty. Hitherto, under the estoppel

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such articles were not included on the minimum price schedule and could not have been sold according to the scheduled price list. The claim for royalties, therefore, was not a claim for royalties at fixed prices.

[5] Upon full consideration the principle of the *Bement* case was reaffirmed and applied in *United States* v. *General Electric Co.*, 272 U. S. 476. The latter case in turn was cited with approval in *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27, 31. It is relevant to note that Mr. Justice Brandeis joined in the *General Electric* opinion and himself wrote the *Carbice* opinion. No member of this Court has been more resourcefully alert to protect the public interest from undue extension of the patent monopoly while at the same time observing the rights which Congress has seen fit to confer by the patent grant.

doctrine, a patentee could be assured that he would not have to litigate the validity of his patent with those to whom he grants license rights under it. Under the present decision, he cannot have this assurance of freedom from litigation if, under reasonable belief that he has a valid patent, he inserts a price-fixing clause in the license, even though afterwards he merely asks for royalties.

What matters is not merely that a patentee must now choose between two safeguards of his patent grant. In the *Sola* case the licensor asked for the enforcement of a pricing agreement. Here the price-fixing agreement is not brought into question and the patentee stands on his estoppel. This important difference is disregarded, the *Sola* case is deemed controlling, and the estoppel is left to fend for itself as a legal stray. By its silence, as by its reasoning in applying the *Sola* case, the decision will engender natural doubts as to the continuing validity of the estoppel doctrine even in those cases where no pricing agreement had ever existed. The result is that all future arrangements between licensor and licensee are overhung by a cloud of doubt as to what one who believes that he holds a valid patent should do in granting licenses under it.

If he insists on a price agreement to help maintain the integrity of his business, he runs the risk of losing his royalties since the mere existence of the price-fixing clause (which is all we have here) may find him entirely in the cold if it should turn out that the patent is not sustained. So long as the estoppel doctrine as such stands unrejected, the patentee may, therefore, prefer to forego price-fixing and be satisfied with the bird in the hand in reliance on estoppel. But the upshot of the present decision is that the Court creates an unfair uncertainty as to the continued vitality of the historic estoppel doctrine. The result is that the patentee who foregoes his right to maintain prices in order to make certain that he can at

least collect his patent royalties without the cost and uncertainty of litigation, may find himself caught in the optimism of his belief as to the vitality of the estoppel doctrine unembarrassed by any price-fixing provision. For he may have given up what he might otherwise assert as a patentee to make sure that he can in any event have what estoppel would give him. It would seem fair to pronounce now that the doctrine of estoppel has or has not survived so that those who deem themselves holders of patent rights might not suffer because they assumed that the Court would preserve that which by no intimation it purports to jettison.

(10) The problem before the Court can be treated as though it was the same as that in the *Sola* case only if a distinction with a difference makes no difference. It is one thing to refuse to enforce a contract restraining trade by price-fixing unless positive justification is shown in the form of a valid patent. It is quite another to use the excuse of an inoperative price-fixing clause to allow a licensee to escape his otherwise valid promise to pay royalties.[6] Nowhere in the *Sola* case did the Court intimate that the decision rested upon the importance to the public economy of allowing challenge to the validity of a patent by those particular members of the public who in a fair bargain had agreed not to do so. In fact, the doctrine of estoppel, flowing from *Kinsman* v. *Parkhurst* and applied in *United States* v. *Harvey Steel Co.*, was explicitly noted

[6] The considerations that determine the granting of a license on payment of royalties are distinct from those that underlie an additional clause for price-fixing. They are not interdependent in fact and were not so treated by the parties; no artificial notion regarding consideration requires that they be treated as interdependent. On lesser considerations of policy than have guided the course of patent law, this Court has refused to treat separate provisions of a contract as integrated. See *Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Howard*, 13 How. 307, 339; *Pollak* v. *Brush Electric Association*, 128 U. S. 446, 455.

only to be put to one side because "here a different question is presented." 317 U. S. at 175. It was again put aside in *Altvater* v. *Freeman*, 319 U. S. 359, 364.[7] The question which those cases did not have to meet should now be met otherwise than by disregard. The Court's essential reasoning would apply equally where the license never attempted to fix prices. If a doctrine that was vital law for more than ninety years will be found to have now been deprived of life, we ought at least to give it decent public burial.

INTERNATIONAL HARVESTER CO. *v.* EVATT, TAX COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 75. Argued December 12, 1946.—Decided January 6, 1947.

Under § 5495, Ohio Gen. Code, Ohio levied a franchise tax on appellant for the "privilege of doing business" in the State. Appellant owns and operates several factories, sales agencies, warehouses, and retail stores in Ohio and numerous factories, sales agencies, and retail stores in other States. Goods manufactured in Ohio are sold partly in Ohio and partly in other States. Some goods manufactured in other States are sold by appellant's sales agencies in Ohio to customers in Ohio. Under § 5498, Ohio Gen. Code, the tax base is computed as follows: The total value of the taxpayer's issued capital stock is divided in half. One half is multiplied by a fraction, whose numerator is the value of all the taxpayer's property in Ohio and whose denominator is the total value of all its property wherever located. The other half is multiplied by a fraction whose numerator is the total value of "business done" in Ohio and whose denominator is the total value of business done everywhere. The sum of these two products is the tax base. *Held:*

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[7] *Scott Paper Co.* v. *Marcalus Co.*, 326 U. S. 249, went on the ground that an earlier expired patent had put the device in question into the public domain.

1. This does not constitute a tax on sales made outside Ohio in violation of the Due Process Clause of the Fourteenth Amendment, since it is a franchise tax for the privilege of doing business in the State. Pp. 419–421.

(a) The fact that the State chose to measure the tax on the business of manufacturing done in the State by the value of the products (including those sold out of the State) does not transform the tax on that business to a tax on sales out of the State. P. 420.

(b) Treatment of sales within Ohio of products manufactured elsewhere as "business done" in Ohio did not result in taxing out-of-state or interstate transactions or sales in violation of the Due Process Clause, since the business of Ohio sales agencies and their sales to Ohio customers were intrastate activities. Pp. 420–421.

2. The tax does not violate the Commerce Clause, since the purpose of the formula was to arrive at a fair conclusion as to what was the value of the intrastate business and it has not been demonstrated that it achieves an unfair result. Pp. 421–423.

(a) A State's tax law is not to be nullified merely because the result is achieved through a formula which includes consideration of interstate and out-of-state transactions in their relation to the intrastate privilege. P. 423.

(b) No multiplication of this tax through its imposition by other States is involved, since the tax is levied only against the privilege of doing local business of manufacturing and selling in Ohio and no other State can tax that privilege. P. 423.

146 Ohio St. 58, 64 N. E. 2d 53, affirmed.

The Supreme Court of Ohio affirmed a decision of Ohio's Board of Tax Appeals fixing the amount owed by appellant for its state corporation franchise tax assessed pursuant to §§ 5495–5499, Ohio Gen. Code. 146 Ohio St. 58, 64 N. E. 2d 53. *Affirmed*, p. 423.

Edward R. Lewis and *Joseph J. Daniels* argued the cause for appellant. With them on the brief was *Paul N. Rowe.*

Aubrey A. Wendt argued the cause and filed a brief for appellee.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Supreme Court of Ohio affirmed a decision of that State's Board of Tax Appeals fixing the amount owed by appellant for its state corporation franchise tax for the years 1935 to 1940, inclusive. 146 Ohio State 58, 64 N. E. 2d 53. In affirming, the Ohio court rejected appellant's contention that the controlling tax act, §§ 5495–5499, Ohio Gen. Code, as applied to appellant, was in violation of the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Federal Constitution. The case is here on appeal under 28 U. S. C. § 344. Appellant repeats its arguments as to invalidity of the tax, but only as to the years 1937 to 1940, inclusive.

Section 5495 of the Ohio Gen. Code provides that each foreign corporation authorized to do business in the State must pay a tax or fee for the "privilege of doing business" or "owning or using a part or all of its capital or property" or "holding a certificate . . . authorizing it to do business in this state." It is not denied that appellant owed a franchise tax under this section, for it held a certificate to do business in Ohio during all the years in question. It also owned and operated two large factories at Springfield, Ohio, which produced millions of dollars worth of goods. And it operated four branch selling establishments associated with four warehouses, and fourteen retail stores, all located at various places in Ohio, which stored and sold goods produced at the Ohio factory.

But appellant also owns and operates sixteen factories, nearly a hundred selling agencies, and numerous retail stores in other states. Goods produced at its Ohio factories are not only sold in Ohio, but in addition, are shipped for storage to out-of-Ohio warehouses to be sold by out-of-Ohio selling agencies to out-of-Ohio customers. Some are shipped directly to out-of-Ohio customers on orders from out-of-Ohio selling agencies. Conversely, goods manufactured by appellant out-of-Ohio are shipped to its Ohio

warehouses, and sold by its Ohio selling agencies to Ohio customers. Appellant's claim is that the amount of the tax assessed against it has been determined in such manner that a part of it is for sales made outside Ohio and another part for interstate sales. These consequences result, appellant argues, from the formula used by Ohio in determining the amount and value of Ohio manufacturing and sales, as distinguished from interstate and out-of-state sales.

The tax is computed under the Ohio statute in the following manner: Section 5498 prescribes the formula used in determining what part of a taxpayer's total capital stock represents business and property conducted and located in Ohio. To determine this, the total value of issued capital stock [1] is divided in half. One half is then multiplied by a fraction, the numerator of which is the value of all the taxpayer's Ohio property, and the denominator of which is the total value of all its property wherever owned. The other half is multiplied by another fraction whose numerator is the total value of the "business done" in the State and whose denominator is country-wide business. Addition of these two products gives the tax base, which, when multiplied by the tax rate of 1/10 of 1%, produces the amount of the franchise tax.

In the "business done" numerator, the State included as a part of Ohio business an amount equal to the sales proceeds of a large part of the goods manufactured at appellant's Ohio plants, no matter where the goods had been sold or delivered.[2] A part of the measure of the tax is con-

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[1] Section 5498 also sets out in some detail the factors to be considered, and those not to be considered, in calculating the total value of a taxpayer's issued and outstanding stock. These provisions are not here at issue.

[2] Rule 275, Tax Commissioner of Ohio, Oct. 13, 1939, exempted from the computation all goods manufactured by appellant in Ohio, but shipped to appellant's out-of-Ohio warehouses before sale.

sequently an amount equal to the sales price of Ohio-manufactured goods sold and delivered to customers in other states. Appellant contends that the State has thus taxed sales made outside of Ohio in violation of the Due Process Clause. A complete answer to this due process contention is that Ohio did not tax these sales. Its statute imposed the franchise tax for the privilege of doing business in Ohio for profit. The state supreme court construed the statute as imposing the tax on corporations for engaging in business such as that in which taxpayer engaged. One branch of that business was manufacturing. It has long been established that a state can tax the business of manufacturing. The fact that it chose to measure the amount of such a tax by the value of the goods the factory has produced, whether of the current or a past year, does not transform the tax on manufacturing to something else. *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284, 288–289; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 189–190; *Wallace* v. *Hines,* 253 U. S. 66, 69; *Freeman* v. *Hewit,* 329 U. S. 249, 255. See also *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 313–314, and cases cited in notes 14 and 15.

In the Ohio "business done" numerator, we assume the State also included sales made by Ohio branches to Ohio customers of goods manufactured and delivered to these Ohio customers from out-of-Ohio factories.[3] Appellant's business practice was to conduct and account for its sales agencies' activities separately and distinctly from its factory operations. The State followed this distinction. It treated the sales agencies as conducting one type of busi-

[3] The State contends here that it did not include in the "business-done" numerator an amount equal to the proceeds from sales by Ohio branches to Ohio customers of goods which were shipped to the Ohio customers from factories outside Ohio. Appellant insists that it did. We need not resolve this controversy, for we think the result is the same whichever view is taken.

ness and the factories another. Thus it measured the value of the Ohio sales agencies' business by the total amount of the preceding year's Ohio sales of goods manufactured outside of Ohio as well as those manufactured in Ohio. Here again, appellant's contention that this resulted in taxing out-of-state or interstate transactions or sales in violation of the Due Process Clause is wholly without substance. The Ohio sales agencies' business and their sales to Ohio customers were intrastate activities. *International Harvester Co.* v. *Department of Treasury,* 322 U. S. 340. What effect inclusion of this element in the "business done" numerator would have were these transactions not intrastate is a question we need not now decide.

What we have said disposes of the only grounds urged to support the due process contention. It also answers most of the argument made against the Ohio statute on the ground that its application to appellant unduly burdens interstate commerce and therefore violates the Commerce Clause. Of course, the Commerce Clause does not bar a state from imposing a tax based on the value of the privilege to do an intrastate business merely because it also does an interstate business. *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331, 336. Nor does the fact that a computation such as that under Ohio's law includes receipts from interstate sales affect the validity of a fair apportionment. See *e. g., Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113; *American Mfg. Co.* v. *St. Louis, supra; International Shoe Co.* v. *Shartel,* 279 U. S. 429, 433; *Western Cartridge Co.* v. *Emmerson,* 281 U. S. 511. And here, it clearly appears from the background of Ohio's tax legislation that the whole purpose of the state formula was to arrive, without undue complication, at a fair conclusion as to what was the value of the intrastate business for which its franchise was granted. In October, 1924, this Court struck down

Ohio's then corporation franchise tax on the ground that it did not make an apportionment between local and interstate business so as to confine its tax to local business only. The tax was also held to be in violation of the Equal Protection clause. *Air-Way Electric Appliance Corporation* v. *Day,* 266 U. S. 71. In April 1925, the legislature of Ohio passed a new act expressly to cure the defects this Court had found in the old law.[4] 111 Ohio Laws 471. That 1925 Act, as slightly amended,[5] is the law under which the present apportionment was made.

Plainly Ohio sought to tax only what she was entitled to tax, and there is nothing about application of the formula in this case that indicates a potentially unfair result under any circumstances. It is not even contended here that the amount of these taxes could be considered to bear an unjust or improper relation to the value of the privilege of doing business in Ohio if the legislature had imposed a flat franchise tax of the same amounts for the respective years which application of this formula has produced. See *Hump Hairpin Co.* v. *Emmerson, supra* at 296. Furthermore, this Court has long realized the practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities such as those of appellant, and has declared that "rough approximation rather than precision" is sufficient. *Illinois Central Ry.* v. *Minnesota,* 309 U. S. 157, 161. Unless a palpably disproportionate result comes from an apportionment, a result

[4] In vetoing the bill which became the law, on grounds not here relevant, the Governor of Ohio said: "The supreme court decision, of course, made it necessary for you to devise a basis for the levy of the tax other than on the authorized capitalization of foreign corporations. You have seen fit to embody in the pending measure an asset value or total net worth basis for the assessment of the tax on domestic corporations as well." Ohio House Journal 1925, Vol. 111, 874. The bill was passed over his veto.

[5] 112 Ohio Laws 410 (1927); 113 Ohio Laws 637 (1929); 114 Ohio Laws 714 (1931); 115 Ohio Laws 589 (1933).

which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments. See cases collected in opinion of Mr. Chief Justice Stone, dissenting, *Northwest Airlines* v. *Minnesota,* 322 U. S. 292, 325. A state's tax law is not to be nullified merely because the result is achieved through a formula which includes consideration of interstate and out-of-state transactions in their relation to the intrastate privilege. Since it has not been demonstrated that the apportionment here achieves an unfair result, *cf. Hans Rees' Sons, Inc.* v. *North Carolina,* 283 U. S. 123, 134, 135, and since it is assessed only against the privilege of doing local Ohio business of manufacturing and selling, we do not come to the question, argued by appellant, of possible multiplication of this tax by reason of its imposition by other states. None of them can tax the privilege of operating factories and sales agencies in Ohio.

Affirmed.

MR. JUSTICE RUTLEDGE, concurring.

I concur in the opinion and judgment of the Court. But I desire to add that, in the due process phase of the case, I find no basis for conclusion that any of the transactions included in the measure of the tax was so lacking in substantial fact connections with Ohio as to preclude the state's use of them, cf. *McLeod* v. *Dilworth Co.,* 322 U. S. 327, dissenting opinion at 352–357, if indeed a limitation of this sort were material to an apportionment found on the whole to be fairly made. For the rest, as the Court holds, the apportionment clearly is valid.

UNITED STATES ET AL. *v.* SEATRAIN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

No. 61. Argued December 9, 1946.—Decided January 6, 1947.

Pursuant to Part III of the Interstate Commerce Act, the Interstate Commerce Commission issued to a common carrier by water, whose vessels had special facilities for carrying loaded railroad cars and tank space for liquid cargoes in bulk, a certificate of public convenience and necessity authorizing it to carry "commodities generally" between certain ports subject "to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by the Commission." Later the Commission, on its own motion and over the protest of the carrier, reopened the proceedings and issued an order directing the cancellation of the original certificate and the issuance of a new one, which deprived the carrier of its right to carry "commodities generally" and limited it to carrying liquid cargoes in bulk, empty railroad cars, and property loaded in freight cars received from and delivered to rail carriers. *Held:*

1. The Commission had no authority to cancel the original certificate. Pp. 428–433.

2. It is apparent from the record in this case that the proceedings were not reopened to correct a clerical mistake in the issuance of the original certificate but to execute a subsequently adopted policy of holding that a certificate to carry "commodities generally" did not authorize water carriage of freight cars. Pp. 428–429.

3. The Commission has no express authority to revoke a certificate of public convenience and necessity issued to water carriers under Part III of the Act. Pp. 429–431.

4. The order was not within the Commission's authority under § 309 (d) to fix "terms, conditions and limitations" for water carrier certificate holders. Pp. 431–432.

5. Nor was it within the Commission's authority under § 315 (c) to "suspend, modify, or set aside its orders," since the Act makes a clear distinction between "orders" and "certificates." P. 432.

6. When a certificate of public convenience and necessity has been finally granted to a water carrier under Part III of the Act,

and the time fixed for rehearing has passed, it is not subject to revocation in whole or in part, except as specifically authorized by Congress. Pp. 432–433.

64 F. Supp. 156, affirmed.

Having issued a certificate of public convenience and necessity to a water carrier under Part III of the Interstate Commerce Act, the Interstate Commerce Commission subsequently ordered its cancellation and the issuance of a new certificate substantially curtailing the rights granted. 260 I. C. C. 430. The District Court set aside the Commission's order. 64 F. Supp. 156. *Affirmed,* p. 433.

Edward M. Reidy argued the cause for the United States and the Interstate Commerce Commission, appellants. With him on the briefs were *Solicitor General McGrath, Assistant Solicitor General Washington, Assistant Attorney General Berge, Frederick Bernays Wiener, Edward Dumbauld* and *Daniel W. Knowlton.*

Wilbur La Roe, Jr. argued the cause for respondent. With him on the brief were *Parker McCollester* and *Arthur L. Winn, Jr.*

Mr. Justice Black delivered the opinion of the Court.

Seatrain is and long has been a common carrier of goods by water. Its harbor facilities and vessels have been constructed to enable it to perform a distinctive type of water carriage. Loaded railroad cars can be hoisted and transported in its vessels, thereby eliminating such things as trouble, time and breakage, said to be incident to loading and unloading goods from railroad cars. See *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612. Seatrain

vessels also have tank space for carriage of liquid cargoes in bulk.[1]

Part III of the Interstate Commerce Act, 54 Stat. 929, 49 U. S. C. § 901, *et seq.*, subjected water carriers to the jurisdiction of the Interstate Commerce Commission. Section 309 (a) of that Act required them to obtain certificates of public convenience and necessity from the Commission. The same section contains a proviso commonly referred to as the grandfather clause. It provides that any water carrier, with an exception not here material, which was in bona fide operation as a common carrier by water on January 1, 1940, shall be entitled to a certificate to continue operations over the route or routes which it had been serving previous to that date without determination by the Commission of the question of public convenience and necessity.

May 29, 1941, Seatrain filed two applications with the Commission to obtain certificates for two different routes, one of which it had operated since 1932, and another which it had begun to operate in 1940 shortly after passage of the water carrier provisions. Seatrain's application described its operation on each route as that of a "common carrier by water of commodities generally." After due notice had been given to all interested parties, Division 4 of the Commission conducted investigations, satisfied itself as to the right of Seatrain to be granted both applications under the provisions of the Act, made appropriate findings, and concluded that Seatrain was entitled to engage in transportation on both the routes as "a common carrier by water of commodities generally." A single certificate to carry "commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of

[1] For a description of Seatrain equipment, see *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, 218–222.

Mexico" was accordingly issued to Seatrain. By its terms it became effective August 10, 1942, subject "to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

A year and a half later, January 27, 1944, the Commission, on its own motion, ordered that the proceedings be reopened for the purpose of determining whether the 1942 certificate should not be modified so as to deprive Seatrain of the right to carry commodities generally. Seatrain appeared and moved to vacate and rescind the Commission's order to reopen the proceedings on the ground that the Commission was without statutory authority to make the alteration proposed. Seatrain's motion was rejected. At the subsequent hearing on the proposed modification, Seatrain declined to offer evidence, resting its case entirely on the Commission's lack of authority to reconsider and alter the original certificate. After argument, the Commission entered an order canceling the former certificate and directing that a different one be issued. 260 I. C. C. 430. The proposed new certificate in effect deprived Seatrain of the right to carry goods generally between the ports it served, and limited it to operations only "as a common carrier by the 'seatrain' type of vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex."

Seatrain then brought this action before a three-judge District Court under 28 U. S. C. §§ 41 (28), 47, to set aside the Commission's order. The District Court set aside the order on the ground that the Commission had exceeded its statutory authority in reopening the pro-

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ceeding and altering the certificate. The District Court further held that even if the Commission would have had power under different circumstances to alter a certificate, it should not have done so in this case where, as the Court found from evidence before it but which had not been before the Commission, Seatrain had expended large sums of money in reliance upon the complete validity of its certificate. 64 F. Supp. 156. We need not consider the Commission's objection to the District Court's admission of evidence not heard by the Commission since we agree with the District Court that the Commission was without authority to cancel this certificate.

In altering Seatrain's certificate, the Commission held that a certificate authorizing the carriage of "commodities generally" does not embrace the right to carry loaded or unloaded railroad cars; that consequently the original certificate granted Seatrain actually deprived it of any future right to carry railroad cars—its chief business; that issuance of the original certificate to carry commodities generally was consequently an inadvertent error, patent on the face of the record, which the Commission has the right and power to change at any time the matter comes to its attention. But Seatrain argues that, far from restoring the right to which it was entitled under the original proceedings, the new order actually results in a drastic limitation on the nature of the equipment and service Seatrain is privileged to employ in loading and carrying freight, and could bar delivery or receipt of freight to or from any consignees except railroads.

We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded from Seatrain's applications for its certificates, from the information supplied to the Commission indicating that Seatrain had long transported goods of all kinds loaded in freight cars to consignees other than railroads, from the findings of the Commission, and from the course of

the earlier decisions of the Commission regarding Seatrain, that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct. For all these indicate that prior to and at the time of the issuance of the Seatrain certificate it was the understanding of Seatrain and the Commission that its transportation of "commodities generally" included carriage of freight cars and that carriage of freight cars would not exclude carriage of commodities generally. Moreover, the Seatrain application was not reopened for consideration by the Commission until its decision in *Foss Launch & Tug Co.*, 260 I. C. C. 103, decided December 18, 1943. There the Commission pointedly ruled for the first time that a certificate to carry "commodities generally" did not authorize water carriage of loaded or unloaded freight cars—so-called "car-ferry service." Thus it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the *Foss* case. This conclusion is supported by the fact that in prior proceedings involving Seatrain, the Commission had rejected the contention that Seatrain's vessels could be classed as "car ferries," and had concluded that they were ocean-going water carriers.[2]

Since the proceedings apparently were not reopened to correct a mere clerical error but were more likely an effort to revoke or modify substantially Seatrain's original certificate under the new policy announced in the *Foss* case, the question remains whether the Act authorizes such alterations. The water carrier provisions are part of the general pattern of the Interstate Commerce Act which grants the Commission power to regulate railroads and

[2] See *Investigation of Seatrain Lines, Inc., supra; Seatrain Lines, Inc.* v. *Akron, C. & Y. R. Co.*, 226 I. C. C. 7; *Hoboken Manufacturers' R. Co.* v. *Abilene & Southern R. Co.*, 248 I. C. C. 109, but see Commissioner Patterson dissenting, *id.* at 120.

motor carriers as well as water carriers.[3] The Commission is authorized to issue certificates to all three types of carriers. But it is specifically empowered to revoke only the certificates of motor carriers. Section 212 (a), Part II, Interstate Commerce Act, 49 Stat. 555, 49 U. S. C. § 312 (a). In fact, when the water carrier provisions were pending in Congress, the Commission's spokesman, Commissioner Eastman, seems specifically to have requested the Congress to include no power to revoke a certificate. The Commissioner explained that while the power to revoke motor carriers' certificates was essential as an effective means of enforcement of the motor carrier section, it was not necessary to use such sanctions in the regulation of water carriers.[4] It is contended nonetheless that the Commission has greater power to revoke water carrier certificates, where Congress granted no specific authority at all, than to cancel and revoke motor carrier certificates, where specific but limited authority was granted. But in ruling upon its power to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in § 212 (a), it

[3] 24 Stat. 379 (as amended), 49 U. S. C. § 1 *et seq.* (railroads); 49 Stat. 543, 54 Stat. 919, 49 U. S. C. § 301 *et seq.* (motor carriers); 54 Stat. 929, 49 U. S. C. § 901 *et seq.* (water carriers).

[4] Commissioner Eastman, Chairman of the Commission's Legislative Committee, reporting to the Senate Committee on Interstate Commerce on S. 2009 on January 29, 1940, stated, "This bill leaves section 212 (a) unchanged, and has no corresponding provision in the new part III. While there is room for argument, we are inclined to believe that provision for the revocation or suspension of water carrier certificates or permits is not essential, if adequate penalty provisions are provided for violations of part III. Revocation or suspension, in the case of motor carriers, is believed to be the most effective means of enforcement, since there are so many such carriers, and the operations of the great majority are so small, that enforcement through penal actions in courts presents many practical difficulties; but this should not be true of water carriers."

cannot revoke such a certificate under its general statutory power to alter orders previously made. *Smith Bros. Revocation of Certificate*, 33 M. C. C. 465.

It is argued, however, that this proceeding does not effect a partial revocation of Seatrain's certificate, but is merely an exercise of the Commission's statutory power under § 309 (d) to fix "terms, conditions, and limitations" for water carrier certificate holders. Whether the Commission could, under this authority, have imposed a restriction in an original certificate as to the type of service a water carrier could utilize to serve its shippers best is by no means free from doubt. Yet the alleged authority to alter a certificate after it has been finally granted so as to limit the type of service is certainly no greater than the Commission's authority to limit the type of service when issuing the original certificate. It is of some significance that § 208, which prescribes the authority of the Commission in granting certificates to motor carriers, authorizes the Commission to "specify the service to be rendered" by those carriers. But § 309, which empowers the Commission to grant certificates to water carriers, does not authorize the Commission to specify "the service to be rendered." Furthermore, § 309 (d), relating to water carrier certificates, specifically provides "That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require . . ." The language of this section would seem to preclude the Commission from attaching terms and conditions to a certificate which would deprive the public of the best type of service which could be rendered between ports by a water carrier. In view of this difference between the statutory authority of the Commission to prescribe the service of water carriers and of motor carriers, our decisions relating to the Commission's power as to motor carriers in this

respect [5] are not controlling as to the Commission's power to regulate the details of the service of water carriers. We can find no authority for alteration of Seatrain's certificate from the Commission's power to fix "terms and conditions."

Nor do we think that the Commission's ruling was justified by the language of § 315 (c) which authorizes it to "suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper." That the word "order," as here used, was intended to describe something different from the word "certificate" used in other places, is clearly shown by the way both these words are used in the Act. Section 309 describes the certificate, the method of obtaining it, and its scope and effect, but it nowhere refers to the word "order." Section 315 of the Act, having specific reference to orders, and which in subsection (c), here relied on, authorizes suspension, alteration, or modification of orders, nowhere mentions the word "certificate." [6] It is clear that the "orders" referred to in § 315 (c) are formal commands of the Commission relating to its procedure and the rates, fares, practices, and like things coming within its authority. But, as the Commission has said as to motor carrier certificates, while the procedural "orders" antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding.[7] The certificate, when finally granted and the time fixed for rehearing it has passed, is not subject to revocation in whole

[5] *Chicago, St. P., M. & O. R. Co.* v. *United States,* 322 U. S. 1; *Crescent Express Lines* v. *United States,* 320 U. S. 401; *Noble* v. *United States,* 319 U. S. 88. See also *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465; *Quaker City Bus Co.,* 38 M. C. C. 603.

[6] And §§ 316 and 317 of the Act pointedly treat an order as one thing and a certificate as another.

[7] See *Smith Bros. Revocation of Certificate, supra, Quaker City Bus Co., supra.*

or in part except as specifically authorized by Congress. Consequently, the Commission was without authority to revoke Seatrain's certificate. That certificate, properly interpreted, authorized it to carry commodities generally, including freight cars, on the routes for which the certificate originally issued. The judgment of the District Court is

Affirmed.

MR. JUSTICE RUTLEDGE concurs in the result.

STEELE *v.* GENERAL MILLS, INC.

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

No. 79. Argued December 18, 1946.—Decided January 6, 1947.

A motor carrier and a shipper entered into a written contract under which the carrier was to transport goods for the shipper by truck entirely within the State of Texas. On the basis of that contract, the carrier obtained from the Texas Railroad Commission a permit to operate as a contract carrier pursuant to rules promulgated by the Commission under Texas R. S., Art. 911 (b), §§ 1–22 (b) granting regulatory power over transportation. The rules required contract carriers to charge not less than the rate prescribed for common motor carriers. Later, pursuant to a prearrangement and without notice to the Commission, the parties entered into a supplemental agreement under which the shipper actually paid the carrier lower rates. About 3½ years later, the carrier sued the shipper in a Federal District Court to recover the difference between the rate paid and the full rate fixed by the Commission. *Held:*

1. This Court cannot say that the District Court sitting in Texas erred in holding that the cause of action was not barred by Art. 5526, Tex. R. S., which applies only to actions for debts not "evidenced by a contract in writing." P. 438.

2. Nor can this Court say that the District Court and the Circuit Court of Appeals erred in interpreting the Texas law to render void and unenforceable the supplemental agreement designed to circumvent payment of the rates fixed by the Commission. P. 438.

3. Nor will this Court disturb the interpretation placed upon purely local law by a District Court sitting in Texas in holding that the Commission's rate-fixing orders applied to the carrier's business, that they were not subject to collateral attack in such a suit, and that the carrier could not lawfully carry the shipper's goods at lower rates—especially where these interpretations were well buttressed by state statutes and court decisions and the Circuit Court of Appeals did not disagree with them. P. 439.

4. Under Texas law, no doctrine of estoppel or *pari delicto* can be invoked to defeat payment of the full rate fixed by the Commission; and a different rule cannot be applied in the federal courts. Pp. 439–441.

154 F. 2d 367, reversed.

A carrier sued a shipper in a Federal District Court to recover the difference between the rate actually paid for the transportation of goods and a higher rate fixed by the Railroad Commission of Texas pursuant to Tex. R. S., Art. 911 (b), §§ 1–22 (b). The District Court gave judgment for the carrier. The Circuit Court of Appeals reversed. 154 F. 2d 367. This Court granted certiorari. 328 U. S. 830. The judgment of the Circuit Court of Appeals is *reversed* and that of the District Court is *affirmed*. P. 441.

Cecil A. Morgan argued the cause for petitioner. With him on the brief was *T. S. Christopher*.

Alfred McKnight argued the cause for respondent. With him on the brief were *Charles E. France* and *Ira Butler*.

By special leave of Court, *Elton M. Hyder* argued the cause for the State of Texas as *amicus curiae*.

Mr. Justice Black delivered the opinion of the Court.

Petitioner and respondent entered into a written contract under which the petitioner was to transport goods for respondent by truck entirely within the State of Texas at

"such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas." Based on that contract petitioner applied to the Commission for a permit to operate as a contract carrier pursuant to rules of the Railroad Commission promulgated under Texas law which grants regulatory power over transportation to that Commission. Article 911b, §§ 1 to 22 (b), Rev. Stat. of Tex. Petitioner's application stated that "the tariff to be charged for the service proposed to be rendered will be that as promulgated by the Railroad Commission of Texas." After notice and hearing, at which petitioner and a representative of respondent testified, the Commission made an order which stated that "after carefully considering the evidence, the laws and its own rules and regulations," the Commission was of the opinion that "the character of business proposed to be done by the applicant strictly conforms with the definition of a contract carrier." The order directed that petitioner be granted a permit, which was later issued, to transport goods for respondent in Texas, but directed attention to the fact that the Commission's "tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rates prescribed for common carrier motor carriers." Later, pursuant to a prearrangement, the parties entered into a supplemental agreement concerning which the Railroad Commission was kept uninformed, in accordance with which respondent actually paid petitioner for carriage of its goods less than the rates prescribed for common motor carriers. About three and a half years later the petitioner filed this suit, of which the District Court had jurisdiction by reason of diversity of citizenship, to recover the difference between the rate paid and the full rate fixed by prior general orders of the Commission prescribing common carrier rates as provided in the contract.

The respondent's answer admitted that it had paid less than the tariff rate fixed in prior general orders, but denied

legal liability to pay that rate on several grounds. It denied that respondent's rates were governed by the Commission's prior general rate orders or by the special order granting petitioner a permit as a contract carrier. It also claimed that a state two-year statute of limitations barred recovery for part of the amount claimed. It further alleged that petitioner had led respondent to believe that his type of transportation was not subject to regulation by the Railroad Commission, and that no prior general or special orders had fixed petitioner's transportation rates. In reliance upon the petitioner's representations, respondent alleged, it had entered into the supplemental agreement to pay less than the tariff rate here claimed. Respondent pleaded that by this conduct petitioner was estopped from claiming that the Commission had power to or had fixed a rate for petitioner's transportation, or from predicating his cause of action upon the Commission's tariffs.

The District Court rejected all of respondent's contentions. Citing Texas statutes, court decisions, and the Commission's practices, the District Court held that the cause of action was not barred by the statute of limitations; that the Commission's prior general rate orders governed the charges to be fixed by contract carriers such as petitioner; that Texas law barred respondent from any collateral attack on the validity of the orders; that had the rate-fixing orders been directly attacked, as authorized by law, they would have been held valid; that shippers and carriers could not by private agreements defeat the State's statutory purpose to require payments of uniform transportation rates; that the original agreement to pay the Commission-fixed rate was valid, and the supplemental agreement to pay less than that rate was void; and that, under Texas law, petitioner was not estopped to rely on the Commission's tariff in order to recover the full

tariff rate. Accordingly, the District Court directed the jury to return a verdict for petitioner for the balance due it under the Commission rate, and a judgment for the petitioner was entered on that verdict.[1]

The Circuit Court of Appeals, one judge dissenting, reversed. 154 F. 2d 367. The majority concluded that petitioner should not recover because the agreement to pay less than the full rates was a subterfuge, that neither party had any intention of living up to the agreement, and that their conduct amounted to a fraud upon the Railroad Commission, "contrary to good morals and that [it] tended . . . to interfere with the purity of the administration of the law such as puts both parties *in pari delicto* with no right to seek advantage or recovery . . ." on the "spurious" contract. The dissenting judge did not agree that the records showed a deliberate purpose to evade the statutes. He further thought that under controlling Texas law and policy the doctrine of *pari delicto* could not be applied so as to have the goods of a Texas shipper hauled in Texas at a less rate than the others were compelled to pay by law. All the judges agreed, however, that the agreement to pay less than the Commission-fixed rates was void.

[1] The court permitted respondent to offer evidence intended to show that the petitioner's contract carriage was neither in competition with common carriers nor substantially the same type of services as common carriers performed. This evidence was offered to support respondent's contention that the Commission was without jurisdiction to fix petitioner's rates because, as respondent urged, § 6 aa of the State motor carrier law limited its power to fix contract carrier rates to motor carriers that did compete with or perform substantially the same services as common carriers. These two questions were submitted to the jury, and they made special findings on the issues in respondent's favor. The district court later directed the jury to find for petitioner despite these findings, holding, as set out in the opinion, that the Commission's orders were valid and beyond collateral attack in this case.

On petitioner's motion for rehearing, the State Attorney General intervened. He contended that the court's decision ran counter to the State's long-established policy against discriminatory transportation rate-cutting, and that if the judgment stood, it would impair the integrity of the State's regulatory system, a primary purpose of which was, he argued, to assure uniform rates to all shippers for substantially the same transportation service. In its opinion denying rehearing, the court reaffirmed its former holding and stated that this was "a suit by one party, *in particeps criminis,* against another in like situation, under a fully completed contract, wherein it was sought to penalize one party to the extent of $37,000.00 and to reward the prime offender in like amount." Whether the Circuit Court of Appeals' judgment does undermine the transportation policy of Texas is a question of such importance that we granted certiorari to review the case. 328 U.S. 830.

The District Court specifically held that no part of the claim sued on was barred by the Texas statute of limitations and the Circuit Court of Appeals did not discuss the question. Article 5526 of the Revised Statutes of Texas, on which respondent relies, by its language applies only to actions for debts not "evidenced by a contract in writing." The contract here sued on was "in writing." Respondent has cited no Texas decisions which have considered this statute to be a bar to suits on contracts such as the one here involved. We cannot say that the District Court sitting in Texas erred in holding that no part of the claim was barred by Article 5526. See *Texarkana & Ft. S. R. Co.* v. *Houston Gas & Fuel Co.,* 121 Tex. 594, 51 S. W. 2d 284.

Nor can we say that the District Court and the Circuit Court of Appeals erred in interpreting Texas law to render the supplemental agreement between petitioner and respondent, designed to circumvent payment of Commission-fixed rates, void and unenforceable. The District

Court's holdings that the Commission's rate-fixing orders applied to petitioner's business, that they were not subject under Texas law to the collateral attack here made, and that petitioner could not carry respondent's goods at less than the rates fixed were well buttressed by state statutes and court decisions.[2] No arguments here made by respondent, or state decisions on which it relies, refute the District Court's reasoning or conclusion. The Circuit Court of Appeals has not disagreed with this holding of the District Court sitting in Texas. Under these circumstances we shall leave undisturbed the interpretation placed upon purely local law by a Texas federal judge. *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U. S. 280; *Henderson Co.* v. *Thompson,* 300 U. S. 258, 266; *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 74–75. Therefore we can proceed to consider whether the Circuit Court erred in holding that respondent could escape payment of the Commission-fixed rates by application of the doctrine of *pari delicto.*

Respondent does not refute what the Texas courts have frequently decided, that agreements by railroads to cut charges to below tariff rates are unlawful and that no doctrine of estoppel or *pari delicto* can be invoked to defeat payment of the full tariff rate. In *Texas & N. O. R. Co.* v. *Yates,* 139 Tex. 89, 93, 161 S. W. 2d 1050, 1052, the Texas court said, "In a word the purpose of our statutes,

[2] The District Court cited the following authorities to support its position: Art. 911b Rev. Stat. of Tex.; General Order No. 25, R. R. Comm'n of Tex., Aug. 22, 1931; *Texas Steel Co.* v. *Ft. Worth & Denver C. R. Co.*, 120 Tex. 597, 40 S. W. 2d 78; *Greer* v. *Railroad Comm'n* (Tex. Civ. App.) 117 S. W. 2d 142; *St. Louis, I. M. & S. R. Co.* v. *Landa & Storey* (Tex. Civ. App.) 187 S. W. 358; *Railroad Comm'n* v. *Uvalde Construction Co.* (Tex. Civ. App.) 49 S. W. 2d 1113; *Alpha Petroleum Co.* v. *Terrell,* 122 Tex. 257, 59 S. W. 2d 364; *Mingus* v. *Wadley,* 115 Tex. 551, 285 S. W. 1084. It also cited the following federal cases: *Burford* v. *Sun Oil Co.*, 319 U. S. 315; *United Fuel Gas Co.* v. *Railroad Comm'n,* 278 U. S. 300.

as they relate to intrastate freight rates, is in every essential respect the same as that of the Federal statutes which we had under consideration in Houston & T. C. R. Co. v. Johnson, Tex. Com. App., 41 S. W. 2d 14, 83 A. L. R. 241." Just as 49 U. S. C. § 41 (3) prohibits rebate and similar devices which might undermine interstate transportation rate systems, so Art. 1690 (b), § (i) of the Penal Code of Texas makes it unlawful for motor carriers to charge less than Commission-fixed rates, and Art. 1687 makes it unlawful for railroads to engage in the same practice. No Texas decisions referred to by the Circuit Court of Appeals or by the respondent here indicate that the State's public policy is any different or less effective in protecting the integrity of motor carrier rates than railroad rates. The Texas motor carrier legislation was designed to be a part of a state transportation regulatory system applicable alike to all lines of transportation which represents a "studied effort . . . to prevent, through regulation, unfair, discriminatory, or destructive competition between such authorized carriers as would ultimately impair their usefulness." *Texas & Pacific R. Co.* v. *Railroad Comm'n* (Tex. Civ. App.) 138 S. W. 2d 927, 931, reversed on other grounds, 138 Tex. 148, 157 S. W. 2d 622. *Cf. Stephenson* v. *Binford,* 287 U. S. 251, 272–273.

Under Texas law the payment of Commission-fixed carrier rates is not merely a private obligation between shippers and carriers. The duty to pay is a public one, *Houston & T. C. R. Co.* v. *Johnson* (Tex. Com. App.) 41 S. W. 2d 14. And, as said in the *Yates* case, *supra,* with reference to a railroad, no carrier can "by means of estoppel 'or by any other device' escape the performance of this public duty." While the doctrine of *pari delicto* might be applied in Texas to some types of contracts so as to defeat recovery, see *Wright* v. *Wight & Wight* (Tex. Civ. App.) 229 S. W. 881, we are satisfied that the Circuit Court of

Appeals erred in holding that Texas courts would apply it in this case. Application of the doctrine of *pari delicto* in this proceeding, therefore, where the federal court has jurisdiction by reason of diversity, would result in applying a rule of law in the federal courts different from the rule we believe has been applicable in the state courts. Such a result cannot be approved. *Holmberg* v. *Armbrecht,* 327 U. S. 392.

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

Reversed.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. *v.* AGNEW ET AL.

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

No. 66. Argued December 10, 1946.—Decided January 6, 1947.

1. An order issued under § 30 of the Banking Act of 1933 by the Board of Governors of the Federal Reserve System removing a director of a national bank from office for continuing violations of law after having been warned to desist is subject to judicial review; and a district court is authorized to enjoin the removal if the Board acts beyond the limits of its statutory authority. P. 444.
2. Section 32 of the Banking Act of 1933 prohibits, *inter alia,* any employee of any partnership "primarily engaged" in the underwriting or distribution of securities from serving at the same time as director of a member bank of the Federal Reserve System. Respondents were directors of a member bank and employees of a partnership which held itself out as being "Underwriters, Distributors . . . and Brokers" in securities, was actively getting what business it could in the underwriting field, and one year ranked 9th among 94 leading investment bankers with respect to its total participations in underwritings. Its gross income from the underwriting field ranged from 26% to 39%, and its gross income from the brokerage business ranged from 40% to 47%, of its gross income

from all sources. About 15% of the total number of transactions and of the total market value of the securities bought and sold by it as broker or dealer were in the underwriting field. The partnership did no business with the bank and respondents did only a strictly commission business with the bank's customers. *Held:* The partnership was "primarily engaged" in the underwriting and distribution of securities within the meaning of § 32 of the Act and its employees were disqualified from serving as directors of a member bank of the Federal Reserve System. Pp. 445–449.

(a) If the underwriting business of a firm is substantial, it is "primarily engaged" in the underwriting business, though by any quantitative test underwriting may not be its chief or principal activity; and whether its underwriting business exceeds 50% of its total business is irrelevant. Pp. 446–449.

(b) Section 32 being a preventive measure, the fact that respondents have been scrupulous in their relationship to the bank is immaterial. P. 449.

3. Substantiality being the statutory guide, § 32 does not constitute an unconstitutional delegation of authority to the Board, since the limits of administrative action are sufficiently definite or ascertainable. P. 449.

153 F. 2d 785, reversed.

In a suit to review or enjoin the action of the Board of Governors of the Federal Reserve System in removing respondents from office as directors of a national bank on the ground that they were employees of a firm "primarily engaged" in underwriting within the meaning of § 32 of the Banking Act of 1933, the District Court dismissed the complaint. The United States Court of Appeals for the District of Columbia reversed. 153 F. 2d 785. This Court granted certiorari. 328 U. S. 825. *Reversed,* p. 449.

J. Leonard Townsend argued the cause for petitioners. With him on the brief were *Solicitor General McGrath, Robert L. Stern* and *George B. Vest.*

Hugh H. Obear argued the cause and filed a brief for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, here on certiorari to the Court of Appeals of the District of Columbia, presents important problems under § 30 and § 32 of the Banking Act of 1933, 48 Stat. 162, 193, 194, as amended, 49 Stat. 684, 709, 12 U. S. C. §§ 77, 78.

Section 30 of the Act provides that the Comptroller of the Currency, whenever he is of the opinion that a director or officer of a national bank has violated any law relating to the bank, shall warn him to discontinue the violation and, if the violation continues, may certify the facts to the Board of Governors of the Federal Reserve System. The Board is granted power to order that the director or officer be removed from office if it finds after notice and a reasonable opportunity to be heard that he has continued to violate the law.[1]

Section 32 of the Act prohibits, *inter alia,* any partner or employee of any partnership "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities" from serving at the same time as an officer, director, or employee of a member bank.[2]

[1] Section 30 also provides:

"That such order and the findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court."

[2] Not material here is an exception "in limited classes of cases in which the Board of Governors of the Federal Reserve System may

Pursuant to the procedure outlined in § 30 the Board ordered respondents removed from office as directors of the Paterson National Bank on the ground that they were employees of a firm "primarily engaged" in underwriting within the meaning of § 32. Respondents brought suit in the District Court for the District of Columbia to review the action of the Board or to enjoin its action. The District Court dismissed the complaint. The Court of Appeals reversed by a divided vote, holding that the Board exceeded its authority and that an injunction should issue. 153 F. 2d 785.

First. The Board contends that the removal orders of the Board made under § 30 are not subject to judicial review in the absence of a charge of fraud. It relies on the absence of an express right of review and on the nature of the federal bank supervisory scheme of which § 30 is an integral part. Cf. *Adams* v. *Nagle,* 303 U. S. 532; *Switchmen's Union* v. *Mediation Board,* 320 U. S. 297; *Estep* v. *United States,* 327 U. S. 114. A majority of the Court, however, is of the opinion that the determination of the extent of the authority granted the Board to issue removal orders under § 30 of the Act is subject to judicial review and that the District Court is authorized to enjoin the removal if the Board transcends its bounds and acts beyond the limits of its statutory grant of authority. See *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 620; *Stark* v. *Wickard,* 321 U. S. 288, 309–310. That being decided, it seems plain that the claim to the office of director is such a personal one as warrants judicial consideration of the controversy. Cf. *Columbia Broadcasting System* v.

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allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments." § 32.

United States, 316 U. S. 407; *Stark* v. *Wickard, supra,* p. 305.

Second. We come then to the merits. Respondents for a number of years have been directors of the Paterson National Bank, a national banking association and a member of the Federal Reserve System. Since 1941 they have been employed by Eastman, Dillon & Co., a partnership, which holds itself out as being "Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities." During the fiscal year ending February 28, 1943, its gross income from the underwriting field [3] was 26 per cent of its gross income from all sources, while its gross income from the brokerage business was 42 per cent of its gross income from all sources. The same percentages for the fiscal year ending February 29, 1944, were 32 per cent and 47 per cent respectively; and for the period from March 1, 1944, to July 31, 1944, 39 per cent and 40 per cent respectively. Of the total number of transactions, as well as the total market value of the securities bought and sold by the firm as broker and as dealer for an indefinite period prior to September 20, 1943, about 15 per cent were in the underwriting field. The firm is active in the underwriting field, getting what business it can. In 1943 it ranked ninth among 94 leading investment bankers in the country with respect to its total participations in underwritings of bonds. For a time during 1943 it ranked first among the underwriters of the country. Apart from municipals and rails, its participation in underwritings during 1943 amounted to $14,657,000. Since October, 1941, respondents have done no business with the bank other than a strictly commission business with its custom-

[3] The issue, flotation, underwriting, public sale or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds or other similar securities. The firm does not deal in United States Government bonds.

ers. Nor has the firm done business with the bank since the fall of 1941.

These are the essential facts found by the Board.

On the basis of these facts the Board concluded that during the times relevant here Eastman, Dillon & Co. was "primarily engaged" in the underwriting business and that respondents, being employees of the firm, were disqualified from serving as directors of the bank.

The Court of Appeals concluded that when applied to a single subject "primary" means first, chief, or principal; that a firm is not "primarily engaged" in underwriting when underwriting is not by any standard its chief or principal business. Since this firm's underwriting business did not by any quantitative test exceed 50 per cent of its total business, the court held that it was not "primarily engaged" in the underwriting business within the meaning of § 32 of the Act.

We take a different view. It is true that "primary" when applied to a single subject often means first, chief, or principal. But that is not always the case. For other accepted and common meanings of "primarily" are "essentially" (Oxford English Dictionary) or "fundamentally" (Webster's New International). An activity or function may be "primary" in that sense if it is substantial. If the underwriting business of a firm is substantial, the firm is engaged in the underwriting business in a primary way, though by any quantitative test underwriting may not be its chief or principal activity. On the facts in this record we would find it hard to say that underwriting was not one primary activity of the firm and brokerage another. If "primarily" is not used in the sense we suggest, then the firm is not "primarily engaged" in any line of business though it specializes in at least two and does a substantial amount of each. One might as well say that a professional man is not "primarily engaged" in his profession though he holds himself out to serve all comers and devotes substan-

tial time to the practice but makes the greater share of his income on the stock market.

That is the construction given the Act by the Board. And it is, we think, not only permissible but also more consonant with the legislative purpose than the construction which the Court of Appeals adopted. Firms which do underwriting also engage in numerous other activities. The Board indeed observed that, if one was not "primarily engaged" in underwriting unless by some quantitative test it was his principal activity, then § 32 would apply to no one. Moreover, the evil at which the section was aimed is not one likely to emerge only when the firm with which a bank director is connected has an underwriting business which exceeds 50 per cent of its total business. Section 32 is directed to the probability or likelihood, based on the experience of the 1920's, that a bank director interested in the underwriting business may use his influence in the bank to involve it or its customers in securities which his underwriting house has in its portfolio or has committed itself to take. That likelihood or probability does not depend on whether the firm's underwriting business exceeds 50 per cent of its total business. It might, of course, exist whatever the proportion of the underwriting business. But Congress did not go the whole way; it drew the line where the need was thought to be the greatest. And the line between substantial and unsubstantial seems to us to be the one indicated by the words "primarily engaged."

There is other intrinsic evidence in the Banking Act of 1933 to support our conclusion. Section 20 of the Act outlaws affiliation [4] of a member bank with an organization "engaged principally" in the underwriting business.

[4] Defined in § 2 (b) as direct or indirect ownership or control of more than 50 per cent of the voting stock of the organization in question, common ownership or control of 50 per cent or more of such voting stock, or a majority of common directors.

Section 19 provides control over bank holding companies. In order to vote its stock in controlled banks a bank holding company must show that it does not own, control, or have any interest in, and is not participating in the management or direction of any organization "engaged principally" in the underwriting business. On the other hand, when Congress came to deal with the practice of underwriters taking checking deposits, it used language different from what it used either in §§ 19 and 20 on the one hand or in § 32 on the other. By § 21 it prohibited any organization "engaged" in the underwriting business "to engage at the same time to any extent whatever" in the business of receiving checking deposits. Thus within the same Act we find Congress dealing with several types of underwriting firms—those "engaged" in underwriting, those "primarily engaged" in underwriting, those "engaged principally" in underwriting. The inference seems reasonable to us that Congress by the words it chose marked a distinction which we should not obliterate by reading "primarily" to mean "principally."

The Court of Appeals laid some stress on the fact that Congress did not abolish the bank affiliate system but only those underwriter affiliates which were under the control of a member bank or which were under a common control with it.[5] Section 20. Since Congress made majority control critical under § 20, it was thought that under § 32 a firm was not "primarily engaged" in underwriting unless underwriting constituted a majority of its business. But the two situations are not comparable. In § 32 Congress was not dealing with the problem of control of underwriters by banks or *vice versa*. The prohibited nexus is in no way dependent on the presence or absence of control, nor would it be made so even if "primarily engaged" in underwriting were construed to mean princi-

[5] See note 4, *supra*.

pally engaged in that business. Section 32 was designed, as we have said, to remove tempting opportunities from the management and personnel of member banks. In no realistic sense do those opportunities disappear merely because the underwriting activities of the outside firm with which the officer, director, or employee is connected happens to fall below 51 per cent. Fifty-one per cent, which is relevant in terms of control, is irrelevant here. The fact then that Congress did not abolish underwriter affiliates serves as no guide in determining whether "primarily engaged" in underwriting as used in § 32 means principally engaged or substantially engaged in that business.

Section 32 is not concerned, of course, with any showing that the director in question has in fact been derelict in his duties or has in any way breached his fiduciary obligation to the bank. It is a preventive or prophylactic measure. The fact that respondents have been scrupulous in their relationships to the bank is therefore immaterial.

There is a suggestion that if "primarily" does not mean principally but merely connotes substantiality, § 32 constitutes an unlawful delegation of authority to the Board. But we think it plain under our decisions that if substantiality is the statutory guide, the limits of administrative action are sufficiently definite or ascertainable so as to survive challenge on the grounds of unconstitutionality. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 397–400; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 142–146; *Yakus* v. *United States,* 321 U. S. 414, 424–428; *Bowles* v. *Willingham,* 321 U. S. 503, 512–516.

Reversed.

MR. JUSTICE RUTLEDGE, concurring.

If the question presented on the merits is reviewable judicially, in my opinion it is only for abuse of discretion

by the Board of Governors. Not only because Congress has committed the system's operation to their hands, but also because the system itself is a highly specialized and technical one, requiring expert and coordinated management in all its phases, I think their judgment should be conclusive upon any matter which, like this one, is open to reasonable difference of opinion. Their specialized experience gives them an advantage judges cannot possibly have, not only in dealing with the problems raised for their discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which they should administer it. Accordingly their judgment in such matters should be overturned only where there is no reasonable basis to sustain it or where they exercise it in a manner which clearly exceeds their statutory authority.

In this case I cannot say that either of these things has occurred. The Board made its determination after the required statutory hearing on notice. 48 Stat. 162, 193, 12 U. S. C. § 77. The consideration given was full and thorough, including detailed findings of fact and conclusions of law, followed by a carefully written opinion.[1] The Board concluded that "primarily" in § 32 does not mean "first in volume in comparison with any other business or businesses in which it [the employer] engages,"[2] but

[1] The opinion is not reported, pursuant to the statutory prohibition, 12 U. S. C. § 77, which is effective except in connection with proceedings for enforcement.

[2] Under such a view, in cases involving different facts the question would become judicial whether "primarily" means more than half of (1) the gross volume of business done; (2) the gross profit; (3) the net profit, where some but not all these factors as relating to one phase of the total activities carried on amounts to more than half the gross. Such discriminations would seem to be clearly within the Board's power to determine in the first instance. If so, it is difficult to see why that power does not include the determination made here.

means rather as "a matter of primary importance," like "primary" colors or planets or as the word is used in the phrase "the primary causes of a war." This view it found not only supported by accepted dictionary meaning but also in conformity with Congress' intent as established by the legislative history. In a further ground which we must take as reflecting its specialized experience, the Board stated: "To say that a securities firm ranking ninth among the leading investment bankers of the country with respect to its total participations in underwritings of bonds, and for a period ranking first, should be held to be beyond the scope of the statute is to say that Congress enacted a statute with the intention that it would apply to no one."

I cannot say that the Board's conclusion, in the light of those groundings, is wanting either for warrant in law or for reasonable basis in fact. The considerations stated in the Court's opinion and in the dissenting opinion filed in the Court of Appeals, 153 F. 2d 785, 795, as well as by the Board itself, confirm this view. I think it important, not only for this case but for like ones which may arise in the future, perhaps as a result of this decision, to make clear that my concurrence in the Court's disposition of the case is based upon the ground I have set forth, and not upon independent judicial determination of the question presented on the merits. I do not think this Court or any other should undertake to reconsider, as an independent judgment, the Board's determination upon that question or similar ones likely to arise, if the Board was not without basis in fact for its judgment and does not clearly transgress a statutory mandate. More than has been shown here would be required to cause me to believe that the Board has exceeded its power in either respect.

MR. JUSTICE FRANKFURTER joins in this opinion.

JESIONOWSKI, ADMINISTRATRIX, *v.* BOSTON & MAINE RAILROAD.

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

No. 88. Argued December 16, 1946.—Decided January 13, 1947.

In an action against a railroad in a federal district court under the Federal Employers' Liability Act to recover damages for the death of a brakeman resulting from the derailment of certain cars, the evidence showed that he threw a switch and signaled the engineer to back the cars, which were being switched from a main line to a siding. There was evidence tending to show that he negligently threw the switch while the lead car straddled it, which might have caused the derailment. Other evidence tended to show that, when the derailment occurred, splinters and planks were thrown into the air near a frog (75 feet from the switch) which could have caused the derailment. Some testified they were found on the track close to the switch and some that they were close to the frog. There was evidence that the frog and switch had been in good condition before and after the derailment and that the cars had been operated and the tracks used previously without any similar mishap. The jury was instructed that, if it found that the accident did not result from negligence of the deceased, it could infer that it resulted from negligence of the railroad. It found for the plaintiff. *Held:*

1. The doctrine of *res ipsa loquitur* was applicable and the judgment against the railroad is sustained. Pp. 456–459.

2. In this case, the jury's right to draw inferences from evidence and the sufficiency of the evidence to support a verdict are federal questions. P. 457.

3. The facts support the jury's findings both that the deceased's conduct did not cause the accident and that the railroad's did. P. 458.

4. Under Rule 75 (d) of the Rules of Civil Procedure, a statement in the designation of record on appeal that "the doctrine of *res ipsa loquitur* is not applicable to the facts of this case" was not sufficient to raise the point that, because the trial judge directed a verdict for the defendant on the first count of the complaint (which charged a defect in the car, track or roadbed), he was not

justified in submitting to the jury the question of such a defect under the second count charging negligence generally. Pp. 458–459. 154 F. 2d 703, reversed.

In an action in a federal district court under the Federal Employers' Liability Act, 35 Stat. 65, 53 Stat. 1404, 45 U. S. C. § 51 *et seq.*, petitioner obtained a judgment for damages for the death of her husband in a railroad accident. The Circuit Court of Appeals reversed. 154 F. 2d 703. This Court granted certiorari. 328 U. S. 830. *Reversed,* p. 459.

Thomas C. O'Brien argued the cause for petitioner. With him on the brief were *J. Edward Keefe, Jr.* and *John S. Stone.*

Francis P. Garland argued the cause and filed a brief for respondent.

Mr. Justice Black delivered the opinion of the Court.

Petitioner brought this action for damages in the Federal District Court under the Federal Employers' Liability Act, 35 Stat. 65, 53 Stat. 1404, 45 U. S. C. § 51 *et seq.*, for causing the death of her intestate. Count I alleged that "By reason of a defect or insufficiency, due to the negligence of the defendant, in its car, track, or roadbed, the car upon which the plaintiff's decedent was riding was derailed . . .," causing the decedent to be thrown from the car and killed. Count II, without specifying any particular acts of negligence, charged generally that the derailment and decedent's death were the "result of the negligence of the defendant." After the evidence was in, the Court, at the request of the respondent, directed the jury to return a verdict for the respondent on the first count. Respondent's motion for directed verdict on the second count, on the ground that the evidence failed to justify a

finding of negligence and that it showed that deceased was killed as the sole result of his own negligence, was overruled. The jury rendered a verdict for petitioner and judgment was entered on it. The Circuit Court of Appeals reversed and remanded to the District Court with directions to render judgment for the respondent. 154 F. 2d 703.

The trial court charged the jury that the burden was upon petitioner to prove by a fair preponderance of the evidence that the deceased's death was caused by respondent's negligence. It invoked the trial rule under which negligence may be inferred from unusual happenings growing out of conditions under a defendant's control. Referring to this rule under the name of *res ipsa loquitur,* the court charged: "Of course if the deceased's negligence was the sole cause of the accident the plaintiff here cannot recover. And since there can be no application of the doctrine of *res ipsa loquitur* if other causes than the negligence of the defendant, its agents or servants, might have produced the accident, the plaintiff is bound, she has the burden, to exclude the operation of such causes by a fair preponderance of the evidence before the rule can be applied. This is so because if there are other causes than the negligence of the defendant that might have caused the accident, the defendant cannot be said to be in exclusive control—one of the prerequisites to the application of the rule here invoked." The Circuit Court of Appeals reversed because it thought that the jury should not be permitted to draw an inference of defendant's negligence from an extraordinary accident growing out of a general set of circumstances which included activities of the injured person, even though a jury, under proper instructions, could find from the evidence that the injured person's activities did not cause the injury. The Circuit Court's limitation of the jury's province by this interpretation of a doctrine of *res ipsa loquitur* raised a question of impor-

tance in the trial of cases arising under federal law. We granted certiorari to consider this question. 328 U. S. 830.

The testimony, so far as relevant to point the issues, may be briefly summarized. Four railroad cars were being pushed backward and eastward by an engine in order to put them on a siding north of the main track. It was the duty of deceased, a brakeman, to throw the switch before the first car reached it in order that the four cars would take the siding. There was evidence that he threw the switch and gave a signal to the engineer to back the cars. Respondent's evidence was sufficient to authorize, but not to compel, the jury to find that the deceased negligently threw the switch while the lead car in the backward movement straddled the switch with one set of the car wheels on one side of the switch and one on the other. If true, this could mean that the wheels east of the switch would move down the main line and the others would enter the siding when the switch was thrown and the backward movement took place, thus probably causing derailment. If the jury had believed respondent's evidence that this last car was astride the switch when it was thrown, it would have been authorized, under the court's charge, to find for the respondent. But about 75 feet east of this switch, at a point where the south rail of the siding track intersected the north rail of the main track, there was a frog. There was testimony that this frog operated with a spring mechanism, and that if the spring failed to work when the wheels passed over it, the cars might be derailed. Some other evidence tended to show that, at the time the derailment occurred, splinters and planks were thrown into the air near the frog. Other evidence tended to show that planks and splinters were found on the track. Some testimony showed that they were close to the switch, and some that they were close to the frog. There was evidence that the frog and switch had been in good condi-

tion before the derailment and after the derailment. The cars had been operated and the tracks had been used previously, so far as the evidence showed, without any similar mishap.

In *San Juan Light Co.* v. *Requena,* 224 U. S. 89, 98–99, this Court said: "when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." Both prior to and after that case was decided, this Court has acted upon this rule in varying types of cases. *Transportation Co.* v. *Downer,* 11 Wall. 129; *Inland & Seaboard Coasting Co.* v. *Tolson,* 139 U. S. 551, 555; *Gleeson* v. *Virginia M. R. R.,* 140 U. S. 435; *Sweeney* v. *Erving,* 228 U. S. 233, 240. See also *Southern Ry.* v. *Bennett,* 233 U. S. 80; *Foltis, Inc.* v. *City of New York,* 287 N. Y. 108, 38 N. E. 2d 455, and cases collected, 153 A. L. R. 1134. The Circuit Court of Appeals thought, however, that the rule was improperly applied in this case because the railroad instrumentalities here were not under the "exclusive control" of the railroad; that "The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault." 154 F. 2d 703, 705.

The Court's reasoning was this: Petitioner was not entitled to have her case submitted to the jury except under the rule of *res ipsa loquitur.* That rule has rigidly defined prerequisities, one of which is that, to apply it, the defendant must have exclusive control of all the things used in an operation which might probably have caused injury. Here the railroad did not have exclusive control of all probable causative factors, since deceased had some immediate control over switching and signaling. "Exclu-

sive control" of all probable causative factors, the court reasoned, means that *res ipsa loquitur* cannot be applied even though those non-exclusively controlled factors are clearly shown to have had no causal connection with the accident.

We cannot agree. *Res ipsa loquitur,* thus applied, would bar juries from drawing an inference of negligence on account of unusual accidents in all operations where the injured person had himself participated in the operations, even though it was proved that his operations of the things under his control did not cause the accident. This viewpoint unduly restricts the power of juries to decide questions of fact, and in this case the jury's right to draw inferences from evidence and the sufficiency of that evidence to support a verdict are federal questions. A conceptualistic interpretation of *res ipsa loquitur* has never been used by this Court to reduce the jury's power to draw inferences from facts. Such an interpretation unduly narrows the doctrine as this Court has applied it.

This Court said, in *Sweeney* v. *Erving,* 228 U. S. 233, 240, a decision which cut through the mass of verbiage built up around the doctrine of *res ipsa loquitur,* that "*res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict." Thus, the question here really is not whether the application of the rule relied on fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding that this derailment was a result of the defendant's negligence. We hold that they were.

Derailments are extraordinary, not usual, happenings. When they do occur, a jury may fairly find that they occurred as a result of negligence. It is true that the jury might have found here that this accident happened as a result of the negligence of the deceased; but although the respondent offered evidence to establish this fact, it "did not satisfy the jury." *Southern Ry.* v. *Bennett, supra* at 86. With the deceased freed from any negligent conduct in connection with the switch or the signaling, we have left an accident, ordinarily the result of negligence, which may be attributed only to the lack of care of the railroad, the only other agency involved. Once a jury, having been appropriately instructed, finds that the employee's activities did not cause the derailment, the defendant remains as the exclusive controller of all the factors which may have caused the accident. It would run counter to common everyday experience to say that, after a finding by the jury that the throwing of the switch and the signaling did not contribute to the derailment, the jury was without authority to infer that either the negligent operation of the train or the negligent maintenance of the instrumentalities other than the switch was the cause of the derailment. It was uncontroverted that the railroad had exclusive control of both. We think that the facts support the jury's findings both that the deceased's conduct did not cause the accident and that the railroad's negligence did.

Respondent also urges here, as it did in the Circuit Court of Appeals, that because the trial judge directed a verdict for it on the first count of the complaint, which charged a defect in the car, track or roadbed, the court was not justified in submitting to the jury the question of a defect in these respects under the second count. The Circuit Court held that this question was not properly raised before it because respondent had failed on appeal to make "a

concise statement" of the point as required by Rule 75 (d) of the Rules of Civil Procedure. Respondent argues that the question was properly raised, though not specifically, by its general point that "the doctrine of *res ipsa loquitur* is not applicable to the facts of this case." We cannot hold that the Circuit Court erred when it refused to consider the question because of respondent's failure to comply with Rule 75 (d).

Reversed.

MR. JUSTICE REED, MR. JUSTICE JACKSON and MR. JUSTICE BURTON would affirm on the grounds stated in the opinion of the Circuit Court of Appeals for the First Circuit.

LOUISIANA EX REL. FRANCIS *v.* RESWEBER, SHERIFF, ET AL.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 142. Argued November 18, 1946.—Decided January 13, 1947.

Petitioner was convicted in a state court of murder and sentenced to be electrocuted. A warrant for his execution was duly issued. He was prepared for electrocution, placed in the electric chair and subjected to a shock which was intended to cause his death but which failed to do so, presumably because of some mechanical difficulty. He was removed from the chair and returned to prison; but another warrant for his execution at a later date was issued. *Held:*

1. Assuming, but not deciding, that violations of the principles of the double jeopardy provision of the Fifth Amendment and the cruel and unusual punishment provision of the Eighth Amendment would violate the due process clause of the Fourteenth Amendment—

(a) The proposed execution would not violate the double jeopardy clause of the Fifth Amendment. P. 462.

(b) It would not violate the cruel and unusual punishment clause of the Eighth Amendment. P. 463.

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2. The proposed execution would not violate the equal protection clause of the Fourteenth Amendment. P. 465.

3. The record of the original trial, showing the warrant of arrest, the indictment, the appointment of counsel, and the minute entries of trial, selection of jury, verdict and sentence, contains nothing on which this Court could conclude that the constitutional rights of petitioner were infringed at the trial. P. 465.

Affirmed.

The Supreme Court of Louisiana denied petitioner's applications for writs of certiorari, mandamus, prohibition and habeas corpus to prevent a second attempt to execute him for murder. This Court granted certiorari. 328 U. S. 833. *Affirmed*, p. 466.

James Skelly Wright argued the cause for petitioner. With him on the brief were *Robert E. Kline, Jr.* and *John L. Ingoldsby, Jr.*

Michael E. Culligan and *L. O. Pecot* argued the cause and filed a brief for respondents.

Mr. Justice Reed announced the judgment of the Court in an opinion in which The Chief Justice, Mr. Justice Black and Mr. Justice Jackson join.

This writ of certiorari brings before this Court a unique situation. The petitioner, Willie Francis, is a colored citizen of Louisiana. He was duly convicted of murder and in September, 1945, sentenced to be electrocuted for the crime. Upon a proper death warrant, Francis was prepared for execution and on May 3, 1946, pursuant to the warrant, was placed in the official electric chair of the State of Louisiana in the presence of the authorized witnesses. The executioner threw the switch but, presumably because of some mechanical difficulty, death did not result. He was thereupon removed from the chair and returned to prison where he now is. A new death warrant was issued

by the Governor of Louisiana, fixing the execution for May 9, 1946.

Applications to the Supreme Court of the state were filed for writs of certiorari, mandamus, prohibition and habeas corpus, directed to the appropriate officials in the state. Execution of the sentence was stayed. By the applications petitioner claimed the protection of the due process clause of the Fourteenth Amendment on the ground that an execution under the circumstances detailed would deny due process to him because of the double jeopardy provision of the Fifth Amendment and the cruel and unusual punishment provision of the Eighth Amendment.[1] These federal constitutional protections, petitioner claimed, would be denied because he had once gone through the difficult preparation for execution and had once received through his body a current of electricity intended to cause death. The Supreme Court of Louisiana denied the applications on the ground of a lack of any basis for judicial relief. That is, the state court concluded there was no violation of state or national law alleged in the various applications. It spoke of the fact that no "current of sufficient intensity to cause death" passed through petitioner's body. It referred specifically to the fact that the applications of petitioner invoked the provisions of the Louisiana Constitution against cruel and inhuman punishments and putting one in jeopardy of life or liberty twice for the same offense. We granted certiorari on a petition setting forth the aforementioned contentions, to consider the alleged violations of rights under the Federal Constitution in the unusual circumstances of this case. 328 U. S. 833. For matters of state law, the opin-

[1] Fifth Amendment: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

ion and order of the Supreme Court of Louisiana are binding on this Court, *Hebert* v. *Louisiana,* 272 U. S. 312, 317. So far as we are aware, this case is without precedent in any court.

To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we shall examine the circumstances under the assumption, but without so deciding, that violation of the principles of the Fifth and Eighth Amendments, as to double jeopardy and cruel and unusual punishment, would be violative of the due process clause of the Fourteenth Amendment.[2] As nothing has been brought to our attention to suggest the contrary, we must and do assume that the state officials carried out their duties under the death warrant in a careful and humane manner. Accidents happen for which no man is to blame. We turn to the question as to whether the proposed enforcement of the criminal law of the state is offensive to any constitutional requirements to which reference has been made.

First. Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense. *Ex parte Lange,* 18 Wall. 163, 168, 175; *In re Bradley,* 318 U. S. 50. Compare *United States* v. *Lanza,* 260 U. S. 377, 382. But where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. *United States* v. *Ball,* 163 U. S. 662, 672. See *People* v. *Trezza,* 128 N. Y. 529, 535, 28 N. E. 533. Even where a state obtains a new trial after conviction because of errors, while an accused may be placed on trial a second time, it is not the sort of hardship to the accused that is forbidden by the Fourteenth Amendment.

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[2] See *Twining* v. *New Jersey,* 211 U S. 78, 99; *Palko* v. *Connecticut,* 302 U. S. 319, 324; *In re Kemmler,* 136 U. S. 436, 445; *Collins* v. *Johnston,* 237 U. S. 502, 510.

Palko v. *Connecticut,* 302 U. S. 319, 328.[3] As this is a prosecution under state law, so far as double jeopardy is concerned, the *Palko* case is decisive. For we see no difference from a constitutional point of view between a new trial for error of law at the instance of the state that results in a death sentence instead of imprisonment for life and an execution that follows a failure of equipment. When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the state's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment. We find no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execution.

Second. We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. The case before us does not call for an examination into any punishments except that of death. See *Weems* v. *United States,* 217 U. S. 349. The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner.[4]

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[3] See *Kepner* v. *United States,* 195 U. S. 100, 129; cf. *United States* v. *Ball,* 163 U. S. 662, 666–70.

[4] This Court said of a similar clause embodied in the constitution of New York, *In re Kemmler,* 136 U. S. 436, 446:

> ". . . but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offence against the laws of the State were mani-

Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.

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festly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."

It added, p. 447:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Louisiana has the same humane provision in its constitution. Louisiana Constitution, Art. I, § 12. The *Kemmler* case denied that electrocution infringed the federal constitutional rights of a convicted criminal sentenced to execution.

Third. The Supreme Court of Louisiana also rejected petitioner's contention that death inflicted after his prior sufferings would deny him the equal protection of the laws, guaranteed by the Fourteenth Amendment. This suggestion in so far as it differs from the due process argument is based on the idea that execution, after an attempt at execution has failed, would be a more severe punishment than is imposed upon others guilty of a like offense. That is, since others do not go through the strain of preparation for execution a second time or have not experienced a nonlethal current in a prior attempt at execution, as petitioner did, to compel petitioner to submit to execution after these prior experiences denies to him equal protection. Equal protection does not protect a prisoner against even illegal acts of officers in charge of him, much less against accidents during his detention for execution. See *Lisenba* v. *California,* 314 U. S. 219, 226. Laws cannot prevent accidents nor can a law equally protect all against them. So long as the law applies to all alike, the requirements of equal protection are met. We have no right to assume that Louisiana singled out Francis for a treatment other than that which has been or would generally be applied.

Fourth. There is a suggestion in the brief that the original trial itself was so unfair to the petitioner as to justify a reversal of the judgment of conviction and a new trial. Petitioner's claim in his brief is that he was inadequately represented by counsel. The record of the original trial presented to us shows the warrant for arrest, the indictment, the appointment of counsel and the minute entries of trial, selection of jury, verdict and sentence. There is nothing in any of these papers to show any violation of petitioner's constitutional rights. See *Carter* v. *Illinois,* 329 U. S. 173. Review is sought here because of a denial of due process of law that would be brought about by execution of petitioner after failure of the first effort to electrocute him. Nothing is before us upon which a ruling

can be predicated as to alleged denial of federal constitutional rights during petitioner's trial. On this record, we see nothing upon which we could conclude that the constitutional rights of petitioner were infringed.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

When four members of the Court find that a State has denied to a person the due process which the Fourteenth Amendment safeguards, it seems to me important to be explicit regarding the criteria by which the State's duty of obedience to the Constitution must be judged. Particularly is this so when life is at stake.

Until July 28, 1868, when the Fourteenth Amendment was ratified, the Constitution of the United States left the States free to carry out their own notions of criminal justice, except insofar as they were limited by Article I, § 10 of the Constitution which declares: "No State shall . . . pass any Bill of Attainder, [or] ex post facto Law . . ." The Fourteenth Amendment placed no specific restraints upon the States in the formulation or the administration of their criminal law. It restricted the freedom of the States generally, so that States thereafter could not "abridge the privileges or immunities of citizens of the United States," or "deprive any person of life, liberty, or property, without due process of law," or "deny to any person within its jurisdiction the equal protection of the laws."

These are broad, inexplicit clauses of the Constitution, unlike specific provisions of the first eight amendments formulated by the Founders to guard against recurrence of well-defined historic grievances. But broad as these clauses are, they are not generalities of empty vagueness. They are circumscribed partly by history and partly by the problems of government, large and dynamic

though they be, with which they are concerned. The "privileges or immunities of citizens of the United States" concern the dual citizenship under our federal system. The safeguards of "due process of law" and "the equal protection of the laws" summarize the meaning of the struggle for freedom of English-speaking peoples. They run back to Magna Carta but contemplate no less advances in the conceptions of justice and freedom by a progressive society. See the classic language of Mr. Justice Matthews in *Hurtado* v. *California,* 110 U. S. 516, 530–31.

When, shortly after its adoption, the Fourteenth Amendment came before this Court for construction, it was urged that the "privileges or immunities of citizens of the United States" which were not to be abridged by any State were the privileges and immunities which citizens theretofore enjoyed under the Constitution. If that view had prevailed, the Privileges or Immunities Clause of the Fourteenth Amendment would have placed upon the States the limitations which the specific articles of the first eight amendments had theretofore placed upon the agencies of the national government. After the fullest consideration that view was rejected. The rejection has the authority that comes from contemporaneous knowledge of the purposes of the Fourteenth Amendment. See *Slaughter-House Cases,* 16 Wall. 36, 67–68; *Davidson* v. *New Orleans,* 96 U. S. 97. The notion that the Privileges or Immunities Clause of the Fourteenth Amendment absorbed, as it is called, the provisions of the Bill of Rights that limit the Federal Government has never been given countenance by this Court.

Not until recently was it suggested that the Due Process Clause of the Fourteenth Amendment was merely a compendious reference to the Bill of Rights whereby the States were now restricted in devising and enforcing their penal code precisely as is the Federal Government by the

first eight amendments. On this view, the States would be confined in the enforcement of their criminal codes by those views for safeguarding the rights of the individual which were deemed necessary in the eighteenth century. Some of these safeguards have perduring validity. Some grew out of transient experience or formulated remedies which time might well improve. The Fourteenth Amendment did not mean to imprison the States into the limited experience of the eighteenth century. It did mean to withdraw from the States the right to act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom.

These are very broad terms by which to accommodate freedom and authority. As has been suggested from time to time, they may be too large to serve as the basis for adjudication, in that they allow much room for individual notions of policy. That is not our concern. The fact is that the duty of such adjudication on a basis no less narrow has been committed to this Court.

In an impressive body of decisions this Court has decided that the Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights. They neither contain the particularities of the first eight amendments nor are they confined to them. That due process of law has its own independent function has been illustrated in numerous decisions, and has been expounded in the opinions of the Court which have canvassed the matter most thoroughly. See *Hurtado* v. *California, supra; Twining* v. *New Jersey,* 211 U. S. 78; *Snyder* v. *Massachusetts,* 291 U. S. 97; *Palko* v. *Connecticut,* 302 U. S. 319. Insofar as due process under the Fourteenth Amendment requires the States to observe any of the immunities "that are valid as against the federal government by force of the specific pledges of particular amendments," it does so because they "have

been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." *Palko* v. *Connecticut, supra,* at 324–25.

The Federal Bill of Rights requires that prosecutions for federal crimes be initiated by a grand jury and tried by a petty jury; it protects an accused from being a witness against himself. The States are free to consult their own conceptions of policy in dispensing with the grand jury, in modifying or abolishing the petty jury, in withholding the privilege against self-crimination. See *Maxwell* v. *Dow,* 176 U. S. 581; *Twining* v. *New Jersey, supra; Snyder* v. *Massachusetts, supra; Palko* v. *Connecticut, supra,* at 323, 324; *cf. Feldman* v. *United States,* 322 U. S. 487. In short, the Due Process Clause of the Fourteenth Amendment did not withdraw the freedom of a State to enforce its own notions of fairness in the administration of criminal justice unless, as it was put for the Court by Mr. Justice Cardozo, "in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts, supra,* at 105.

A State may offend such a principle of justice by brutal subjection of an individual to successive retrials on a charge on which he has been acquitted. Such conduct by a State might be a denial of due process, but not because the protection against double jeopardy in a federal prosecution against which the Fifth Amendment safeguards limits a State. For the disputations that are engendered by technical aspects of double jeopardy as enshrined in the Fifth Amendment, see the majority and dissenting opinions in *Ex parte Lange,* 18 Wall. 163, and *In re Bradley,* 318 U. S. 50. Again, a State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted though not when it treats him

by a mode about which opinion is fairly divided. But the penological policy of a State is not to be tested by the scope of the Eighth Amendment and is not involved in the controversy which is necessarily evoked by that Amendment as to the historic meaning of "cruel and unusual punishment." See *Weems* v. *United States,* 217 U. S. 349, and particularly the dissenting opinion of White and Holmes, JJ.

Once we are explicit in stating the problem before us in terms defined by an unbroken series of decisions, we cannot escape acknowledging that it involves the application of standards of fairness and justice very broadly conceived. They are not the application of merely personal standards but the impersonal standards of society which alone judges, as the organs of Law, are empowered to enforce. When the standards for judicial judgment are not narrower than "immutable principles of justice which inhere in the very idea of free government," *Holden* v. *Hardy,* 169 U. S. 366, 389, "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, "immunities . . . implicit in the concept of ordered liberty," *Palko* v. *Connecticut, supra,* at 324–25, great tolerance toward a State's conduct is demanded of this Court. Such were recently stated to be "the controlling principles." See Mr. Chief Justice Stone in *Malinski* v. *New York,* 324 U. S. 401, 438, in connection with the concurring opinion in that case, *ibid.,* 412, 416, 417.

I cannot bring myself to believe that for Louisiana to leave to executive clemency, rather than to require, mitigation of a sentence of death duly pronounced upon conviction for murder because a first attempt to carry it out was an innocent misadventure, offends a principle of justice "rooted in the traditions and conscience of our people." See *Snyder* v. *Massachusetts, supra,* at 105. Short of

the compulsion of such a principle, this Court must abstain from interference with State action no matter how strong one's personal feeling of revulsion against a State's insistence on its pound of flesh. One must be on guard against finding in personal disapproval a reflection of more or less prevailing condemnation. Strongly drawn as I am to some of the sentiments expressed by my brother BURTON, I cannot rid myself of the conviction that were I to hold that Louisiana would transgress the Due Process Clause if the State were allowed, in the precise circumstances before us, to carry out the death sentence, I would be enforcing my private view rather than that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution.

The fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions. When the Fourteenth Amendment first came here for application the Court abstained from venturing even a tentative definition of due process. With wise forethought it indicated that what may be found within or without the Due Process Clause must inevitably be left to "the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." *Davidson* v. *New Orleans, supra,* at 104. This is another way of saying that these are matters which depend on "differences of degree. The whole law does so as soon as it is civilized." Holmes, J., in *LeRoy Fibre Co.* v. *Chicago, M. & St. P. R. Co.,* 232 U. S. 340, 354. Especially is this so as to questions arising under the Due Process Clause. A finding that in this case the State of Louisiana has not gone beyond its powers is for me not the starting point for abstractly logical extension. Since I cannot say that it would be "repugnant to the conscience of mankind,"

Palko v. *Connecticut, supra,* at 323, for Louisiana to exercise the power on which she here stands, I cannot say that the Constitution withholds it.

MR. JUSTICE BURTON, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE concur, dissenting.

Under circumstances unique in judicial history, the relator asks this Court to stay his execution on the ground that it will violate the due process of law guaranteed to him by the Constitution of the United States. We believe that the unusual facts before us require that the judgment of the Supreme Court of Louisiana be vacated and that this cause be remanded for further proceedings not inconsistent with this opinion. Those proceedings should include the determination of certain material facts not previously determined, including the extent, if any, to which electric current was applied to the relator during his attempted electrocution on May 3, 1946. Where life is to be taken, there must be no avoidable error of law or uncertainty of fact.

The relator's execution was ordered by the Governor of Louisiana to take place May 3, 1946. Of the proceedings on that day, the Supreme Court of Louisiana has said:

> ". . . between the Hours of 12:00 o'clock noon and 3:00 o'clock p. m., Willie Francis was strapped in the electric chair and an attempt was made to electrocute him, but, because of some defect in the apparatus devised and used for electrocutions, the contrivance failed to function, and after an unsuccessful attempt to electrocute Francis he was removed from the chair."

Of the same proceedings, the State's brief says:

> "Through a latent electrical defect, the attempt to electrocute Francis failed, the State contending no

current whatsoever reached Francis' body, the relator contending a current of electricity did pass through his body; but in any event, Willie Francis was not put to death."

On May 8, the death warrant was canceled, and the relator's execution has been stayed pending completion of these proceedings. The Governor proposes to issue another death warrant for the relator's electrocution and the relator now asks this Court to prevent it for the reason that, under the present unique circumstances, his electrocution will be so cruel and unusual as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

That Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." When this was adopted in 1868, there long had been imbedded deeply in the standards of this nation a revulsion against subjecting guilty persons to torture culminating in death. Preconstitutional American history reeked with cruel punishment to such an extent that, in 1791, the Eighth Amendment to the Constitution of the United States expressly imposed upon federal agencies a mandate that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Louisiana and many other states have adopted like constitutional provisions. See Section 12 of Article I of the Constitution of Louisiana (1921).

The capital case before us presents an instance of the violation of constitutional due process that is more clear than would be presented by many lesser punishments prohibited by the Eighth Amendment or its state counterparts. Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional proce-

dure of a self-governing people. Abhorrence of the cruelty of ancient forms of capital punishment has increased steadily until, today, some states have prohibited capital punishment altogether. It is unthinkable that any state legislature in modern times would enact a statute expressly authorizing capital punishment by repeated applications of an electric current separated by intervals of days or hours until finally death shall result. The Legislature of Louisiana did not do so. The Supreme Court of Louisiana did not say that it did. The Supreme Court of Louisiana said merely that the pending petitions for relief in this case presented an executive rather than a judicial question and, by that mistake of law, it precluded itself from discussing the constitutional issue before us.

In determining whether the proposed procedure is unconstitutional, we must measure it against a lawful electrocution. The contrast is that between instantaneous death and death by installments—caused by electric shocks administered after one or more intervening periods of complete consciousness of the victim. Electrocution, when instantaneous, *can* be inflicted by a state in conformity with due process of law. *In re Kemmler,* 136 U. S. 436. The Supreme Court of Louisiana has held that electrocution, in the manner prescribed in its statute, is more humane than hanging. *State ex rel. Pierre* v. *Jones,* 200 La. 807, 9 So. 2d 42, cert. denied, 317 U. S. 633. See also, *Malloy* v. *South Carolina,* 237 U. S. 180.

The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself. Electrocution has been approved only in a form that eliminates suffering.

The Louisiana statute makes this clear. It provides that:

> "Every sentence of death imposed in this State shall be by electrocution; that is, causing to pass

through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. . . ." La. Code of Criminal Procedure (1928), Act No. 2, Art. 569, as amended by § 1, Act No. 14, 1940.

It does not provide for electrocution by interrupted or repeated applications of electric current at intervals of several days or even minutes. It does not provide for the application of electric current of an intensity less than that sufficient to cause death. It prescribes expressly and solely for the application of a current of sufficient intensity to cause death and for the *continuance* of that application until death results. Prescribing capital punishment, it should be construed strictly. There can be no implied provision for a second, third or multiple application of the current. There is no statutory or judicial precedent upholding a delayed process of electrocution.

These considerations were emphasized in *In re Kemmler, supra,* when an early New York statute authorizing electrocution was attacked as violative of the due process clause of the Fourteenth Amendment because prescribing a cruel and unusual punishment. In upholding that statute, this Court stressed the fact that the electric current was to cause instantaneous death. Like the Louisiana statute before us, that statute called expressly for the continued application of a sufficient electric current to cause death. It was the resulting "instantaneous" and "painless" death that was referred to as "humane."

After quoting the New York County and Supreme Courts, this Court quoted the New York Court of Appeals, at 119 N. Y. 579, as follows:

" 'We have examined this testimony and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the con-

stitution, though it is certainly unusual. On the contrary, we agree with the court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, *under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless, death.*' " (Italics supplied.) *In re Kemmler, supra,* at 443–444.

Finally, speaking for itself, this Court said:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." (Italics supplied.) *Id.* at 447.

If the state officials deliberately and intentionally had placed the relator in the electric chair five times and, each time, had applied electric current to his body in a manner not sufficient, until the final time, to kill him, such a form of torture would rival that of burning at the stake. Although the failure of the first attempt, in the present case, was unintended, the reapplication of the electric current will be intentional. How many deliberate and intentional reapplications of electric current does it take to produce a cruel, unusual and unconstitutional punishment? While five applications would be more cruel and unusual than one, the uniqueness of the present case demonstrates that, today, two separated applications are sufficiently "cruel and unusual" to be prohibited. If five attempts would be "cruel and unusual," it would be difficult to draw the line between two, three, four and five. It is not difficult, however, as we here contend, to draw the line between the one continuous application prescribed by statute and any other application of the current.

Lack of intent that the first application be less than fatal is not material. The intent of the executioner cannot lessen the torture or excuse the result. It was the statutory duty of the state officials to make sure that there was no failure. The procedure in this case contrasts with common knowledge of precautions generally taken elsewhere to insure against failure of electrocutions. The high standard of care generally taken evidences the significance properly attached to the unconditional requirement of a single continued application of the current until death results. In our view of this case, we are giving careful recognition to the law of Louisiana. Neither the Legislature nor the Supreme Court of Louisiana has expressed approval of electrocution other than by one continuous application of a lethal current.

Executive clemency provides a common means of avoiding unconstitutional or otherwise questionable executions. When, however, the unconstitutionality of proposed executive procedure is brought before this Court, as in this case, we should apply the constitutional protection. In this case, final recourse is had to the high trusteeship vested in this Court by the people of the United States over the constitutional process by which their own lives may be taken.

In determining whether a case of cruel and unusual punishment constitutes a violation of due process of law, each case must turn upon its particular facts. The record in this case is not limited to an instance where a prisoner was placed in the electric chair and released before being subjected to the electric current. It presents more than a case of mental anguish, however severe such a case might be. The petition to the Supreme Court of Louisiana expressly states that a current of electricity was caused to pass through the body of the relator. This allegation was de-

nied in the answer and no evidence was presented by either side. The Supreme Court of Louisiana thereupon undertook to decide the case on the pleadings. It said:

> "Our conclusion is that the complaint made by the relator is a matter over which the courts have no authority. Inasmuch as the proceedings had in the district court, up to and including the pronouncing of the sentence of death, were entirely regular, we have no authority to set aside the sentence and release the relator from the sheriff's custody." [1]

This statement assumed that the relief sought in the Supreme Court of Louisiana was only a review of the judicial proceedings in the lower state courts prior to the passing of sentence upon the relator on September 14, 1945. On the contrary, the issue raised there and here primarily concerns the action of state officials on and after May 3, 1946, in connection with their past and proposed attempts to electrocute the relator. This issue properly presents a federal constitutional question based on the impending deprivation of the life of the relator by executive officials of the State of Louisiana in a manner alleged

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[1] That court, in discussing the pleadings, also said:

> "In this latter answer or opposition it is admitted that the attempt was made to electrocute Willie Francis on May 3, 1946, in obedience of the death warrant, but it is averred that through some latent electrical defect in the apparatus, no electric current reached the body of Willie Francis and for that reason the sentence of death was not carried out. We have no other evidence, of course, as to whether an electric current did reach the body of Willie Francis. The important fact, however, is that a current of sufficient intensity to cause death, as required by the statute on the subject, and by the death warrant, did not pass through the body of Willie Francis."

This means that, as long as the relator did not die, the court apparently regarded the carrying out of the death sentence as a purely executive function not subject to judicial review.

to be a violation of the due process of law guaranteed by the Fourteenth Amendment. The refusal of the writs necessarily denied the constitutional protection prayed for. In ruling against the relator on the pleadings, in the absence of further evidence, the Supreme Court of Louisiana must be taken to have acted upon the allegations of fact most favorable to the relator. The petition contains the unequivocal allegation that the official electrocutioner "turned on the switch and a current of electricity was caused to pass through the body of relator, all in the presence of the official witnesses." This allegation must be read in the light of the Louisiana statute which authorized the electrocutioner to apply to the body of the relator only such an electric current as was of "sufficient intensity to cause death." On that record, denial of relief means that the proposed repeated, and at least second, application to the relator of an electric current sufficient to cause death is not, under present circumstances, a cruel and unusual punishment violative of due process of law. It exceeds any punishment prescribed by law. There is no precedent for it. What then is it, if it be not cruel, unusual and unlawful? In spite of the constitutional issue thus raised, the Supreme Court of Louisiana treated it as an executive question not subject to judicial review. We believe that if the facts are as alleged by the relator the proposed action is unconstitutional. We believe also that the Supreme Court of Louisiana should provide for the determination of the facts and then proceed in a manner not inconsistent with this opinion.

That counsel for both sides recognize the materiality of what occurred on May 3, 1946, is demonstrated by the affidavits and the transcript of testimony which they took from available public records and called to the attention of this Court by publication of them in connection with their respective briefs in this Court. Excerpts from those

public records, printed in the margin, indicate the conflict of testimony which should be resolved.[2]

The remand of this cause to the Supreme Court of Louisiana in the manner indicated would not mean that the

[2] The following excerpts are from copies of affidavits printed as appendices to the brief on behalf of the petitioner. The official witnesses named were persons charged by statute with the duty of making a signed report or "proces verbal" reciting the manner and date of the execution to be filed with the clerk of the court in which the sentence was imposed. La. Code of Criminal Procedure (1928), Act No. 2, Art. 571. The statements refer to what happened after the relator had been strapped into the electric chair and a hood placed before his eyes.

"Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breath.'" Affidavit of official witness Harold Resweber, dated May 23, 1946.

"I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one on the outside yelled back he was giving him all he had. Then Willie Francis cried out 'Take it off. Let me breath.' Then they took the hood from his eyes and unstrapped him.

. . . . .

"This boy really got a shock when they turned that machine on." Affidavit of official witness Ignace Doucet, dated May 30, 1946.

"After he was strapped to the chair the Sheriff of St. Martin Parish asked him if he had anything to say about anything and he said nothing. Then the hood was placed before his eyes. Then the officials in charge of the electrocution were adjusting the mechanisms and when the needle of the meter registered to a certain point on the dial, the electrocutioner pulled down on the switch and at the same time said: 'Goodby Willie.' At that very moment, Willie Francis' lips puffed out and his body squirmed and tensed and he jumped so that the chair rocked on the floor. Then the condemned man said: 'Take it off. Let me breath.' Then the switch was turned off. Then some of the men left and a few

relator necessarily is entitled to a complete release. It would mean merely that the courts of Louisiana must examine the facts, both as to the actual nature of the punishment already inflicted and that proposed to be inflicted and, if the proposed punishment amounts to a violation of due process of law under the Constitution of the United States, then the State must find some means of disposing of this case that will not violate that Constitution.

For the reasons stated, we are unable to concur in the judgment of this Court which affirms the judgment below.

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minutes after the Sheriff of St. Martin Parish, Mr. E. L. Resweber, came in and announced that the governor had granted the condemned man a reprieve." Affidavit of official chaplain Reverend Maurice L. Rousseve, dated May 25, 1946.

Attached to the brief on behalf of the respondents there was submitted a copy of the transcript of testimony taken before the Louisiana Pardon Board on May 31, 1946, in support of the relator's application for executive clemency which was denied June 1, 1946. This transcript includes testimony of those who were in charge of the electrical equipment on May 3, to the effect that no electric current reached the body of the relator and that his flesh did not show electrical burns. It also included a statement by the sheriff of a neighboring parish, who accompanied the relator from the chair, that the relator told him on leaving the chair that the electric current had "tickled him."

These public records were not in existence and therefore not before the Supreme Court of Louisiana when it rendered its decision on May 15, 1946.

ANDERSON, RECEIVER, *v.* YUNGKAU, EXECUTOR, ET AL.

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

No. 87. Argued December 19, 20, 1946.—Decided January 13, 1947.

Rule 25 (a) of the Federal Rules of Civil Procedure provides that "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party." *Held:* More than two years after the deaths of defendants, actions may not be revived and their representatives substituted; and the actions should be dismissed—even though the failure to act within the specified period was the result of "excusable neglect" within the meaning of Rule 6 (b). Pp. 484–486.

153 F. 2d 685, affirmed.

The District Court denied motions to revive certain actions against certain parties and substitute their legal representatives more than two years after the deaths of the original parties, and dismissed the actions under Rule 25 (a) of the Federal Rules of Civil Procedure. 1 F. R. D. 589. The Circuit Court of Appeals affirmed. 153 F. 2d 685. *Affirmed*, p. 486.

Robert S. Marx argued the cause for petitioner. With him on the brief were *Frank E. Wood, Harry Kasfir* and *Edward M. Brown.*

LeWright Browning argued the cause and filed a brief for respondents. *William J. Price, Henry G. Sandifer* and *George W. Luedeke* filed a brief for Henry G. Sandifer, and *H. R. Dysard* filed a brief for Yungkau et al., respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These are seven cases in which petitioner sued to recover stock assessments from shareholders of the Banco Kentucky Co. They were started in 1936 in the Eastern District of Kentucky and were stayed by agreement while the principal case upon which these depended, *Anderson* v. *Abbott*, 321 U. S. 349, wended its way through the courts. In the latter case we sustained the liability of the shareholders of Banco for the stock assessment. That was in 1944. During the time *Anderson* v. *Abbott* was being litigated, the shareholders involved in the present litigation died and respondents became executors of their estates. Through no lack of diligence,[1] petitioner failed to learn of these facts until more than two years later. Upon learning of them he promptly moved to revive the actions against the representatives of the decedents. The District Court, following *Anderson* v. *Brady*, 1 F. R. D. 589, denied the motions for revivor and granted motions of the executors to dismiss. The Circuit Court of Appeals affirmed by a divided vote. 153 F. 2d 685. The case is here on a petition for a writ of certiorari which we granted because the case presented an important problem in the construction of the Rules of Civil Procedure.[2]

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[1] Petitioner brought actions against approximately 5,000 shareholders scattered throughout the United States and some in foreign countries. During the progress of the litigation some changed their residences. And it was stipulated that petitioner, with a limited staff, could not during this time keep up with the changes of residence or deaths of defendants.

[2] Cf. *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83, with *Burke* v. *Canfield*, 72 App. D. C. 127, 111 F. 2d 526, and *Mutual Benefit Health & Accident Assn.* v. *Snyder*, 109 F. 2d 469.

The case involves a reconciliation of Rule 25 (a) and Rule 6 (b). So far as material here, Rule 25 (a) provides:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party."

And the relevant part of Rule 6 (b) reads:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion . . . (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law."

It is said that since by Rule 25 (a) substitution may be made within two years after the death of a party, substitution is, within the meaning of Rule 6 (b), an act "allowed" to be done "within a specified time" which the court may on a showing of "excusable neglect" permit to be done after the two-year period. That argument is reinforced by reliance on the provision in Rule 6 (b) which grants but two exceptions to the power of enlargement of time. Since Rule 25 (a) is not included in the exceptions, it is argued that the time allowed by that rule may be enlarged under Rule 6 (b). And it is pointed out that the facts of the present cases establish that the failure of the receiver to act within the two-year period was the result of "excusable neglect," [3] thus giving the District Court discretion to allow the substitution under Rule 6 (b).

[3] See note 1, *supra*.

We agree, however, with the Circuit Court of Appeals. Rule 25 (a) is based in part on 28 U. S. C. § 778, 42 Stat. 352, which limited the power of substitution to two years from the death of a party.[4] And even within that two-year period substitution could not be made unless the executor or administrator was served "before final settlement and distribution of the estate." That statute, like other statutes of limitations, was a statute of repose. It was designed to keep short the time within which actions might be revived so that the closing and distribution of estates might not be interminably delayed.[5] That policy is reflected in Rule 25 (a). Even within the two-year period substitution is not a matter of right; the court "may" order substitution but it is under no duty to do so. Under the Rule, as under the statute, the settlement and distribution of the estate might be so far advanced as to warrant a denial of the motion for substitution within the two-year period. In contrast to the discretion of the court to order substitution within the two-year period is the provision of Rule 25 (a) that if substitution is not made within that time the action "shall be dismissed" as to the deceased. The word "shall" is ordinarily "the language of command." *Escoe* v. *Zerbst,* 295 U. S. 490, 493. And when the same Rule uses both "may" and "shall," the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. See *United States* v. *Thoman,* 156 U. S. 353, 360.

Thus, as stated by the Circuit Court of Appeals, Rule 25 (a) operates both as a statute of limitations upon revivor and as a mandate to the court to dismiss an action not revived within the two-year period. Rule 6 (b) relates to acts required or allowed to be done by parties to an action and permits the court to afford relief to a party for

[4] But see *Baltimore & Ohio R. Co.* v. *Joy,* 173 U. S. 226; *Winslow* v. *Domestic Engineering Co.,* 20 F. Supp. 578.

[5] And see H. Rep. No. 429, 67th Cong., 1st Sess., p. 2.

his failure to act within the prescribed time limits. There would be more force in petitioner's argument if Rule 25 (a) had, without more, set a two-year period within which substitution might be made. But Rule 25 (a) does not stop there. It directs the court to dismiss the action if substitution has not been made within that time. That is action required of the court, not of a party. And Rule 6 (b) should not be construed to override an express direction of action to be taken by the court. See *Wallace* v. *United States*, 142 F. 2d 240, 244.

Reasons of policy support this construction. It is, to be sure, stipulated that in five of the present cases the estate is "still open and undistributed"; in one it is "still open"; in another it has been distributed. At least where an estate is ready to be closed or where there has already been a distribution, revivor may work unfairness and be disruptive of orderly and expeditious administration of estates. But it is not enough to say that if Rule 6 (b) and Rule 25 (a) are construed to permit substitution after the two-year period, the court need not allow it where unfairness or prejudice would result. For the normal policy of a statute of limitations is to close the door—finally, not qualifiedly or conditionally. The federal law embodied in Rule 25 (a) has a direct impact on the probate of estates in the state courts. It should not be construed to be more disruptive of prompt and orderly probate administration in those courts than its language makes necessary.

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. JUSTICE RUTLEDGE, dissenting.

Rule 25 (a) provides:

"If a party dies and the claim is not thereby extinguished, the court within 2 years after the death

may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. . . ."

I agree that the rule confers discretion to order substitution of parties, hence in appropriate circumstances to refuse to do so and thereupon to dismiss the action. But I do not think the discretion ends with the two-year period.[1] The rule is not worded to require this and ascribing such a construction to it brings it into collision with the express terms and the policy of Rule 6 (b). The difference made by expiration of the period is not to convert the rule's command for dismissal from a discretionary to a mandatory one. It is merely to narrow the conditions under which the discretionary power shall be exercised.[2]

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[1] The Notes of the Advisory Committee on the original Federal Rules state that Rule 25 (a) "is based upon Equity Rule 45 (Death of Party—Revivor) and U. S. C., Title 28, § 778 (Death of parties; substitution of executor or administrator)." Prior to 1921 what is now 28 U. S. C. § 778 did not apply to suits in equity. Equity Rule 45, with its provision that a motion for substitution might be made within "a reasonable time," was governing. But by 42 Stat. 352 it was provided that the revival of equity suits should be by *scire facias*, and a two-year statute of limitations was made applicable. See 28 U. S. C. A. (1928) § 774 to End, p. 99, "Compiler's note."

However, in general the Rules were intended to supersede rather than incorporate previously existing statutory or other provisions, where the wording was different; and the committee's statement that Rule 25 (a) "is based upon Equity Rule 45" as well as 28 U. S. C. § 778, together with the different wording of the rule and that section, may indicate that the committee either considered Equity Rule 45 still effective, for which there seems to have been some judicial authority, see *Electropure Sales Corp.* v. *Anglim*, 21 F. Supp. 451, 452; *Gaskins* v. *Bonfils*, 4 F. Supp. 547, 550–551, or intended to adopt it in substance as the basis and effect of Rule 25 (a). Had the purpose been to incorporate 28 U. S. C. § 778, there would have been no necessity for changing the wording, except in relation to the *scire facias* procedure. See note 10 *infra* and text.

[2] See text at note 6 *infra*.

I find no basis for thinking that the time limitation prescribed by the first sentence of Rule 25 (a) was intended to be treated differently than any other prescribed by the Rules, except those concerning which they expressly forbid enlargement. The committee which drafted the Rules was highly competent, spent years in exacting preparation, and was thoroughly cognizant of what it intended to propose concerning time limitations. Meticulous attention was given to them. By count the index shows 134 references to provisions relating to time for taking various actions.

The committee knew their volume and variety. It was conscious also of the many difficulties and injustices which had arisen by virtue of rigid time limitations, whether laid by statute, rule of court, or judicial decision.[3] The deliberately chosen policy was to do away with those rigidities and to substitute sound discretionary limitations, except as otherwise expressly directed.[4] This policy was stated clearly, fully and I think accurately in the Rules themselves by the addition of Rule 6, of which subdivision (b) is expressly applicable here.

By this unambiguous declaration it was provided that "the court for cause shown may, at any time in its discretion . . . (2) upon motion permit the act to be done after the expiration of the specified period where the failure to

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[3] See Rules 6 (b), (c) and 60, all of which have received wide comment. See also notes 4 and 10.

[4] See Proceedings of the Institute on the Federal Rules of Civil Procedure at Washington, D. C., and of the Symposium at New York City (1939) 83–84; Proceedings of the Institute on the Federal Rules of Civil Procedure at Cleveland (1938) 210–211; Hearings before the Committee on the Judiciary of the House of Representatives with Regard to the Rules of Civil Procedure for the District Courts of the United States, 75th Cong., 3d Sess., 60.

act was the result of excusable neglect." [5] This was applicable in any situation "when by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified period," with two and only two exceptions. These were to forbid enlarging the time for taking any action under Rule 59, except as stated in subdivision (c) thereof, and the period for taking appeal. Rule 73. The forbidden enlargements under Rule 59 involve matters concerning the granting of new trials.

In those two respects and in them alone the time limitation was made, and was intended to be, "jurisdictional." For the rest, the courts were to exercise discretion. It is to be emphasized that the limits of discretion fixed for enlarging time after the prescribed periods were narrowed by requiring that enlargement be made, if at all, only upon motion and only upon showing that the failure to act within time was due to excusable neglect.[6]

[5] The rule in full is as follows:

"Rule 6 (b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law."

[6] See note 5. If Rule 25 (a) constitutes in effect a statute of limitations, as the Court holds, it may be inquired whether, even upon proper application made within the two-year period under Rule 6 (b) (1), see note 5, the Court could enlarge the time by extension, as seems clearly contemplated by the clause "or as extended by a previous order."

Those limitations were applicable here, in my opinion, and admittedly they were satisfied.

Rule 6, including subdivisions (b) and (c), was thus a general and a carefully drawn declaration of paramount policy for the application of limitations of time. It made no distinction between rules governing actions to be taken by the parties and actions to be taken by the courts.[7] It made no exceptions other than the two expressly set forth. This Court approved the rule as drawn and Congress allowed it to become law without modification. To assume or to rule that additional exceptions were intended is to assume that the committee, the Court and Congress overlooked others which should have been stated in Rule 6 (b) or did not intend the declared policy of that section to be effective fully according to its terms. I am unable to accept either conclusion. If we may make an additional exception forbidding enlargement of time in cases covered by Rule 25 (a) in the face of the express provision of Rule 6 (b), there is no reason why others may not also be made, and thus the salutary policy of Rule 6 (b) be defeated.[8]

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[7] See note 5. The rules are replete with provisions for action to be taken within specified periods by the courts upon their own initiative as well as upon motion by the parties. Rule 6 (b) is itself an illustration. Certainly it cannot be said, in view of the rule's comprehensive language, that it applies only to actions to be taken by the parties and has no application to the large number of instances in which limitations of time are imposed for action to be taken by the courts. Such a construction would bring back many of the evils the Rules were designed to avoid. It would defeat perhaps as many of the literal and intended applications of Rule 6 (b) as it would preserve.

Rule 6 (c) is as follows: "The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it."

[8] The Advisory Committee in its Report of Proposed Amendments to the Rules of Civil Procedure (1946) 2–6 points out that District Courts and Circuit Courts of Appeals in some cases have refused to

The considerations of policy said to support the decision would be grounds either for the district court's consideration in determining whether to deny enlargement in the exercise of its discretion or for amendment of Rule 6 (b) so as to exclude such cases as this.[9] They are not a basis in my opinion for changing that rule by interpretation or for opening the door to further restrictive amendments of Rule 6 (b) in this respect by that process. If this is to be done, it should be by the prescribed rule-making procedure. Indeed the Advisory Committee, in the recently proposed amendments to the rule, has recommended that Rule 25 (a) be rephrased so as to eliminate any question that the rule has the meaning ascribed to it in this opinion. And its note appended to the recommendation states that the purpose is to guard against injustices likely to result from a flat two-year limitation.[10] In my opinion

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apply Rule 6 (b) to other Rules as well as Rule 25 (a), see, *e. g.*, *Wallace* v. *United States*, 142 F. 2d 240; *Reed* v. *South Atlantic S. S. Co.*, 2 F. R. D. 475; *Mutual Benefit Health & Accident Assn.* v. *Snyder*, 109 F. 2d 469; cf. *Burke* v. *Canfield*, 72 App. D. C. 127, 111 F. 2d 526, though other cases have ruled the other way. See, *e. g.*, *Schram* v. *O'Connor*, 2 F. R. D. 192, 194; *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83.

[9] But see note 10 and text.

[10] Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States (1946) 31–32.

The revision of Rule 25 (a) recommended by the committee reads as follows, the revised matter appearing in italics: "If a party dies and the claim is not thereby extinguished, the court *upon application made* within 2 years after the death *shall* order substitution of the proper parties. *If the application is made after 2 years the court may order substitution but only upon the showing of a reasonable excuse for failure to apply within that period.* If substitution is not so made, the action shall be dismissed as to the deceased party. . . ."

The committee appends the following comment: "This amendment guards against possible injustice in a case where there is some reasonable excuse for not applying for substitution within the 2-year period. It has been held that the court has no power to permit substitution after the expiration of the 2-year limit, irrespective of the circum-

727731 O—47——37

the committee's action and the reasons given for it confirm, rather than disavow, the section's originally intended meaning.

This case is an illustration of the kinds of injustice the committee sought to avoid. And the considerations of policy are not altogether one-sided. The effect of the decision in such a case as this is not only to throw an admittedly impossible burden upon the party seeking without neglect to enforce his cause of action. It is also to throw upon other parties, equally helpless, a heavier burden of financial loss, whether by depriving them of rightful recovery or by forcing them, in some instances at least, to bear a larger share of the common responsibility.[11]

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stances. *Winkelman* v. *General Motors Corp.* (S. D. N. Y. 1939) 30 F. Supp. 112; *Anderson* v. *Brady* (E. D. Ky. 1941) 4 Fed. Rules Serv. 25a.1, Case 1; *Photometric Products Corp.* v. *Radtke* (S. D. N. Y. 1946) 9 Fed. Rules Serv. 25a.3, Case 1; *Anderson* v. *Yungkau* (C. C. A. 6th, 1946) 153 F. (2d) 685, cert. granted (1946) 66 S. Ct. 1025."

In its comment relating to Rule 6(b), pp. 2–3, the committee states: "In a number of cases the effect of Rule 6 (b) on the time limitations of these rules has been considered. Certainly the rule is susceptible of the interpretation that the court is given the power in its discretion to relieve a party from failure to act within the times specified in any of these other rules, with only the exceptions stated in Rule 6 (b), and in some cases the rule has been so construed."

"With regard to Rule 25 (a) for substitution, it was held in *Anderson* v. *Brady* (E. D. Ky. 1941) 4 Fed. Rules Service 25a.1, Case 1, and in *Anderson* v. *Yungkau* (C. C. A. 6th, 1946) 153 F. (2d) 685, cert. granted (1946) 66 S. Ct. 1025, that under Rule 6 (b) the court had no authority to allow substitution of parties after the expiration of the limit fixed in Rule 25 (a)."

[11] The statutory liability of shareholders in national banking associations was created by 12 U. S. C. §§ 63, 64. By § 63 the shareholder was made "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

In my opinion the judgment should be reversed and the cause remanded to the District Court for the exercise of the discretion given by the Rules.

MR. JUSTICE BURTON joins in this dissent.

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value thereof, in addition to the amount invested in such shares . . . ." (Emphasis added.) By § 64 the shareholder was made "individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock."

To what extent § 64 may have modified § 63 has been disputed. See *American Trust Co.* v. *Grut,* 80 F. 2d 155; *First Nat. Bank* v. *First Nat. Bank,* 14 F. 2d 129. But in *Anderson* v. *Abbott* we said: "It is sufficient at this time to state that the liability of the shareholders of Banco would be measured by the number of shares of stock of the Bank, whether several or only fractional, represented by each share of stock of Banco; and that the assessment liability of each share of stock of Banco would be a like proportion of the assessment liability of the shares of the Bank represented by the former." 321 U. S. 349, 368–369. And in *Frank* v. *Giesy,* 117 F. 2d 122, 125, it was held that the omission in § 64 of the pro rata limitation of § 63 was intended to strengthen the position of creditors, making each shareholder's liability several and fully enforceable though others go free. In *First Nat. Bank* v. *First Nat. Bank, supra,* the shareholder made to pay was held entitled to enforce contribution against others not proceeded against. The shareholder's liability is secondary only, *McClaine* v. *Rankin,* 197 U. S. 154, 161; *First National Bank* v. *Nichols,* 294 Mass. 173, 181, 200 N. E. 869, and though one is not relieved either wholly or in part because others are not compelled to pay, neither is any required to pay more proportionately than is needed from the fund actually collected to discharge the bank's obligations. *Bank of Ware Shoals* v. *Martin,* 17 F. Supp. 61, 63. The liability is not a debt but is one merely assuring payment of the bank's obligations. *McClaine* v. *Rankin, supra.*

The Court's decision therefore in effect cuts off any possibility shareholders forced to pay may have for reduction of the amounts of their payments either through the receiver's enforcement of the liability directly against decedent shareholders' estates or by seeking contribution from them after the two-year period. And this is done regardless of the estate's comparative ability to pay, of whether it is in

an early or a late stage of administration, and of when the death occurs. Thus, in these cases, only one estate has been closed and one other is nearing that stage; but so far as appears the other five remain open and undistributed.

The suits were begun in 1936. Eight years were taken up for litigation of the principal issue of liability in *Anderson* v. *Abbott, supra.* That liability having been established after so long a time, now eleven years after the suits were instituted this decision comes to nullify it in substantial part and effect. The result, in my opinion, is quite as much to make the protection afforded by these statutes turn on accidents of life and death in some instances, perhaps in many, at variance with the nature of the liability and its fair administration, as other distinctions were said in the *Anderson* case to make the protection turn on irrelevant accidents. 321 U. S. at 367.

Syllabus.

HICKMAN, ADMINISTRATOR, *v.* TAYLOR ET AL., TRADING AS TAYLOR & ANDERSON TOWING & LIGHTERAGE CO., ET AL.

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

No. 47. Argued November 13, 1946.—Decided January 13, 1947.

Under the Federal Rules of Civil Procedure, plaintiff in a suit in a federal district court against certain tug owners to recover for the death of a seaman in the sinking of the tug filed numerous interrogatories directed to the defendants, including one inquiring whether any statements of members of the crew were taken in connection with the accident and requesting that exact copies of all such written statements be attached and that the defendant "set forth in detail the exact provisions of any such oral statements or reports." There was no showing of necessity or other justification for these requests. A public hearing had been held before the United States Steamboat Inspectors, at which the survivors of the accident had been examined and their testimony recorded and made available to all interested parties. Defendants answered all other interrogatories, stating objective facts and giving the names and addresses of witnesses, but declined to summarize or set forth the statements taken from witnesses, on the ground that they were "privileged matter obtained in preparation for litigation." After a hearing on objections to the interrogatories, the District Court held that the requested matters were not privileged and decreed that they be produced and that memoranda of defendants' counsel containing statements of fact by witnesses either be produced or submitted to the court for determination of those portions which should be revealed to plaintiff. Defendants and their counsel refused and were adjudged guilty of contempt. *Held:*

1. In these circumstances, Rules 26, 33 and 34 of the Federal Rules of Civil Procedure do not require the production as of right of oral and written statements of witnesses secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen. Pp. 509–514.

2. Since plaintiff addressed simple interrogatories to adverse parties, did not direct them to such parties or their counsel by way of deposition under Rule 26, and it does not appear that he filed a

motion under Rule 34 for a court order directing the production of the documents in question, he was proceeding primarily under Rule 33, relating to interrogatories to parties. P. 504.

3. Rules 33 and 34 are limited to parties, thereby excluding their counsel or agents. P. 504.

4. Rule 33 did not permit the plaintiff to obtain, as adjuncts to interrogatories addressed to defendants, memoranda and statements prepared by their counsel after a claim had arisen. P. 504.

5. The District Court erred in holding defendants in contempt for failure to produce that which was in the possession of their counsel and in holding their counsel in contempt for failure to produce that which he could not be compelled to produce under either Rule 33 or Rule 34. P. 505.

6. Memoranda, statements and mental impressions prepared or obtained from interviews with witnesses by counsel in preparing for litigation after a claim has arisen are not within the attorney-client privilege and are not protected from discovery on that basis. P. 508.

7. The general policy against invading the privacy of an attorney's course of preparation is so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. P. 512.

8. Rule 30 (b) gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to *written* statements secured from witnesses; but in this case there was no ground for the exercise of that discretion in favor of plaintiff. P. 512.

9. Under the circumstances of this case, no showing of necessity could be made which would justify requiring the production of *oral* statements made by witnesses to defendants' counsel, whether presently in the form of his mental impressions or in the form of memoranda. P. 512.

153 F. 2d 212, affirmed.

A District Court adjudged respondents guilty of contempt for failure to produce, in response to interrogatories, copies of certain written statements and memoranda prepared by counsel in connection with pending litigation. 4 F. R. D. 479. The Circuit Court of Appeals reversed. 153 F. 2d 212. This Court granted certiorari. 328 U. S. 876. *Affirmed*, p. 514.

Abraham E. Freedman argued the cause for petitioner. With him on the brief were *Milton M. Borowsky* and *Charles Lakatos.*

Samuel B. Fortenbaugh, Jr. and *William I. Radner* argued the cause for respondents. With them on the brief was *Benjamin F. Stahl, Jr.*

Briefs were filed by *Lee Pressman* and *Frank Donner* for the United Railroad Workers of America, and by *William L. Standard* for the National Maritime Union of America, as *amici curiae,* urging reversal.

Briefs were filed by *B. Allston Moore, James W. Ryan* and *J. Harry LaBrum* for the American Bar Association, and by *John C. Prizer, Albert T. Gould, Leslie C. Krusen, D. Roger Englar, Joseph W. Henderson, Jos. M. Rault, Archie M. Stevenson* and *Thomas E. Byrne, Jr.* for the Maritime Law Association of the United States, as *amici curiae,* urging affirmance.

Mr. Justice Murphy delivered the opinion of the Court.

This case presents an important problem under the Federal Rules of Civil Procedure as to the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen. Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task.

On February 7, 1943, the tug "J. M. Taylor" sank while engaged in helping to tow a car float of the Baltimore & Ohio Railroad across the Delaware River at Philadelphia. The accident was apparently unusual in nature, the cause of it still being unknown. Five of the nine crew members were drowned. Three days later the tug owners and the underwriters employed a law firm, of which respondent Fortenbaugh is a member, to defend them against potential suits by representatives of the deceased crew members and to sue the railroad for damages to the tug.

A public hearing was held on March 4, 1943, before the United States Steamboat Inspectors, at which the four survivors were examined. This testimony was recorded and made available to all interested parties. Shortly thereafter, Fortenbaugh privately interviewed the survivors and took statements from them with an eye toward the anticipated litigation; the survivors signed these statements on March 29. Fortenbaugh also interviewed other persons believed to have some information relating to the accident and in some cases he made memoranda of what they told him. At the time when Fortenbaugh secured the statements of the survivors, representatives of two of the deceased crew members had been in communication with him. Ultimately claims were presented by representatives of all five of the deceased; four of the claims, however, were settled without litigation. The fifth claimant, petitioner herein, brought suit in a federal court under the Jones Act on November 26, 1943, naming as defendants the two tug owners, individually and as partners, and the railroad.

One year later, petitioner filed 39 interrogatories directed to the tug owners. The 38th interrogatory read: "State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Tay-

lor.' Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."

Supplemental interrogatories asked whether any oral or written statements, records, reports or other memoranda had been made concerning any matter relative to the towing operation, the sinking of the tug, the salvaging and repair of the tug, and the death of the deceased. If the answer was in the affirmative, the tug owners were then requested to set forth the nature of all such records, reports, statements or other memoranda.

The tug owners, through Fortenbaugh, answered all of the interrogatories except No. 38 and the supplemental ones just described. While admitting that statements of the survivors had been taken, they declined to summarize or set forth the contents. They did so on the ground that such requests called "for privileged matter obtained in preparation for litigation" and constituted "an attempt to obtain indirectly counsel's private files." It was claimed that answering these requests "would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel."

In connection with the hearing on these objections, Fortenbaugh made a written statement and gave an informal oral deposition explaining the circumstances under which he had taken the statements. But he was not expressly asked in the deposition to produce the statements. The District Court for the Eastern District of Pennsylvania, sitting *en banc*, held that the requested matters were not privileged. 4 F. R. D. 479. The court then decreed that the tug owners and Fortenbaugh, as counsel and agent for the tug owners, forthwith "answer Plaintiff's 38th interrogatory and supplementary interrogatories; produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for Defendants;

state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's memoranda containing statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff." Upon their refusal, the court adjudged them in contempt and ordered them imprisoned until they complied.

The Third Circuit Court of Appeals, also sitting *en banc*, reversed the judgment of the District Court. 153 F. 2d 212. It held that the information here sought was part of the "work product of the lawyer" and hence privileged from discovery under the Federal Rules of Civil Procedure. The importance of the problem, which has engendered a great divergence of views among district courts,[1] led us to grant certiorari. 328 U. S. 876.

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings.[2] Inquiry into the issues and the facts before trial was

[1] See cases collected by Advisory Committee on Rules of Civil Procedure in its Report of Proposed Amendments (June, 1946), pp. 40–47; 5 F. R. D. 433, 457–460. See also 2 Moore's Federal Practice (1945 Cum. Supp.), § 26.12, pp. 155–159; Holtzoff, "Instruments of Discovery under Federal Rules of Civil Procedure," 41 Mich. L. Rev. 205, 210–212; Pike and Willis, "Federal Discovery in Operation," 7 Univ. of Chicago L. Rev. 297, 301–307.

[2] "The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for the pleader's allegations and denials." Sunderland, "The Theory and Practice of Pre-Trial Procedure," 36 Mich. L. Rev. 215, 216. See also Ragland, Discovery Before Trial (1932), ch. I.

narrowly confined and was often cumbersome in method.[3] The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.[4]

There is an initial question as to which of the deposition-discovery rules is involved in this case. Petitioner, in filing his interrogatories, thought that he was proceeding under Rule 33. That rule provides that a party may serve upon any adverse party written interrogatories to be answered by the party served.[5] The District Court pro-

[3] 2 Moore's Federal Practice (1938), § 26.02, pp. 2445–2455.

[4] Pike and Willis, "The New Federal Deposition-Discovery Procedure," 38 Col. L. Rev. 1179, 1436; Pike, "The New Federal Deposition-Discovery Procedure and the Rules of Evidence," 34 Ill. L. Rev. 1.

[5] Rule 33 reads: "Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice

ceeded on the same assumption in its opinion, although its order to produce and its contempt order stated that both Rules 33 and 34 were involved. Rule 34 establishes a procedure whereby, upon motion of any party showing good cause therefor and upon notice to all other parties, the court may order any party to produce and permit the inspection and copying or photographing of any designated documents, etc., not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control.[6]

The Circuit Court of Appeals, however, felt that Rule 26 was the crucial one. Petitioner, it said, was proceeding by interrogatories and, in connection with those interrogatories, wanted copies of memoranda and statements secured from witnesses. While the court believed that Rule 33 was involved, at least as to the defending tug owners, it stated that this rule could not be used as the basis for condemning Fortenbaugh's failure to disclose or produce

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as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party."

[6] Rule 34 provides: "Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

the memoranda and statements, since the rule applies only to interrogatories addressed to adverse parties, not to their agents or counsel. And Rule 34 was said to be inapplicable since petitioner was not trying to see an original document and to copy or photograph it, within the scope of that rule. The court then concluded that Rule 26 must be the one really involved. That provides that the testimony of any person, whether a party or not, may be taken by any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence; and that the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things.[7]

[7] The relevant portions of Rule 26 provide as follows:

"(a) When Depositions May Be Taken. By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

"(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts."

The matter is not without difficulty in light of the events that transpired below. We believe, however, that petitioner was proceeding primarily under Rule 33. He addressed simple interrogatories solely to the individual tug owners, the adverse parties, as contemplated by that rule. He did not, and could not under Rule 33, address such interrogatories to their counsel, Fortenbaugh. Nor did he direct these interrogatories either to the tug owners or to Fortenbaugh by way of deposition; Rule 26 thus could not come into operation. And it does not appear from the record that petitioner filed a motion under Rule 34 for a court order directing the production of the documents in question. Indeed, such an order could not have been entered as to Fortenbaugh since Rule 34, like Rule 33, is limited to parties to the proceeding, thereby excluding their counsel or agents.

Thus to the extent that petitioner was seeking the production of the memoranda and statements gathered by Fortenbaugh in the course of his activities as counsel, petitioner misconceived his remedy. Rule 33 did not permit him to obtain such memoranda and statements as adjuncts to the interrogatories addressed to the individual tug owners. A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney. But that is not this case. Here production was sought of documents prepared by a party's attorney after the claim has arisen. Rule 33 does not make provision for such production, even when sought in connection with permissible interrogatories. Moreover, since petitioner was also foreclosed from securing them through an order under Rule 34, his only recourse was to take Fortenbaugh's deposition under Rule 26 and to attempt to force Fortenbaugh to produce the materials by use of a subpoena *duces tecum* in accordance with Rule 45. Holtzoff, "Instruments of Discovery under the Federal Rules of Civil Procedure," 41

Mich. L. Rev. 205, 220. But despite petitioner's faulty choice of action, the District Court entered an order, apparently under Rule 34, commanding the tug owners and Fortenbaugh, as their agent and counsel, to produce the materials in question. Their refusal led to the anomalous result of holding the tug owners in contempt for failure to produce that which was in the possession of their counsel and of holding Fortenbaugh in contempt for failure to produce that which he could not be compelled to produce under either Rule 33 or Rule 34.

But, under the circumstances, we deem it unnecessary and unwise to rest our decision upon this procedural irregularity, an irregularity which is not strongly urged upon us and which was disregarded in the two courts below. It matters little at this late stage whether Fortenbaugh fails to answer interrogatories filed under Rule 26 or under Rule 33 or whether he refuses to produce the memoranda and statements pursuant to a subpoena under Rule 45 or a court order under Rule 34. The deposition-discovery rules create integrated procedural devices. And the basic question at stake is whether any of those devices may be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation. The fact that the petitioner may have used the wrong method does not destroy the main thrust of his attempt. Nor does it relieve us of the responsibility of dealing with the problem raised by that attempt. It would be inconsistent with the liberal atmosphere surrounding these rules to insist that petitioner now go through the empty formality of pursuing the right procedural device only to reestablish precisely the same basic problem now confronting us. We do not mean to say, however, that there may not be situations in which the failure to proceed in accordance with a specific rule would be important or decisive. But in the present circumstances, for the purposes of this decision, the procedural

irregularity is not material. Having noted the proper procedure, we may accordingly turn our attention to the substance of the underlying problem.

In urging that he has a right to inquire into the materials secured and prepared by Fortenbaugh, petitioner emphasizes that the deposition-discovery portions of the Federal Rules of Civil Procedure are designed to enable the parties to discover the true facts and to compel their disclosure wherever they may be found. It is said that inquiry may be made under these rules, epitomized by Rule 26, as to any relevant matter which is not privileged; and since the discovery provisions are to be applied as broadly and liberally as possible, the privilege limitation must be restricted to its narrowest bounds. On the premise that the attorney-client privilege is the one involved in this case, petitioner argues that it must be strictly confined to confidential communications made by a client to his attorney. And since the materials here in issue were secured by Fortenbaugh from third persons rather than from his clients, the tug owners, the conclusion is reached that these materials are proper subjects for discovery under Rule 26.

As additional support for this result, petitioner claims that to prohibit discovery under these circumstances would give a corporate defendant a tremendous advantage in a suit by an individual plaintiff. Thus in a suit by an injured employee against a railroad or in a suit by an insured person against an insurance company the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents. At the same time, the individual plaintiff, who often has direct knowledge of the matter in issue and has no counsel until some time after his claim arises could be compelled to disclose all the intimate details of his case. By endowing with

immunity from disclosure all that a lawyer discovers in the course of his duties, it is said, the rights of individual litigants in such cases are drained of vitality and the lawsuit becomes more of a battle of deception than a search for truth.

But framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory. Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant. The problem thus far transcends the situation confronting this petitioner. And we must view that problem in light of the limitless situations where the particular kind of discovery sought by petitioner might be used.

We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case.[8] Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30 (b) and (d) and 31 (d), limitations inevitably arise when it can be shown

[8] "One of the chief arguments against the 'fishing expedition' objection is the idea that discovery is mutual—that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position." Pike and Willis, "Federal Discovery in Operation," 7 Univ. of Chicago L. Rev. 297, 303.

that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26 (b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. It is unnecessary here to delineate the content and scope of that privilege as recognized in the federal courts. For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.

But the impropriety of invoking that privilege does not provide an answer to the problem before us. Petitioner has made more than an ordinary request for relevant, nonprivileged facts in the possession of his adversaries or their counsel. He has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired. He has sought production of these matters after making the most searching inquiries of his opponents as to the circumstances surrounding the fatal accident, which inquiries were sworn to have been answered to the best of their information and belief. Interrogatories were directed toward all the events prior to, during and subsequent to the sinking of the tug. Full and honest answers to such broad inquiries would necessarily have included all

pertinent information gleaned by Fortenbaugh through his interviews with the witnesses. Petitioner makes no suggestion, and we cannot assume, that the tug owners or Fortenbaugh were incomplete or dishonest in the framing of their answers. In addition, petitioner was free to examine the public testimony of the witnesses taken before the United States Steamboat Inspectors. We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney Fortenbaugh without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice. For aught that appears, the essence of what petitioner seeks either has been revealed to him already through the interrogatories or is readily available to him direct from the witnesses for the asking.

The District Court, after hearing objections to petitioner's request, commanded Fortenbaugh to produce all written statements of witnesses and to state in substance any facts learned through oral statements of witnesses to him. Fortenbaugh was to submit any memoranda he had made of the oral statements so that the court might determine what portions should be revealed to petitioner. All of this was ordered without any showing by petitioner, or any requirement that he make a proper showing, of the necessity for the production of any of this material or any demonstration that denial of production would cause hardship or injustice. The court simply ordered production on the theory that the facts sought were material and were not privileged as constituting attorney-client communications.

In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. That is not because the subject matter is privileged or irrelevant, as those concepts are used in these

rules.[9] Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their coun-

[9] The English courts have developed the concept of privilege to include all documents prepared by or for counsel with a view to litigation. "All documents which are called into existence for the purpose—but not necessarily the sole purpose—of assisting the deponent or his legal advisers in any actual or anticipated litigation are privileged from production. . . . Thus all proofs, briefs, draft pleadings, etc., are privileged; but not counsel's indorsement on the outside of his brief . . ., nor any deposition or notes of evidence given publicly in open Court. . . . So are all papers prepared by any agent of the party *bona fide* for the use of his solicitor for the purposes of the action, whether in fact so used or not. . . . Reports by a company's servant, if made in the ordinary course of routine, are not privileged, even though it is desirable that the solicitor should have them and they are subsequently sent to him; but if the solicitor has requested that such documents shall always be prepared for his use and this was one of the reasons why they were prepared, they need not be disclosed." Odgers on Pleading and Practice (12th ed., 1939), p. 264.

See Order 31, rule 1, of the Rules of the Supreme Court, 1883, set forth in The Annual Practice, 1945, p. 519, and the discussion following that rule. For a compilation of the English cases on the matter see 8 Wigmore on Evidence (3d ed., 1940), § 2319, pp. 618–622, notes.

sel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under

such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted.[10]

Rule 30 (b), as presently written, gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements secured from witnesses. But in the instant case there was no room for that discretion to operate in favor of the petitioner. No attempt was made to establish any reason why Fortenbaugh should be forced to produce the written statements. There was only a naked, general demand for these materials as of right and a finding by the District Court that no recognizable privilege was involved. That was insufficient to justify discovery under these circumstances and the court should have sustained the refusal of the tug owners and Fortenbaugh to produce.

But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account

[10] Rule 34 is explicit in its requirements that a party show good cause before obtaining a court order directing another party to produce documents. See Report of Proposed Amendments by Advisory Committee on Rules of Civil Procedure (June, 1946); 5 F. R. D. 433.

to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Denial of production of this nature does not mean that any material, non-privileged facts can be hidden from the petitioner in this case. He need not be unduly hindered in the preparation of his case, in the discovery of facts or in his anticipation of his opponents' position. Searching interrogatories directed to Fortenbaugh and the tug owners, production of written documents and statements upon a proper showing and direct interviews with the witnesses themselves all serve to reveal the facts in Fortenbaugh's possession to the fullest possible extent consistent with public policy. Petitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing. That is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of Fortenbaugh's professional activities. If there should be a rare situation justifying production of these matters, petitioner's case is not of that type.

We fully appreciate the wide-spread controversy among the members of the legal profession over the problem raised by this case.[11] It is a problem that rests on what

[11] See Report of Proposed Amendments by Advisory Committee on Rules of Civil Procedure (June, 1946), pp. 44–47; 5 F. R. D. 433, 459–460; Discovery Procedure Symposium before the 1946 Conference

has been one of the most hazy frontiers of the discovery process. But until some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right. When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.

We therefore affirm the judgment of the Circuit Court of Appeals.

Affirmed.

MR. JUSTICE JACKSON, concurring.

The narrow question in this case concerns only one of thirty-nine interrogatories which defendants and their counsel refused to answer. As there was persistence in refusal after the court ordered them to answer it, counsel and clients were committed to jail by the district court until they should purge themselves of contempt.

The interrogatory asked whether statements were taken from the crews of the tugs involved in the accident, or of any other vessel, and demanded "Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports." The question is simply whether such a demand is authorized by the rules relating to various aspects of "discovery."

The primary effect of the practice advocated here would be on the legal profession itself. But it too often is over-

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of the Third United States Circuit Court of Appeals, 5 F. R. D. 403; Armstrong, "Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments," 5 F. R. D. 339, 353–357.

looked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.

"Discovery" is one of the working tools of the legal profession. It traces back to the equity bill of discovery in English Chancery practice and seems to have had a forerunner in Continental practice. See Ragland, Discovery Before Trial (1932) 13–16. Since 1848 when the draftsmen of New York's Code of Procedure recognized the importance of a better system of discovery, the impetus to extend and expand discovery, as well as the opposition to it, has come from within the Bar itself. It happens in this case that it is the plaintiff's attorney who demands such unprecedented latitude of discovery and, strangely enough, *amicus* briefs in his support have been filed by several labor unions representing plaintiffs as a class. It is the history of the movement for broader discovery, however, that in actual experience the chief opposition to its extension has come from lawyers who specialize in representing plaintiffs, because defendants have made liberal use of it to force plaintiffs to disclose their cases in advance. See Report of the Commission on the Administration of Justice in New York State (1934) 330–31; Ragland, Discovery Before Trial (1932) 35–36. Discovery is a two-edged sword and we cannot decide this problem on any doctrine of extending help to one class of litigants.

It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case. *Cf.* Report of Commission on the Administration of Justice in New York State (1934) 41–42.

It seems equally clear that discovery should not nullify the privilege of confidential communication between attorney and client. But those principles give us no real assistance here because what is being sought is neither evidence nor is it a privileged communication between attorney and client.

To consider first the most extreme aspect of the requirement in litigation here, we find it calls upon counsel, if he has had any conversations with any of the crews of the vessels in question or of any other, to "set forth in detail the exact provision of any such oral statements or reports." Thus the demand is not for the production of a transcript in existence but calls for the creation of a written statement not in being. But the statement by counsel of what a witness told him is not evidence when written. Plaintiff could not introduce it to prove his case. What, then, is the purpose sought to be served by demanding this of adverse counsel?

Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing. He bases his claim to it in his brief on the view that the Rules were to do away with the old situation where a law suit developed into "a battle of wits between counsel." But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

The real purpose and the probable effect of the practice ordered by the district court would be to put trials on a level even lower than a "battle of wits." I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his lan-

guage, permeated with his inferences. Every one who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will not be departures in some respects. Whenever the testimony of the witness would differ from the "exact" statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's "inexact" statement could lose nothing by saying, "Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not." Of course, if this practice were adopted, that scene would be repeated over and over again. The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility—perhaps against that of his chief witness, or possibly even his client.

Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not as to what he has seen or done but as to other witnesses' stories, and not because he wants to do so but in self-defense.

And what is the lawyer to do who has interviewed one whom he believes to be a biased, lying or hostile witness to get his unfavorable statements and know what to meet? He must record and deliver such statements even though he would not vouch for the credibility of the witness by calling him. Perhaps the other side would not want to

call him either, but the attorney is open to the charge of suppressing evidence at the trial if he fails to call such a hostile witness even though he never regarded him as reliable or truthful.

Having been supplied the names of the witnesses, petitioner's lawyer gives no reason why he cannot interview them himself. If an employee-witness refuses to tell his story, he, too, may be examined under the Rules. He may be compelled on discovery, as fully as on the trial, to disclose his version of the facts. But that is his own disclosure—it can be used to impeach him if he contradicts it and such a deposition is not useful to promote an unseemly disagreement between the witness and the counsel in the case.

It is true that the literal language of the Rules would admit of an interpretation that would sustain the district court's order. So the literal language of the Act of Congress which makes "any writing or record . . . made as a memorandum or record of any . . . occurrence, or event" admissible as evidence, would have allowed the railroad company to put its engineer's accident statements in evidence. *Cf. Palmer* v. *Hoffman,* 318 U. S. 109, 111. But all such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them. We reviewed the background of the Act and the consequences on the trial of negligence cases of allowing railroads and others to put in their statements and thus to shield the crew from cross-examination. We said, "Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication." 318 U. S. at 114. We pointed out that there, as here, the "several hundred years of history behind the Act . . . indicate the nature of the reforms which it was designed to effect."

318 U. S. at 115. We refused to apply it beyond that point. We should follow the same course of reasoning here. Certainly nothing in the tradition or practice of discovery up to the time of these Rules would have suggested that they would authorize such a practice as here proposed.

The question remains as to signed statements or those written by witnesses. Such statements are not evidence for the defendant. *Palmer* v. *Hoffman,* 318 U. S. 109. Nor should I think they ordinarily could be evidence for the plaintiff. But such a statement might be useful for impeachment of the witness who signed it, if he is called and if he departs from the statement. There might be circumstances, too, where impossibility or difficulty of access to the witness or his refusal to respond to requests for information or other facts would show that the interests of justice require that such statements be made available. Production of such statements are governed by Rule 34 and on "showing good cause therefor" the court may order their inspection, copying or photographing. No such application has here been made; the demand is made on the basis of right, not on showing of cause.

I agree to the affirmance of the judgment of the Circuit Court of Appeals which reversed the district court.

MR. JUSTICE FRANKFURTER joins in this opinion.

ORDER OF RAILWAY CONDUCTORS OF AMERICA ET AL. *v.* SWAN ET AL.

NO. 63. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.*

Argued December 10, 11, 1946.—Decided January 13, 1947.

1. Members of the First and Fourth Divisions of the National Railroad Adjustment Board were evenly divided, in each division, as to whether under the Railway Labor Act their division has jurisdiction of disputes involving yardmasters. It was conceded that neither the Second nor the Third Division has jurisdiction of such disputes. No settlement of such disputes was possible in these circumstances. *Held:* The federal courts have jurisdiction under Judicial Code § 274d of a suit by interested parties for a declaratory judgment to determine which division of the Board has jurisdiction of such disputes. *Switchmen's Union* v. *Mediation Board,* 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323; and *General Committee* v. *Southern Pacific Co.,* 320 U. S. 338, distinguished. P. 524.
2. Under the Railway Labor Act, yardmasters are not "yard-service employees" within the jurisdiction of the First Division of the National Railroad Adjustment Board. Pp. 524–529.
3. Under the Railway Labor Act, disputes involving yardmasters are exclusively within the "catch-all" jurisdiction of the Fourth Division of the National Railroad Adjustment Board. P. 530.
4. Whatever persuasive effect prior administrative adjudications on the jurisdictional issue may have had is destroyed by present and prolonged administrative deadlock on this issue. P. 529.
5. Although amendatory bills which would have specifically excluded yardmasters from the jurisdiction of the First Division of the Adjustment Board were introduced and referred to an appropriate congressional committee, the failure of Congress to amend the statute is without significance for purposes of statutory interpretation, where the committee held no hearings and made no report. P. 529.

152 F. 2d 325, affirmed.

*Together with No. 64, *Williams et al.* v. *Swan et al.,* also on certiorari to the Circuit Court of Appeals for the Seventh Circuit.

Petitioners, two national labor organizations, brought an action in the District Court under Judicial Code § 274d against members of the First and Fourth Divisions of the National Railroad Adjustment Board, seeking a declaratory judgment to the effect that the First Division has jurisdiction under the Railway Labor Act of disputes involving yardmasters. Another national labor organization and two railroad companies were allowed to intervene. The District Court held that yardmaster disputes are within the jurisdiction of the Fourth Division of the Board. The Circuit Court of Appeals affirmed. 152 F. 2d 325. This Court granted certiorari. 327 U. S. 776. *Affirmed,* p. 530.

V. C. Shuttleworth argued the cause for petitioners. With him on the brief were *H. E. Wilmarth, Everett L. Gordon* and *Leo J. Hassenauer.*

Douglas F. Smith argued the cause for Carrier Members of the First and Fourth Divisions et al., respondents. With him on the brief were *Kenneth F. Burgess, R. J. Hagman, Bryce L. Hamilton, Burton Mason* and *John A. Sheean.*

Anan Raymond argued the cause for the Railroad Yardmasters of America, respondents. With him on the brief was *Conrad H. Poppenhusen.*

Mr. Justice Murphy delivered the opinion of the Court.

Our attention here is directed to a determination of which division of the National Railroad Adjustment Board has jurisdiction over disputes involving railroad yardmasters. The four divisions of the Board and their respective jurisdictions are established by § 3, First (h), of the Railway Labor Act, as amended in 1934.[1]

[1] 48 Stat. 1185, 1190–1191; 45 U. S. C. § 153, First (h).

Each division of the Board is composed of an equal number of representatives of carriers and of national labor organizations. The statute authorizes the carriers and the national labor organizations to select their respective representatives and to designate the division on which each such representative shall serve. § 3, First (b) and (c). The jurisdiction of the divisions relates to disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . ." § 3, First (i). Disputes involving employees in certain specifically designated crafts are assigned to each division; the Fourth Division also has a "catch-all" jurisdiction over all disputes not assigned to one of the other three divisions. Appropriate provisions are made for hearings and for the entry of an award, to be followed by an order directed to the carrier if the award be in favor of the petitioner. In the event that the carrier fails to comply with the order, the petitioner or any person for whose benefit the order was made may seek enforcement of the order in a federal district court. § 3, First (p). In such suits, "the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated . . ." And the court is given power to take such action as may be appropriate to enforce or set aside the order. See *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 305.

Two of the national labor organizations are the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, petitioners herein. Their membership includes a small portion of the total number of railroad yardmasters in the country, approximately 20% of the total on the basis of the railroad mileage represented. Each of these organizations has one representative on the First Division and each contends that all yardmaster disputes must be heard solely by that division. But that

contention is contradicted by the Railroad Yardmasters of America, a national labor organization composed almost entirely of yardmasters and claiming to represent more than 70% of all the yardmasters in the country. That organization, which is an intervenor-respondent herein, has failed to place a representative on any of the four divisions. Along with certain other organizations representing the small balance of yardmasters, it claims that yardmaster disputes lie within the exclusive jurisdiction of the Fourth Division. Various carriers with representatives on both the First and the Fourth Divisions join in that claim.

The result of this controversy is a stalemate so far as yardmaster disputes are concerned. The carrier and the labor members of the First Division are split evenly, the carrier members claiming that the division has no jurisdiction over these matters. The members of the Fourth Division are also evenly divided on the jurisdictional question, the labor members being of the view that yardmaster disputes are outside that division's jurisdiction. And since all the parties concede that neither the Second nor the Third Division has jurisdiction, no settlement of these disputes is possible under the present situation.[2]

[2] A decree was entered in the District Court in 1938 commanding the Fourth Division to hear and determine certain disputes involving yardmasters. That case arose on a petition for mandamus filed by the Railroad Yardmasters of America against the members of the Fourth Division. After issuance of summons, the members of the Fourth Division appeared and filed an answer stating that they were of the opinion that the Fourth Division did have jurisdiction. The decree was then entered with the consent of the parties to the action, but without argument and without the District Court being aware that a public question was involved and that other parties had an interest in the matter. The District Court and the Circuit Court of Appeals in the instant case held that this 1938 decree was not *res judicata* of the issue now presented in view of the circumstances under which it was entered.

The Order of Railway Conductors and the Brotherhood of Railroad Trainmen brought this action under 28 U. S. C. § 400 (1) to obtain a declaratory judgment to the effect that the First Division has sole jurisdiction over yardmaster disputes. Members of the First and Fourth Divisions were made parties defendant; and the Railroad Yardmasters of America, the Great Northern Railway Company and the Southern Pacific Company were allowed to intervene. The District Court, after a hearing, held that yardmaster disputes fall within the "catch-all" jurisdiction of the Fourth Division. The Circuit Court of Appeals agreed. 152 F. 2d 325. We granted certiorari because the issue raised is one of importance in the orderly administration of the Railway Labor Act. 327 U. S. 776.

At the outstart it is important to note that judicial review of this matter is not precluded by the principles set forth in *Switchmen's Union* v. *National Mediation Board, supra,* and companion cases, *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323, and *General Committee* v. *Southern Pacific Co.,* 320 U. S. 338. We are dealing here with something quite different from an administrative determination which Congress has made final and beyond the realm of judicial scrutiny. We are dealing with a jurisdictional frustration on an administrative level, making impossible the issuance of administrative orders which Congress explicitly has opened to review by the courts. Until that basic jurisdictional controversy is settled, the procedure contemplated by § 3 of the Railway Labor Act remains a dead letter so far as yardmasters are concerned and the statutory rights of such persons become atrophied. A declaratory judgment action is therefore appropriate to remove such an administrative stagnation.

In other instances, we have left the problem of jurisdiction to be determined in the first instance by the ad-

ministrative agency. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41. But here both the First and the Fourth Divisions of the Board, due to the evenly-matched membership of railroad and labor representatives, appear hopelessly divided on the jurisdictional issue, making a determination impossible. Judicial guidance at this stage is justified as long as such a condition exists.

The issue is primarily one of statutory interpretation. The First Division is given jurisdiction over disputes "involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees." The Fourth Division's jurisdiction extends to disputes "involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions." It is agreed that the only possible category under the First Division into which yardmasters might be placed is "yard-service employees." But if they cannot be so placed, they must necessarily fall into the "catch-all" jurisdiction of the Fourth Division. The problem thus is to determine what Congress meant when it used the term "yard-service employees."

There is no statutory definition of "yard-service employees." Nor is the term explained in any of the relevant legislative debates or reports; and it derives no meaning from the statutory policy or framework. Moreover, it is not in common or general usage outside of the railroad world. It is a technical term found only in railroad parlance. Evidence as to the meaning attached to it by those who are familiar with such parlance therefore becomes relevant in determining the meaning of the term as used by Congress. See *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 370–371.

The parties, all of whom are well acquainted with railroad terminology, stipulated certain facts. It was agreed that a railroad yard is a system of tracks within defined limits over which movements of engines and cars not authorized by timetable or train order may be made, subject to prescribed signals and rules or special instructions. It was further agreed that the "yard-service employees" or "yardmen" working in a yard perform such functions as switching, making and breaking up trains, moving and storing cars, inspecting cars and freight, repairing cars, maintaining equipment, sending and receiving messages, keeping records and making reports. As to yardmasters, the stipulation stated: "All such yardmen and other employees performing work in a yard are directed and supervised in their work by a yardmaster, with the aid, if necessary, of one or more assistant yardmasters. Yardmasters do not and may not perform the work of yardmen and employees in train and engine service; they may perform some clerical work, if their entire time is not taken up with the direction and supervision of yardmen and other employees working in yards. . . . In general, yardmasters run the yards, of which they are in charge, and they are responsible for conditions within the same. Necessarily, they exercise a substantial measure of individual initiative and responsibility."

All of the witnesses who testified at the hearing agreed that yardmasters are functionally different from other employees working in yards due to their supervisory activities and responsibilities. The evidence also indicated that yardmasters have supervision over some who work within the yards but who are not spoken of as "yard-service employees," such as storekeepers, section men and clerks. On the crucial point, there was substantial agreement among the witnesses that yardmasters are not commonly designated in railroad parlance as "yard-service

employees," that term being reserved for the yardmen described in the stipulation who work under the supervision of the yardmasters.[3]

The documentary evidence submitted by the parties tends to bear out this testimony. Thus numerous past awards made by the First and Fourth Divisions speak of yardmasters as distinct from yardmen or yard-service employees.[4] And the Interstate Commerce Commission, in making various classifications of railroad employees, recognizes a clear distinction between yardmasters and those

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[3] Petitioners' sole witness testified: "Yardmen are usually men who have to do with the making up and breaking up of trains, switching in the yard, and supervising the work of the yardmen, which would include, in my opinion, yardmasters and assistant yardmasters." But his opinion as to yardmasters in this respect was based upon his understanding of the law, not upon his own use or his knowledge of the use of the term "yard-service employees." He explained his belief that "every tribunal that has decided a dispute for men engaged in yard service, such as yard engineers, firemen, hostlers, hostler helpers, road conductors, trainmen and yardmen, have also decided cases for yardmasters and assistant yardmasters. Division 1, set up under, by agreement, in 1918, the very first board in existence, did that. The Western Train Service Board, upon which I served, did that, as evidenced by Board decisions submitted here as an exhibit."

This witness also stated that yardmasters "fit more nearly in with the yard service employees than with any other class"—a recognition that yardmasters are different in fact from yard-service employees and that they do not fit precisely within that category.

[4] See National Railroad Adjustment Board, First Division, Award No. 1274 (July 13, 1936), Award No. 1464 (Oct. 7, 1936), Award No. 1603 (Dec. 14, 1936), Award No. 1648 (Jan. 21, 1937), Award No. 1728 (Feb. 11, 1937), Award No. 1896 (April 15, 1937), Award No. 2065 (July 16, 1937), Award No. 2364 (Nov. 12, 1937), Award No. 4466 (Jan. 15, 1940), Award No. 4548 (Feb. 8, 1940), Award No. 4584 (Feb. 20, 1940), Award No. 5816 (June 24, 1941), Award No. 7355 (Oct. 15, 1942); Fourth Division, Award No. 67 (July 25, 1940).

over whom they have supervision.[5] In addition, other documents introduced into the record and sources to which the parties have made reference either show the same distinction or are inconclusive on the matter.[6]

The District Court was therefore justified in finding as a fact that railroad usage has never included yardmasters and assistant yardmasters within the meaning of the terms "yard-service employees" or "yardmen." That court was also correct in concluding that the history of the adjustment of disputes prior to the amendment of the present statute in 1934 affords no assistance in resolving the problem confronting us. As pointed out more fully by the Circuit Court of Appeals, 152 F. 2d at 327–328, disputes involving yardmasters and disputes involving yard-service employees were previously submitted to various adjustment boards, which had been created by agreement, primarily on the basis of membership in signatory labor organizations. Jurisdiction was not then grounded, as it is now, on a craft or job classification irrespective of the labor organization representing the particular employees involved. Hence there was no occasion giving rise to a consistent and unequivocal administrative interpretation of the term "yard-service employees" to include yardmasters—an interpretation which, had it existed, might have shed some light on the adoption of the term by Congress in 1934.

[5] See *Ex parte No. 72* (Nov. 24, 1920, unreported); *Ex parte No. 106, Six-Hour Day Investigation*, 190 I. C. C. 750. The forms and classification plan to be used in reporting wage and compensation data of steam railroad employees to the United States Railroad Labor Board and the Interstate Commerce Commission place yardmasters under "Supervisory Skilled Trades and Labor Service," while those performing yard-service work are placed under "Train and Engine Service."

[6] Thus the method used by the National Railroad Adjustment Board in indexing awards of the First Division does not provide any helpful guide as to the usage of "yard-service employees" in the railroad world.

Petitioners also urge that the jurisdiction of the First Division over yardmaster disputes is established by the settled administrative action of that division since its creation in 1934.[7] There is a serious question whether the jurisdictional issue now before us was fully considered by the division in many of the cases to which reference is made; certainly none of the awards did more than recite perfunctorily that the division had jurisdiction over the particular dispute. And none of the awards involved the Railroad Yardmasters of America, which has consistently objected to the assumption of jurisdiction by the First Division.[8] But aside from those factors, the present and prolonged administrative deadlock on the jurisdictional issue destroys whatever persuasive effect these prior adjudications by the First Division may have had. The administrative action has become anything but settled.

Finally, petitioners point out that Congress has failed to amend § 3, First (h), so as specifically to exclude "yardmasters and other subordinate officers" from the jurisdiction of the First Division, despite the introduction of two bills to that effect in the Senate in 1940 and 1941.[9] These bills were sent to an appropriate committee, but were never reported out. It does not appear whether the bills died because they were thought to be unnecessary or undesirable. No hearings were held; no committee reports were made. Under such circumstances, the failure of Congress to amend the statute is without meaning for purposes of statutory interpretation.

We accordingly agree with the two courts below that yardmasters are not "yard-service employees" within the jurisdiction of the First Division of the National Railroad

[7] See cases cited in footnote 4, *supra*.

[8] See footnote 2, *supra*.

[9] S. 4375, 76th Cong., 3d Sess.; S. 1660, 77th Cong., 1st Sess. Both bills were introduced by Senator Smith at the request of the American Short Line Railroad Association.

Adjustment Board. Yardmaster disputes fall exclusively within the "catch-all" jurisdiction of the Fourth Division.

Affirmed.

MR. JUSTICE FRANKFURTER.

After the fullest consideration this Court recently held in two cases that jurisdictional disputes between railroad unions subject to the Railway Labor Act are not within judicial competence. *Switchmen's Union* v. *Board,* 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323. The decision in those cases derived from the fact that Congress "had not expressly authorized judicial review" and the history, the setting, and the implications of railway labor controversies counseled against inferring judicial review. Here we have a controversy between two divisions of the National Railroad Adjustment Board as to the disputes over which they respectively have jurisdiction. This controversy, however, entails consideration of technical problems in the railroad world and consequences in construing the distribution of authority among the divisions of the Adjustment Board for which judicial review seems no more appropriate than it did to settle jurisdictional conflicts between railroad brotherhoods. Not finding any command in the statute for judicial review of this controversy, it seems to me, therefore, appropriate to leave it to the mediatory resources of the Railway Labor Act. If it be said that thus far deadlock has resulted, it does not follow that it will continue, if the Court keeps hands off. In any event, because mediatory machinery may not be effective is not a sufficient reason for judicial intervention, unless the direction of Congress is much more clear than I find it in the Railway Labor Act. This view is reinforced by the fact that the decision of the Court may be no more than an advisory opinion. My doubts

have not commended themselves to the Court, but since I am not alone in entertaining them it seemed to me that they should be expressed.

PARKER ET AL. v. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR.

CERTIORARI TO THE EMERGENCY COURT OF APPEALS.

No. 80. Argued December 18, 1946.—Decided January 20, 1947.

Under rent regulations promulgated pursuant to the Emergency Price Control Act, the Price Administrator issued an order granting to landlords of residential properties special certificates authorizing eviction proceedings. *Held:* The tenants were "subject to" the order, within the meaning of § 203 (a) of the Act, and had a right to file a protest with the Administrator; and were entitled, under § 204 (a) of the Act, to judicial review of the Administrator's dismissal of their protest. Pp. 533, 538.

154 F. 2d 830, reversed.

The Price Administrator dismissed petitioners' protest against an order issued by him under rent regulations promulgated pursuant to the Emergency Price Control Act. The Emergency Court of Appeals dismissed petitioners' complaint. 154 F. 2d 830. This Court granted certiorari. 328 U. S. 828. The Temporary Controls Administrator was substituted for the Price Administrator as the respondent in this Court. *Reversed,* p. 538.

Alexander Pfeiffer argued the cause and filed a brief for petitioners.

Carl A. Auerbach argued the cause for respondent. With him on the brief were *Acting Solicitor General Washington, John R. Benney, Richard H. Field, Harry H. Schneider* and *Bernard A. Stol.*

Louis L. Tetelman, Gertrude Tetelman, Sylvia U. Siegel and *Harry Carroll* filed a brief for the landlords, as *amici curiae*, urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioners are tenants of a New York apartment house. Their landlords applied for a certificate from the New York Area Rent Director authorizing eviction proceedings in the State courts.[1] Section 6 of the Rent Regulations for New York City, issued by the Price Administrator under authority of § 2 of the Emergency Price Control Act, 56 Stat. 23, 58 Stat. 632, 50 U. S. C. App. Supp. V, § 902, prohibits landlords from instituting such proceedings except under certain specific conditions not here relevant,[2] or when a special certificate authorizing eviction is issued by the Area Rent Director upon his finding, for example, that failure to authorize eviction would impose "substantial hardship" upon the landlords.[3]

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[1] The landlords here claimed to be purchasers of stock in a co-operative apartment corporation which stock holding entitled each of them to possession of an apartment under a proprietary lease.

[2] Section 6 (a) of the Rent Regulations for New York City Defense Area, 8 Fed. Reg. 13914, as amended, provides that "no tenant shall be removed from any housing accommodations, by action to evict . . . unless:" (1) The tenant has refused to renew his lease; (2) The tenant has unreasonably refused the landlord access to the premises; (3) The tenant has violated an obligation of tenancy or is committing a nuisance; (4) Subtenants occupy the premises at the time of the expiration of the prime tenant's lease; (5) The landlord "has an immediate compelling necessity to recover possession . . . for use and occupancy as a dwelling for himself."

[3] Section 6 (b) (3) "applies to the issuance of a certificate for occupancy of housing accommodations in a structure or premises owned or leased by a cooperative corporation . . . by a purchaser of stock . . . in such cooperative who is entitled by reason of ownership of such stock to possession of such housing accommodations by virtue of a proprietary lease or otherwise." The part of § 6 (b) (3) ii pertinent here provides that where the co-operative was organized after February 17, 1945, or the effective date of the regulation, "no certificate shall be

In this case the Area Rent Director refused to issue the requested certificate after extensive hearings at which both the landlords and the tenants presented evidence. Denial was based on a finding that the landlords had wholly failed to meet the regulation's conditions; that their request was part of a concerted plan to evade the Price Control Act; and that a fraud had been perpetrated against the OPA. The Regional Rent Director affirmed this ruling. On protest by the landlords, the Price Administrator reversed the ruling of the Area Director and ordered that the certificate be issued. Petitioners thereupon filed a protest of their own with the Administrator. When the Administrator dismissed this protest, they sought relief in the Emergency Court of Appeals, complaining that the Administrator's order was "not in accordance with law" and was "arbitrary and capricious." On motion of the Administrator, that action was dismissed on the ground that petitioners were not "subject to" the Administrator's order and therefore had no right to protest or have judicial review of the dismissal of their protest. *Parker* v. *Porter,* 154 F. 2d 830.[4] We granted certiorari because of the importance of the issue raised. 328 U. S. 828.

Section 204 (a) of the Emergency Price Control Act provides that "Any person who is aggrieved by the denial . . . of his protest" against an order of the Price Administrator issued under § 2 of the Act may, upon complaint to the Emergency Court of Appeals, secure a judicial review of the Administrator's denial of such "protest."

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issued, unless on such date the cooperative was in the process of organization and the Administrator finds that substantial hardship would result from the failure to issue a certificate . . ."

[4] The original respondent here was Paul A. Porter, Price Administrator. The functions of his office have been assumed by Philip B. Fleming, Temporary Controls Administrator, who has been substituted as respondent.

Under § 204 (b) that Court can enjoin or set aside the protested "order" in whole or in part only if it is satisfied that the order "is not in accordance with law, or is arbitrary or capricious." But § 203 (a) denies the right to make a "protest" upon which review may be had to all but persons who are "subject to any provision of such . . . order." The Emergency Court of Appeals did not question that the petitioners were "aggrieved" within the meaning of § 204 (b) by the Administrator's special order authorizing their landlord to institute legal proceedings to evict them from their apartments. See *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 476, 477. Review was denied solely on the ground that they were not "subject to" that order within the meaning of § 203 (a).

In deciding a case concerning review of the Administrator's order granting a special exception to one of his general regulations, we are mindful that the legislative history of the Price Control Act strongly indicates that judicial review of the Administrator's general regulations and orders was intended by Congress to be limited to relatively few of the millions of people who would be more or less affected by them. Congress did not provide for protest and judicial review of general price orders by the great mass of consumers because of an apprehension that this might cause delay and difficulty in administering the Price Control Act with the efficiency and expedition deemed necessary to accomplish its broad purpose.[5] Only a few categories of persons whom the Act affected and whose protests, if reviewed, would not have these consequences, were specifically permitted by the Act to protest and have

[5] The congressional purpose in this regard has been summarized in our previous decisions in *Yakus* v. *United States,* 321 U. S. 414, 423, 431–433, 439, 441 and *Bowles* v. *Willingham,* 321 U. S. 503, 513, 520–521.

general price orders affecting them judicially reviewed.[6] The Administrator and the courts have adhered to this congressional policy. See *e. g. Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503.

Procedural Regulation No. 1 of the Office of Price Administration, 7 Fed. Reg. 971, defined a person as "subject to" a general price regulation or order, and therefore entitled to protest and obtain judicial review of it, only when such regulation or order "prohibits or requires action by him." The Emergency Court of Appeals sustained the regulation which contained this definition. *Buka Coal Co.* v. *Brown,* 133 F. 2d 949, 952. But in other special situations not directly involving general price-fixing orders the words "subject to" have been construed more broadly by the Administrator and the Emergency Court of Appeals.

Revised Procedural Regulation No. 1, 7 F. R. 8961, promulgated by the Administrator, provides that agricultural producers may protest an order which denies them a subsidy granted by Congress as one of the mechanisms of the price control program, the regulation stating that such a producer "shall be considered to be subject to a maximum price regulation." And in *Illinois Packing Co.* v. *Snyder,* 151 F. 2d 337, the Emergency Court of Appeals held that meat packers, denied such a subsidy under regulations of the Defense Supplies Corporation promulgated under the same authority on which Office of Price Administration orders were based, were subject to and could protest against such regulations. The court there said that:

> "If anybody could be 'subject to' a provision of the subsidy regulation, complainant certainly would meet

[6] Section 4 (a) of the Act lists the classes of persons to be punished for disobedience of the provisions of a regulation or order and therefore *ipso facto* "subject to" it as sellers of commodities, buyers of commodities in the course of business and landlords.

this requirement, since it claims to be excluded from the subsidy by a discriminatory and unlawful condition inserted in the subsidy regulation by Amendment No. 2. Since section 204 (d) confers upon this court 'jurisdiction to determine the validity of any regulation or order issued under section 2,' and since Amendment No. 2 is such a regulation or order, it is inadmissible to put upon the phrase 'any person subject to any provision' of a regulation under section 2 an interpretation which would make it impossible for anyone to invoke our jurisdiction in this type of case, especially one who, like complainant, is most immediately and directly prejudiced by the challenged provision of the subsidy regulation." *Illinois Packing Co.* v. *Snyder, supra,* at 338–339.

Thus it appears that the Administrator and the Emergency Court of Appeals have determined that the question of whether a person is "subject to" an order is dependent to some extent upon whether the order immediately, substantially and adversely affects him, as well as whether the order requires or prohibits action by him. Under these standards we think the tenants here were "subject to" the order.

Whether the regulations gave the tenants a "vested right" to remain in possession is not decisive of their right to protest or obtain judicial review. However that may be, general regulations prohibited these landlords from evicting the tenants unless the Administrator granted a certificate. The Emergency Price Control Act was intended in part to prevent excessive rents in the public interest,[7] and the very anti-eviction regulations under

[7] Among other provisions showing that such was the purpose of the Act, § 2 (d) provides in part that the Administrator may promulgate regulations or orders to "prohibit speculative or manipulative practices . . . or renting or leasing practices (including practices

which the Administrator granted the eviction certificate here were specifically designed to prevent manipulative renting practices which would result in excessive rents.[8] Those regulations have been held valid by the Emergency Court of Appeals, *Taylor* v. *Brown,* 137 F. 2d 654, 662–663, and their validity is not here challenged. If these tenants cannot "protest" this order issued under these regulations, no one can; and if they cannot challenge it in the Emer-

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relating to recovery of the possession) . . . which in his judgment are equivalent to or are likely to result in price or rent increases . . ." 58 Stat. 634.

[8] The landlords here claimed to be recent purchasers of stock in a cooperative ownership arrangement. Regulation 6 (b), here involved, was promulgated, according to the Administrator, for the following, among other, stated reasons:

"In recent months the problem of evictions and potential evictions in connection with the sale of stock in cooperative housing corporations has reached serious proportions. Apartment houses and other multiple-unit premises are being sold to cooperative corporations. These corporations in turn sell stock in the corporation which entitles the purchaser to a 'proprietary lease' of a dwelling unit in the structure. In selling stock in the cooperative, tenants usually are first approached. They are under heavy pressure to purchase stock because the alternative is likely to be eviction in favor of the ultimate purchaser of the stock. If the stock is not purchased by a tenant, it is then sold to another person who obtains a proprietary lease of the tenant's dwelling unit and seeks possession of that unit for personal occupancy.

. . . . . .

"In the past cooperative housing corporations were virtually unknown in most defense-rental areas. Since rent control there has been a tendency to make more frequent use of the device and there is every indication that this will accelerate.

. . . . . .

". . . During recent months, as the housing shortage has become more acute, the cooperative corporations or other owners of this stock have begun to sell it to purchasers who become entitled to proprietary leases." Statement of Reasons Accompanying Amendment 17 to the Rent Regulation for Housing for the New York City Defense-Rental Area.

gency Court of Appeals, they cannot effectively challenge it at all.

We cannot say that tenants who are about to be evicted from their apartments on account of the order are not "subject to" it. We are persuaded that these tenants would be required to act by the issuance of the certificate. They would either have to move themselves and their possessions to another abode, which might be difficult or impossible to obtain, or undertake defense of eviction proceedings in the State courts, which proceedings, but for the certificate, would have been barred by the regulation promulgated under the Act. For the same reason, it seems apparent that they would be immediately, substantially, and adversely affected by the order.

This situation is altogether different, in terms of administrative complications and the impact of the order on the individual, from one in which a consumer member of the public wishes to attack a general price-fixing regulation which will require him to pay higher prices, or even a tenant to pay higher rent. For this reason, the legislative history relied on by the Administrator, thought to indicate a purpose not to make such general price-fixing orders open to widespread challenge, has no relevancy here. While the scope of judicial review authorized by the Act is a limited one, *Illinois Packing Co.* v. *Snyder, supra* at 339, we think that these tenants were entitled to have their protest considered by the Administrator and that the Emergency Court of Appeals has jurisdiction of their complaint.

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE BURTON dissent.

Counsel for Parties.

PATTERSON, SECRETARY OF WAR, ET AL. *v.* LAMB.

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

No. 229. Argued January 7, 1947.—Decided January 20, 1947.

Respondent was ordered by his local draft board to report to the board on November 11, 1918, at 9 a. m., for "immediate military service"; and was informed that from that day and hour he would be "a soldier in the military service of the United States." He reported as ordered and was made the leader of a group of draftees awaiting entrainment for a mobilization camp. Later that day he was told that, because of the Armistice, the draft call had been canceled; and that he would not go to camp but could return home and await further orders. Four days later he received a notice from the board that all registrants who had been inducted but had not entrained were discharged from the Army; and that the cancellation of the induction orders would have the effect of an honorable discharge from the Army. *Held:* The War Department acted within its power in later granting to the respondent a "discharge from draft" rather than a certificate of honorable discharge from the Army. P. 544.

81 U. S. App. D. C. —, 154 F. 2d 319, reversed.

Respondent brought suit in the District Court against the Secretary of War and The Adjutant General of the Army praying a mandatory injunction to compel issuance to him of a certificate of honorable discharge from the Army. The District Court dismissed the complaint. The Court of Appeals reversed. 81 U. S. App. D. C. —, 154 F. 2d 319. This Court granted certiorari. 329 U. S. 695. *Reversed,* p. 545.

Frederick Bernays Wiener argued the cause for petitioners. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett* and *Paul A. Sweeney.*

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Roger Robb argued the cause for respondent. With him on the brief were *Samuel T. Ansell* and *Mahlon C. Masterson.*

Mr. Justice Black delivered the opinion of the Court.

On October 28, 1944, respondent brought this action in the United States District Court for the District of Columbia against the then Secretary of War and Adjutant General of the Army.[1] He prayed for a judgment declaring that he had served in the United States Army from November 11, 1918 (Armistice Day) until November 14, 1918, and that for this service he was entitled to a certificate of honorable discharge from the Army, instead of the certificate of "Discharge from Draft" which had been issued to him. He also prayed for a mandatory injunction to compel issuance to him of a certificate of honorable discharge from the Army.

The complainant alleged that on November 9, 1918, he received a communication from his local draft board directing him to report to the board at Davenport, Iowa, for "immediate military service" at 9 a. m., November 11, 1918, and stating that from that day and hour he would be "a soldier in the military service of the United States"; that he reported as ordered, and was made the leader of the drafted group there assembled which was to board a train that day for a mobilization camp at Camp Dodge, Iowa; that during the day he was told that because of the Armistice the draft call had been canceled; that he and the other draftees would not go to Camp Dodge, but could return home, still soldiers, and await further orders; that four days later he received a notice from his board that by telegraphic order of the Provost Marshal, acting under instructions of the President, all induction orders through-

[1] The Secretary of War and The Adjutant General against whom the action was originally instituted are no longer in office; their successors have been properly substituted as parties.

out the Nation had been canceled, and all registrants, who, like himself, had been inducted but not entrained, were discharged from the Army; and that cancellation of their induction orders would have the effect of an honorable discharge from the Army. He further alleged that in January, 1919, he received a certificate dated November 14, 1918, entitled "Discharge from Draft," accompanying which was a check for four dollars ($4.00) bearing the notation "Final Pay"; that because of the foregoing circumstances he had always assumed that his discharge had the effect of an honorable discharge from the Army; that he had obtained certain tax exemptions from the State of Iowa on the ground that he had such a discharge, but was later authoritatively denied the exemptions by reason of a decision of the state supreme court, *Lamb* v. *Kroeger,* 233 Iowa 730, 8 N. W. 2d 405; that it was after this decision that he applied for and was denied an honorable discharge by the Secretary and Adjutant General.

The District Court sustained petitioners' motion to dismiss the complaint on the ground that it failed to state a cause of action for which relief could be granted. Other grounds of the motion, not passed on by the District Court, were that the alleged cause of action was not justiciable, was barred by laches, and that the type of certificate to be issued draftees under the circumstances alleged was a matter solely within the discretion of the Secretary of War and not a subject for judicial review. The Court of Appeals reversed, rejecting all the grounds set up in the motion to dismiss. 81 U. S. App. D. C. —, 154 F. 2d 319. This holding not only decided important questions concerning the power of the War Department, but also upset twenty-five years of important War Department rulings and practices which have affected, and will hereafter affect, the status and claims of thousands of draftees of the First World War. This called for our review, and we granted certiorari.

Whether and to what extent the courts have power to review or control the War Department's action in fixing the type of discharge certificates issued to soldiers,[2] is a question that we need not here determine; nor need we decide whether the action should have been dismissed because of laches. For we are satisfied that the War Department was within its power in granting a discharge from draft rather than the type of discharge it granted soldiers who performed military service after having become fully and finally absorbed into that service.

The only statute which directly bears upon "certificates of discharge" for enlisted men, Article of War 108, set out below,[3] does not particularly prescribe the types or contents of certificates authorized to be granted. But pursuant to authority granted by Congress,[4] the War Department many years ago promulgated Army Regulation No. 150 which provided for three types of certificates of discharge: honorable, dishonorable, and unclassified.[5] An honorable discharge was one granted to a soldier whose conduct in service had been such as to warrant his re-

[2] See *Denby* v. *Berry*, 51 App. D. C. 335, 279 F. 317, 263 U. S. 29; *Davis* v. *Woodring*, 111 F. 2d 523; *Palmer* v. *United States*, 72 Ct. Cl. 401; *Wilbur* v. *United States*, 281 U. S. 206; *cf.* 58 Stat. 286, 38 U. S. C. Supp. IV, § 693h.

[3] "No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs . . ." 39 Stat. 619, 668.

[4] 18 Stat. 337, 10 U. S. C. § 16; see also *United States* v. *Eliason*, 16 Pet. 291, 301–302.

[5] Paragraph 150 of the Army Regulations of 1913, corrected to April 15, 1917, was as follows:

"150. Blank forms for discharge and final statements will be furnished by the Adjutant General's Department and will be retained in the personal custody of company commanders. Discharge certificates will be used in the discharge of enlisted men

enlistment. This regulation was well suited to fit cases of soldiers who had enlisted under ordinary conditions, had seen service and had been discharged in the course of regular Army routine. On its face, however, it shows how poorly it was adapted to fit the extraordinary circumstances bound to develop in connection with a nation-wide program for passing upon acceptances, rejections, and discharges of draftees in the course of their progress from their homes to their complete and final integration into the Army. So, after the passage of the 1917 Draft Act, 40 Stat. 76, the War Department, on January 12, 1918, issued its Circular No. 651 in which it made provision for men discharged from draft as distinguished from men discharged from the Army. This provision, in effect when respondent reported for induction, had particular, though not necessarily exclusive, reference to draftees rejected for one reason or another at mobilization camps after their induction at their local draft boards. But despite the fact that draftees became subject to military law and duty from the moment of their arrival for entrainment at the local board, Selective Service Regulation 174–176 provided that they nevertheless were not finally accepted for military service, and could be rejected after arrival at camp.[6] And it was not until

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and for no other purpose, and will be of three classes: For honorable discharge, for discharge, and for dishonorable discharge.

They will be used as follows:

1. The blank for honorable discharge, when the soldier's conduct has been such as to warrant his reenlistment and his service has been honest and faithful.

2. The blank for dishonorable discharge, for dishonorable discharge by sentence of a court martial or a military commission.

3. The blank for discharge when the soldier is discharged except as specified under sections 1 and 2 of this paragraph (C. A. R. Nos. 14 and 34)."

[6] *Cf. Gibson* v. *United States,* 329 U. S. 338; *Dodez* v. *United States,* 329 U. S. 338.

they had been finally accepted that they could or would be assigned to full-fledged duty as soldiers.

The Discharge from Draft Form No. 638, referred to in Circular No. 651, was originally prepared for draftees rejected at camp after induction "on account of physical unfitness, dependency, etc." Form No. 638 had been in use long prior to the respondent's rejection on the ground that the Government did not need his services after the Armistice. Had the Armistice not been declared, had respondent gone on to Camp Dodge, and had he then been rejected for any reason there, he would have received, not an honorable discharge from the Army, but a "Discharge from Draft." Yet we are asked to give the regulations and certificates a judicial construction, contrary to the Army's construction, whereby respondent, who got no farther than his local board, would stand in a better status than the tens of thousands of other draftees who came much closer to complete integration into the Army than he ever did.

An argument to support this contention is that the telegraphic order issued from Army headquarters on Armistice Day, which canceled entrainment orders for respondent and about 155,000 other draftees then ready for entrainment, provided that all of them were "discharged from the Army." But that same order stated that "The issue of formal papers of discharge will be considered and determined later" and that the purpose of the telegraphic order was "merely to cancel outstanding calls and stop the entrainment thereunder of men for the Army." And when "the issue of formal papers of discharge" was "later" considered, it resulted in War Department Circular No. 111 of 1918. That circular was the follow-up of the President's Armistice Day draft cancellation order, and as foreshadowed by the Armistice Day order, this circular prescribed with definiteness the type of "formal papers of discharge" which this respondent and others like him would later receive. It was a "Discharge from Draft."

539 Syllabus.

No statute or previous Army Regulation had provided for the extraordinary situation which developed on Armistice Day and which made it necessary for the President to halt the processing of these thousands of men and direct that they return to their homes. When this new situation arose, it was certainly within the province of the War Department to provide for its solution by, among other things, issuing to those returned home an appropriate form of certificate, whether of the honorable discharge variety, a "discharge from draft," or some special form designed specifically for the occasion. Respondent was inducted into the Army and was discharged before he reached a mobilization camp for final processing. His discharge adequately indicates these facts. The law demands no more.

Reversed.

MORRIS *v.* JONES, DIRECTOR OF INSURANCE.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 62. Argued December 9, 10, 1946.—Decided January 20, 1947.

An unincorporated association was authorized by Illinois to transact an insurance business there and in other States. It qualified to do business in Missouri. Petitioner sued the association in a Missouri court. Subsequently, but before judgment was obtained in Missouri, an Illinois court appointed a liquidator for the association and issued an order staying suits against it. All assets of the association vested in the liquidator. With notice of the stay order, petitioner continued to prosecute the Missouri suit; but counsel for the association withdrew and did not defend it. Petitioner obtained a judgment against the association in Missouri and filed a copy as proof of his claim in the Illinois proceedings. An order disallowing the claim was sustained by the Supreme Court of Illinois. An appeal was taken to this Court. *Held:*

1. The question whether full faith and credit should have been given the Missouri judgment does not present a ground for appeal; but certiorari is granted under Judicial Code § 237 (c). P. 547.

2. Under the Full Faith and Credit Clause of the Constitution (Art. IV, § 1) and R. S. § 905, the nature and amount of petitioner's claim was conclusively determined by the Missouri judgment and may not be relitigated in the Illinois proceedings, it not appearing that the Missouri court lacked jurisdiction over either the parties or the subject matter. Pp. 550–554.

3. The establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have. Pp. 549, 554.

391 Ill. 492, 63 N. E. 2d 479, reversed.

Petitioner obtained a judgment in Missouri against an Illinois association for which a liquidator had been appointed in Illinois after the suit was brought and filed a copy as proof of his claim in the Illinois proceedings. The Supreme Court of Illinois affirmed an order disallowing the claim. 391 Ill. 492, 63 N. E. 2d 479. An appeal to this Court was treated as a petition for certiorari and certiorari was granted under Judicial Code § 237 (c). *Reversed,* p. 554.

J. L. London and *Ford W. Thompson* argued the cause and filed a brief for petitioner.

Ferre C. Watkins argued the cause for respondent. With him on the brief were *Charles F. Meyers, Otis F. Glenn* and *Raymond G. Real.*

Mr. Justice Douglas delivered the opinion of the Court.

This case presents a substantial question under the Full Faith and Credit Clause (Art. IV, § 1) of the Constitution.

Chicago Lloyds, an unincorporated association, was authorized by Illinois to transact an insurance business in Illinois and other states. It qualified to do business in

Missouri. In 1934 petitioner sued Chicago Lloyds in a Missouri court for malicious prosecution and false arrest. In 1938, before judgment was obtained in Missouri, respondent's predecessor was appointed by an Illinois court as statutory liquidator for Chicago Lloyds. The Illinois court fixed a time for the filing of claims against Chicago Lloyds and issued an order staying suits against it. Petitioner had notice of the stay order but nevertheless continued to prosecute the Missouri suit. At the instance of the liquidator, however, counsel for Chicago Lloyds withdrew from the suit and did not defend it, stating to the Missouri court that the Illinois liquidation proceedings had vested all the property of Chicago Lloyds in the liquidator. Thereafter petitioner obtained a judgment in the Missouri court and filed an exemplified copy of it as proof of his claim in the Illinois proceedings. An order disallowing the claim was sustained by the Illinois Supreme Court against the contention that its allowance was required by the Full Faith and Credit Clause. 391 Ill. 492, 63 N. E. 2d 479.

The case was brought here by appeal. We postponed the question of jurisdiction to the merits. Under the rule of *Roche* v. *McDonald,* 275 U. S. 449, 450, the question whether full faith and credit should have been given the Missouri judgment does not present a ground for appeal. But treating the jurisdictional statement as a petition for certiorari (Judicial Code § 237 (c), 28 U. S. C. § 344 (c)), that writ is granted; and we come to the merits of the controversy.

The Full Faith and Credit Clause and the statute which implements it (R. S. § 905, 28 U. S. C. § 687) require the judgments of the courts of one State to be given the same faith and credit in another State as they have by law or usage in the courts of the State rendering them. The Illinois Supreme Court concluded that compliance with that mandate required that precedence be given to the

Illinois decree appointing the statutory liquidator. It held that title to all the property of Chicago Lloyds, wherever located, vested in the liquidator; that the liquidator was entitled to keep and retain possession of the property to the exclusion of the process of any other court; that although Missouri might give priority to Missouri creditors in the property of the debtor located there,[1] *Clark* v. *Williard,* 292 U. S. 112, the Missouri judgment could have no priority as respects Illinois assets; that if a liquidator had been appointed in Missouri, petitioner could not have obtained his judgment, or if he had obtained it, he could not have enforced it against the property in the hands of the Missouri liquidator, see *McDonald* v. *Pacific States Life Ins. Co.,* 344 Mo. 1, 124 S. W. 2d 1157; and that to disallow the judgment in the Illinois proceedings is, therefore, to give it the same effect that it would have had under the same circumstances in Missouri.

First. We can put to one side, as irrelevant to the problem at hand, several arguments which have been pressed upon us. We are not dealing here with any question of priority of claims against the property of the debtor. For in this proceeding petitioner is not seeking, nor is respondent denying him, anything other than the right to prove his claim in judgment form. No question of parity of treatment of creditors, or the lack thereof (see *Blake* v. *McClung,* 172 U. S. 239), is in issue. Nor is there involved in this case any challenge to the Illinois rule, which follows *Relfe* v. *Rundle,* 103 U. S. 222, that title to all the property of Chicago Lloyds, wherever located, vested in the liquidator. Nor do we have here a challenge to the possession of the liquidator either through an attempt to obtain a lien on the property or otherwise. As pointed out in *Riehle* v. *Margolies,* 279 U. S. 218, 224, the distribution

[1] It does not appear that there is any property of the debtor in Missouri; nor was a liquidator appointed in Missouri.

of assets of a debtor among creditors ordinarily has a "two-fold aspect." It deals "directly with the property" when it fixes the time and manner of distribution. No one can obtain part of the assets or enforce a right to specific property in the possession of the liquidation court except upon application to it. But proof and allowance of claims are matters distinct from distribution. They do not "deal directly with any of the property." "The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam.*" *Id.*, p. 224. The establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have. And see *Chicago Title & T. Co.* v. *Fox Theatres Corp.*, 69 F. 2d 60.

One line of cases holds that where a statutory liquidator or receiver is appointed, the court taking jurisdiction of the property draws unto itself exclusive control over the proof of all claims.[2] But the notion that such control over the proof of claims is necessary for the protection of the exclusive jurisdiction of the court over the property is a mistaken one. As Justice Beach of the Supreme Court

[2] *Attorney General* v. *Supreme Council,* 196 Mass. 151, 159, 81 N. E. 966 (receivership); *Hackett* v. *Supreme Council,* 206 Mass. 139, 142, 92 N. E. 133 (receivership).

The Illinois rule announced in the instant case is likewise applicable in receivership proceedings. *Evans* v. *Illinois Surety Co.*, 319 Ill. 105, 149 N. E. 802.

Contra: Pringle v. *Woolworth,* 90 N. Y. 502 (receivership). The federal receivership rule permits continuance of suits in other courts at least where they were pending at the time of the appointment of the receiver. *Riehle* v. *Margolies, supra.* And see *Chicago Title & T. Co.* v. *Fox Theatres Corp., supra,* and *Dickinson* v. *Universal Service Stations,* 100 F. 2d 753, 757, applying the *Riehle* ruling to a suit started in a state court after the receivership. For collection of cases see 96 A. L. R. 485.

of Errors of Connecticut aptly said, "The question is simply one of the admissibility and effect of evidence; and the obligation to receive a judgment in evidence is no more derogatory to the jurisdiction *in rem* than the obligation to receive in evidence a promissory note or other admissible evidence of debt." Beach, Judgment Claims in Receivership Proceedings, 30 Yale L. Journ. 674, 680.

Moreover, we do not have here a situation like that involved in *Pendleton* v. *Russell,* 144 U. S. 640, where it was sought to prove in a New York receivership of a dissolved corporation a judgment obtained in Tennessee after dissolution. The proof was disallowed, dissolution having operated, like death, as an abatement of the suit. No such infirmity appears to be present in the Missouri judgment; and the Illinois Supreme Court did not hold that the appointment of a liquidator for Chicago Lloyds operated as an abatement of the suit. Nor is it sought on any other ground to bring the Missouri judgment within the exception on which *Williams* v. *North Carolina,* 325 U. S. 226, rests, by challenging the jurisdiction of the Missouri court over either the parties or the subject matter. Nor is there any lack of privity between Chicago Lloyds and the Illinois liquidator. Cf. *Ingersoll* v. *Coram,* 211 U. S. 335, 362–364. There is no difference in the cause of action, cf. *United States* v. *California Bridge Co.,* 245 U. S. 337, whether Chicago Lloyds or the liquidator is sued. The Missouri judgment represents a liability for acts committed by Chicago Lloyds, not for those of the liquidator. The claims for which the Illinois assets are being administered are claims against Chicago Lloyds. The Missouri judgment represents one of them. There is no more reason for discharging a liquidator from the responsibility for defending pending actions than there is for relieving a receiver of that task. *Riehle* v. *Margolies, supra.*

Second. "A judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judi-*

cata, in the absence of fraud or collusion, even if obtained upon a default." *Riehle* v. *Margolies, supra*, p. 225. Such a judgment obtained in a sister State is, with exceptions not relevant here, see *Williams* v. *North Carolina*, 317 U. S. 287, 294–295, entitled to full faith and credit in another State, though the underlying claim would not be enforced in the State of the forum. *Christmas* v. *Russell*, 5 Wall. 290; *Fauntleroy* v. *Lum* 210 U. S. 230; *Roche* v. *McDonald, supra; Titus* v. *Wallick*, 306 U. S. 282, 291. It is no more important that the suit on this underlying claim could not have been maintained in Illinois after the liquidator had been appointed than the fact that a statute of limitations of the State of the forum might have barred it. See *Christmas* v. *Russell, supra; Roche* v. *McDonald, supra*. And the Missouri judgment may not be defeated by virtue of the fact that under other circumstances petitioner might not have been able to obtain it in Missouri or to have received any benefit from it there, as, for example, if a liquidator had been appointed for the debtor in Missouri prior to judgment. The full faith and credit to which a judgment is entitled is the credit which it has in the State from which it is taken, not the credit that under other circumstances and conditions it might have had. Moreover, the question whether a judgment is entitled to full faith and credit does not depend on the presence of reciprocal engagements between the States.

Under Missouri law petitioner's judgment was a final determination of the nature and amount of his claim. See *Pitts* v. *Fugate*, 41 Mo. 405; *Central Trust Co.* v. *D'Arcy*, 238 Mo. 676, 142 S. W. 294; *State ex rel. Robb* v. *Shain*, 347 Mo. 928, 149 S. W. 2d 812. That determination is final and conclusive in all courts. "Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment." *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 439–440.

For the Full Faith and Credit Clause established "throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered." *Id.*, p. 439. And see *Riley* v. *New York Trust Co.*, 315 U. S. 343, 348–349. The nature and amount of petitioner's claim may not, therefore, be challenged or retried in the Illinois proceedings.

As to respondent's contention that the Illinois decree, of which petitioner had notice, should have been given full faith and credit by the Missouri court, only a word need be said. *Roche* v. *McDonald, supra,* pp. 454–455, makes plain that the place to raise that defense was in the Missouri proceedings. And see *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 77. And whatever might have been the ruling on the question, the rights of the parties could have been preserved by a resort to this Court, which is the final arbiter of questions arising under the Full Faith and Credit Clause. *Williams* v. *North Carolina,* 317 U. S. 287, 302. In any event, the Missouri judgment is *res judicata* as to the nature and amount of petitioner's claim as against all defenses which could have been raised. *Roche* v. *McDonald, supra; Milwaukee County* v. *White Co.*, 296 U. S. 268, 275; *Magnolia Petroleum Co.* v. *Hunt, supra,* p. 438.

It is finally suggested that since the Federal Bankruptcy Act provides for exclusive adjudication of claims by the bankruptcy court [3] and excepts insurance companies from the Act (§ 4, 52 Stat. 840, 845, 11 U. S. C. § 22; *Vallely* v. *Northern Fire & Marine Ins. Co.*, 254 U. S. 348), the state liquidators of insolvent insurance companies should have the same control over the determination of claims as the

[3] See *In re Paramount Publix Corp.*, 85 F. 2d 42, and cases collected in 106 A. L. R. pp. 1121 *et seq.* Cf. *Robinson* v. *Trustees,* 318 Mass. 121, 60 N. E. 2d 593; *In re Chicago & E. I. Ry. Co.*, 121 F. 2d 785.

bankruptcy court has. This is to argue that by reason of its police power a State may determine the method and manner of proving claims against property which is in its jurisdiction and which is being administered by its courts or administrative agencies. We have no doubt that it may do so except as such procedure collides with the federal Constitution or an Act of Congress. See *Broderick* v. *Rosner,* 294 U. S. 629. But where there is such a collision, the action of a State under its police power must give way by virtue of the Supremacy Clause. Article VI, Clause 2. There is such a collision here. When we look to the general statute which Congress has enacted pursuant to the Full Faith and Credit Clause, we find no exception in case of liquidations of insolvent insurance companies. The command is to give full faith and credit to every judgment of a sister State. And where there is no jurisdictional infirmity, exceptions have rarely, if ever, been read into the constitutional provision or the Act of Congress in cases involving money judgments rendered in civil suits. *Magnolia Petroleum Co.* v. *Hunt, supra,* p. 438; *Williams* v. *North Carolina,* 317 U. S. 287, 294, footnote 6.

The function of the Full Faith and Credit Clause is to resolve controversies where state policies differ. Its need might not be so greatly felt in situations where there was no clash of interests between the States. The argument of convenience in administration is at best only another illustration of how the enforcement of a judgment of one State in another State may run counter to the latter's policies. But the answer given by *Fauntleroy* v. *Lum, supra,* is conclusive. If full faith and credit is not given in that situation, the Clause and the statute fail where their need is the greatest. The argument of convenience, moreover, proves too much. In the first place, it would often be equally appealing to individuals or corporations engaging in multistate activities which might well prefer to defend law suits at home. In the second place, against the

convenience of the administration of assets in Illinois is the hardship on the Missouri creditor if he were forced to drop his Missouri litigation, bring his witnesses to Illinois, and start all over again. But full faith and credit is a more inexorable command; its applicability does not turn on a balance of convenience as between litigants. If this were a situation where Missouri's policy would result in the dismemberment of the Illinois estate so that Illinois creditors would go begging, Illinois would have such a large interest at stake as to prevent it. See *Clark* v. *Williard*, 294 U. S. 211. But, as we have said, proof and allowance of claims are matters distinct from distribution of assets.

The single point of our decision is that the nature and amount of petitioner's claim has been conclusively determined by the Missouri judgment and may not be relitigated in the Illinois proceedings, it not appearing that the Missouri court lacked jurisdiction over either the parties or the subject matter. We do not suggest that petitioner by proving his claim in judgment form can gain a priority which he would not have had if he had to relitigate his claim in Illinois. And, as we have said, there is not involved in this case any rule of distribution which departs from the principle of parity as between Illinois creditors and creditors from other States. See *Clark* v. *Williard*, 294 U. S. 211; *Blake* v. *McClung, supra*.

Reversed.

MR. JUSTICE FRANKFURTER, with whom concur MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE, dissenting.

So far as they are relevant to the question before us, the facts of this case may be briefly stated. As part of its policy in regulating the insurance business, Illinois has formulated a system for liquidating the business of any Illinois insurance concern that falls below requisite standards. To that end it has provided that the title

to the assets of such an Illinois concern should, upon the approval of the Illinois courts, pass to a State officer known as a liquidator. A further provision of the State law defines the procedure for enforcing claims against the assets in Illinois that have thus passed into the liquidator's hands. Claims against such assets must be proved to the satisfaction of the liquidator, subject to appropriate judicial review of his determinations.

It is not in question that the Illinois assets of Chicago Lloyds, an Illinois insurance concern, passed into the ownership of an Illinois liquidator in due conformity with Illinois law. Chicago Lloyds had also done business in Missouri under a Missouri license. While the Illinois assets were being administered by the Illinois liquidator, Morris, a Missouri claimant, pressed against Chicago Lloyds in a Missouri court an action for damages begun while the company was still solvent. Without substitution of the Illinois administrator or appearance by him, Morris obtained a judgment in the Missouri Court against Chicago Lloyds. Apparently, there were no assets in Missouri against which this judgment could go. Thereupon the Missouri judgment-creditor asserted a claim in the distribution of the Illinois assets on the basis of the Missouri judgment. The liquidator declined to recognize the Missouri judgment as such, maintaining that the Missouri creditor must prove his claim on its merits, precisely as did Illinois creditors. The Superior Court of Cook County sustained the liquidator and disallowed the claim based on the Missouri judgment. Disallowance was affirmed by the Supreme Court of Illinois. 391 Ill. 492, 63 N. E. 2d 479. The question now here is whether in disallowing the claim based on the Missouri judgment against Chicago Lloyds, Illinois failed to give full faith and credit to the judgment of a sister State, as required by Article IV, § 1 of the Constitution, and 1 Stat. 122, 2 Stat. 299, 28 U. S. C. § 687.

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We have under review a decision of the Illinois Supreme Court regarding the mode of proving claims against Illinois assets of an Illinois insurance company in liquidation in an Illinois court. The issue before us must be determined, however, as though the construction which the Illinois Supreme Court placed upon the Illinois law had been spelt out unambiguously in the legislation itself. And so the real issue is this. May Illinois provide that when an insurance concern to which Illinois has given life can, in the judgment of the State courts, no longer be allowed to conduct the insurance business in Illinois, the State may take over the local assets of such an insurance concern for fair distribution among all who have claims against the defunct concern? May the State, pursuant to such a policy, announce in advance, as a rule of fairness, that all claims not previously reduced to valid judgment, no matter how or where they arose, if they are to be paid out of assets thus administered by the State, must be proven on their merits to the satisfaction of Illinois? And may the State specify that this mode of proof apply also to out-of-State creditors so as to require such creditors to prove the merit of their claims against the Illinois assets in liquidation as though they were Illinois creditors, and preclude them from basing their claims merely on a judgment against the insurance concern, obtained after it had legally ceased to be, and after its Illinois assets had by appropriate proceedings passed into ownership of an Illinois liquidator?

It is safe to say that State regulation of the insurance business is as old and as pervasive as any regulatory power exercised by our States. See, *e. g., Osborn* v. *Ozlin,* 310 U. S. 53; *Hoopeston Co.* v. *Cullen,* 318 U. S. 313. Not even the banking business, of which, after all, insurance is another phase, has been subjected to such continuous and extensive State surveillance. But while banking has increasingly been absorbed by federal regulation, the reverse

has been true as to insurance. Indeed, after a pronouncement by this Court that insurance partakes of commerce between the States, Congress by prompt legislation delegated or relegated the regulation of insurance, with appropriate exceptions, to the diverse laws of the several States. See *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408.

We are concerned here solely with the situation presented by a State's exercise of its power over the liquidation of the assets of an insurance company of its own creation. It is important to remember that in this as well as in other connections rights are largely dependent on procedure. It seems, therefore, difficult to believe that when the property of a domestic insurance company within the confines of a State comes into the State's hands for the fair administration of still unliquidated claims against that property, the State may not provide a rule of parity in proving the amount of all claims which are to be paid out of the common pot. We assume, of course, that the procedure prescribed is consistent with the requirements of due process, and not in conflict with overriding federal legislation. It is not suggested that the procedure which Illinois affords does not satisfy these requirements. Standing by itself, such a rule of administration would not be beyond the authority of a State. We must assume it to be Illinois law that the power to pass upon claims against property of a defunct Illinois insurance company is lodged in the liquidator and that such power is not to be foreclosed by a judgment against the defunct concern after title passes to the liquidator. Does the Full Faith and Credit Clause cut the ground from under such a State law as to judgments obtained outside the State after the control of the company and its assets had passed to the State?

Concededly, after the title to the Illinois assets of Chicago Lloyds has passed to the Illinois liquidator, it would

not be open to a citizen of Illinois to obtain in the courts of Illinois, so as to serve as a basis of a claim in Lloyds Illinois assets, such a judgment as Morris, a citizen of Missouri, secured in the Missouri courts. It is thought, however, that because of Article IV, § 1, of the Constitution, Illinois could not deny such a superior right to the Missouri citizen without denying full faith and credit to the Missouri judgment. But the Full Faith and Credit Clause does not imply that a judgment validly procured in one State is automatically enforceable in another, quite regardless of the consequences of such enforcement upon that State's policy in matters peculiarly within its control. *Alaska Packers Assn.* v. *Industrial Comm'n,* 294 U. S. 532, 546. The Full Faith and Credit Clause does not eat up the powers reserved to the States by the Constitution. That clause does not embody an absolutist conception of mechanical applicability. As is so often true of constitutional problems, an accommodation must be struck between different provisions of the Constitution. When rights are asserted in one State on the basis of a judgment procured in another, it frequently becomes necessary, as it does here, to define the duty of the courts of the former State in view of that State's power to regulate its own affairs.

The Full Faith and Credit Clause does not require a State to provide a court for enforcing every valid sister State judgment, even if its courts enforce like judgments in general. *Anglo-Am. Prov. Co.* v. *Davis Prov. Co. No. 1,* 191 U. S. 373. Again, a judgment in one State determining the validity of a will is not a judgment binding on another although it controls issues of succession in the first State. *Robertson* v. *Pickrell,* 109 U. S. 608; *Overby* v. *Gordon,* 177 U. S. 214. Surely, the Full Faith and Credit Clause does not require a State to give an advantage to persons dwelling without, when State policy may justifiably restrict its own citizens to a particular proce-

dure in proving claims against a State fund. But that precisely might be the result if Illinois had to accept at face value judgments obtained outside Illinois against a defunct Illinois insurance concern after the Illinois assets had passed to the Illinois liquidator.

Precedent and policy sustain the right of Illinois to have each claimant prove his fair share to the assets in Illinois by the same procedure. Chicago Lloyds is an Illinois entity doing business in Illinois according to conditions which Illinois had a right to fix for engaging in the insurance business in Illinois. Illinois initiated her policy for liquidating insurance companies in 1925. Lloyds was first authorized to do business in 1928, and thereafter renewed annual authority was required. Missouri gave Lloyds entry in 1932, and later renewed its authority for additional one-year periods. Thus, Illinois gave advance notice that if Chicago Lloyds should fall short of those standards of solvency and safety appropriate for an insurance concern, it will, through a liquidator, seize the Illinois assets of Chicago Lloyds for the protection of all claimants as to the merits of their claims. It warned the world that when such a situation arose claims against assets in Illinois must be proven in the manner which Illinois has here required. The authorization to do Lloyds business in Illinois created against the Lloyds assets in Illinois a sort of equitable lien, to speak freely but not too loosely, to become effective at insolvency and liquidation. To require that all claims against the estate in Illinois liquidation should be established on their merits in the Illinois proceedings may well have been deemed by Illinois the only way to protect the estate against foreign judgments which the Illinois liquidator might have no adequate means of contesting. It is irrelevant whether in this or in any other particular situation the liquidator could have contested a suit outside of Illinois. Certainly nothing can turn on whether the Illinois liquidator appears

specially in the foreign litigation to assert the liquidation of the company and the vesting of title to its assets in the State of Illinois. We are concerned here with the respect that is to be accorded to a judgment secured against the company by appropriate procedure in another State. Either such a judgment, obtained after the title to the Illinois assets vested in the Illinois liquidator, could be proven for the face value of the judgment, or it could not. The respect to be accorded such a judgment must turn on the control which Illinois may constitutionally exercise in the administration of Illinois property. Relevant to that issue of power is not whether in a particular suit the liquidator could have protected himself by entering as a litigant in the suit in another State. What is relevant is whether Illinois may deem that its liquidator might not be able adequately to defend the estate in liquidation in every State in which a suit might be pressed to judgment. What is relevant also is whether in such liquidation proceedings Illinois can refuse to accept at face value a judgment against an Illinois insurance company obtained after that company had ceased to exist, a judgment which the creditor would enforce against assets which passed to the State before the judgment was obtained.

Due regard for the relations of the States to one another, expressed by appropriate respect by one for the judicial proceedings of another, does not require that the provisions carefully established by Illinois for the proper safeguarding of these Illinois assets should be disturbed by judgments secured outside of Illinois after the very contingency for which Illinois provided had become a reality. It would be unfair thus to subordinate the primary and predominant interest of Illinois simply because the Illinois entity was allowed to enter Missouri. Missouri, like every other State, in admitting Chicago Lloyds had notice of the congenital limitations, so far as Illinois assets were concerned, under which Chicago Lloyds came

into being. And so, when Missouri admitted Chicago Lloyds, it admitted an Illinois insurance concern with full knowledge of what Illinois would exact, in case trouble arose, to the extent of assets within the control of Illinois. Of course Missouri has a right to provide for its methods of administration, in case of default, as to Missouri assets. But we are not here concerned with an attempt to enforce the Missouri judgment against Missouri assets. We put to one side whether Illinois law could pass title to Missouri assets to the Illinois liquidator. See *Clark* v. *Williard,* 294 U. S. 211. We do say that it is not within the power of any other State, by admitting the Illinois entity, to effect discrimination against the citizens of Illinois in the distribution of Illinois assets that had passed to the State, for the fair distribution of which Illinois had formulated an appropriate method of proof.

This analysis assumes a heavier burden than the case makes necessary. It is not merely that Missouri had notice of the conditions under which Chicago Lloyds was doing business in Illinois and thereby charged all its citizens with knowledge of the limited power of Missouri to affect Illinois assets upon liquidation. The Missouri claimant had actual notice that the Illinois assets had passed to the Illinois liquidator and that he was at liberty to come into the Illinois proceedings to prove his claim. The Missouri claimant had in fact come into the Illinois proceedings and filed his claim with the Illinois liquidator before he pressed his Missouri suit to judgment. It is a strong thing to say that Illinois could not say that under these circumstances the Missouri claimant must prove his claim the way every claimant in Illinois was bound to prove his. Surely the Constitution of the United States does not bar legislation by Illinois which provides a fair sifting process for determining the amount of claims against Illinois assets of an Illinois insurance company in liquidation in an Illinois court so as to secure equality of

treatment for all who assert claims against such a fund. The Full Faith and Credit Clause does not impose upon Illinois a duty to allow the face value of a judgment against the insurance company secured in Missouri after the company's assets had passed into the possession of the Illinois court, in a proceeding to which the Illinois liquidator was not a party and could not have been made one.

The precise relation of the liquidator's legal position to the Missouri judgment, on the basis of which Morris asserts a claim against the liquidator's assets, reinforces the more general considerations. Morris had no judgment against the company when by Illinois law title to Lloyds' assets passed to the liquidator. The mere institution of the Missouri suit gave Morris no greater right to the Illinois assets of Lloyds than he had before the action was begun. By the time he obtained his judgment in Missouri, the company no longer had title to any assets in Illinois to which the judgment might attach. By unassailable Illinois law, Lloyds' assets had passed to the liquidator. These assets could be reached only by valid judgment against him. In this respect, the law of Illinois controlling the liquidation of Lloyds, as authoritatively given us by the Supreme Court of Illinois, is decisively different from what this Court found to be the law of Illinois regarding the Illinois surety company in process of dissolution in *Ewen* v. *American Fidelity Company,* 261 U. S. 322. The liquidator was not a party to the Missouri action; he had not been served; he had not appeared; he expressly denied the right of Lloyds to represent and bind the Illinois liquidation estate. The authority with which Illinois clothed its liquidator put him under a duty to contest claims which the Company might not have deemed itself under duty to contest, while on the other hand it enabled him to recognize, as the Company might not have recognized, the merit of claims otherwise than by judicial command. The liquidator, as trustee for the creditors of

the extinct Illinois company, represented interests that were not the same as those represented by the extinct company when it conducted its own business. In short, the Illinois liquidator was thus a stranger to the Missouri judgment and it cannot be invoked against him in Illinois. See *United States* v. *California Bridge Co.*, 245 U. S. 337; *Kersh Lake Dist.* v. *Johnson*, 309 U. S. 485. Indeed, to subject the assets of the Illinois liquidator to the claim of a judgment obtained against Lloyds in Missouri subsequent to the passage of those assets to the liquidator may well raise constitutional questions. *Riley* v. *New York Trust Co.*, 315 U. S. 343; *cf.* Restatement, Conflict of Laws, § 450, comment *d*.

It is suggested that out-of-State creditors should be saved the burden of proving their claims in Illinois. Of course that is a proper consideration, and it would be controlling, where a creditor has obtained judgment, if there were no countervailing considerations. Against the claim of out-of-State creditors must be set not merely the interests of Illinois creditors, but also the importance of a unified liquidation administration, the burden to the liquidator of defending suits anywhere in the United States, and the resulting hazards to a fair distribution of the estate. To require the face value of the Missouri judgment of the Missouri claimant to determine his share out of the Illinois fund might, of course, dilute the share in the Illinois assets that can go to legitimate Illinois claimants. Considering the primary and predominant relation of Illinois in the adjustment of these conflicting interests, considering, that is, that we are dealing with a creature of Illinois and the property of that creature within her bounds, neither the demands of fairness nor anything in the Constitution requires that the interests of the out-of-State creditors should control the Constitutional issue. The resolution of this conflict so that the out-of-State creditor must take his place with the Illinois creditors is an-

other instance of a price to be paid for our federalism, and in this instance it is a very small price. If the situation calls for correction by a uniform regulation, Congress has the power to deal with the matter. Or the States might do so through the various devices for securing uniformity of State legislation. Illinois, in fact, has made overtures to its sister States in this regard. It has adopted the Uniform Reciprocal Liquidation Act as proposed by the Commissioners on Uniform State Laws. By this Act claims against insolvent Illinois insurance companies may be proved in ancillary proceedings in any "reciprocal state." Ill. Laws 1941, pp. 832–37, replacing Laws 1937, pp. 788–90, Smith-Hurd Ann. Stat. c. 73, § 833.3. That Missouri has not seen fit to protect the interests of Missouri creditors by becoming a "reciprocal state" is not the fault of Illinois.

A final word. It is suggested that this Court is merely deciding the finality of the Missouri judgment in Illinois, without any regard to its provability on a parity with the claims of Illinois creditors in the distribution of Illinois assets. But we are not merely passing on the abstract status of the Missouri judgment. The only issue that has ever been in this case is the right of the Missouri claimant to participate in the Illinois assets on the basis of the face value of his judgment. Such was the claim made by the creditor; such was the claim disallowed by the liquidator; such was the claim rejected by the lower court, and such was the disallowance affirmed by the Supreme Court of Illinois. It has never been questioned that the thrust of the case was the opportunity of the Missouri judgment-creditor-claimant to compete with the Illinois claimants in the distribution of the estate not on the basis of the merits of his claim, but on the amount fixed by the Missouri judgment. Neither by any of the courts nor by any of the parties was any suggestion made that under Illinois law the Illinois creditors have priority to exhaust the

Illinois assets. What was before that court and what is before this Court is whether a Missouri claimant may share in the distribution of a common fund not on the basis of a claim established according to a uniform procedure but on the basis of a judgment secured in Missouri subsequent to the passing of that fund to the Illinois liquidator.

This is not to say that the Missouri judgment is invalid. Whether recovery may be based on this judgment in Missouri, or in any other State except Illinois, or even in Illinois should the assets go out of the State's hands and return to a reanimated Chicago Lloyds, are questions that do not now call for consideration.

The judgment should be affirmed.

GARDNER, TRUSTEE, *v.* NEW JERSEY.

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

No. 92. Argued December 20, 1946.—Decided January 20, 1947.

A railroad petitioned for reorganization under § 77 of the Bankruptcy Act after New Jersey taxes had accrued against it in an aggregate amount exceeding the value of its liquid assets and extensive litigation over the tax assessments had resulted adversely to it. The state comptroller filed on behalf of the State a claim for taxes, plus interest, claiming that, under the state law, the sums owed were secured by "a lien paramount to all other liens upon all the lands and tangible property and franchises of the company in this State." Objections to the claim were filed by the debtor, the trustee, security holders, and an indenture trustee, who claimed, *inter alia*, that the debtor's property was grossly overvalued, that the debtor had been intentionally and systematically discriminated against in making the assessments, that no interest accrued after the petition for reorganization was filed or during the period when collection of the taxes was enjoined and the debtor was contesting their validity, that the State had no lien on the debtor's personal property, and that no part of the State's claim except the principal amount of taxes was entitled to a lien equal or paramount to the debtor's general

mortgage. After an attempt by the trustee to compromise the State's tax claims pursuant to state legislation facilitating such compromises had been frustrated by a declaration of the invalidity of the legislation, the trustee petitioned the reorganization court for adjudication of these claims. Appearing specially, the state attorney general claimed that entertainment of the petition would constitute a prohibited suit against the State. *Held:*

1. The reorganization court had jurisdiction over proof and allowance of the tax claims, and the exercise of that power was not a suit against the State. P. 572.

2. As so construed, § 77 is constitutional. *New York* v. *Irving Trust Co.*, 288 U. S. 329. P. 574.

3. The conclusion of the Federal District Court in New Jersey that the state comptroller had authority under New Jersey law to file the claim is entitled to special weight, and this Court finds nothing to impeach it. P. 574.

4. The reorganization court has jurisdiction over all property of the debtor, including that on which the State asserts a lien, and the court's power to deal with liens extends to the lien claimed by the State. P. 575.

5. The reorganization court has no power to redetermine for state tax purposes the valuations of the railroad's property underlying the assessments or the validity of the assessments. *Arkansas Corporation Commission* v. *Thompson*, 313 U. S. 132. P. 578.

6. The reorganization court is not precluded, however, from adjudicating other issues raised by objections to the State's claim. P. 579.

(a) The validity and priority of one lien, whether or not claimed by a State, as against other liens, are questions for the reorganization court. P. 579.

(b) The extent of the lien—to what property it applies and whether it is restricted to realty or covers personal property or revenues as well—is a question for the reorganization court. P. 580.

(c) Excepting questions involving the valuations underlying the assessments and the validity of the assessments, the reorganization court may adjudicate questions pertaining to the amount of a tax claim secured by a lien—*e. g.*, whether the amount of the claim has been swollen by the inclusion of forbidden penalties, what claims sought to be proved by the State are "penalties," the applicability of § 57j to reorganizations under § 77, the liability of the estate for penalties incurred by the trustee in the operation of the business,

and what interest, if any, accrues after the petition for reorganization has been filed. P. 580.

(d) Through appropriate exercise of the power to compromise or settle claims, the court may authorize the trustee to compromise claims, secured or unsecured, and may approve equitable adjustments of them, thus reducing or otherwise affecting the participation that the claimant, whether a State or another, may have in the *res* which is *in custodia legis*. P. 581.

7. This Court will not pass on questions of local law as to the validity or effect of settlements made in accordance with state legislation later held invalid, since those questions have not been passed upon by either the reorganization court or the Circuit Court of Appeals, both of which have greater familiarity than this Court with local law and local practice. Pp. 582–583.

8. These rulings are subject to the limitation that *res judicata* may have made binding on the reorganization court various questions of local law, including the amount and validity of the taxes under the state law and the character and extent of the lien which that law affords them. P. 584.

152 F. 2d 408, affirmed in part and reversed in part.

In a proceeding for the reorganization of a railroad under § 77 of the Bankruptcy Act, the reorganization court confirmed a report of a special master finding that (1) certain proofs of claim of New Jersey for taxes were properly filed by state officers acting in pursuance of their statutory authority, (2) § 77 confers on the reorganization court jurisdiction over the kind of claims asserted by the State in the proceeding, and such construction of the Act is not unconstitutional, and (3) the entire property of the debtor is *in custodia legis*, subject to the rights of lienholders, and the reorganization court is the proper court to determine the validity and amount of the tax claims, subject to certain limitations. New Jersey appealed and petitioned for a writ of prohibition. The Circuit Court of Appeals reversed the order of the reorganization court and dismissed the application for a writ of prohibition. 152 F. 2d 408. This Court granted certiorari. 328 U. S. 876. *Affirmed in part and reversed in part*, p. 584.

James D. Carpenter argued the cause for petitioner. With him on the brief were *Howard L. Kern, Alexander H. Elder* and *Samuel M. Coombs, Jr.*

Benjamin C. Van Tine argued the cause and filed a brief for respondent.

Fred N. Oliver, Willard P. Scott, Thomas Raeburn White, William A. Roberts, Philip S. Jessup and *A. M. Lewis* filed a brief for the Group of Institutional Investors et al., as *amici curiae,* urging reversal. *Charles A. Rooney, Charles Hershenstein* and *Milton B. Conford* filed a brief for Jersey City, as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, here on certiorari, presents important problems under § 77 of the Bankruptcy Act. 49 Stat. 911, 11 U. S. C. § 205. The Central Railroad Company of New Jersey (the debtor), of which petitioner is trustee, filed its petition for reorganization in 1939 shortly after receiving notice from the Attorney General of New Jersey that he would apply to a state court for a summary judgment for unpaid taxes of the debtor and seek to sell its property in satisfaction of the judgment. The tax assessments for the years 1932 to 1939 had been extensively litigated both in the state and federal courts and the results were for the most part adverse to the debtor.[1] By the end of 1939 the tax claims of the State against the debtor, exclusive of interest and penalties, exceeded $15,000,000, while the liquid assets of the debtor available to pay them were apparently less than half that amount. The reorganization court stayed suits to collect the taxes but from time to time entered orders directing the debtor to make speci-

[1] The history of the litigation is reviewed in the opinion of the Circuit Court of Appeals in this case. 152 F. 2d pp. 408–411.

fied installment payments on account of the taxes for various years.

In 1941 the New Jersey legislature passed a law designed to lessen the tax burden of railroads in the State. P. L. 1941, chs. 290, 291. This law was implemented and somewhat modified in 1942. P. L. 1942, chs. 169, 241. These acts included changes in the tax rates and provided for installment payments of the full principal amount of unpaid property taxes without interest or penalties, which were due on or before December 1, 1940. The statutory settlement of the claims was conditioned on (1) the execution of installment payment plans and the payment of the first installment, and (2) a waiver of all rights to contest the legality or amount of any assessment made prior to December 1, 1941, together with written consent to the discontinuance and dismissal of all pending suits concerning such assessments. The reorganization court authorized petitioner to settle and compromise the delinquent taxes in accordance with the provisions of these acts. Petitioner undertook to comply with the statutory requirements, filing documents and payments required of a delinquent taxpayer, discontinuing litigation, and consenting to the discontinuance of pending appeals.[2] The state officials—the Attorney General, Treasurer, and Comptroller—did not accept these tenders.[3] Instead, the Attorney General instituted suit to enjoin the Treasurer from carrying out the provisions of the 1941 and 1942 acts. The result was a holding that the acts violated the New Jersey constitution. *Wilentz* v. *Hendrickson,* 135 N. J. Eq. 244, 38 A. 2d 199.

[2] Delinquencies of subsidiary companies of the debtor were also included.

The 1942 Act increased the 1941 franchise tax of the debtor. The waiver authorized by the reorganization court included a waiver of the right to contest the legality of that additional assessment.

[3] See *In re Central R. Co. of New Jersey,* 136 F. 2d 633, which contains a review of the facts of this episode.

Meanwhile the reorganization court set a time within which all claims against the debtor should be filed. In compliance therewith the State Comptroller filed on behalf of the State of New Jersey a claim for taxes owing it.[4] The proof of claim stated that over $18,000,000 had been paid on the tax claim, leaving unpaid some $12,000,000, plus interest of over $7,700,000, plus additional interest on those sums from December 1, 1940. The proof of claim also stated that under New Jersey law the sums owed were secured by "a lien paramount to all other liens upon all the lands and tangible property and franchises of the company in this State."

The debtor and trustee filed initial objections to the claim. They contended that the property of the debtor was grossly overvalued and that the debtor and other railroads had been intentionally and systematically discriminated against in the making of the assessments. They also objected to the interest or penalty part of the claim, contending, *inter alia,* that no interest accrued after the date when the debtor's petition for reorganization was filed or during the period when collection of the taxes was enjoined and the debtor was in good faith contesting their validity. Subsequently they objected to the claim on the further ground that its amount and the time allowed for its payment were governed by the terms of settlement or compromise tendered under the 1941 and 1942 acts of the New Jersey legislature. They also contended that New Jersey had no lien on the debtor's personal property. Like objections were made by a group of security holders of the debtor and by an indenture trustee. They also objected to the State's claim on the ground that no part of it other than that representing the principal amount of taxes was entitled to a lien equal or paramount to the debtor's general mortgage.

[4] Like claims were also filed against subsidiaries of the debtor.

New Jersey, through her Attorney General, filed replies to the various objections which had been made to her claim, stating, *inter alia,* that the principal amount of the claim had been finally adjudicated and was lawfully owing, that the principal amount together with interest was entitled to priority under § 64 of the Bankruptcy Act, and that the claim was entitled to a paramount lien on all the lands, tangible property, and franchises of the debtor.

Shortly after *Wilentz* v. *Hendrickson, supra,* was decided, the trustee filed with the reorganization court a petition for adjudication of New Jersey's tax claims which in substance recapitulated his earlier objections to the claim and asked for an adjudication that the settlement or compromise tendered under the 1941 and 1942 acts of New Jersey was binding; or alternatively, if it was not binding, a determination of the extent to which the claim should be allowed and the relative rights, liens and priorities of the various claimants in the debtor's assets.

The Attorney General of New Jersey thereupon entered a special appearance in the proceedings, claiming, *inter alia,* that the entertainment of the petition would constitute a prohibited suit against the State, both as respects the determination of the amount of the claim and its priority or lien.

The reorganization court referred New Jersey's claim to a special master to consider this additional contention of the State, as well as the previous objections to it and the State's replies thereto.

The special master rendered a report in 1945 in which he found (1) that the proofs of claim of New Jersey were properly filed by state officers acting in pursuance of their statutory authority; (2) that § 77 confers on the reorganization court jurisdiction over the kind of claims asserted by the State in the proceeding and that such construction of the Act is not unconstitutional; and (3) that

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the entire property of the debtor is *in custodia legis* subject to the rights of lienholders, and that the reorganization court is the proper court to determine the validity and amount of the tax claims and their lien, subject to the limitations of *Arkansas Corporation Commission* v. *Thompson,* 313 U. S. 132, which he did not think were presently involved in the proceedings. New Jersey, through her Attorney General, filed objections to the report. The reorganization court overruled them and adopted and confirmed the report. New Jersey took an appeal to the Circuit Court of Appeals. She also filed in that court a petition for a writ of prohibition in which she challenged the rulings of the reorganization court on the same grounds.

The Circuit Court of Appeals treated the appeal as if all of the questions presented were covered by *Arkansas Corporation Commission* v. *Thompson, supra.* It held that the "only matters left open" for the reorganization court were (1) mathematical error in the computation of the amount of the tax or (2) legal error in its assessment. It accordingly reversed the order of the reorganization court and dismissed the application for a writ of prohibition. 152 F. 2d 408, 418.

First. We think, contrary to the position of New Jersey, that the reorganization court had jurisdiction over the proof and allowance of the tax claims and that the exercise of that power was not a suit against the State. Section 77 deals not only with claims of private parties but with those of public agencies as well. Section 77 (b) defines "creditors" as "all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act." And "claims" are defined to include "debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

Id. And § 77 (c) (7) provides for the prompt fixing of a reasonable time within which the "claims of creditors" may be filed and the manner in which they may be filed and allowed. The words "all holders of claims" have no qualification and are sufficiently broad to include public agencies as well as private parties. The "claims" of creditors include secured and unsecured claims. We find not the slightest suggestion that Congress left out the large class of tax claims which recurringly appears in reorganizations and often assumes, as here, large proportions. They are expressly included among provable claims in § 57n of the Bankruptcy Act, 52 Stat. 840, 867, 11 U. S. C. § 93 (n).[5] And the sweeping, all-inclusive definitions of "claims" and "creditors" in § 77 leave room for no exception under it.

When a State files a proof of claim in the reorganization court, it is using a traditional method of collecting a debt. A proof of claim is, of course, *prima facie* evidence of its validity. *Whitney* v. *Dresser,* 200 U. S. 532. But the bankruptcy court whose aid is sought for enforcement of an asserted claim is not bound to treat the tendered proof as conclusive. When objections are made, it is duty bound to pass on them. That process is, indeed, of basic importance in the administration of a bankruptcy estate whether the objective be liquidation or reorganization. Without that sifting process, unmeritorious or excessive claims might dilute the participation of the legitimate claimants.

It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. *Wiswall* v. *Campbell,* 93 U. S. 347, 351. If the claimant is a State, the procedure of proof and

[5] See H. Rep. No. 1409, 75th Cong., 1st Sess., p. 13; S. Rep. No. 1916, 75th Cong., 3d Sess., pp. 5, 16.

allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*. It is none the less such because the claim is rejected *in toto*, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash. When the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim. See *Clark* v. *Barnard*, 108 U. S. 436, 447–448; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 284–289; *Missouri* v. *Fiske*, 290 U. S. 18, 24–25.

The extent of the constitutional authority of the bankruptcy court in this respect was passed upon in *New York* v. *Irving Trust Co.*, 288 U. S. 329. In that case the Court sustained an order of the bankruptcy court which barred a State's tax claim because not filed within the time fixed for the filing of claims. The Court stated, p. 333, "If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated."

In the present circumstances there is, therefore, no collision between § 77 and the Constitution.

Nor can we conclude that the claim was not properly filed by the State. The State Comptroller, who filed the claim on behalf of the State, is authorized to "institute and direct prosecution . . . for just claims and debts due to the state." N. J. R. S. § 52:19–10c. And see *id.*, § 52:19–15. The State Attorney General, who resisted the objections made to the claim, is authorized to "attend generally to all matters in which the state is a party or in

which its rights and interests are involved." *Id.*, § 52: 17–2g. The special master, whose report the reorganization court adopted, held that what these officials did in this case was in pursuance of their authority. For that conclusion he relied on the statutes which we have mentioned and the practice in other reorganization proceedings. That construction of New Jersey law made by a federal judge of the New Jersey District Court is entitled to special weight. *Steele* v. *General Mills,* 329 U. S. 433. We find nothing which impeaches it. To hold otherwise might, indeed, imperil the claim which New Jersey so vigorously asserts. For it appears that the time for filing claims has expired and under the rule of *New York* v. *Irving Trust Co., supra,* a filing at this late date might come too late.[6]

Second. New Jersey contends that Congress did not include a State's tax liens within the scheme of § 77 proceedings. That is but another way of saying that since the State's asserted liens attached before the reorganization petition was filed, the only property of the debtor *in custodia legis* was its equity after the tax liens were satisfied.

We do not agree with that conclusion. We partially answered the contention when we reviewed the broad, all-

[6] See *Meyer* v. *Fleming,* 327 U. S. 161, 169, footnote 18: "Sec. 77 (c) (7) provides that the judge 'shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown . . .' This is the equity rule (5 Collier on Bankruptcy (1944) p. 537) which permits the filing of claims out of time provided the claim is equitable, the claimant is not chargeable with laches, and the assets have not been distributed (see *Conklin* v. *United States Shipbuilding Co.,* 136 F. 1006, 1009–1010; *Pennsylvania Steel Co.* v. *New York City R. Co.,* 198 F. 721, 740–742); and provided further that the late filing does not unduly delay the proceedings. *Guaranty Trust Co.* v. *Henwood,* 86 F. 2d 347, 353."

inclusive nature of the definitions of "creditors" and "claims" contained in § 77 (b). As those definitions make plain, "all holders of claims" include those who assert "liens" against the property of the debtor.

Section 77 (b), moreover, gives the reorganization court broad powers over all types of liens. Thus a plan of reorganization "shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise." § 77 (b) (1). A plan of reorganization may provide for "the sale of all or any part of the property of the debtor either subject to or free from *any lien* at not less than a fair upset price." § 77 (b) (5). (Italics added.) It may order "the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein." *Id.* Or it may provide for "the satisfaction or modification of *any liens*" or "the curing or waiver of defaults." *Id.* (Italics added.) This is comprehensive language suggesting that all liens are included, not that some are beyond the reach of the court. While valid liens existing at the commencement of bankruptcy proceedings have always been preserved, it has long been a function of the bankruptcy court to ascertain their validity and extent and to determine the method of their liquidation. *Whitney* v. *Wenman,* 198 U. S. 539, 552; *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U. S. 734, 737–738; *Straton* v. *New,* 283 U. S. 318, 321. Moreover, both in receivership cases, *New York* v. *Maclay,* 288 U. S. 290; *United States* v. *Texas,* 314 U. S. 480, and in bankruptcy cases, *Van Huffel* v. *Harkelrode,* 284 U. S. 225; *New York* v. *Irving Trust Co., supra,* the authority of the court to deal with the lien of a State has long been recognized. In reorganization cases the task of resolving disputes as to liens is a common one for the court. See *Institutional Investors* v. *Chicago, M., St. P. &*

P. R. Co., 318 U. S. 523, 569. Indeed, before a plan of reorganization can be designed in accord with fair and equitable requirements, liens must be disentangled and their relative priorities ascertained. This problem, present in most reorganizations, is acute in the railroad field.

If the reorganization court lacked the power to deal with tax liens of a State, the assertion by a State of a lien would pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into tax bureaus and other state tribunals. That would not only seriously impair the power of the court to administer the estate and adversely affect the power of the Interstate Commerce Commission and the court to promulgate a reorganization plan. See *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 466–475; *Smith* v. *Hoboken Railroad, W. & S. C. Co.*, 328 U. S. 123. It would fly in the teeth of § 77 (a), which grants the reorganization court "exclusive jurisdiction of the debtor and its property wherever located." That jurisdiction is not limited to the prevention of interference with the use of the property by the trustee; it "extends also to the adjudication of questions respecting the title." *Ex parte Baldwin*, 291 U. S. 610, 616; *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, 140. It is the exclusive jurisdiction of the reorganization court which gives it power to preserve the railway as a unit and as a going concern and to prevent it from being divided up and dismembered piecemeal. Only in that way can continuous operation of the road be assured and a plan of reorganization be effected which not only safeguards the interests of the various claimants but is also compatible with the public interest. *Continental Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648; *Smith* v. *Hoboken Railroad, W. & S. C. Co., supra.*

When § 77 is read against this historical background and in light of practical requirements, we cannot conceive that

Congress gave the reorganization court power less replete than the sweeping language of § 77 suggests.

The constitutional authority of Congress to grant the bankruptcy court power to deal with the lien of a State has been settled. In *Van Huffel* v. *Harkelrode, supra,* the Court held that the bankruptcy court was constitutionally empowered to order a sale of property of a bankrupt free and clear of a lien of a State for taxes.

We hold that the reorganization court has jurisdiction over all of the property of the debtor, including that on which New Jersey asserts a lien, and that the power of the court to deal with liens extends to the lien which New Jersey claims.[7]

Third. We held in *Arkansas Corporation Commission* v. *Thompson, supra,* that the reorganization court lacked the power under § 77 to redetermine for state tax purposes the property value of a railroad where that value had already been determined in state proceedings which afforded ample protection to the railroad's rights. We adhere to that decision. Its ruling precludes redetermination by the reorganization court in this case of the valuations underlying the assessments made by the state authorities and the validity of those assessments used as the basis for the computation of the taxes. It may not therefore entertain the objections to New Jersey's claim which tender those issues. The proper tribunals where

[7] Section 64a of the Bankruptcy Act determines the priority to which taxes owing a State are entitled and grants the bankruptcy court power to determine questions concerning "the amount or legality of any taxes." In *Arkansas Corporation Commission* v. *Thompson, supra,* we reserved decision on whether § 64a was applicable in reorganizations under § 77. We do not reach that question here. For § 77 alone is adequate to sustain the asserted jurisdiction of the reorganization court over all the property of the debtor. See *Lyford* v. *City of New York,* 137 F. 2d 782, 785–786.

those issues may be litigated, if they are still open for any year, are the state agencies and courts and, under special circumstances, the federal courts. *Hillsborough* v. *Cromwell,* 326 U. S. 620. The Circuit Court of Appeals has reviewed at length the New Jersey procedure available for challenging the valuations which underlie assessments. 152 F. 2d pp. 411–414. By the standards of *Arkansas Corporation Commission* v. *Thompson, supra,* that procedure is adequate, so that relitigation of the question in the reorganization proceedings would not be appropriate.

Fourth. The rule of *Arkansas Corporation Commission* v. *Thompson, supra,* does not, however, preclude the reorganization court from adjudicating the other issues raised by the objections to New Jersey's claim. The contrary view, which the Circuit Court of Appeals apparently took, fails to recognize historic bankruptcy powers which, as we have already pointed out,[8] are part of the arsenal of authority granted the reorganization court by § 77.

(1) The validity and priority of one lien, whether or not claimed by a State, as against other liens, are questions for the reorganization court. Illustrating but not limiting the range of that inquiry are questions whether local law creates the lien asserted; whether it was sufficiently perfected prior to the petition for reorganization as to be good against other liens, *cf. New York* v. *Maclay, supra; United States* v. *Texas, supra;* whether, if it were inchoate at that time, it could be perfected subsequent to the petition, *Lyford* v. *State of New York,* 140 F. 2d 840; and whether the lien, though paramount, is subordinate

[8] As stated in *Isaacs* v. *Hobbs Tie & Timber Co., supra,* p. 738, "while valid liens existing at the time of the commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation."

to administration expenses or other claims under either the general bankruptcy rule, *City of New York* v. *Hall,* 139 F. 2d 935, or the equity rule,[9] 5 Collier on Bankruptcy (14th ed.) ¶ 77.21. See *Warren* v. *Palmer,* 310 U. S. 132.

(2) The extent of the lien—to what property it applies, and whether it is restricted to realty or covers personal property or revenues as well—are also questions for the reorganization court. See *Ecker* v. *Western Pacific R. Corp., supra,* pp. 489, 503.

(3) The reorganization court may also adjudicate questions pertaining to the amount of a tax claim secured by a lien without crossing the forbidden line marked by *Arkansas Corporation Commission* v. *Thompson, supra.* There is, for example, the question whether the amount of the claim has been swollen by the inclusion of a forbidden penalty and thus to that extent does not meet the bankruptcy requirements for proof and allowance of claims. Section 57j of the Bankruptcy Act provides that debts owing a State as a "penalty or forfeiture" [10] shall not be allowed. What claims accruing before bankruptcy and sought to be proved by a State are "penalties," *New York* v. *Jersawit,* 263 U. S. 493, and what are not, *Meilink* v. *Unemployment Reserves Commission,* 314 U. S. 564; the applicability of

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[9] Section 77 (a) provides that if the petition is approved the reorganization court "during the pendency of the proceedings under this section and for the purposes thereof, . . . shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

[10] Section 57j reads in full:

> "Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

§ 57j to reorganizations under § 77; [11] the liability of the estate for penalties incurred by the trustee in the operation of the business, *Boteler* v. *Ingels*, 308 U. S. 57; what interest, if any, accrues after the petition for reorganization has been filed, *Vanston Committee* v. *Green*, 329 U. S. 156, are all questions for the reorganization court.

(4) We noted in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 130, that one useful and fitting function of a reorganization court was the compromise or settlement of claims, so that interminable litigation might be ended and the interests of expedition in promulgating a plan of reorganization served. That power, expressly included in the Bankruptcy Act [12] and governed by our General Order No. 33,[13] is part of the broad authority granted the reorganization court by § 77.[14] Through the appro-

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[11] Section 77 (l) provides:

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

[12] Section 27 provides:

"The receiver or trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate." 52 Stat. 855.

[13] General Order No. 33 provides:

"Whenever a receiver, trustee or debtor in possession shall make application to the court for authority to submit to arbitration any controversy arising in the settlement of an estate, or for authority to compromise any such controversy, the application shall clearly and distinctly set forth the subject matter of the controversy, and the reasons why it is proper and for the best interest of the estate that the controversy should be settled by arbitration or compromise." 305 U. S. 696.

[14] See § 77 (l), note 11, *supra*, and § 77 (a), note 9, *supra*.

priate exercise of that power, the court may authorize the trustee to compromise claims, secured or unsecured, and may approve equitable adjustments of them, and so reduce or otherwise affect the participation that the claimant, whether a State or another, may have in the *res* which is *in custodia legis*.

It is urged in this case that the settlement and compromise of New Jersey's tax claim which the reorganization court authorized the trustee to make under the so-called settlement acts of the New Jersey legislature of 1941 and 1942 was an appropriate exercise of that power; that the compromise was valid and binding under New Jersey law; and that even if the compromise was not valid, payments made by the trustee and the conduct of the parties have altered the claim as respects the lien, the principal amount of the claim, and the interest or penalty portion of it. New Jersey vigorously contests all and each of these contentions.

A phase of this controversy was before the Circuit Court of Appeals in *In re Central R. Co. of New Jersey, supra.* That court had before it on appeal the order of the reorganization court (entered prior to the decision in *Wilentz* v. *Hendrickson, supra,* holding the acts of 1941 and 1942 unconstitutional) which, on the basis of the compromise, allowed New Jersey's claim only in a reduced amount. The Circuit Court of Appeals held (1) that it would have been more appropriate for the reorganization court to have stayed its hand pending determination of the state litigation and (2) that, in any event, it should not have passed on the constitutionality of the 1941 and 1942 acts without giving New Jersey an opportunity for a hearing and argument on the issue. This controversy is now in a different posture. New questions of local law emerge—whether *Wilentz* v. *Hendrickson, supra,* controls this case; whether a valid settlement can be made under an

unconstitutional act and, if so, whether this alleged compromise was valid and effective; whether, if the settlement was not binding, the amount of the claim or the extent of the lien has been altered by the payments made during reorganization or by the conduct of the parties.

These points have been briefed and argued here. The difficulty is that neither the reorganization court nor the Circuit Court of Appeals passed on them. The reorganization court passed solely on a question of jurisdiction—whether it had the power to make adjudications concerning the amount of New Jersey's claim which should be allowed and the validity and extent of her lien, or whether New Jersey's sovereign immunity stood in the way of such determinations. And the Circuit Court of Appeals did not pass on these questions because it, too, was concerned solely with the question of jurisdiction.

These issues bristle with questions of New Jersey law on which we should not pass, even if we were to assume they are properly here, without the benefit of the views of judges who sit there and have a greater familiarity with local law and local practices than we. See *Huddleston* v. *Dwyer,* 322 U. S. 232, 237; *Brillhart* v. *Excess Insurance Co.,* 316 U. S. 491, 497; *Hammond* v. *Schappi Bus Line,* 275 U. S. 164, 169; *Wilson Cypress Co.* v. *Del Pozo,* 236 U. S. 635, 656–657. And for a review of the earlier cases, see dissenting opinion of Mr. Justice Brandeis in *Railroad Commission* v. *Los Angeles R. Co.,* 280 U. S. 145, 164–165. Moreover, we are now advised that there is presently pending before the Circuit Court of Appeals an appeal by the Attorney General of New Jersey from an order of the reorganization court denying leave to join the trustee as party defendant in a suit in the New Jersey courts to determine whether there was a valid settlement of the tax claims and to stay further determination of that controversy in the federal court until the state courts have

passed on the question.[15] If the Circuit Court of Appeals orders the application granted, cf. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483; *Ex parte Baldwin, supra,* p. 619, the state law phases of the controversy will be authoritatively settled. If the other course is followed, the issues can be resolved by the reorganization court on a record more adequate than the present one for purposes of review. Whatever procedure is followed, it is more fitting that those more versed than we in the intricacies and niceties of New Jersey law first pass on these questions.

We intimate no opinion on the merits of the settlement controversy. Nor do we intimate any view on the amount of the tax claim which should be allowed or on the validity, character, priority, or extent of the lien asserted by New Jersey, or on the manner in which it should be satisfied in a plan for reorganization. We only hold that the reorganization court could properly entertain all objections to the claim except those involving the valuations underlying the assessments and the validity of those assessments.

On the present record we do not know all the issues that were involved in the prolonged litigation concerning the taxes for the years in question. Hence, what we have said is subject to the limitation that *res judicata* may have made binding on the reorganization court various questions of local law, including the amount and validity of the taxes under New Jersey law and the character and extent of the lien which that law affords them.

We affirm in part and reverse in part the judgment of the Circuit Court of Appeals and remand the cause to the District Court for further proceedings in conformity with this opinion.

So ordered.

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[15] *New Jersey et al.* v. *Central Railroad Co. of New Jersey,* No. 8808. We are advised that by stipulation of the parties the case is being held in the Circuit Court of Appeals until the jurisdictional question involved in the instant case has been decided.

Counsel for Parties.

UNITED STATES *v.* THAYER-WEST POINT HOTEL CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 106. Argued December 20, 1946.—Decided January 20, 1947.

The Act of March 30, 1920 authorized the Secretary of War to lease land on a military reservation for the construction and operation of a hotel. The Act provided that the lease should contain a provision for "just compensation" to the lessee for the construction of the hotel, etc., upon termination of the lease. A lease was entered into pursuant to the Act; the hotel was constructed and operated for a time. Later the Secretary cancelled the lease. *Held:*

1. The Court of Claims is precluded by § 177 (a) of the Judicial Code from including interest in its award of "just compensation" upon the claim of the lessee, since the case was not one of eminent domain and neither the Act nor the lease contained an express provision for the payment of interest. P. 588.

2. The fact that "just compensation" includes interest in the eminent domain setting does not necessarily mean that the term must be given the same scope in other situations. P. 589.

3. References in the Act and in the lease to "just compensation," without more, are not to be construed as an express provision for the payment of interest. P. 589.

106 Ct. Cl. 60, 64 F. Supp. 565, reversed in part.

Respondent brought suit in the Court of Claims to recover upon a claim arising out of the termination of a lease executed pursuant to the Act of March 30, 1920. The Court of Claims allowed recovery and included interest in its award. 106 Ct. Cl. 60, 64 F. Supp. 565. This Court granted certiorari, 329 U. S. 698. *Judgment reversed* so far as it included interest, p. 591.

Oscar H. Davis argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Paul A. Sweeney* and *John R. Benney.*

Ernest J. Ellenwood argued the cause for respondent. With him on the brief was *John S. Shedden.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

The decision here turns upon the power of the Court of Claims, in light of § 177 (a) of the Judicial Code,[1] to include interest in its award of "just compensation" to a lessee for the construction of a hotel and other buildings pursuant to the provisions of the Act of March 30, 1920.[2]

The Act of March 30, 1920, authorizes the Secretary of War to lease land on the United States Military Reservation at West Point, N. Y., to any person for a term not exceeding 50 years upon which to erect a hotel and other necessary buildings in connection therewith. The lease is to contain such conditions, terms, reservations and covenants as may be agreed upon and is to provide "for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease."

On October 17, 1924, the Secretary of War duly made a lease under this Act to one Williams for a period of 50 years. The lease provided, among other things, that it might be canceled at any time by the Secretary if the lessee should fail to observe all the covenants and conditions in the lease. One of the covenants was that the lessee was to "keep the said hotel open for business every day during the continuance of this lease, except at such times as permission to close may be given in writing by the Superintendent, U. S. M. A." Upon a cancellation of the lease, "just compensation" was to be paid to the lessee for the construction of the hotel, appurtenances and equipment, and title thereto was to pass at once to the United States.

[1] 28 U. S. C. § 284 (a).

[2] 41 Stat. 538, 548.

Similar provisions were made in connection with the termination of the lease on the expiration of the 50-year term. The lease also set forth numerous restrictions and requirements as to the operation of the hotel—such restrictions and requirements being primarily for the benefit of the Military Academy.

The lease was assigned to a corporation and a hotel and other buildings were subsequently erected. Through a series of events which need not be detailed here, the respondent took over the leasehold and the hotel properties in 1930 with the approval of the Superintendent of the Military Academy. Respondent began operating the hotel on January 1, 1931, and continued under the terms of the lease until March 10, 1943.

On January 5, 1943, respondent wrote to the Secretary of War that conditions then existing made continued operation of the hotel impossible and that to avoid a curtailment of operations or a closing down of the hotel "the properties should be owned and operated by the Government." It was accordingly suggested that the Secretary declare the lease forfeited upon the closing of the hotel by respondent, a default contemplated by the lease. The Secretary agreed to this proposal. The respondent then gave notice of its intention to close the hotel on the morning of March 10, 1943. The agents of the Secretary immediately took over the possession, management and operation of the hotel on March 10 and shortly thereafter the Secretary declared the lease annulled.

The parties were unable to agree on the amount of "just compensation" due under the lease. Respondent then brought this suit in the Court of Claims, praying for a judgment in the sum of $1,932,000. That court found that the "total of just compensation to the plaintiff for construction of the hotel, its appurtenances, and equipments, is therefore $867,682, as of March 10, 1943." 106

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Ct. Cl. 60, 80, 64 F. Supp. 565, 568. The court then added interest at the rate of 4% per annum from March 10, 1943, to the date of payment as "additional allowance to make compensation a just one as of the date of payment." The sole question before us concerns the propriety of adding the 4% interest from March 10, 1943.

The pertinent part of § 177 (a) of the Judicial Code provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, . . ." Section 177 (a) thus embodies the traditional rule that interest cannot be recovered against the United States upon unpaid accounts or claims in the absence of an express provision to the contrary in a relevant statute or contract. *Tillson* v. *United States,* 100 U. S. 43, 47; *United States v. North American Co.,* 253 U. S. 330, 336; *United States* v. *Goltra,* 312 U. S. 203, 207. This rule is inapplicable, however, where the United States takes property under its power of eminent domain; in such cases it has consistently been held that the Fifth Amendment's reference to "just compensation" entitles the property owner to receive interest from the date of the taking to the date of payment as a part of his just compensation. *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 306; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; *Phelps* v. *United States,* 274 U. S. 341, 344.

Since it is clear in the instant case that the United States did not exercise its power of eminent domain and that there was no taking of the hotel properties in the legal sense, we can put to one side the eminent domain situation. There is nothing more here than an ordinary contractual relationship between the United States and the respondent. That relationship was voluntarily entered into by respondent's predecessor and was severed at respondent's suggestion. The Government's liability to

pay for the construction of the hotel properties was fixed by the Act of March 30, 1920, and by the lease, not by the Constitution. The sole issue thus becomes whether there is any express provision in the Act or in the lease permitting the recovery of interest under the circumstances. Only if there is such a provision can respondent avoid the traditional rule set forth in § 177 (a).

Respondent's claim in this respect rests upon the references in the Act and in the lease to the payment of "just compensation" for the construction of the hotel, appurtenances and equipment. "Just compensation," it is said, is to be given the same meaning here as in the case of a taking under the power of eminent domain, thereby entitling respondent to the full value of the properties down to the date of payment. From this viewpoint, the Court of Claims could use interest at the rate of 4% as the measure of the value of the use of the hotel properties from the time when the Government took possession on March 10, 1943, to the time of payment and include such interest as a component part of just compensation. The conclusion is reached that the term "just compensation," as used in the Act and in the lease, constitutes an express provision for interest so that the bar of § 177 (a) is removed. We cannot agree.

The fact that "just compensation" includes interest in the eminent domain setting does not necessarily mean that the term must be given the same scope in other situations. *United States* v. *Goltra, supra.* It may or it may not imply an obligation to pay interest. For example, interest conceivably may not be contemplated where the term refers to compensatory damages for a tort or a breach of contract, or where it has reference to the price to be paid for the exchange or sale of property at a future date. Hence, in the absence of constitutional connotations, "just compensation" is not a term of art so far as interest is

concerned. The inclusion or exclusion of interest depends upon other contractual provisions, the intention of the parties and the circumstances surrounding the use of the term.

But in order to override the historical rule codified in § 177 (a), something more is necessary than an equivocal use of the term "just compensation." It is not enough that the term might be construed to include the payment of interest. As § 177 (a) itself indicates, there must be a provision in the contract "expressly stipulating for the payment of interest." That provision must be affirmative, clear-cut, unambiguous; and an unexpressed intention by the parties that the term "just compensation" be construed to include interest is insufficient. Likewise, where a statute is relied upon to overcome the force of § 177 (a), the intention of Congress to permit the recovery of interest must be expressly and specifically set forth in the statute. *Tillson* v. *United States, supra,* 46; *United States ex rel. Angarica* v. *Bayard,* 127 U.S. 251, 260. Mere use of the term "just compensation," without more, is no substitute for an express provision for interest.

Here neither the Act of March 30, 1920, nor the lease under which respondent operated contains an express provision for the payment of interest, either in addition to or as a part of the "just compensation" to be paid to respondent. If the United States had desired to provide by statute or to contract in the lease for the payment of interest, it would have been easy to have said so in express terms.[3] Because it did not say so, we are led irresistibly to the conclusion that it did not intend to negative the effect of § 177 (a) in this instance. *Tillson* v. *United States, supra.*

[3] Congress has expressly provided for the payment of interest in other instances. See Judicial Code, § 177 (b), 28 U. S. C. § 284 (b); Contract Settlement Act of 1944, 58 Stat. 649, 654, § 6 (f), 41 U. S. C., Supp. V, § 106 (f).

We therefore reverse the judgment of the Court of Claims to the extent that it includes an allowance for interest.

KRUG, SECRETARY OF THE INTERIOR, ET AL. *v.* SANTA FE PACIFIC RAILROAD CO.

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

Nos. 97 and 98. Argued January 6, 7, 1947.—Decided February 3, 1947.

1. A release filed by a land-grant railroad pursuant to § 321 (b) of the Transportation Act of 1940, as a condition to collecting commercial rates on transportation for the Government, extinguishes the right of the railroad to select lands in lieu of lands originally acquired under the Act of 1866 in aid of construction but relinquished under the Acts of 1874 and 1904. Pp. 596–597.
2. Congress intended by the 1940 Act that a release filed pursuant thereto should bar any future claims arising out of any or all of the land-grant acts, so far as such claims arise from originally granted, indemnity or lieu lands. P. 598.

153 F. 2d 305, reversed.

Respondent railroad company brought two suits in the District Court to compel the Secretary of the Interior to determine respondent's right to "lieu" lands, without regard to a release filed by respondent pursuant to § 321 (b) of the Transportation Act of 1940. The District Court dismissed the complaints on the merits. 57 F. Supp. 984. The Court of Appeals reversed. 80 U. S. App. D. C. 360, 153 F. 2d 305. This Court granted certiorari. 328 U. S. 832. *Reversed*, p. 598.

Frederick Bernays Wiener argued the cause for petitioners. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Bazelon, Roger P. Marquis, Dwight D. Doty, Alvin O. West, Harry M. Edelstein* and *Sidney B. Jacoby*.

Lawrence H. Cake argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

In the first half of the Nineteenth Century the United States acquired a vast new area of sparsely populated lands in the South and West. Settlement and absorption of this territory into the older part of the country became a national problem which demanded for its solution a more rapid and extensive means of transportation of goods and people than was provided by wagons, stagecoaches, and waterways. The building of railroads largely provided the answer. They made it possible for the frontier homesteads and communities to be established on the lands of the new territory and yet maintain live contact with the national economy and culture. To encourage a rapid railroad building program, Congress chose to make public grants of a large proportion of the new lands to underwrite and subsidize the participation of private individuals and privately owned companies in the program.[1] In this congressional program of land grants "in aid of construction" were sown the seeds of the present lawsuit.

Enormous areas of public lands were granted railroads, almost equal to the acreage of the New England States, New York and Pennsylvania combined.[2] Execution of the land-grant program was marked by innumerable complex and unforeseen difficulties; its course has been beset by claims and counterclaims asserted by and between

[1] For an account see *Public Aids to Transportation,* Section of Research, Federal Coordinator of Transportation (1940) I, 45–46; Hibbard, *Land Grants,* Encyc. Soc. Sciences (1935) IX, 32–35.

[2] Hibbard, *Land Grants, supra,* 35. Other sources put the figure of federal grants-in-aid at 134,303,668 acres, equivalent to 209,849 square miles or 6.93 per cent of the area of the continental United States. Seventy railroads received these grants. *Public Aids to Transportation, op. cit. supra,* n. 1, 12, 13. See also *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 273.

settlers, railroads, and Government.[3] Congress, the executive agencies, and the courts have been repeatedly called upon to help resolve these conflicting claims. The lapse of nearly a century since the program was instituted has not resolved all of them. This lawsuit requires consideration of old and recent congressional efforts to settle these persistently recurring controversies.

One substantial field of railroad-government controversy has been the terms of the original land-grant acts which required the railroads to carry government goods and personnel free of tolls. By reason of judicial interpretation of these terms, as supplemented by periodic legislation,[4] land-grant railroads for more than half a century immediately prior to 1940 transported for the Government at one-half of the standard commercial rates. During the depression years beginning in the late 1920's and immediately following, railroad earnings declined considerably, and a movement began to relieve the roads of their land-grant rate obligations. Studies by some government-selected agencies recommended legislation for outright repeal of the provisions for rate concessions to the Government.[5] Bills to accomplish this in the 75th and 76th Congresses failed to pass.[6] But § 321 of the Transpor-

[3] See *Public Aids to Transportation, op. cit. supra,* n. 1, II, 5–56, Gates, *Land Grants to Railways,* Dictionary of Amer. Hist. (1940) III, 237. See also cases collected 43 U. S. C. A. §§ 888, 890, 893, 894, 900, 904; 43 F. C. A. §§ 888, 890, 893, 894, 900, 904.

[4] See *Lake Superior & M. R. R.* v. *United States,* 93 U. S. 442; *Atchison, T. & S. F. R. Co.* v. *United States,* 15 Ct. Cl. 126, 148. *Cf.* 18 Stat. 72, 74; 18 Stat. 452, 453–454; 20 Stat. 377, 390; 27 Stat. 174, 180.

[5] See Committee of Three: Report of March 24, 1938, H. Doc. No. 583, 75th Cong., 3d Sess., 32; Committee of Six: Report of December 23, 1938, in Hearings, House Committee on Interstate and Foreign Commerce on H. R. 2531, 76th Cong., 1st Sess., II, 260.

[6] H. R. 10620, 75th Cong., 3d Sess.; S. 3876, 75th Cong., 3d Sess.; S. 1915 and S. 1990, 76th Cong., 1st Sess.

tation Act of 1940 [7] provided that land-grant roads could, by compliance with specified conditions,[8] collect from the Government full commercial rates, except for the transportation of military and naval freight and personnel. In brief, it required that a railroad, to qualify for full rates, must execute, within a year after passage of the Act, a release of any claim it might have "against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any . . . predecessor in interest *under any grant* to such

[7] 54 Stat. 954, 49 U. S. C. § 65.

[8] Section 321 (b) provides that

"If any carrier by railroad . . . or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to [reduced rate] compensation for such a transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law."

carrier or such predecessor in interest as aforesaid." (Italics supplied.)

Shortly after passage of this Act respondent took advantage of it, and gave the Government a release framed substantially in the words of the statute.[9] Its predecessor in interest had obtained a grant of lands in Arizona and New Mexico, under an Act of 1866 containing the usual governmental rate-concession terms. 14 Stat. 292, 297.[10] The 1866 Act had specifically recited that if the Government, because of prior settlement of part of the granted lands by homesteaders, could not give possession to some of the lands granted to the railroad, it could select, under the direction of the Secretary of the Interior, other public lands in lieu of them as an indemnity. Respondent had large outstanding claims against the Government for these "indemnity" lands when it signed the release and concedes that the release extinguishes these claims.

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[9] "Santa Fe Pacific Railroad Company, a corporation organized and existing by virtue of an Act of Congress approved March 3, 1897 (29 Stat. 622), with office and principal place of business at New York, in the State of New York, hereby, in accordance with section 321 of Part II of Title III of the Transportation Act of 1940, and the rules and regulations issued thereunder by the Secretary of the Interior, relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

"This release does not embrace the rights of way or station grounds of this company, lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad."

[10] *Cf.* note 4, *supra.*

But it had other so-called lieu land claims against the Government which it asserts were not extinguished. The railroad urges that these claims are not covered by the Act or by the release. They, allegedly, are not claims "on account of" or "under any grant" of lands, but rest on contractual exchanges of lands made under the Acts of 1874 and 1904. 18 Stat. 194; 33 Stat. 556. These Acts largely represented a congressional effort to settle conflicts among railroads, Government, and settlers, which arose by reason of settlement by homesteaders on railroad-granted lands after the grants had been made. Both Acts provided that where settlers had so occupied railroad-granted lands, the railroad could, upon relinquishment of its title to them, select other lands in lieu of them. The procedure for selecting the lieu lands under the 1874 and 1904 Acts was substantially identical to the original procedure provided by the Acts for selection of indemnity lands. Before the 1940 Act respondent had, under the 1874 and 1904 Acts, relinquished title to the Government to certain lands previously granted. In August 1940, and subsequently in March 1943, respondent filed applications with the Secretary of the Interior to select its lieu lands. After the respondent signed the release, and because of it, the Secretary rejected the applications. The railroad then filed this suit in a Federal District Court for relief by injunction or by way of mandamus to require the Secretary and other Interior Department officials to pass on its applications without regard to the release. The District Court dismissed the bill on the merits, holding that the statute and release barred the claims. It read the 1940 Act as defining a congressional purpose "to wipe the slate clean of such claims by any railroad which enjoyed the benefits of the rate concessions made by the Transportation Act . . ." 57 F. Supp. 984, 987. The United States Court of Appeals for the District of Columbia reversed, holding, as respond-

ent urges in this Court, that the 1940 Act did not apply to the type of claims involved here. 80 U. S. App. D. C. 360, 153 F. 2d 305. Importance of the question decided caused us to grant certiorari.

We agree with the District Court. We think, as it held, that the Secretary of the Interior's construction of the 1940 Act was clearly right. Therefore, we do not discuss the Government's contention that, since the Secretary's construction was a reasonable one, it was an allowable exercise of his discretion which should not be set aside by injunction or relief in the nature of mandamus. See *Santa Fe P. R. R.* v. *Work,* 267 U. S. 511, 517; *cf. Santa Fe P. R. R.* v. *Lane,* 244 U. S. 492.

The respondent argues the case here as though the 1940 Act applied only to claims for "lands under any grant." The language is not so narrow. It also required railroads to surrender claims for "*compensation, or reimbursement* on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted . . . under any grant." (Italics supplied.) This language in itself indicates a purpose of its draftsmen to utilize every term which could possibly be conceived to give the required release a scope so broad that it would put an end to future controversies, administrative difficulties, and claims growing out of land grants. Beyond a doubt, the words "compensation" and "reimbursement" as ordinarily understood would describe a payment to railroads in money or in kind for the surrender of lands previously acquired by them "under a grant." [11] If they do not have this meaning, their use in the Act would have been hardly more than surplusage. And when viewed in the context of the historical controversies and claims under the land grants, the conclusion

[11] See *United States* v. *Northern P. Ry.,* 311 U. S. 317, 332, 335, 353, 354.

that the 1940 Act covers claims such as respondent's seems inescapable.

The legislative history of the Act shows that Congress was familiar with these controversies. In 1929 it passed an Act intended to authorize and require judicial determination of land-grant claims of the Northern Pacific Railroad in order finally and completely to set them at rest. 46 Stat. 41. The suit authorized by that Act was tried in a Federal District Court and was pending in this Court when the 1940 Act was passed. *United States* v. *Northern Pac. Ry.*, 311 U. S. 317. Our decision in it shows the complexity and ramifications of the numerous questions involved in land-grant controversies. Reference to this case was made by Government officials in urging Congress to include in the predecessors of the 1940 Act a requirement that the railroad surrender all claims arising out of land grants as a prerequisite to any Government rate concessions.[12] Here, as in the 1929 Act, which applied to the claims of only one railroad, we think Congress intended to bar any future claims by all accepting railroads which arose out of any or all of the land-grant acts, insofar as those claims arose from originally granted, indemnity or lieu lands. All the Acts here involved, the Acts of 1866, 1874, 1904 and 1940, relate to a continuous stream of interrelated transactions and controversies, all basically stemming from one thing—the land grants. We think Congress wrote finis to all these claims for all railroads which accepted the Act by executing releases.

Reversed.

[12] See Hearings, Subcommittee of the Senate Committee on Interstate Commerce, S. 1915, 1990 and 2294, 76th Cong., 1st Sess., 65, 66; see also *ibid.*, 59, 164.

ALBRECHT ET AL. *v.* UNITED STATES.

NO. 148. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

Argued January 8, 1947.—Decided February 3, 1947.

Contracts for the purchase of lands by the Government stipulated the purchase price, granted the right of immediate possession, but contained no provision for interest. The Government subsequently instituted condemnation proceedings, filed a declaration of taking, and deposited in court sums substantially less than the contract prices. The landowners asserted their contract rights. The validity of the contracts having thereafter been judicially established, the Government paid into court the full contract price. *Held:*

1. The Government is not obligated in these circumstances to pay interest, since the compensation of the landowners is controlled by the contracts, which contained no provision for interest, rather than by the Fifth Amendment. Pp. 600, 602.

2. The landowners having relied upon the purchase-price provisions of their contracts, the interest provisions of the Declaration of Taking Act are inapplicable. P. 604.

155 F. 2d 73, 77, affirmed.

In condemnation proceedings instituted by the Government, the landowners, petitioners here, relied upon the purchase-price provisions of earlier contracts and in addition claimed interest. In No. 151, the District Court, on the question of interest, held for the Government. 60 F. Supp. 741. In the other cases, the District Court held for the landowners. 61 F. Supp. 199. The Circuit Court of Appeals held for the Government. 155 F. 2d 73, 77. This Court granted certiorari. 329 U. S. 694. *Affirmed,* p. 606.

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* Together with No. 149, *Linnenbringer* v. *United States;* No. 150, *Pitman et al.* v. *United States;* No. 151, *Oliver, Executor, et al.* v. *United States;* and No. 155, *Q. W. S. S. Realty & Investment Co.* v. *United States,* also on certiorari to the Circuit Court of Appeals for the Eighth Circuit.

Richmond C. Coburn and *Samuel M. Watson* argued the cause for petitioners. With them on the brief were *George Eigel, William L. Igoe* and *William H. Allen. Roscoe Anderson* filed a brief for petitioner in No. 149.

Roger P. Marquis argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Bazelon* and *Wilma C. Martin.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The question here is whether the Government is obligated to pay interest in connection with the following land-purchase arrangements and condemnation proceedings. The Government made separate contracts with the petitioners to buy certain lands from them to be used for a public purpose. The contracts stipulated a purchase price to be paid at an indefinite future time when certain conditions had been fulfilled.[1] They also granted the Government the right to immediate possession. Later the Government questioned the validity of the contracts and attempted to rescind them on the ground that by reason of fraud and other things the contract prices were grossly excessive and represented far more than the "just compensation" required by the Fifth Amendment. It filed condemnation proceedings in District Courts under 40 Stat. 241, as amended, 50 U. S. C. § 171, asking the Courts to fix "just compensation" after hearing evidence on that subject. It also filed a declaration of taking under 46

[1] The first contract condition as to payment was that it should be made upon conveyance of a good and merchantable title. The second was that if "for any reason" the Attorney General did not approve the title, the Government could obtain a good title by condemnation proceedings in an appropriate district court, in which event the agreed compensation was to be deposited in court.

Stat. 1421, 40 U. S. C. § 258a, at the same time depositing in the Courts sums of money, substantially less than the contract prices, which it estimated to be the true "just compensation" for the property taken. The Courts then entered orders divesting the property owners of all title and vesting it in the Government. A companion case in which a District Court held an identical contract valid was appealed and eventually reached this Court. Prior to and pending this appeal these petitioners vigorously asserted the validity of the terms of the contracts which fixed the agreed prices for transfer of possession and title to their properties. Several years later this Court upheld the validity of the identical contract in the companion case.[2] Thereupon the Government, complying with that decision, paid the full contract purchase prices into the District Courts. It prayed that the landowners' compensation be fixed as the contract price without interest. Petitioners asserted that they had a right to interest from the time of the "taking," guaranteed by the Fifth Amendment's provision for "just compensation." The Government contended that the "just compensation" provision was not applicable, and that petitioners had no right to interest because their purchase contracts did not provide for it. One District Court decided this question in favor of the Government, 60 F. Supp. 741, but two decided against it. 61 F. Supp. 199.[3] The Circuit Court of Ap-

[2] *Muschany* v. *United States*, 324 U. S. 49.

[3] Some of the petitioners claimed interest from the date the Government took possession of the lands under the contract to the date the Government deposited the full contract price. One petitioner claimed interest only from the date of the filing of the declaration of taking on the difference on that date between the sum the Government deposited as the estimated "just compensation" and the full contract price finally deposited. Interest was awarded by the two District Courts on this latter theory only from the date of the declaration of taking.

peals held for the Government. 155 F. 2d 73, 77. In a case involving somewhat similar facts, *United States* v. *Baugh,* 149 F. 2d 190, the Circuit Court of Appeals for the Fifth Circuit had decided against the Government. Because of the apparent conflict presented and because the question is of widespread importance, we granted certiorari. The facts and issues, so far as we deem them relevant to disposition of all the cases, are identical, and so we consider all of them together.

We agree with the Circuit Court of Appeals that the Government is not obligated to pay interest in these cases. It is true that in cases submitted to them for determination of "just compensation," courts have evolved a rule whereby an element of compensation designated as interest is sometimes allowed. Under this rule, and in the absence of an agreement of the parties fixing compensation, courts first fix the fair market value of property as of the time it is taken. The property owner, against whom there is no counterclaim, is always entitled to payment of this much. But where payment of that fair market value is deferred, it has been held that something more than fair market value is required to make the property owner whole, to afford him "just compensation." This additional element of compensation has been measured in terms of reasonable interest. Thus, "just compensation" in the constitutional sense has been held, absent a settlement between the parties, to be fair market value at the time of taking plus "interest" from that date to the date of payment.[4]

But the method used by courts to determine "just compensation" in an adversary proceeding where the parties

[4] *Seaboard Air Line* v. *United States,* 261 U. S. 299, 306; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 496, 497; *Jacobs* v. *United States,* 290 U. S. 13, 16–17; *United States* v. *Klamath Indians,* 304 U. S. 119, 123.

have failed previously to agree on its amount is not the exclusive method for determining that question. The Fifth Amendment does not prohibit landowners and the Government from agreeing between themselves as to what is just compensation for property taken. See *Danforth* v. *United States,* 308 U. S. 271. Nor does it bar them from embodying that agreement in a contract, as was done here. And certainly where a party to such a contract stands upon its terms to enforce them for his own advantage, he cannot at the same time successfully disavow those terms so far as he conceives them to be to his disadvantage. That is precisely the position of the petitioners here. They made contracts for the transfer and possession of lands at prices concerning which they have never complained. At the end of prolonged litigation, the Government was barred from showing that compensations fixed by the contracts were not just, but were excessive. Having thus bound the Government to the contract prices as the measure of "just compensation," which prices, to say the least, generously meet the Fifth Amendment's "just compensation" requirement, they now seek to escape the burdens of these identical contract provisions. They invoke the Fifth Amendment in pursuit of something more than the compensation for which their contracts provide—contracts which they are not willing to abandon.

The answer to their contention is that in this posture of the cases these transactions have passed out of the range of the Fifth Amendment. For the reasoning on which interest is added to value as a part of "just compensation" in court condemnation proceedings is not applicable to this situation. That reasoning is that when a court determines just compensation, it first fixes bare value at the time of the taking and adds a sum to compensate for deferred payment of bare value so as to make the property owner whole as required by the Fifth Amendment. We

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do not think this formula fits contractual arrangements for compensation. Exactly what factors the parties consider, in addition to bare value, cannot easily be ascertained. This very group of transactions illustrates that there may be many such additional factors. For example, all the contracts here provided for immediate Government possession, though none contemplated immediate payments. We cannot know what amounts were added in the bargains to the bare market values as estimated, though unarticulated, allowances for the anticipated delays in payment. And other factors, which need not be enumerated, entered into the contract prices. These things demonstrate the inadvisability of applying a constitutional rule as to interest, specially designed to enable courts to calculate "just compensation," to an entirely different situation in which parties, supposedly with due regard to their own interests, bargain between themselves as to compensation. Since these petitioners have chosen to stand on their contract terms as to the amount they will receive for their property, rather than to have "just compensation," in the constitutional sense, fixed by the courts, we must look to those terms for the measure of their compensation, including their right to that part of compensation which courts have called interest.

We have not overlooked the contention that this conclusion is in conflict with our holding in *Danforth* v. *United States*, 308 U. S. 271. We do not think it is. That was also a case in which a statute authorized Government agents to purchase property, and a price had been agreed on prior to condemnation proceedings. But the asserted interest claim was there denied. The decision in that case reasserted the principle that interest in condemnation proceedings does not begin until there has been a taking. After noting the several incidents asserted to constitute a taking, we held that there was no interval between the

taking of the property there and payment for it. Thus the question we have considered here was neither directly involved, raised, nor given special consideration. A further incidental distinction between that case and this is that in the *Danforth* case the contract did not anticipate that the taking would precede payment.

Turning now to the right to interest under the contracts, and apart from the contention regarding the Fifth Amendment, we find that the contracts have no provision for payment of interest. No statute authorizes the payment of interest in cases like this. In the absence of specific contract or statutory provisions no interest runs against the Government even though the Government's payment for the contract purchases be delayed. See *Smyth* v. *United States,* 302 U. S. 329, 353; *United States* v. *Thayer-West Point Hotel Co.,* 329 U. S. 585, 588; *United States* v. *N. Y. Rayon Importing Co.,* 329 U. S. 654, 659–660.

There is some argument that interest should be allowed because the Declaration of Taking Act, 46 Stat. 1421, 40 U. S. C. § 258a, under which condemnation proceedings were filed, authorizes payment of interest from the date property is taken. *Cf. United States* v. *Thayer-West Point Hotel Co., supra,* p. 588. This provision, however, is no more than a statutory embodiment of the rule for determining constitutional "just compensation" in the absence of a governing contract, and what we have already said is equally applicable to the claim for interest under the statute. It contains no specific provision for interest on Government contracts of purchase. And here, while the litigation was under the condemnation statute, the petitioners' reliance on the purchase price provisions of the contracts as to value took these claims for interest outside the purview of the interest provisions of the Declaration of Taking Act, and left them to be governed by the interest rules which would have applied had suit been

brought by petitioners to enforce the contract terms. Petitioners were barred from receiving interest in any proceeding for the reason that their contracts contained no promise to pay interest.

Affirmed.

MR. JUSTICE REED and MR. JUSTICE DOUGLAS, dissenting.

"The stipulation merely had the effect of relieving the Government from having to make proof as to what was just compensation and of running the risk of having an amount fixed which might be unsatisfactory." *United States* v. *Baugh*, 149 F. 2d 190, 192. The landowners' "right to have interest is found in the Constitution and is neither found nor lost in the contract." *Id.*, p. 193. The justness of the claim for interest in these cases is underlined by the fact that the land was taken over four years before full payment was made. The United States renounced these contracts and retained possession of the properties by the Declaration of Taking Act, which by its terms, 46 Stat. 1421, 40 U. S. C. § 258a, entitled the condemnee to interest on the value from the date of taking except as to sums paid into court. After the decision in *Muschany* v. *United States*, 324 U. S. 49, the Government carried out its condemnation suits and obtained titles to these properties by condemnation.

In these condemnation actions the agreed price, stated in the contracts, became the "just compensation" of the Declaration of Taking Act and by that Act interest was due for such amount as had not been deposited with the trial court when the declaration was filed. Interest for the period between the declaration and the payment of the value into the trial court should be allowed on the amount by which the sum fixed in the final decree exceeded the sum deposited with the declaration of taking.

Syllabus.

INSURANCE GROUP COMMITTEE ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL.

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

No. 690. Argued January 6, 1947.—Decided February 3, 1947.

After confirmation of a plan for reorganization of a railroad under § 77 of the Bankruptcy Act had been affirmed by this Court, 328 U. S. 495, the debtor moved in the District Court for a re-examination of the plan in the light of circumstances which had changed since the Interstate Commerce Commission's hearings on the plan. The debtor specified three categories of changed conditions: (a) The decline in money rates to a level far below the rates prevailing at the time of the Commission's hearings, (b) the recent purchase by private capital for private operation of a steel plant which had been constructed by the Government during the war in the area served by the railroad, and (c) a permanent elevation of the national income through intensified industrial activity involving for the indefinite future a greatly increased demand for railway transportation. The debtor prayed that, upon re-examination, the District Court set aside its orders approving and confirming the plan and refer the proceeding back to the Interstate Commerce Commission for the formulation of a new plan. *Held:*

1. Re-examination would not be justified in this case; because the debtor has failed to allege the existence, since this Court's decision affirming the confirmation of the plan, of changed conditions of a kind not envisaged and considered by the Commission in its deliberations upon or explanations of the plan. P. 611.

2. This Court having ruled in its prior decision that in this reorganization no changed circumstances, up to that date, presented to it by the debtor or other respondents in that review justified a re-examination of the plan as confirmed, that ruling was binding on the District Court and the Circuit Court of Appeals as to changed circumstances arising after the order of confirmation and prior to the decision of this Court. P. 612.

3. While power rests in a federal court that passes an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, re-

quires it to refuse to permit the relitigation of matters or issues previously determined on a former review. P. 612.

4. The changed conditions relied upon by the debtor in support of its motion for re-examination of the plan have been considered or anticipated heretofore by the Commission, the District Court, the Circuit Court of Appeals and this Court. Pp. 613–617.

5. Until it can be contended with some show of reasonableness that creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, the debtor's insistence on a re-examination of the plan is without substantial support. P. 618.

6. While allegations of a petition for re-examination into a confirmed railroad reorganization plan need not contain allegations of the primary facts, they should allege ultimate facts, such as sales and values of securities or improved earnings, sufficient to indicate the factual basis for a re-examination; and such facts have not been alleged here. Pp. 618–619.

7. To open a confirmed plan of railroad reorganization, assuming the power to do so, accepted after years of consideration, requires a showing by allegation of injustice to the complaining debtor or junior creditors far stronger than any made here. P. 619.

8. The record affirmatively shows a proper basis for the valuation and allocation of securities by the Commission and fails to show any sound basis for a re-examination on account of changed circumstances between the date of the Commission's hearings and the date of this Court's prior decision. P. 619.

9. As to the period since this Court's prior decision, there is no basis in the record or in anything judicially known to this Court for a conclusion that there has been a significant change in interest rates, earnings available for interest, or traffic. P. 620.

10. The action of Congress in passing a bill pertaining to railroad reorganizations, which was vetoed by the President, does not require a stay to await further enactments that might affect this reorganization, since this Court does not know whether any changes will be enacted and must continue to act under existing law. P. 620.

11. The public interest in what persons or corporations hold in the future a controlling voice in the management of this railroad has already been considered and protected by the Commission. P. 620.

12. Nothing before or since the confirmation of this plan indicates any disregard by the Commission or the courts of the interests of operators, stockholders, creditors or the public. Pp. 620–621.

Order denying petition affirmed.

After confirmation of a plan for reorganization of a railroad under § 77 of the Bankruptcy Act had been affirmed by this Court, 328 U. S. 495 (rehearing denied, 329 U. S. 824), the debtor moved in the District Court for a re-examination of the plan in the light of circumstances which had changed since the Interstate Commerce Commission's hearings on the plan (254 I. C. C. 6). The District Court dismissed the petition. The debtor appealed to the Circuit Court of Appeals and a Judge of that Court issued an order staying proceedings in the District Court to consummate the plan. Under Judicial Code § 240 (a) this Court granted a writ of certiorari before judgment in the Circuit Court of Appeals. 329 U. S. 708. The order of the Circuit Judge directing a stay of the consummation of the plan is vacated and the order of the District Judge denying the petition is *affirmed*, p. 621.

George D. Gibson and *Kenneth F. Burgess* argued the cause for petitioners. With them on the brief were *Henry W. Anderson, John W. Riely, Morrison Shafroth, William Grant, Walter J. Cummings, Jr., Alexander M. Lewis, Edwin S. S. Sunderland, James L. Homire, W. A. W. Stewart* and *Arthur A. Gammell.*

William V. Hodges and *Frank C. Nicodemus, Jr.* argued the cause and filed a brief for respondents.

MR. JUSTICE REED delivered the opinion of the Court.

On November 29, 1944, the District Court for the District of Colorado confirmed a plan of reorganization for the debtor, the Denver & Rio Grande Western Railroad Co., 62 F. Supp. 384, notwithstanding the rejection of the plan by holders of the General Mortgage bonds pursuant to § 77 (e). Upon appeal the Circuit Court of Appeals reversed the order of confirmation. This Court granted certiorari, reversed the Circuit Court and affirmed the order of confirmation. 328 U. S. 495. The debtor con-

sistently opposed the plan throughout those proceedings. After the opinion of this Court was filed on June 10, 1946, the debtor petitioned for a rehearing, which was denied October 28, 1946. At about the same time as that of filing its petition for rehearing, it moved in the District Court (September 17, 1946) for a re-examination of the plan in the light of circumstances which had changed since the Interstate Commerce Commission's hearings on the plan in May, 1941. 254 I. C. C. 5, 6. The debtor specified three categories of changed conditions: "(a) The decline in money rates to a level far below the rates prevailing at these dates; (b) The recent public offering by the Government and purchase by private capital for private operation of the steel plant at Geneva, near Provo, Utah, which had been constructed by the Government in the exigencies of the War at a cost in excess of $200,000,000; (c) A permanent elevation of the National income through intensified industrial activity involving for the indefinite future a greatly increased demand for railway transportation."

The debtor prayed that upon re-examination the District Court set aside its order of October 25, 1943, approving the plan, and its order of November 29, 1944, confirming the plan, and refer the proceeding back to the Interstate Commerce Commission for the formulation of a new plan. After a hearing on a motion to dismiss the debtor's petition but without the introduction of evidence, the District Court dismissed the petition on October 30, 1946, on the grounds that the order of confirmation determined the rights of participation and that the District Court did not now have power to reopen the proceedings. The District Court also held that the petition failed to state a case that justified reconsideration. The debtor filed notice of appeal and requested a stay of execution of the plan on the same day; the latter motion

was denied by the District Court at that time. Thereupon the debtor docketed its appeal in the Circuit Court of Appeals and applied for an order staying execution of the plan until the appeal should be considered. This application of the debtor was granted on November 2, 1946, by an order of Judge Phillips staying proceedings in the District Court to consummate the plan. A petition for certiorari to the Circuit Court was filed in this Court under Judicial Code § 240 (a) which asked that we grant a writ of certiorari to the Circuit Court of Appeals, before judgment, and that the order of the District Court be affirmed in this Court. The grounds urged were that the action of the respondent was in violation of the mandate of this Court issued June 10, 1946, and that even if the mandate had not been violated the denial of the petition to reopen proceedings on the plan was not appealable because the petition for re-examination was in reality a petition for rehearing. Further, petitioner urged that this Court take and decide the whole case because the claim of change of circumstances was repetitious of the same claim rejected by this Court in its June, 1946, decision and that no allegations were made sufficient to justify a re-examination of the plan on account of changes in circumstances since the June decision. Because of the importance of the questions raised to the efficient administration of railroad reorganizations under the Bankruptcy Act, we granted certiorari. 329 U. S. 708.

We may assume, arguendo, that both this Court upon appeal from an order of confirmation in bankruptcy, and the bankruptcy court itself, after its order of confirmation has been affirmed on review (11 U. S. C. § 205 (f)), may take cognizance of subsequent changes in conditions and order a plan re-examined by the Interstate Commerce Commission. On that assumption, we are of the opinion that the debtor has failed to allege the existence of changed

conditions since our decision of June 10, 1946, of a kind not "envisaged and considered by the Commission in its deliberations upon or explanations of the plan." *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 522. We do not therefore think that re-examination would be justified in this case.

The conclusion in the foregoing paragraph removes the necessity of considering the question whether the respondent disregarded the effect of the judgment of this Court of June 10, 1946, which affirmed the orders of approval and confirmation of the plan. Likewise it disposes of any necessity to determine whether this petition in the District Court was in reality a request for a rehearing. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 247.

Upon the same assumption employed above, we ruled in our decision of June 10, 1946, 328 U. S. 495, 534, that in this reorganization no changed circumstances, up to that date, presented to us by the debtor or other respondents in that review justified a re-examination of the plan as confirmed. This ruling was binding upon the District Court and the Circuit Court of Appeals as to changed circumstances arising after the order of confirmation and prior to our decision. When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. Thus a cause proceeds to final determination. While power rests in a federal court that passes an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review.[1]

[1] *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339, 344; *King* v. *West Virginia*, 216 U. S. 92, 101; *Messenger* v. *Anderson*, 225 U. S. 436, 444; *Wichita Co.* v. *City Bank*, 306 U. S. 103, 106. Cf. *Chaffin* v. *Taylor*, 116 U. S. 567, 572.

The debtor's brief and the opinion of the Circuit Court of Appeals on the hearing of the review of the orders of approval and confirmation of the plan make clear that changed circumstances in the period between the Interstate Commerce Commission hearings in May, 1941, and our decision of June 10, 1946, of a like character with those now alleged, were relied upon by the debtor in its former effort to set aside the District Court's orders of approval and confirmation. The debtor argued on the former review, as it again argues, that the plan should not be confirmed because of the "radical lowering for the indefinite future of money rates." And it was emphasized at that time that capitalizing on these lower rates would permit the issuance of a greater volume of securities against earnings of the debtor, and consequently a larger allotment to presently dissatisfied creditors. Every example of railroad refinancing, listed in respondent's present brief to support by illustration the argument of falling interest rates, was listed in the brief on the last review for the same purpose. The purpose was to set forth instances of the issue of railroad securities at interest rates definitely lower than those borne by the debtor's issues. The debtor in its brief of that time also argued the beneficial effects of the "permanent elevation of National income" upon the anticipated earnings of the debtor. Lastly, the debtor there pointed out that the establishment and construction of the great Geneva steel plant was "certain to be revolutionary in its contribution to the new earning power of the Debtor . . ." Although it did not then rely, as it does now, upon the purchase of that corporation by private capital, the argument, then as now, was that the prospective business from a great steel plant was a factor indicating higher earnings. The plant may or may not turn out to be strategically located for private low cost operation and distribution. The shift of ownership has only moderate significance.

In sum, the very kinds of changed circumstances which were argued here formerly as reasons for not approving and confirming the plan of reorganization were presented by the petition now under review to the District Court as reasons why that court should vacate its orders of approval and confirmation, and remand the plan to the Commission for reconsideration. The debtor argues that it only urged this Court to take judicial notice of the existence of these changed circumstances, and that our refusal to do so should not bar it from proving these changes in the District Court. Our holding was not based upon a conclusion that this Court could not take judicial notice of changes in economic conditions subsequent to approval by the Interstate Commerce Commission. We concluded that, even if weighed, the alleged changes were not of a kind which justified re-examination of the plan. 328 U. S. 495, 534.

The questions of interest rates and increased earnings from the Geneva steel plant were considered by the Commission and the District Court before the order of confirmation. The approval of the plan by the Commission on June 14, 1943, appraised economic changes subsequent to the hearings. 254 I. C. C. 349, 356, 358, 359.

The Commission gave consideration to the interest rates the proposed securities should bear. 328 U. S. 495, 515, 516. There was a forecast of available income of $6,215,423 for annual charges in a future normal year. It was thought that this would support a capitalization of $155,000,000 plus, even though more than $35,000,000 of that represented by common stock participated only in earnings above the estimated normal except as to long-range advantages from capital investments and bond sinking-fund payments that had the effect of increasing the value of the common stock equities. 254 I. C. C. 15, 356.

As appears from the tables of capitalization, annual charges and distribution of securities, 328 U. S. 495, 502–503, the interest rates chosen varied with the type of security. As none of the authorized securities are alleged by the debtor to have shown values much above par, the chosen rates of return have not proven to be excessive. See note 6, *infra*. From the various recommendations as to the proper interest for the new first mortgage bonds, the Commission selected finally a fixed rate of three per cent and a contingent rate of an additional one per cent.[2] 233 I. C. C. 537, 542, 554–5; 254 I. C. C. 15, 387. To guard against a drain upon the reorganized railroad if interest rates should fall, a provision appears in the plan [3] for refunding the authorized first mortgage bonds at a maximum premium of 5 per cent. This gives protection to the reorganized road if not to the unpaid creditors and excluded stockholders.

Much the same situation exists as to the Geneva Steel Plant. A discussion occurred before the District Court on October 23, 1942, in which it was recognized that the plant would make a substantial contribution to the traffic of the road. This was the basis for further consideration before approval by the Commission on its reconsideration of the plan, 254 I. C. C. 349, 356. The effect of the existence of this plant received further consideration in the Circuit Court of Appeals, 150 F. 2d 28, 34, 38, 43.

As we indicated above, the alleged increases in the national income were briefed and decided contrary to the debtor's contention on the former review. Nothing was called to our attention in the former review to indicate that an increased level of economic activity above that in actual

[2] The earnings contingency which authorized the payment of the prior contingent interest, as expressed in technical detail at 254 I. C. C. 393–94, was the net income less certain fixed charges.

[3] 254 I. C. C. 387.

existence when the order of confirmation was issued had occurred beyond that anticipated by the Commission.[4] Earnings available for interest depend upon costs as well as upon revenue. It might be added to this Court's comments on railroad rate increases, 328 U. S. 495, 522, n. 29, that in handing down its order of December 5, 1946, granting certain increases, the Interstate Commerce Commission considered the necessity of meeting the increased costs.[5]

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[4] The national income* as reported in the annual publication of the Department of Commerce, The Survey of Current Business, for the following years was, in billions:

1940	77.6	1943	149.4
1941	96.9	1944	160.7
1942	122.2	1945	161.0

The national income as computed by the Department of Commerce is tentatively estimated at 164.0 billions for 1946; for 1947, no statement of an expected increase. See The Economic Report of the President to the Congress, of January 8, 1947, H. Doc. No. 49, 80th Cong., 1st Sess., as required under the Employment Act of 1946, 60 Stat. 23.

The Dow-Jones average of the ten first-grade rails was 117.25 on June 10, 1946, but had fallen to 110.73 on December 30, 1946. The market bid for the first bonds of the reorganized debtor, when, as, and if issued, was 101 on June 10, 1946, but had fallen to 89 on December 30, 1946. These latter figures are from the Commercial and Financial Chronicle, issues of June 10 and December 30, 1946.

*National income is the total net income earned in production by individuals or businesses.

[5] While the reports of the Commission deal with the national railroad situation rather than with individual roads, an examination of them does not indicate that the Commission intended to supply by means of the increase in rates a net railway operating income sufficient to give a rate of return on invested capital substantially higher than for normal pre-war years. 264 I. C. C. 695, 722, 728; I. C. C., *Ex parte* No. 162, December 5, 1946, mimeographed report, p. 7.

See the discussion of increased revenue and costs, mimeographed report, *supra*, pp. 3, 4, 5.

The Commission made no finding that the cash value of the securities allocated to the senior creditors paid them in full. To justify the change of position of creditors from fully secured to partially secured, creditors were given opportunities to participate in profits through common stock ownership with a chance at larger earnings than the Commission's forecast anticipated. We held the priority rule was satisfied by this type of allocation. This was explained by our decision on the last review. 328 U. S. 495, 517–518. The debtor has made no allegation, either in this effort for re-examination or before, that the existing cash value of the securities allotted any creditor has ever aggregated the amount of the creditor's claim against the debtor.[6] We think the absence of such an allegation, of itself, demonstrates that the plan is not, because of excessive interest, unfair to the debtor or those for whom it is allowed to appear.

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[6] As far as they are readily available to us, the ranges of the reorganized road's securities traded on a when, as and if issued basis have been as follows:

	1945		*1946*	
	High	Low	High	Low
First Bonds	103	82	102	89
Income Bonds	89½	44½	89	50
Preferred Stock			75½	37
Common Stock			35½	16

Bond ranges are from Year's End Edition of Moody's Bond Record, Vol. 14, No. 1, January 10, 1947; stock ranges are from Standard & Poor's Earnings and Ratings Stock Guide, Year's End Edition, January, 1947.

The highest market bids on the securities so far this year are, so far as the figures are available to us:

First Bonds	89
Income Bonds	62
Preferred Stock	50
Common Stock	16½

From Commercial & Financial Chronicle, Editions of January 6, January 13, and January 20, 1947.

Until it can be contended with some show of reasonableness that the creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, the debtor's insistence on a re-examination of the plan is without substantial support. See *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 541.

Not only does the debtor fail to allege any actual sales or values of the securities which would show that the creditors have received through the allotted securities payments on their claims in excess of their face, but there is no allegation of a radically improved situation as to this railroad's earnings available for interest.[7] Although distortions of income available for interest from varying causes do appear in the reports of the Trustees, available interest is an important figure as a basis for the consideration of capitalization. Traffic comparisons are not specifically set out.[8] While the allegations of a petition for

[7] The annual reports of the Trustees to stockholders show the income available for interest as follows:

1942	$17,044,420.39
1943	11,573,667.94
1944	8,157,880.25
1945	1,503,289.07 Dr.*

In 1946 the income available for all fixed charges at the end of eleven months was $3,405,118.00.

*This deficit is shown after deducting from gross earnings a tax accrual for prior years of $3,648,589.63 (in addition to the tax accrual for the year 1945) and $12,790,657.50 in amortization of war facilities.

[8] Revenue freight carloading weekly report of American Association of Railroads shows car loadings for the month of December for the years 1941 to 1946 as follows:

1941	14,045	1944	15,308
1942	16,915	1945	12,007
1943	14,571	1946	13,517

re-examination into a confirmed railroad reorganization plan need not contain allegations of the primary facts, the allegations should allege ultimate facts, such as those just referred to, sufficient to indicate the factual basis for a re-examination. The allegations of changed conditions in this petition to the District Court do not have the specificity of those which caused this Court in 1932 to direct an injunction against a Commission order of 1930 that was based on hearings that antedated the depression, beginning in 1929.[9] The ruling in that case has not been extended to authorize the reopening of hearings before the Commission because of alleged changes in conditions. For cases of that type, this Court has pointed out, there must be a showing of substantial injury.[10] We have approved a statement that the *Atchison* case rested upon exceptional facts.[11]

To open a confirmed plan of railroad reorganization, assuming the power to do so, accepted after years of consideration, requires a showing by allegation of injustice to the complaining debtor or junior creditors far stronger than any here made. Compare *Pewabic Mining Co.* v. *Mason,* 145 U. S. 349, 356, 367; *Group of Investors* v. *Milwaukee R. Co.,* 318 U. S. 523, 543.

Much of what we have written is directed at the suggestion that there should be a plenary re-examination of reorganization proposals for the Denver & Rio Grande. As to that suggestion, we are of the opinion that the record affirmatively shows a proper basis for the valuation and allocation of securities by the Commission, 328 U. S. 495, 502–503, and that the record fails to show any sound

[9] *Atchison, Topeka & Santa Fe Railway Co.* v. *United States,* 284 U. S. 248, 256.

[10] *United States* v. *Northern Pacific Railway Co.,* 288 U. S. 490, 494.

[11] *Interstate Commerce Commission* v. *City of Jersey City,* 322 U. S. 503, 515.

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basis for a re-examination on account of changed circumstances between May, 1941, and June 10, 1946.

So far as the period since June 10, 1946, is concerned, there is no basis in this record or in anything judicially known to us for a conclusion that there has been a significant change in interest rates, earnings available for interest or traffic. Nor do we see that the action of Congress in passing S. 1253, on July 31, 1946, should persuade us to require a stay to await further enactments that might affect this reorganization. It was vetoed. President's Memorandum of Disapproval, August 13, 1946. Our understanding of our duties under the Railroad Reorganization Act, in the face of strong criticism of its provisions, was expressed in the former review of this plan, 328 U. S. 495, 509, 510. It need not be repeated. We must continue to act under the now existing law. Whether or not changes may be made that will effect this reorganization, we do not know. It is quite understandable to us that stockholders strive to preserve the equities of their investments and that creditors should feel, in this case, that they have not recovered the value of their investment. Such convictions are to be respected.

The suggestion is made that there is a public interest in what persons or corporations hold in the future a controlling voice in the management of this railroad. This matter had the consideration of the Commission, 254 I. C. C. at 367 *et seq.* The plan adopted contains a ten-year voting trust for the new stock with Commission-regulated provisions for its sale. 254 I. C. C. at 400. The record does not present any ground for concluding that the new owners will be any the less solicitous for the public welfare than those who, at present, hold the stock certificates.

However, nothing before or since the confirmation of this plan indicates any disregard by the Commission or the courts of the interest of operators, stockholders, the

creditors or the public. When the Interstate Commerce Commission finds the value of a railroad system by any means, the correctness of the result cannot be mathematically proved or disproved. The difficulties of appraisal are multiplied by the necessity of looking into the future to estimate earnings. Earnings estimates are made with allowance for changing economic conditions. So are interest rates. All this is recognized by everyone; but the Commission has found no better way to determine the allocation of new securities among the various classes of stockholders or of creditors of a railroad with their different rights. Cf. *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 505–509.

The reorganization should be carried out. The order of the Circuit Judge in directing a stay of the consummation of the plan is vacated and the order of the District Judge of October 30, 1946, denying the petition is affirmed.

MR. JUSTICE FRANKFURTER, dissenting.

Formally, this is a litigation between private litigants, creditors quarreling over their share in the capitalization of a reorganized enterprise. Intrinsically, the case concerns issues of serious public importance. Control of one of the major railroad systems of the country is at stake. Disposition of the controversy brings into play considerations of policy on which the Congress and the President have clearly expressed themselves with relevance to the problem before the Court.

The peculiar and controlling public aspect of the case is emphasized by the position taken by the Government. The Government frequently intervenes as *amicus curiae* in so-called private litigation to present the dominant public aspects of such litigation. In the earlier stages of this litigation the Government was in fact a party of record. Through one of its agencies, the Reconstruction Finance Corporation, the Government is itself a creditor. When

the plan for reorganization, now ordered to be carried out, was found by the Circuit Court of Appeals not "fair and equitable," and justifiably rejected by the general bondholders whose claims constituted about one-fourth of the entire debt of the railroad, the Government here joined the present petitioners in urging reversal of that decision and approval of the plan. See 150 F. 2d 28, and 328 U. S. 495. After such reversal here, the case went back to the District Court and the present proceedings were begun for re-examination of the plan. The District Court dismissed these proceedings, but an order by the Circuit Court of Appeals stayed the execution of the plan until the court had opportunity to consider an appeal duly docketed. When a petition for certiorari was filed here to lift the case out of the Circuit Court of Appeals before it could be heard, the Government no longer asked this Court to approve the plan which it had supported here last March. Instead, the Government bowed itself out of the case. What has happened to make the Government abstain from standing on the decision which it obtained here last June? That which has happened constrains me to the view that the Denver and Rio Grande reorganization plan calls for further scrutiny, and should not, as matters now stand, be carried out.

What has happened since this Court rendered its decision last June? The Government, in its memorandum of abstention, states it succinctly and with candor:

> "Because of the action of the Congress last Summer in passing the Bill known as S. 1253 and the reasoning of the President's Memorandum of Disapproval, dated August 13, 1946, both of which indicated disapproval of certain features of railroad reorganizations approved pursuant to the provisions of Section 77 of the Bankruptcy Act, which is the existing law, the RFC, as an agency of the United States created

> and existing by virtue of Congressional enactment, is not taking any position as to whether the petitions should be granted."

The decisive change in relevant circumstances, which thus caused a decisive change of position by the Government since the case was here originally, is the essential basis for the debtor-railroad's unsuccessful effort in the District Court to secure re-examination of the reorganization plan, and was presumably the basis for the order of Judge Phillips in the Circuit Court of Appeals staying proceedings in the District Court to consummate the plan.

This controlling change in circumstances is dismissed by the Court with the observation that "the action of Congress in passing S. 1253 . . . was vetoed. President's Memorandum of Disapproval, August 13, 1946." But the decisive consideration is not that the President vetoed the bill but why he vetoed it. The President left no doubt regarding the grounds of his veto. In the interest of an adequate appreciation of them the full text of his Memorandum is made part of this opinion (Appendix I). The President did not veto the bill because he disapproved its purposes. He vetoed the bill because it was too weak, in some of its provisions, for carrying out those purposes. "By withholding my signature to this bill," wrote President Truman, "I do not intend to indicate that I favor the pending reorganization plans. I am in agreement with those objectives of the bill which prevent undesirable control of the railroads, either immediately or within a few years, and which prevent forfeitures of securities." He continued: "I believe that the next Congress can pass a bill which will meet the stated objections and which will be in the best interests of the public, the railroads, the bondholders and other creditors, and the stockholders." These are not merely the views of the President of the United States. They are the views of a President with expert

knowledge of the subject, gained through years of active participation in the most elaborate investigation of railroad reorganizations ever conducted by a Congressional committee.

The President's veto statement elicited a prompt response from leaders of the Conference Committee out of which the vetoed bill came. They represented both Houses and both parties. The statement deserves quotation in full:

"Statement of Members of Congress Regarding Further Legislation

"The railroad reorganization bill, S. 1253, was the culmination of over 3 years of intensive effort to save $2,000,000,000 of investments made by hundreds of thousands of stockholders and junior bondholders in railroads now in process of reorganization under section 77 of the Bankruptcy Act. Those investments will be wiped out under pending plans of reorganization unless legislation is enacted to prevent it. This bill was designed and passed by the Congress primarily for that purpose.

"Those who have supported this legislation will be definitely heartened by the declaration of principles contained in the President's memorandum stating why he withheld his signature from the bill. For it is clear that the broad principles announced by the President are shared by the proponents and supporters of this legislation. Broadening of the bill to meet the requirements of the President's objections can and will be drafted. Such a bill will be promptly introduced at the next session of the Congress. As Congress has already overwhelmingly committed itself to such legislation and the President has declared that he, too, favors its purposes, the prompt enactment of such a measure appears certain.

"While this legislation was under consideration in the committees of the Senate and House, a number of courts and the Interstate Commerce Commission recognized the appropriateness of cooperating with Congress in meeting this public problem and abstained from taking steps which would have carried forward any of the pending reorganization plans under section 77. This was months before the legislation came up for a vote in either the Senate or House. Now that the legislation, both in the form in which it was reported by the respective committees of the Senate and House and in the subsequent form contained in the conference report, was passed by an overwhelming vote in each Chamber and the objectives of the legislation have received the approbation of the President, it is confidently hoped that the courts and the Commission will take no steps in support or furtherance of pending reorganization plans under section 77, but will instead await action by the Congress and the President on legislation giving effect to the principles favored by both.

CLYDE M. REED.
JAMES M. TUNNELL.
SAM HOBBS.
CHAUNCEY W. REED.

Washington, D. C.,
August 14, 1946."

It is difficult to believe that had the President signed S. 1253 this Court would have sustained the action of the District Court in dismissing out of hand the petition for re-examination of the reorganization plan. The considerations of public policy which underlay that measure could hardly have been disregarded, for the inequities of this very reorganization plan were extensively cited in Congress as demonstrating the need for correction.

This would have been so although Congress did not see fit to withdraw entirely the further jurisdiction of the District Court in these reorganization proceedings. But the grounds of the President's veto only emphasize these considerations of public policy. They should prompt a court of equity to stay its hand until further scrutiny of the plan. The bi-partisan statement of the conference leaders underwrites the President's formulation of public policy. Of course, neither the President's hopes nor the confidence of Congressional leaders insures legislation. But if the realization of the desires of the President and the expectations of bi-partisan Congressional leaders concerned with this legislation would affect, as I cannot believe it would not, the action of a court of equity when asked to enforce this reorganization plan, the Court ought not to proceed on the assumption that the legislation as outlined by the President will not be forthcoming.

We are dealing here not with an ordinary litigation as to which courts are exercising conventional judicial authority. The courts are carrying out the legislative mandate of Congress as to the considerations of public policy by which the role of the judiciary in railroad reorganization should be guided. The primary responsibility is lodged with an agency of Congress, the Interstate Commerce Commission. This Court's jurisdiction is at once very limited and novel. If legislation which would make it the duty of the Court to reconsider the reorganization plan now before us is really in prospect, only the most imperative public emergency should require this Court to engage in a race with the President and Congress in the disposition of questions of public policy. *Cf. Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 13 How. 518, and 18 How. 421.

Moreover, Congressional intention has not been latent and conjectural since last summer. Legislation, as sug-

gested by the President, appears to have every prospect of prompt consideration in the new Congress. In submitting a joint bi-partisan resolution (see Appendix II of this opinion) dealing with railroad reorganizations, after referring to the President's Memorandum of Disapproval and the Statement of Members of Congress Regarding Further Legislation, *supra,* Senator Reed stated that

> "preliminary discussions have already been agreed to with Members of the House, with a view to expediting this legislation in the Eightieth Congress. It is hoped that it can be taken up, in a preliminary stage, with the White House so that the greatest possible speed can be secured for the legislation to be finally enacted in the Eightieth Congress."

The Court rightly assumes that neither this Court nor the District Court is concluded by what was decided here last June. Changed circumstances, of course, may require the re-examination of a plan by the Interstate Commerce Commission. First and last, this is a proceeding in equity, and until a decree consummating a plan of reorganization is finally signed it is the duty of a court of equity not to make of itself an instrument of inequity. Peculiarly is this so where the paramount interest is that of the public, though the formal litigation is carried on by private parties. In such a situation we are not restricted to the specific claims of the formal litigants. We are not restricted to the limited specific financial factors which, in the debtor's opinion, have affected the situation since last June. The decisive issues are those posed by the Congress and the President. The real question before the Court is whether, in the light of events since its prior decision, there is a solid basis for the judgment which we are asked to enforce. To be sure, even in a court of equity a matter once adjudicated should not be relitigated even though the litigation is still open, as it always is until

there is a final decree. Usually reconsideration of an interim determination because of "changed conditions" implies new events in nature. But new understanding of old facts or hitherto unexplored relevant facts may constitute the most significant kind of change in circumstances.

The essence of the matter before the Court is this. We are asked to give our imprimatur to a plan of far-reaching implications to the public interest, in that it concerns the control of one of the major railroad systems of the nation. That plan was born of the confused uncertainties of the war years, after a long period of incubation and many changes. Judgment often involves prophecy, and all prophecy has an element of guesswork. But guessing can be less rather than more. How much guesswork is involved in this plan has been candidly indicated by members of the Interstate Commerce Commission. To expect a "normal" period, in the sense of assured stability, for a good stretch ahead is doubtless to pursue a will-o'-the-wisp. But the President's message pointed to factors to which certainly no adequate attention has thus far been paid in these proceedings.

The President spoke of the "evil, present in reorganizations under section 77, of permitting improper control of railroads after their reorganization." Repeatedly he referred to this vital aspect of the public interest, the protection of which requires "that reorganizations shall place control of railroads in persons primarily concerned with transportation for the communities served and for the nation as a whole, without any strings direct or indirect, conditional or otherwise, to institutions or others in distant financial centers."

Here is certainly a matter of prime relevance in ascertaining whether this reorganization plan should be given final judicial sanction. The control of this major railroad system is to pass into the hands of the so-called insurance

group in New York and its two largest lending national banks. The directions in which insurance companies have in the past exerted their power over the railroads of the country are not calculated to give confidence in future control by them. The geographical and functional remoteness of powerful financial interests in New York, in relation to a railroad system operating in Colorado and Utah, bars that single-minded attentiveness and pioneering enterprise which characterized great railroad men like Edward H. Harriman, James J. Hill and Daniel Willard.

Another ground of President Truman's dissatisfaction with S. 1253 was its failure to deal adequately with the "grossly excessive interest rates now wasting the funds of the railroads in section 77 proceedings." To be sure, the Interstate Commerce Commission was not unmindful of the present low interest levels when it approved the 1943 reorganization plan. It is safe to say, however, that the significance of the sharp drop in interest levels has recently been made more manifest and further inquiry would lay it bare.

Finally, the President seemed much concerned by needless forfeitures under reorganization plans. In all discussions in Congress, the plan before us was given as a conspicuous example. The avoidance of forfeitures does not involve large capitalizations. It is to be avoided in other ways, such as calling for tenders of bonds by bondholders and their purchase by court trustees at the below-par prevailing market prices.

On two of these important aspects of sound financing in railroad reorganizations, proper interest rates and what has been called "the painless reorganization of the railroad debt structure," (see speech of Senator Vandenberg, August 3, 1939, 76th Cong., 1st Sess., 84 Cong. Rec. 11127), the record here is slender indeed, if not barren.

Here are lines of crucial public interest to which the Congress and the President have called authoritative at-

tention since the case was last here. These are matters on which the Court should satisfy itself on its own initiative whether or not private litigants have adequately presented them. The Court is not passing merely on specific issues framed by the parties or on the narrow claims on which the parties press for reconsideration. Abstractly, no one will reject what the President has called the principle that "reorganizations must give primary consideration to the public interest." But that public interest is in the keeping of the courts. It must be safeguarded by them without regard to the manner in which those who have also private interests represent the public interest.

And what consideration is more compelling than that this reorganization be re-examined by the Interstate Commerce Commission in the light of the vast changes of the transforming six years since the Interstate Commerce Commission closed its record in this case, particularly in light of the scrutiny which these reorganizations have received from the Congress and the President since this Court last considered the case? There is no suggestion that the interests of the railroad, or the public that it serves, or its creditors, will suffer by the delay necessary to explore further these basic issues before turning its control over to distant financial institutions. No one has suggested that this railroad has not served the public effectively while under court control, or that it cannot continue to do so until full inquiry dissipates the heavy clouds of doubt resting over this reorganization. To be sure, the road has been in reorganization since 1935. But it took four years for the formulation of the first reorganization plan and another four to formulate the additional plans. What Judge Learned Hand recently said of another situation is here applicable: "there can be considerations more imperative than the despatch of judicial business, even after delays so long as existed in this case. If the legally protected interests of any opposing parties are fully pre-

served, it is not a good reason to deny others any reasonable chance to protect their own interests that they have been long in asserting them." *Knight* v. *Wertheim & Co.*, 158 F. 2d 838, 844. Surely the protection of the public interest in the special keeping of the Court is more imperative than the despatch of judicial business, and no legally protected interest of those to whom the financial control of this road has been awarded can possibly suffer by full inquiry as to whether the paramount public interest has been properly safeguarded.

APPENDIX I.

MEMORANDUM OF DISAPPROVAL.

I am withholding my approval of S. 1253, entitled "An Act to enable debtor railroad corporations, whose properties during a period of seven years have provided sufficient earnings to pay fixed charges, to effect a readjustment of their financial structures; to alter or modify their financial obligations; and for other purposes."

Even though I am familiar with the deficiencies and inequities and the evils that exist under section 77 of the present Bankruptcy Act, I fear that this new bill would not accomplish the purpose for which it was intended.

The bill contains two sections, the first of which contemplates the prevention of bankruptcy proceedings where practicable; the second contemplates the reorganization of certain railroad carriers by the institution of proceedings under section 1 of the bill for readjustment of their financial affairs.

Objections which I have to the bill include the following:

The bill fails to direct specifically the immediate reduction of the grossly excessive interest rates now wasting the funds of the railroads in section 77 proceedings. Millions of dollars per year can be saved at once for each of

the railroads in section 77 proceedings, by reducing the interest rates on their bonds and other debt down to the level of the interest rates paid by railroads not in section 77 proceedings. I reiterate a statement which I made in my message to Congress on the state of the Union which is as follows, "low interest rates will be an important force in promoting the full production and full employment in the post-war period for which we are all striving."

The bill does not adequately cure the evil, present in reorganizations under section 77, of permitting improper control of railroads after their reorganization.

The bill fails to provide full protection against forfeiture of securities and investments.

The level of fees and expenses in reorganization cases under section 77 has been excessive. This is not corrected in this bill. Affirmative provisions to curb this evil and to bring it under strict control should be included in any bill which may be enacted.

The bill excludes from its benefits certain railroads which should be brought within its provisions if it is to become law. In this regard it appears that the fifty million dollar limitation in section 2 of the bill would exclude some railroads for whose exclusion there appears to be no logical justification.

This bill fails to correct a serious abuse which I condemned in the course of the Senate railroad investigation. I refer to the abuse of diverting, under cover of a reorganization plan, the funds of a railroad for the purchase of its own stocks in the market.

On the other hand, the bill does incorporate principles for which I was one of the sponsors in the Senate. I commend particularly the emphasis which the bill places on the principle that reorganizations must give primary consideration to the public interest, and to the best interests of the railroads which are being reorganized.

This requires among other things that reorganizations shall place control of railroads in persons primarily concerned with transportation for the communities served and for the nation as a whole, without any strings direct or indirect, conditional or otherwise, to institutions or others in distant financial centers.

Such regard for the public interest will also help the stockholders, whether they be railroad employees who have invested in the stocks of the companies for which they work, or ordinary investors, desirous of safeguarding their investment, but not of helping any interest to capture control of their railroad. These stockholders, whom the bill justly seeks to protect against forfeiture, can and should get such protection, but without enabling any financial interest to use such legislation to acquire control.

By withholding my signature to this bill I do not intend to indicate that I favor the pending reorganization plans. I am in agreement with those objectives of the bill which prevent undesirable control of the railroads, either immediately or within a few years, and which prevent forfeitures of securities.

I believe that the next Congress can pass a bill which will meet the stated objections and which will be in the best interests of the public, the railroads, the bondholders and other creditors, and the stockholders.

HARRY S. TRUMAN

THE WHITE HOUSE,
August 13, 1946.

APPENDIX II.

(S. Res. 65, 80th Cong., 1st Sess., Jan. 22, 1947, Cong. Rec. p. 543.)

Whereas many railroads in the continental United States are in the hands of receivers and trustees because

of insolvency proceedings brought under section 77 of the Bankruptcy Act, or through equity court procedure; and

Whereas the mileage of these railroads is approximately forty thousand, and the investment in road and equipment amounts to several billion dollars; and

Whereas many of these roads entered bankruptcy in 1933, 1934, 1935, or 1936, 10 to 14 years ago, and the earnings of these roads in recent years have been sufficient to accumulate large cash amounts, and have placed such roads in a solvent position; and

Whereas, according to the best information available, court proceedings involving some very important railroads are in such a condition that it is difficult if not impossible to approximate the time when reorganization under section 77 will be completed, and it is feasible for a number of these roads to retire part of their indebtedness, at a discount, and to refund or extend the maturity date of the balance of their indebtedness, and it further appears desirable to discharge such railroads from bankruptcy proceedings without the necessity of drastic reorganizations under section 77; and

Whereas the continued holding of roads that have become solvent in trustee or receiver operation as insolvent roads, and further efforts to reorganize, under section 77, railroads which no longer need such reorganization, are contrary to the general public interest and contrary to sound public policy; and

Whereas the President of the United States has joined with Congress in going on record in favor of modifications of present reorganization legislation and in favor of the principles proposed by the appropriate committees of the Senate and House of Representatives in 1946, and in favor of the principles enacted by Congress in 1946, and the President has further urged the strengthening of such pro-

posals and the adoption of further provisions to carry out those general principles: Therefore be it

Resolved, That the Committee on Interstate Commerce of the Senate is authorized and directed either as a committee, or through a duly constituted subcommittee, to make an investigation of the conditions surrounding the operation and handling of said railroads by trustees and receivers through the period of receivership or trusteeship; to ascertain the extent to which there should be elimination or reduction of any of the exceptions heretofore proposed to legislation on this subject; to inquire into the causes for the failures, (a) to reduce the interest rates of railroads in receivership and bankruptcy proceedings; (b) to arrange for the reduction of the rates of interest payable by such railroads on their outstanding indebtedness; (c) to arrange for the refunding and extension of maturity dates of part or all of the indebtedness of such railroads while in the hands of the courts; (d) to call for the tender of bonds and the purchase of bonds of such railroads either at a discount or otherwise, by the receivers or trustees, out of funds in their hands; (e) to discharge such railroads from court proceedings without the necessity of being subjected to drastic reorganization under section 77 of the Bankruptcy Act; and (f) to return such railroads to their owners as promptly as possible; to investigate the fees paid trustees, receivers, counsel, bankers or bank syndicates, committees and experts, and any and all matters relating thereto, and to ascertain the methods of reducing reorganization expenses and the possibility of eliminating, by discharge of railroads without further reorganization proceedings under section 77, the necessity for any further reorganization expenses under elaborate and therefore costly reorganization proceedings; to ascertain what legislative methods can be provided to enable railroads now undergoing reorganization to obtain management local to

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their lines of operation and to the communities, shippers, and passengers they serve, and to enable the owners of such railroads to secure control free from domination by interests which have not received the affirmative and express vote of the security holders subsequent to reorganization; to ascertain what voluntary methods and steps additional to those proposed in legislation adopted by the Seventy-ninth Congress on this subject will be useful in expediting the discharge of railroads from costly bankruptcy and reorganization proceedings without the necessity of drastic reorganizations under section 77, and to permit reorganization by voluntary proceedings in a businesslike manner and on a businesslike basis; to ascertain what methods and procedures, additional to those provided in legislation passed by the Seventy-ninth Congress on this subject, will be useful for the protection of railroad employees and other investors in the stocks of the railroads. The committee is directed to report to the Senate as early as practicable, with such recommendations as to changes in existing law as may be found desirable.

For the purposes of this resolution, the committee, or any duly authorized subcommittee thereof, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Eightieth Congress, to employ such clerical and other assistants, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to administer such oaths, to take such testimony, and to make such expenditures, as it deems advisable. The cost of stenographic services to report such hearings shall not be in excess of 25 cents per 100 words.

Counsel for Parties.

TRANSPARENT-WRAP MACHINE CORP. *v.* STOKES & SMITH CO.

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

No. 208. Argued January 7, 8, 1947.—Decided February 3, 1947.

A patent-licensing agreement granted an exclusive license to manufacture and sell in the United States, Canada and Mexico a patented machine under the patents then owned or later acquired by the licensor, subject to a condition that the licensee assign to the licensor any improvement patents applicable to the machine and suitable for use in connection with it. *Held:* The inclusion in the license of the condition requiring the licensee to assign improvement patents is not *per se* illegal and unenforceable. Pp. 642–648.
156 F. 2d 198, reversed.

In a suit for a declaratory judgment and an injunction instituted by a licensee under a patent-licensing agreement, the District Court sustained the validity of a condition requiring the licensee to assign improvement patents to the licensor. The Circuit Court of Appeals reversed. 156 F. 2d 198. This Court granted certiorari. 329 U. S. 695. *Reversed,* p. 648.

R. Morton Adams argued the cause and filed a brief for petitioner.

Samuel E. Darby, Jr. argued the cause for respondent. With him on the brief was *Virgil E. Woodcock.*

Acting Solicitor General Washington, Assistant Attorney General Sonnett and *Paul A. Sweeney* filed a brief for the United States, as *amicus curiae,* in support of respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit for a declaratory judgment (Judicial Code § 274d, 28 U. S. C. § 400) and an injunction, instituted by respondent for the determination of the legality and enforceability of a provision of a patent license agreement. The District Court, whose jurisdiction was based on diversity of citizenship (Judicial Code § 24 (1), 28 U. S. C. § 41 (1)), entered judgment for petitioner, holding the provision valid. The Circuit Court of Appeals reversed by a divided vote, 156 F. 2d 198, being of the opinion that the provision in question was illegal under the line of decisions represented by *Mercoid Corporation* v. *Mid-Continent Co.*, 320 U. S. 661. The case is here on a petition for a writ of certiorari which we granted because of the public importance of the question presented and of the apparent conflict between the decision below and *Allbright-Nell Co.* v. *Stanley Hiller Co.*, 72 F. 2d 392, decided by the Seventh Circuit Court of Appeals.

Petitioner, organized in 1934, has patents on a machine which bears the trade-mark "Transwrap." This machine makes transparent packages, simultaneously fills them with such articles as candy, and seals them. In 1937 petitioner sold and respondent acquired the Transwrap business in the United States, Canada, and Mexico, the right to use the trade-mark "Transwrap," and an exclusive license to manufacture and sell the Transwrap machine under the patents petitioner then owned or might acquire. The agreement contained a formula by which royalties were to be computed and paid. The term of the agreement was ten years with an option in respondent to renew it thereafter for five-year periods during the life of the patents covered by the agreement. The agreement could be terminated by petitioner on notice for specified defaults on respondent's part. The provision of

the agreement around which the present controversy turns is a covenant by respondent to assign to petitioner improvement patents applicable to the machine and suitable for use in connection with it.[1]

The parties had operated under the agreement for several years when petitioner ascertained that respondent had taken out certain patents on improvements in the machine. Petitioner notified respondent that its failure to disclose and assign these improvements constituted a breach of the agreement and called on respondent to

[1] The relevant portions of this provision read as follows:

"If the Licensee shall discover or invent an improvement which is applicable to the Transwrap Packaging Machine and suitable for use in connection therewith and applicable to the making and closing of the package, but not to the filling nor to the contents of the package, it shall submit the same to the Licensor, which may, at its option, apply for Letters Patent covering the same. In the event of the failure of the Licensor so to apply for Letters Patent covering such additional improvements, inventions or patentable ideas, the Licensee may apply for the same. In the event that such additional Letters Patent are applied for and are granted to the Licensor, they shall be deemed covered by the terms of this License Agreement and may be used by the Licensee hereunder without any further consideration, license fee or royalty as above provided. In the event that any such additional improvements are patented by the Licensee for use in connection with Transwrap Packaging Machines, (after the refusal or failure of the Licensor to apply for Patents thereon), the Licensor may, nevertheless, have the use but not the exclusive use of the same outside of the several territories covered by this License Agreement. The expenses of obtaining any such Patents shall be paid by the party applying therefor."

By another provision of the agreement, likewise challenged, it was provided that during the term of the license all improvement patents, whether secured by petitioner or by respondent, were to be included in the terms of the license without payment of an additional royalty. The petitioner, however, was to have the right to use and license the use of any such improvements outside the territories covered by the agreement.

remedy the default. When that did not occur, petitioner notified respondent that the agreement would be terminated on a day certain. Thereupon respondent instituted this action asking that the provisions respecting the improvement patents be declared illegal and unenforceable and that petitioner be enjoined from terminating the agreement.[2]

In a long and consistent line of cases the Court has held that an owner of a patent may not condition a license so as to tie to the use of the patent the use of other materials, processes or devices which lie outside of the monopoly of the patent. *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502; *Carbice Corp.* v. *American Patents Dev. Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458; *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488; *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495; *Mercoid Corporation* v. *Mid-Continent Co., supra; Mercoid Corp.* v. *Honeywell Co.*, 320 U. S. 680. As stated in *Morton Salt Co.* v. *Suppiger Co., supra*, p. 492, ". . . the public policy which includes inventions within the granted monopoly excludes from it all that is not embraced in the invention. It equally forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant." If such practices were tolerated,

[2] Petitioner joined issue and filed a counterclaim asking that the improvement patents be assigned, that the agreement be held terminated and that respondent be enjoined from using the original or improvement patents. The District Court dismissed the complaint, declared the agreement terminated, and ordered respondent to assign the petitioner the improvement patents. The Circuit Court of Appeals, on reversing, held not only that the provision for the assignment of the improvement patents was unlawful but also that petitioner was excused from any further performance because respondent had repudiated its agreement to assign those patents. It remanded the cause to the District Court to determine whether petitioner was entitled to restitution.

ownership of a patent would give the patentee control over unpatented articles which but for the patent he would not possess. "If the restraint is lawful because of the patent, the patent will have been expanded by contract. That on which no patent could be obtained would be as effectively protected as if a patent had been issued. Private business would function as its own patent office and impose its own law upon its licensees." *Mercoid Corp.* v. *Mid-Continent Co., supra,* p. 667. The requirement that a licensee under a patent use an unpatented material or device with the patent might violate the anti-trust laws but for the attempted protection of the patent. *Id.* The condemnation of the practice, however, does not depend on such a showing. Though control of the unpatented article or device falls short of a prohibited restraint of trade or monopoly, it will not be sanctioned. *Morton Salt Co.* v. *Suppiger Co., supra.* For it is the tendency in that direction which condemns the practice and which, if approved by a court either through enjoining infringement or enforcing the covenant, would receive a powerful impetus. *Id.*

The Circuit Court of Appeals was of the view that the principle of those cases was applicable here and rendered illegal and unenforceable the covenant to assign the improvement patents to petitioner. It stated, 156 F. 2d, p. 202, "The owner of all property, by withholding it upon any other terms, may, if he can, force others to buy from him; land is the best example and every parcel of land is a monopoly. But it is precisely in this that a patent is not like other property; the patentee may not use it to force others to buy of him things outside its four corners. If the defendant gets the plaintiff's patents, it will have put itself in that position, in part at any rate, by virtue of the compulsion of its own patents."

It went on to note that since all improvement patents would not expire until after expiration of petitioner's pat-

ents on the machine, the arrangement put respondent at a competitive disadvantage. For respondent would lose the negative command over the art which ownership of the improvement patents would have given it. Moreover, respondent, though able to renew the license on conditions stated in the agreement, would be irretrievably tied to it so as to be "forced, either to cease all efforts to patent improvements, or to keep renewing the contract in order to escape the consequences of its own ingenuity." *Id.*, p. 203.

First. The first difficulty we have with the position of the Circuit Court of Appeals is that Congress has made all patents assignable and has granted the assignee the same exclusive rights as the patentee. "Every application for patent or patent or any interest therein shall be assignable in law by an instrument in writing, and the applicant or patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under his application for patent or patent to the whole or any specified part of the United States." R. S. § 4898, 35 U. S. C. Supp. V § 47. The statute does not limit the consideration which may be paid for the assignment to any species or kind of property. At least so far as the terms of the statute are concerned, we see no difference whether the consideration is services (cf. *Standard Parts Co.* v. *Peck*, 264 U. S. 52) or cash, or the right to use another patent.

An improvement patent may, like a patent on a step in a process, have great strategic value. For it may, on expiration of the basic patent, be the key to a whole technology. One who holds it may therefore have a considerable competitive advantage. And one who assigns it and thereby loses negative command of the art may by reason of his assignment have suffered a real competitive handicap. For thereafter he will have to pay toll to the assignee, if he practices the invention. But the competi-

tive handicap or disadvantage which he suffers is no greater and no less whether the consideration for the assignment be the right to use the basic patent or something else of value. That is to say, the freedom of one who assigns a patent is restricted to the same degree whether the assignment is made pursuant to a license agreement or otherwise.

If Congress, by whose authority patent rights are created, had allowed patents to be assigned only for a specified consideration, it would be our duty to permit no exceptions. But here Congress has made no such limitation. A patent is a species of property. It gives the patentee or his assignee the "exclusive right to make, use, and vend the invention or discovery" for a limited period. R. S. § 4884, 35 U. S. C. § 40. That is to say, it carries for the statutory period "a right to be free from competition in the practice of the invention." *Mercoid Corporation* v. *Mid-Continent Co., supra,* p. 665. That exclusive right, being the essence of the patent privilege, is, for purposes of the assignment statute, of the same dignity as any other property which may be used to purchase patents.

Second. What we have said is not, of course, a complete answer to the position of the Circuit Court of Appeals. For the question remains whether here, as in *Mercoid Corporation* v. *Mid-Continent Co., supra,* and its predecessors, the condition in the license agreement violates some other principle of law or public policy. The fact that a patentee has the power to refuse a license does not mean that he has the power to grant a license on such conditions as he may choose. *United States* v. *Masonite Corp.,* 316 U. S. 265, 277.

As we have noted, such a power, if conceded, would enable the patentee not only to exploit the invention but to use it to acquire a monopoly not embraced in the patent.

Thus, if he could require all licensees to use his unpatented materials with the patent, he would have, or stand in a strategic position to acquire, a monopoly in the unpatented materials themselves. Beyond the "limited monopoly" granted by the patent, the methods by which a patent is exploited are "subject to the general law." *United States* v. *Masonite Corp., supra,* p. 277. Protection from competition in the sale of unpatented materials is not granted by either the patent law or the general law. He who uses his patent to obtain protection from competition in the sale of unpatented materials extends by contract his patent monopoly to articles as respects which the law sanctions neither monopolies nor restraints of trade.

It is at precisely this point that our second difficulty with the view of the Circuit Court of Appeals is found. An improvement patent, like the basic patent to which it relates, is a legalized monopoly for a limited period. The law permits both to be bought and sold. One who uses one patent to acquire another is not extending his patent monopoly to articles governed by the general law and as respects which neither monopolies nor restraints of trade are sanctioned. He is indeed using one legalized monopoly to acquire another legalized monopoly.

Mercoid Corporation v. *Mid-Continent Co., supra,* and its predecessors, by limiting a patentee to the monopoly found within the four corners of the grant, outlawed business practices which the patent law unaided by restrictive agreements did not protect. Take the case of the owner of an unpatented machine who leases it or otherwise licenses its use on condition that all improvements which the lessee or licensee patents should be assigned. He is using his property to acquire a monopoly. But the monopoly, being a patent, is a lawful one. The general law would no more make that acquisition of a patent unlawful than it would the assignment of a patent

for cash. Yet a patent is a species of property; [3] and if the owner of an unpatented machine could exact that condition, why may not the owner of a patented machine?

It is true that for some purposes the owner of a patent is under disabilities with which owners of other property are not burdened. Thus where the use of unpatented materials is tied to the use of a patent, a court will not lend its aid to enforce the agreement though control of the unpatented article falls short of a prohibited restraint of trade or monopoly. *Morton Salt Co.* v. *Suppiger Co., supra.* There is a suggestion that the same course should be followed in this case since the tendency of the practice we have here would be in the direction of concentration of economic power that might run counter to the policy of the anti-trust laws. The difficulty is that Congress has not made illegal the acquisition of improvement patents by the owner of a basic patent. The assignment of patents is indeed sanctioned. And as we have said, there is no difference in the policy of the assignment statute whatever consideration may be used to purchase the improvement patents. And apart from violations of the anti-trust laws to which we will shortly advert, the end result is the same whether the owner of a basic patent uses a license to obtain improvement patents or uses the wealth which he accumulates by exploiting his basic patent for that purpose. In sum, a patent license may not be used coercively to exact a condition contrary to public policy. But what falls within the terms of the assignment statute is plainly not *per se* against the public interest.

It is, of course, true that the monopoly which the licensor obtains when he acquires the improvement patents extends

[3] See *James* v. *Campbell,* 104 U. S. 356, 358; *Hollister* v. *Benedict Mfg. Co.,* 113 U. S. 59, 67; *Cramp & Sons Co.* v. *International Curtis Co.,* 246 U. S. 28, 39–40; *United States* v. *Dubilier Condenser Corp.,* 289 U. S. 178, 187.

beyond the term of his basic patent. But as we have said, that is not creating by agreement a monopoly which the law otherwise would not sanction. The grant of the improvement patent itself creates the monopoly. On the facts of the present case the effect on the public interest would seem to be the same whether the licensee or the licensor owns the improvement patents.

There is a suggestion that the enforcement of the condition gives the licensee less incentive to make inventions when he is bound to turn over to the licensor the products of his inventive genius. Since the primary aim of the patent laws is to promote the progress of science and the useful arts (*United States* v. *Masonite Corp., supra,* p. 278 and cases cited), an arrangement which diminishes the incentive is said to be against the public interest. Whatever force that argument might have in other situations, it is not persuasive here. Respondent pays no additional royalty on any improvement patents which are used. By reason of the agreement any improvement patent can be put to immediate use and exploited for the account of the licensee. And that benefit continues so long as the agreement is renewed. The agreement thus serves a function of supplying a market for the improvement patents. Whether that opportunity to exploit the improvement patents would be increased but for the agreement depends on vicissitudes of business too conjectural on this record to appraise.

Third. We are quite aware of the possibilities of abuse in the practice of licensing a patent on condition that the licensee assign all improvement patents to the licensor. Conceivably the device could be employed with the purpose or effect of violating the anti-trust laws. He who acquires two patents acquires a double monopoly. As patents are added to patents a whole industry may be regimented. The owner of a basic patent might thus per-

petuate his control over an industry long after the basic patent expired. Competitors might be eliminated and an industrial monopoly perfected and maintained.[4] Through the use of patent pools or multiple licensing agreements the fruits of invention of an entire industry might be systematically funneled into the hands of the original patentee. See *United Shoe Machinery Co.* v. *La Chapelle,* 212 Mass. 467, 99 N. E. 289.

A patent may be so used as to violate the anti-trust laws. *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20; *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436; *United States* v. *Masonite Corp., supra.* Such violations may arise through conditions in the license whereby the licensor seeks to control the conduct of the licensee by the fixing of prices (*Ethyl Gasoline Corp.* v. *United States, supra; United States* v. *Masonite Corp., supra*) or by other restrictive practices. *United Shoe Machinery Corp.* v. *United States, supra.* Moreover, in the Clayton Act, 38 Stat. 730, 731, 15 U. S. C. § 14, Congress made it unlawful to condition the sale or lease of one article on an agreement not to use or buy a competitor's article (whether either or both are patented), where the effect is "to substantially lessen competition or tend to create a monopoly." See *International Business Machines Corp.* v. *United States,* 298 U. S. 131. Congress, however, has made no specific prohibition against conditioning a patent license on the assignment by the licensee of improvement patents. But that does not mean that the

[4] See Patents and Free Enterprise, Monograph No. 31, Investigation of Concentration of Economic Power, Temporary National Economic Committee, 76th Cong., 3d Sess., chs. V & VII; Wood, Patents and Antitrust Law (1941), chs. 3 & 4; Marcus, Patents, Antitrust Law and Antitrust Judgments through Hartford-Empire, (1945–46) 34 Georgetown L. J. 1.

practice we have here has immunity under the anti-trust laws. Indeed, the recent case of *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 324 U. S. 570, dramatically illustrates how the use of a condition or covenant in a patent license that the licensee will assign improvement patents may give rise to violations of the anti-trust laws.[5]

The District Court found no violation of the anti-trust laws in the present case. The Circuit Court of Appeals did not reach that question. Hence it, as well as any other questions which may have been preserved, are open on our remand of the cause to the Circuit Court of Appeals.

We only hold that the inclusion in the license of the condition requiring the licensee to assign improvement patents is not *per se* illegal and unenforceable.

Reversed.

MR. JUSTICE BLACK, MR. JUSTICE RUTLEDGE, and MR. JUSTICE BURTON would affirm the judgment for the reasons set forth in the opinion of the Circuit Court of Appeals.

MR. JUSTICE MURPHY is of the view that the judgment below should be affirmed. He believes that the Court's decision in this case unduly enlarges the scope of patent monopolies and is inconsistent with the philosophy enunciated in *Mercoid Corporation* v. *Mid-Continent Co.,* 320 U. S. 661, and similar cases.

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[5] See note 45 Col. L. Rev. 601.

ELLIS *v.* UNION PACIFIC RAILROAD CO.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 320. Argued January 16, 17, 1947.—Decided February 3, 1947.

1. In this action under the Federal Employers' Liability Act, the evidence of the defendant's negligence (detailed in the opinion) was sufficient to justify submission of the case to the jury; and the judgment of the appellate court setting aside a verdict for the plaintiff is reversed. Pp. 652–653.
2. The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. P. 653.
3. If there is a reasonable basis in the record for concluding that there was negligence of the employer which caused the injury, it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavender* v. *Kurn,* 327 U. S. 645. P. 653.

147 Neb. 18, 22 N. W. 2d 305, reversed.

In a suit in a Nebraska court under the Federal Employers' Liability Act, the plaintiff obtained a judgment on a jury verdict. The Supreme Court of Nebraska reversed for insufficiency of the evidence to show negligence and ordered the complaint dismissed. 146 Neb. 397, 19 N. W. 2d 641; 147 Neb. 18, 22 N. W. 2d 305. This Court granted certiorari. 329 U. S. 706. *Reversed,* p. 653.

George Mecham argued the cause for petitioner. With him on the brief were *L. Wm. Crawhall* and *William A. Tautges.*

Robert B. Hamer argued the cause for respondent. With him on the brief was *Thomas W. Bockes.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner was crushed between a moving railroad car and a building while working for respondent railroad as

an engine foreman in charge of a switching crew. Damages for personal injuries were sought in a Nebraska state court under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.* Judgment was rendered for petitioner on a jury verdict for $10,000, but on appeal the state Supreme Court reversed for insufficiency of evidence to show negligence, and ordered the complaint dismissed. 146 Neb. 397, 19 N. W. 2d 641; 147 Neb. 18, 22 N. W. 2d 305. We granted certiorari because of an apparent conflict between that decision and *Lavender* v. *Kurn,* 327 U. S. 645.

Petitioner's evidence tended to show the following: Petitioner, aged 41, had been in the employ of respondent only one year, and had a total railroad experience of two or three years. Just before sunset on March 15, 1943, he was engaged, along with other members of his crew, in backing an engine and box car around a curve on a spur track where visibility was obstructed by a building located on the inside and near the middle of the curve. He was standing on the ground on the same side as the building and to the right of the engine, and was controlling operations by hand signals to the engineer. Engine foremen frequently stand to the right of the engine, on the engineer's side of the cab. A switchman was located around the curve, out of sight of the engineer, on a loading platform at which the car was to be "spotted." Petitioner moved between the building and the track in an attempt to be in a central position from which he could receive signals from the switchman and relay them to the engineer. As the car moved past petitioner, it caught and pinned the upper part of his body against the wall of the building, causing serious injuries. The situation was deceptive because the overhang of the car on the curve and its tilt toward the building resulting from a higher outside rail, reduced clearance materially. In fact, the place where petitioner was standing was in the one short segment

of the arc of the curve where clearance was insufficient. Petitioner was unfamiliar with the area and its hazards; if there was a sign warning of the danger, he did not see it; no effort was made to warn him personally. The nearness of the track to the building created an unsafe place for work. Though the engineer was an experienced railroad worker thoroughly familiar with this particular spur, and though it was his duty to watch petitioner continuously or stop the engine,[1] he failed either to warn petitioner or to stop in time to avert the tragedy. During the operation the engineer could see the right side of petitioner and when he saw petitioner's right foot twisted on the ground, he stopped the train.

Respondent's evidence, on the other hand, tended to establish the following: Petitioner was inconsistent in his statements, and it actually appeared that he had worked around this spur a number of times. The clearance, once adequate, was impaired by a subsequent extension of the building over which the respondent had no control. Neither the overhang of the car nor the pitch of the curve was unusual. Respondent maintained, near the building and some eight feet above the ground, a prominent, legible sign reading "IMPAIRED CLEARANCE." It was not required or desirable that petitioner stand between the building and the track; he could equally well have performed his functions on the left, or safe, side of the engine. He did not stand where he could see the switchman, and, in fact, it was not necessary for him to relay signals from the switchman since the engineer would be in a position to watch the switchman himself when the car approached the loading platform. The engineer had not worked on the

[1] The engineer was required to have some member of the crew in sight at all times when the engine was in motion. At the time of the accident the undisputed testimony indicated that petitioner was the only member of the crew that the engineer could see. The engineer testified that he watched petitioner continuously.

ground and was not aware of the precise hazard; his distance from the petitioner (about 60 feet) and the configuration of the building were such that it was not apparent that the petitioner was in peril. That the engineer was vigilant is somewhat supported by the fact that the train was moving only one or two miles an hour and that he stopped it almost instantly, and within a distance of 12 or 14 inches, when petitioner was pinned between the car and the building.

From this evidence the jury might have concluded that petitioner had a safe place to work but elected to choose a dangerous one, that any duty of warning was fully discharged by the presence of the sign, and that the engineer had not been negligent in any way. In that view of the case the accident would be an unforeseeable, freak event or one caused solely by petitioner's own negligence. On the other hand, it would not have been unreasonable for the triers of fact to have inferred that it was proper and usual procedure to work on the right side of the engine, that the hazard was not readily apparent and was almost in the nature of a trap, that while the sign was placed so as to be readily visible from a train, it was insufficient warning to a man on the ground, and that consequently petitioner was not furnished a safe place to work.[2] And the jury might have thought that the engineer was negligent in failing to perceive the peril in time to avert the accident by a warning or by stopping the engine. Again, both parties might have been found negligent, in which event it would have been the duty of the jury, as the trial judge charged, to render a verdict based upon the damages caused by respondent's negligence diminished by the pro-

[2] The duty of the carrier to furnish a safe place to work "is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent." *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353.

portion of negligence attributable to petitioner. 45 U. S. C. § 53.

The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be "in whole or in part" the cause of the injury. 45 U. S. C. § 51; *Brady* v. *Southern R. Co.,* 320 U. S. 476, 484. Whether those standards are satisfied is a federal question, the rights created being federal rights. *Brady* v. *Southern R. Co., supra; Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350.

The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. *Tennant* v. *Peoria & P. U. R. Co.,* 321 U. S. 29; *Lavender* v. *Kurn, supra.* Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavender* v. *Kurn, supra,* p. 652. And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. *Washington & Georgetown R. Co.* v. *McDade,* 135 U. S. 554, 572; *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 68.

We think the evidence raised substantial questions for the jury to determine and that there was a reasonable basis for the verdict which it returned.

Reversed.

UNITED STATES *v.* N. Y. RAYON IMPORTING CO., INC. (#2) ET AL.

NO. 94. CERTIORARI TO THE COURT OF CLAIMS.*

Argued January 8, 1947.—Decided February 3, 1947.

1. The Court of Claims is precluded by § 177 (a) of the Judicial Code from awarding interest on claims for refunds of customs-duties, even though the claims were based upon pre-existing judgments of the Customs Court, and even assuming that the General Accounting Office had unreasonably delayed the determination of ownership of the funds. P. 658.
2. Apart from constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress. P. 658.
3. The consent of Congress to recovery of interest against the United States may be given, as indicated by § 177 (a), only by (1) a specific provision for the payment of interest in a statute, or (2) an express stipulation for the payment of interest in a contract duly entered into by agents of the United States. P. 659.
4. Since there is no contractual stipulation involved in this case, and since the appropriation statutes which cover the refunds here in issue contain no provision for the recovery of interest, the traditional immunity of the United States, as codified in § 177 (a), applies. P. 659.
5. That an award of interest on a claim against the United States would be just or equitable does not empower the Court of Claims to make it. Pp. 659–660.
6. Assuming that officials of the General Accounting Office unreasonably delayed determination of the ownership of the funds, this could not operate as a consent on the part of the United States to imposition of interest. P. 660.
7. The immunity established by § 177 (a) embraces claims arising out of pre-existing judgments. P. 661.
8. The Act of March 3, 1875, as amended by the Act of March 3, 1933 (31 U. S. C. § 227), relates solely to cases where the Government asserts a set-off against a judgment creditor, and is inapplicable in the circumstances here. P. 662.

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*Together with No. 96, *N. Y. Rayon Importing Co., Inc. (#2) et al.* v. *United States*, also on certiorari to the Court of Claims.

9. Courts lack the power to award interest against the United States on the basis of what they may consider to be sound policy. P. 663.
105 Ct. Cl. 606, 64 F. Supp. 684, reversed in part.

From a judgment of the Court of Claims, which included an award of interest, 105 Ct. Cl. 606, 64 F. Supp. 684, the United States and the claimants sought review on cross-petitions for certiorari, which this Court granted. 329 U. S. 699. In No. 94, the judgment is reversed so far as it includes interest. In No. 96, the writ of certiorari is dismissed. P. 663.

Samuel D. Slade argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Stanley M. Silverberg* and *Paul A. Sweeney.*

Joseph M. Proskauer argued the cause for the N. Y. Rayon Importing Co. et al. With him on the brief were *Eugene Eisenmann* and *Albert L. Solodar.*

Opinion of the Court by MR. JUSTICE MURPHY, announced by MR. JUSTICE RUTLEDGE.

This case involves another impact of § 177 (a) of the Judicial Code [1] on the power of the Court of Claims to award interest in a judgment against the United States.

The N. Y. Rayon Importing Co., Inc., (Rayon #1) and the Nyrayco Importing & Converting Corporation (Nyrayco) were engaged in the importation of rayon yarn. Between 1925 and 1929 they paid customs duties on such importations which they claimed were erroneous. Prior to March 1, 1930, they filed protests with the Collector of Customs in accordance with applicable Tariff Act provisions, which resulted in the institution of actions in the United States Customs Court.

[1] 28 U. S. C. § 284 (a).

On March 1, 1930, the N. Y. Rayon Importing Co., Inc., (Rayon #2) was incorporated for the purpose of acquiring all the assets and assuming all the liabilities of Rayon #1, Nyrayco and two other corporations in the rayon business. As a part of this reorganization, Rayon #1 was dissolved as of March 1, 1930, the New York Secretary of State issuing a certificate of dissolution on that date.

Rayon #2 was voluntarily dissolved on January 9, 1931, in accordance with New York law. Nyrayco was dissolved on December 16, 1935, by proclamation for nonpayment of New York franchise taxes.

In 1937, long after these three corporations were dissolved, the Customs Court rendered decisions sustaining the protests which Rayon #1 and Nyrayco had filed in connection with the duties on rayon yarn imported between 1925 and 1929. A reliquidation of the customs entries was directed. On reliquidation, the Collector of Customs ascertained that a refund of $362,482.71 was payable to Rayon #1 and $30,809.75 to Nyrayco. Checks payable to those corporations were drawn, but since the corporations had been dissolved the Collector caused the checks to be transmitted to the General Accounting Office "for lawful disposition." Representatives of Rayon #2 thereafter requested the General Accounting Office to deliver these checks to them; this request was denied and the Comptroller General deposited the proceeds of the checks in the Treasury in a trust fund entitled "Outstanding Liabilities 1938," pursuant to law.[2]

Several unsuccessful attempts were made by the representatives of the three dissolved corporations to obtain the money in the trust fund. First, a consent decree was entered in a declaratory judgment proceeding in the Supreme Court of the State of New York adjudicating that,

[2] Section 21 of the Act of June 26, 1934, c. 756, 48 Stat. 1235, 31 U. S. C. § 725t.

as among the three dissolved corporations, Rayon #2 was the owner of these customs refunds or the proceeds thereof.[3] But the General Accounting Office refused to make payment when confronted with this decree. Thereafter, on February 26, 1943, attorneys for the three dissolved corporations suggested to the Comptroller General that the money be released to Rayon #1 and Nyrayco with the consent of Rayon #2, each corporation being represented by its director or directors as trustees in liquidation. The Comptroller General rejected this proposal and stated that payment would be permitted only upon final judgment by a court of competent jurisdiction concluding the issue of ownership. He suggested that a suit be brought for this purpose in the Court of Claims.

Rayon #2 and its liquidating directors and trustees then brought this suit in the Court of Claims, claiming that Rayon #2 continued to exist for the purpose of collecting and distributing its assets and that it was the owner of the funds in issue. Rayon #1 and Nyrayco also brought suits in the Court of Claims; they claimed the amounts of their respective refunds and alleged that ownership remained in them. After consideration of all three claims,[4] the court held that the rights of Rayon #1 and Nyrayco had been taken over by Rayon #2 and its liquidating directors and trustees, who were thus entitled to

[3] This non-adversary proceeding only affected rights as between Rayon #1 and Nyrayco, on the one hand, and Rayon #2 on the other. It provided the Government no protection as against the other possible claimants who were later impleaded and cited in the Court of Claims action. See footnote 4.

[4] The three suits were consolidated. In all three cases, the Societé Pour Nouveaux Placements de Capitaux was impleaded as plaintiff. It filed a disclaimer of interest and the Court of Claims dismissed "all claims of interest" which it had. Several other persons and companies were named by the United States as having possible claims, but none of them asserted any claims or filed any intervening petitions; the court dismissed "all claims of interest" as to them.

recover the amounts held in trust by the United States. 64 F. Supp. 684. As a part of its judgment, however, the Court of Claims awarded 6% interest on the total fund, such interest to run from April 19, 1941, the date of an amendment to the New York Tax Law which retroactively clarified the capacity to sue of involuntarily dissolved corporations.[5]

We issued a writ of certiorari in No. 94, on petition of the United States, to review the action of the Court of Claims in awarding such interest. At the same time, we issued a writ of certiorari in No. 96 on a cross-petition of Rayon #2 and its liquidating directors and trustees urging that interest should have been allowed from the time of the issuance of the refund checks in 1937 and 1938 rather than from April 19, 1941.

In our opinion, § 177 (a) of the Judicial Code prohibits the award of any interest under the circumstances of this case. Section 177 (a) provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, . . ." As we recently pointed out in *United States* v. *Thayer-West Point Hotel Co.*, 329 U. S. 585, this provision codifies the traditional rule regarding the immunity of the United States from liability for interest on unpaid accounts or claims. In other words, in the absence of constitutional requirements, interest can be recovered against the United

[5] April 19, 1941, was the date when the Governor of New York approved an amendment to § 203a of the New York Tax Law, removing all possible question whether corporations which had previously and involuntarily been dissolved under the New York Tax Law for non-payment of franchise taxes had the right to maintain suits. This had relevance, however, only to Nyrayco. Rayon #1 and Rayon #2 were voluntarily dissolved in accordance with § 105 of the New York Stock Corporation Law. Their right to maintain suit to collect their assets was never questioned.

States only if express consent to such a recovery has been given by Congress. And Congress has indicated in § 177 (a) that its consent can take only two forms: (1) a specific provision for the payment of interest in a statute; (2) an express stipulation for the payment of interest in a contract duly entered into by agents of the United States. Thus there can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed. *Tillson* v. *United States,* 100 U. S. 43; *United States* v. *Thayer-West Point Hotel Co., supra.*

Tested by those standards, the award of interest in this case cannot be sustained. There is obviously no contractual stipulation involved. And the appropriation statutes which cover the refunds here in issue contain no provision whatever for the recovery of interest. Act of May 14, 1937, 50 Stat. 137, 142; Act of June 25, 1938, 52 Stat. 1114, 1149. The traditional immunity of the United States, as codified in § 177 (a), accordingly applies.

The Court of Claims, without making a reference to § 177 (a), sought to justify its award of interest on what it thought "would be right or just." It felt that the officials of the General Accounting Office had delayed too long in determining the ownership of the refund claims and that, at the very least, they could have suggested at an earlier date that a suit in the Court of Claims was necessary. Inasmuch as it was known since the time of the Customs Court's decisions in 1937 that the money did not belong to the Government, the Court of Claims believed that it was only fair that the true owners get interest from the time when all defects and uncertainties were removed in

New York as to the capacity of dissolved corporations to maintain suits or to be sued.[6]

But assuming that the equities of the situation all favor the owners of the refund claims, the Court of Claims did not thereby acquire power to carve out an implied exception to the plain words of § 177 (a). Had Congress desired to permit the recovery of interest in situations where the Court of Claims felt it just or equitable, it could have so provided. The absence of such a provision is conclusive evidence that the court lacks any power of that nature. Indeed, any other conclusion would permit the Court of Claims to supply the consent which only Congress can give to the imposition of interest against the United States.

By the same token, if we assume that the officials of the General Accounting Office unreasonably delayed the determination of ownership of the funds, such action or inaction could not operate as a consent on the part of the United States. *Tillson* v. *United States, supra.* It has long been settled that officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court in the absence of some express provision by Congress. *Carr* v. *United States,* 98 U. S. 433; *Stanley* v. *Schwalby,* 162 U. S. 255; *Minnesota* v. *United States,* 305 U. S. 382; *United States* v. *Shaw,* 309 U. S. 495. The same rule applies here. Only Congress can take the necessary steps to waive the immunity of the United States from liability

[6] Rayon #2 and its liquidating directors and trustees claim that the date of April 19, 1941, has no relevance whatever to the claim of Rayon #1. See footnote 5. And they claim that this date has no proper relation to the Nyrayco claim since the Government made no objection to Nyrayco's capacity to sue until several years after the decisions of the Customs Court and after checks in its name had been drawn by the Government.

for interest on unpaid claims. Cf. *Smyth* v. *United States*, 302 U. S. 329, 353.

The owners of the refund claims, however, seek to avoid the effect of § 177 (a) by urging that it applies only to original claims which have not previously been reduced to judgment. This proceeding, it is said, is based upon the pre-existing judgments of the Customs Court, thereby precluding the application of § 177 (a). We do not pause here to inquire into the nature and effect of the decisions rendered by the Customs Court or the jurisdiction of the Court of Claims to entertain suits based upon pre-existing judgments. It is enough to note that the traditional rule embodied in § 177 (a) is a complete one covering all types of claims, including those arising out of pre-existing judgments. As we have seen, any exception to that rule must be grounded upon an express provision in a statute or contract. It follows that any exception relating to pre-existing judgments must be traced to specific language in a contract or some other statute. Section 177 (a) by itself warrants no such exception. Cf. 31 U. S. C. § 226.

In this connection, the owners of the refund claims point to the Act of March 3, 1875, as amended in 1933.[7] That

[7] Act of March 3, 1875, 18 Stat. 481, as amended by the Act of March 3, 1933, c. 212, Title II, § 13, 47 Stat. 1516, 31 U. S. C. § 227. This provides:

"When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United

Act directs the Comptroller General to withhold payment from a judgment creditor of the United States, if such creditor is indebted in turn to the United States, until the indebtedness is satisfied. The Comptroller General is to cause suit to be brought on the Government's cross debt if the judgment creditor denies the indebtedness. The Act then expressly permits 6% interest to be paid to the judgment creditor for the period of the withholding if the Government fails to win its suit and to substantiate its asserted set-off. Thus to that limited extent the Act of March 3, 1875, marks an exception to the traditional rule set forth in § 177 (a). See, for example, *American Potash Co.* v. *United States,* 80 Ct. Cl. 160, 8 F. Supp. 717; *Stewart & Co.* v. *United States,* 71 Ct. Cl. 126.

But the inapplicability of that Act to the facts of this case is at once apparent. The Act relates solely to the situation where the Government asserts a set-off against a judgment creditor. No such set-off is here asserted; there is nothing more than a withholding of payment by the Government until an ascertainment of ownership. In fact, there is no real claim that the situation in the instant case can be fitted within the terms of the Act of March 3, 1875. There is merely an argument that the policy of

States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff."

that Act in providing for the payment of interest where the withholding results from an erroneous belief in the existence of a cross-indebtedness applies with equal force where the withholding results from an attempt to determine ownership of a claim. But the immunity of the United States from liability for interest is not to be waived by policy arguments of this nature. Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy. We reiterate that only express language in a statute or contract can justify the imposition of such interest. Such language is absent in this instance.

We accordingly reverse the judgment of the Court of Claims in No. 94 to the extent that it includes an award of interest. And since it becomes unnecessary to consider the merits of the cross-claims, the writ of certiorari previously issued in No. 96 is dismissed.

So ordered.

DE MEERLEER *v.* MICHIGAN.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 140. Argued January 6, 1947.—Decided February 3, 1947.

On the same day that an information was filed in a state court charging him with murder, a 17-year-old defendant was arraigned, convicted on his plea of guilty, and sentenced to life imprisonment. He had no counsel and none was offered or assigned; the court did not apprise him of the consequences of his plea of guilty; no evidence was offered in his behalf and none of the State's witnesses were cross-examined. *Held* that he was deprived of rights essential to a fair hearing under the Federal Constitution. P. 665.

313 Mich. 548, 21 N. W. 2d 849, reversed.

A state court in which he had been convicted and sentenced for murder denied petitioner's motion for leave to file a delayed motion for a new trial. The state su-

preme court affirmed. 313 Mich. 548, 21 N. W. 2d 849. This Court granted certiorari. 329 U. S. 702. *Reversed,* p. 665.

David W. Louisell argued the cause and filed a brief for petitioner.

Edmund E. Shepherd, Solicitor General of Michigan, argued the cause for respondent. With him on the brief were *Eugene F. Black,* Attorney General, and *Daniel J. O'Hara,* Assistant Attorney General.

PER CURIAM.

In conformity with Michigan procedure, petitioner moved for leave to file a delayed motion for new trial in the court in which he had been convicted of first-degree murder. Serious impairment of his constitutional rights at the arraignment and trial were asserted as grounds for the motion. The trial court denied the motion, and the Supreme Court of Michigan on appeal affirmed that ruling. 313 Mich. 548, 21 N. W. 2d 849. We granted certiorari because of the importance of the constitutional issues presented.

The facts are not in dispute. On May 16, 1932, an information was filed in the Circuit Court of Lenawee County, Michigan, charging petitioner, then seventeen years of age, and one Virgil Scott with the crime of murder. On the same day, petitioner was arraigned, tried, convicted of first-degree murder and sentenced to life imprisonment. The record indicates that petitioner was without legal assistance throughout all these proceedings and was never advised of his right to counsel. The court did not explain the consequences of the plea of guilty, and the record indicates considerable confusion in petitioner's mind at the time of the arraignment as to the effect of such a plea. No

evidence in petitioner's behalf was introduced at the trial and none of the State's witnesses were subjected to cross-examination.

After reviewing the foregoing facts, the Supreme Court of Michigan determined that the record revealed no deprivation of petitioner's constitutional rights. The court indicated that it had given consideration to the case of *Hawk* v. *Olson,* 326 U. S. 271 (1945), and the authorities cited therein, but concluded that the rule of the Michigan cases was determinative. See *People* v. *Williams,* 225 Mich. 133, 195 N. W. 818 (1923). In this there was error.

Here a seventeen-year-old defendant, confronted by a serious and complicated criminal charge, was hurried through unfamiliar legal proceedings without a word being said in his defense. At no time was assistance of counsel offered or mentioned to him, nor was he apprised of the consequences of his plea. Under the holdings of this Court, petitioner was deprived of rights essential to a fair hearing under the Federal Constitution. *Powell* v. *Alabama,* 287 U. S. 45 (1932); *Williams* v. *Kaiser,* 323 U. S. 471 (1945); *Tomkins* v. *Missouri,* 323 U. S. 485 (1945); *White* v. *Ragen,* 324 U. S. 760 (1945); *Hawk* v. *Olson, supra.* See *Betts* v. *Brady,* 316 U. S. 455 (1942).

Reversed.

DECISIONS PER CURIAM, ETC., THROUGH FEBRUARY 3, 1947.*

No. 105. UNITED STATES EX REL. GOODMAN *v.* HEARN, COMMANDING GENERAL. Certiorari, 328 U. S. 833, to the Circuit Court of Appeals for the Fifth Circuit. September 7, 1946. Dismissed pursuant to Rule 35. *Harry Mesard* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 153 F. 2d 186.

No. 246. CONNECTICUT COMPANY *v.* WALLING, WAGE & HOUR ADMINISTRATOR. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. October 7, 1946. Dismissed on motion of counsel for the petitioner. *H. L. Filer* for petitioner. *Solicitor General McGrath, William S. Tyson* and *Morton Liftin* for respondent. Reported below: 154 F. 2d 552.

No. 440. UNITED STATES ET AL. *v.* NEW YORK ET AL. Appeal from the District Court of the United States for the Northern District of New York. October 7, 1946. Dismissed on motion of counsel for the appellants. *Attorney General Clark, Solicitor General McGrath, Assistant Attorney General Berge, Edward H. Miller, David O. Mathews, Daniel W. Knowlton* and *J. Stanley Payne* for appellants.

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*For orders on petitions for certiorari, see *post,* pp. 694, 713; rehearing, *post,* pp. 817, 818.

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No. 210. WHITMORE *v.* ORMSBEE, COMMISSIONER OF THE BUREAU OF REVENUE;

No. 211. KGFL, INC. *v.* ORMSBEE, COMMISSIONER OF THE BUREAU OF REVENUE; and

No. 212. HOUCK ET AL. *v.* ORMSBEE, COMMISSIONER OF THE BUREAU OF REVENUE. Appeals from the District Court of the United States for the District of New Mexico. October 14, 1946. *Per Curiam:* The motions to affirm are granted and the judgments are affirmed. (1) *Hillsborough* v. *Cromwell,* 326 U. S. 620, 623; *Matthews* v. *Rodgers,* 284 U. S. 521, 525; (2) *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202. *Lake J. Frazier* for appellants. *Arthur W. Scharfeld* and *Fred E. Wilson* for appellee. Reported below: 64 F. Supp. 911.

No. 276. GENERAL TRANSPORTATION CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the District of Massachusetts. October 14, 1946. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. §§ 5 (2) (a), 203 (a) (14), 212 (a), Interstate Commerce Act, as amended, 49 U. S. C. §§ 5, 303 (a) (14), 312 (a). *Michael Carchia* for appellants. *Solicitor General McGrath* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees. Reported below: 65 F. Supp. 981.

No. 296. EVANS, TRADING AS OTIS EVANS TRUCK LINE, *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Western District of Virginia. October 14, 1946. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Alton Railroad Co.* v. *United States,* 315 U. S. 15, 25; *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 484, 490; *Mis-*

sissippi Valley Barge Line Co. v. *United States,* 292 U. S. 282, 286–7. *Rutledge C. Clement* for appellant. *Solicitor General McGrath* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees. Reported below: 65 F. Supp. 183.

No. 318. MOFFETT ET AL. *v.* COMMERCE TRUST CO. ET AL. Appeal from the Supreme Court of Missouri. October 14, 1946. *Per Curiam:* The motion to dismiss is granted, and the appeal is dismissed for the reason that the decision of the state court sought here to be reviewed was based upon a non-federal ground adequate to support it. *Enterprise Irrigation District* v. *Farmers Canal Co.,* 243 U. S. 157, 165; *Utley* v. *St. Petersburg,* 292 U. S. 106, 111. *Martin J. O'Donnell* for appellants. *Charles M. Blackmar, John T. Harding, R. C. Tucker, Walter A. Raymond* and *B. C. Howard* for appellees. Reported below: 354 Mo. 1098, 193 S. W. 2d 588.

No. 338. KUT *v.* BUREAU OF UNEMPLOYMENT COMPENSATION ET AL. Appeal from the Supreme Court of Ohio. October 14, 1946. *Per Curiam:* The motion to dismiss is granted, and the appeal is dismissed for the reason that the decision of the state court sought here to be reviewed was based upon a non-federal ground adequate to support it. *Berea College* v. *Kentucky,* 211 U. S. 45. *Murray Seasongood* and *Lester A. Jaffe* for appellant. *E. G. Schuessler* for appellees. Reported below: 146 Ohio St. 522, 66 N. E. 2d 643.

No. 374. GALLUP *v.* TOWNSHIP OF LOWER MERION. Appeal from the Superior Court of Pennsylvania. October 14, 1946. *Per Curiam:* The motion to dismiss is

granted, and the appeal is dismissed for want of a substantial federal question. *Hadacheck* v. *Los Angeles,* 239 U.S. 394; *New Orleans Public Service* v. *New Orleans,* 281 U.S. 682. *G. Harry Ditter* for appellant. *Harold Evans* for appellee. Reported below: 158 Pa. Super. 572, 46 A. 2d 35.

No. 424. MEMPHIS NATURAL GAS CO. *v.* McCANLESS, COMMISSIONER OF FINANCE & TAXATION, ET AL. Appeal from the Supreme Court of Tennessee. October 14, 1946. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). 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. *Edward P. Russell* for appellant. *W. F. Barry, Jr.* for appellees. Reported below: 183 Tenn. 635, 194 S. W. 2d 476.

No. 220. BAILEY *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. October 14, 1946. *Per Curiam:* The Court having given consideration to the Government's confession of error, the petition for writ of certiorari is granted and the judgment of the Circuit Court of Appeals is reversed. *Theodore Lockyear* and *Paul Wever* for petitioner. *Solicitor General McGrath, W. Marvin Smith, Robert S. Erdahl* and *Andrew F. Oehmann* for the United States. Reported below: 155 F. 2d 184.

No. 10, original. UNITED STATES *v.* WYOMING ET AL. October 14, 1946. The report of the Special Master herein is received and ordered filed.

No. 1, Misc. WATKINS *v.* INDIANA ET AL.;
No. 3, Misc. REAVIS *v.* NIERSTHEIMER, WARDEN;
No. 5, Misc. VIALVA *v.* SHAW, DIRECTOR;
No. 6, Misc. FIELDS *v.* PARKER, WARDEN;
No. 7, Misc. MORRIS *v.* DELAWARE;
No. 8, Misc. DRAKOS *v.* NIERSTHEIMER, WARDEN;
No. 9, Misc. DONNELL *v.* STEWART, ACTING WARDEN;
No. 10, Misc. HANSON *v.* SMYTH, SUPERINTENDENT;
No. 11, Misc. MCCAULEY *v.* RAGEN, WARDEN;
No. 13, Misc. GODWIN *v.* SMYTH, SUPERINTENDENT;
No. 17, Misc. MINER *v.* RAGEN, WARDEN;
No. 21, Misc. EX PARTE TRENT;
No. 23, Misc. BANTZ *v.* SQUIER, WARDEN; and
No. 26, Misc. UNITED STATES EX REL. MCAULIFFE *v.* PENNSYLVANIA. October 14, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 12, Misc. HOUSE *v.* MAYO, PRISON CUSTODIAN, ET AL. October 14, 1946. The motions for leave to file petitions for writs of habeas corpus and certiorari are denied.

No. 4, Misc. WRIGHT *v.* CLARK, ATTORNEY GENERAL, ET AL. October 14, 1946. The application to withdraw the motion for leave to file petition for writ of habeas corpus is granted.

No. 27, Misc. UNITED STATES EX REL. MCCOLLISTER *v.* RAGEN, WARDEN. October 14, 1946. The motion for leave to file petition for writ of mandamus is denied.

No. 2, Misc. SLIVENSKY *v.* NEW JERSEY;
No. 14, Misc. MCMILLAN ET AL. *v.* TAYLOR ET AL.;

No. 15, Misc. DVORAK *v.* STUBBLEFIELD;
No. 16, Misc. SMITH *v.* PESCOR, WARDEN;
No. 22, Misc. MCMAHAN *v.* CLARK, ATTORNEY GENERAL;
No. 28, Misc. EX PARTE BROWN; and
No. 29, Misc. IN RE RUMBLE. October 14, 1946. The applications are denied.

No. 18, Misc. EX PARTE BETZ;
No. 19, Misc. EX PARTE DURANT;
No. 24, Misc. EX PARTE WILLS;
No. 25, Misc. EX PARTE CUTINO;
No. 30, Misc. EX PARTE WALCZAK;
No. 31, Misc. EX PARTE MCKINLEY; and
No. 32, Misc. EX PARTE MURPHY. October 14, 1946. The motions for leave to file petitions for writs of habeas corpus are denied for want of original jurisdiction. MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE are of the opinion that, as in *Ex parte Hawk*, 321 U. S. 114 (see also *White* v. *Ragen*, 324 U. S. 760, 765) where this Court declined to entertain an application for relief by habeas corpus, the petitions for habeas corpus should be denied without prejudice to their being filed in the appropriate District Court. See *Ex parte Endo*, 323 U. S. 283, 304–306. MR. JUSTICE MURPHY is of the view that these petitions raise questions as to jurisdiction and proper procedure which should be heard and determined by this Court. MR. JUSTICE JACKSON took no part in the consideration or decision of the application in No. 19, Miscellaneous.

No. 58. HOBBS, POST COMMANDING OFFICER, *v.* UNITED STATES EX REL. HOROWITZ; and
No. 59. HOBBS, POST COMMANDING OFFICER, *v.* UNITED STATES EX REL. SAMUELS. October 14, 1946.

Eagles substituted for Hobbs as the party petitioner herein.

No. 511. CINCINNATI, NEWPORT & COVINGTON RAILWAY CO. *v.* BRUMLEVE, DIRECTOR. On petition for writ of certiorari to the Court of Appeals of Kentucky. October 14, 1946. Dismissed on motion of counsel for the petitioner. *Stephens L. Blakely* and *Jacob L. Holtzmann* for petitioner. Reported below: 302 Ky. 477, 194 S. W. 2d 640.

No. 20. UNITED FEDERAL WORKERS OF AMERICA (C. I. O.) ET AL. *v.* MITCHELL ET AL. October 18, 1946. United Public Workers of America (C. I. O.) substituted as a party appellant herein in the place and stead of United Federal Workers of America (C. I. O.).

No. —. SEMEL ET AL. *v.* UNITED STATES. October 21, 1946. The motion for a stay is denied.

No. 36, Misc. EX PARTE GOINS;
No. 39, Misc. EX PARTE STEPHENSON; and
No. 40, Misc. EX PARTE MCCRACKIN. October 21, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 35, Misc. BURT *v.* CONGER, DISTRICT JUDGE; and
No. 38, Misc. EX PARTE HAYES. October 21, 1946. The motions for leave to file petitions for writs of mandamus are denied.

No. 82, Misc., October Term, 1945. SMITH *v.* MAGUIRE, JUSTICE OF THE DOMESTIC RELATIONS COURT OF THE CITY OF NEW YORK, ET AL.;

No. 83, Misc., October Term, 1945. HARDING *v.* LA-GUARDIA, MAYOR, ET AL.;

No. 33, Misc. STEPHENS, ADMINISTRATOR, *v.* UNITED STATES;

No. 34, Misc. MASSEY *v.* TEXAS;

No. 37, Misc. EX PARTE WILSON; and

No. 43, Misc. EX PARTE PORESKY. October 21, 1946. The applications are denied.

No. 20, Misc. LAVENDER, ADMINISTRATOR, *v.* CLARK, CHIEF JUSTICE OF THE SUPREME COURT OF MISSOURI, ET AL. October 21, 1946. The motion for leave to file petition for writ of mandamus is denied. MR. JUSTICE BLACK, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that leave to file should be granted and that a rule to show cause should issue. *N. Murry Edwards, James A. Waechter* and *Douglas H. Jones* for petitioner. *Maurice G. Roberts, Cornelius H. Skinker, Jr., William R. Gentry, Charles A. Helsell* and *John W. Freels* for respondents.

No. 2, October Term, 1941. BERNARDS ET AL. *v.* JOHNSON ET AL. October 21, 1946. The motion to recall the mandate is denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 625, October Term, 1945. HUST *v.* MOORE-MCCORMACK LINES, INC. October 21, 1946. Order entered amending opinion. The petition for rehearing is denied.

THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

Opinion reported as amended, 328 U. S. 707.

No. 531. COOK *v.* FORTSON, SECRETARY OF STATE, ET AL.; and

No. 532. TURMAN ET AL. *v.* DUCKWORTH, CHAIRMAN OF THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE, ET AL. Appeals from the District Court of the United States for the Northern District of Georgia. October 28, 1946. *Per Curiam:* The appeals are dismissed and the District Court is directed to dismiss the bill in each case. See *United States* v. *Anchor Coal Co.*, 279 U. S. 812. MR. JUSTICE BLACK and MR. JUSTICE MURPHY are of the opinion that probable jurisdiction should be noted. MR. JUSTICE RUTLEDGE is of the opinion that the question of jurisdiction should be postponed to the hearing of the cases on the merits and has set forth his views in an opinion (*infra*) which he has filed. *Alex. W. Smith* and *Croom Partridge* for appellant in No. 531. *Charles S. Reid, W. D. Thomson, Marshall L. Allison* and *John L. Tye* for appellants in No. 532. *Eugene Cook*, Attorney General of Georgia, *Victor Davidson, C. E. Gregory, Jr.*, Assistant Attorneys General, *John A. Dunaway, Walter McElreath, Samuel D. Hewlett* and *B. D. Murphy* for appellees. Reported below: 68 F. Supp. 624, 744.

MR. JUSTICE RUTLEDGE.

These appeals seek to invalidate Georgia's county unit system for selecting candidates for election to public office. No. 531 relates to the office of Representative in Congress, No. 532 to that of Governor. In each instance the basic substantive claim is that the system operates to deprive the appellants and other voters of the equal protection of the laws in respect to their rights of suffrage, contrary to

the provisions of the Fourteenth Amendment. Presented also are important questions of jurisdiction and of discretion in exercising it.[1] Both declaratory relief and injunctive relief in various forms were sought.

The District Court in each case denied applications for interlocutory injunctions. At the same time it formally declined to pass finally upon motions to dismiss the causes, although stating "We consider them, however, on the general question of the grant of interlocutory relief."[2] The court then went on to deny the applications upon grounds which, if sustained, would conclude the entire controversy in each case in all but formal entry of an order for dismissal.[3] The principal ground of decision in both cases was reliance upon *Colegrove* v. *Green,* 328 U. S. 549, decided June 10, 1946, rehearing denied this day, 329 U. S. 825, as precluding equitable relief. In No. 532 it was said this was required "whether it be that the subject matter is not of equitable cognizance, or merely that equity should withhold its hand."

In each case, however, the court refused to rest on this ground alone. In No. 531 it went on to rule, apparently, that the county unit system is imposed by party action, not by state action; and that the system was not being

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[1] The jurisdiction of this Court is invoked under §§ 238 and 266 of the Judicial Code as amended, 28 U. S. C. §§ 345, 380. In No. 532 it is not questioned that the attack is upon the validity of a state statute. In No. 531 one ground of appellee's motion to dismiss the appeal is that the appellant's suit attacks, not a state statute, but the rules and action of a political party. Cf. *Ex parte Collins,* 277 U. S. 565, 569.

The two decisions were rendered by three-judge District Courts, constituted identically, pursuant to § 266 of the Judicial Code.

[2] The quoted language is from the opinion in No. 532. A similar statement appears in the opinion in No. 531.

[3] In view of this fact an affirmance of the judgments here would preclude the District Court from taking any other action than to dismiss the causes, upon their being remanded to it.

applied in fact, since the state executive committee prior to the decisions had certified both candidates, subject to later action by the party's state convention. In No. 532 "in order that all questions may be ripe for consideration in the Appellate Court, if necessary," the opinion further stated that "on the ultimate merits we do not think the State of Georgia has been shown to have deprived the plaintiffs of the equal protection of the laws." The decisions come here therefore not only as somewhat dubious rulings upon strictly jurisdictional matters but as decisive and conclusive adjudications upon the merits.

It may be that the orders now in appeal have become moot in part because actions in execution of the challenged Georgia laws which appellants sought to have restrained have now taken place.[4] But in No. 532 in one respect at least injunctive relief prayed for still could be given, if appellants should be found, on hearing, entitled to have it.[5] And in each case declaratory relief, appropriate in many instances where aid by way of injunction cannot be afforded,[6] is sought.

Obviously the appeals present questions related closely to the issues in *Colegrove* v. *Green*, but in my opinion not

[4] Thus, in No. 532, party officials have certified the results of the primary elections to the Secretary of State and he in turn has sent out the forms for ballots to county ordinaries on the basis of those certifications. The applications sought to restrain these acts.

[5] By amendment, to avoid the effect of the actions taken as set forth in note 4, appellant sought to restrain the Secretary of State from certifying the returns from the general election to the General Assembly.

[6] It was to avoid the limitations resulting from the fact that injunctive or other immediately effective equitable relief could not be given that relief by way of declaratory judgment was authorized by Congress. This Court has not yet determined that declaratory relief cannot be given beyond the boundaries fixed by the preexisting jurisdiction in equity, compare *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 262, with *Giles* v. *Harris*, 189 U. S. 475, 486, although three

necessarily determined by that decision. A majority of the justices participating refused to find that there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied.[7] I was of the opinion that, in the particular circumstances, this should be done as a matter of discretion, for the reasons stated in a concurring opinion. 328 U. S. 549, 564. Those reasons would be pertinent to a consideration of the present appeals, though not necessarily controlling in relation to the somewhat different facts and issues they involve.[8] The issues, whether of jurisdiction, of discretion in exercising it,[9] or of substantive right, are obviously important. In my judgment they have not been conclusively adjudicated by prior decisions of this Court. I therefore think they should not be determined without full hearing and consideration after argument here, more especially in view of the breadth and character of the rulings made in the District Court's decisions. Accordingly I think we should postpone determination of any jurisdictional issues until consideration of the merits and place the appeals upon the calendar for argument. I also think that if these appeals were to be so

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members of the Court announced their view apparently to that effect in *Colegrove* v. *Green,* 328 U. S. 549, 551–552. The outer boundaries of jurisdiction under the declaratory procedure remain largely undetermined. Cf. Judicial Code § 274d, 28 U. S. C. § 400; Borchard, Declaratory Judgments (2d ed. 1941) 365–367, 766–788, 868–874.

[7] Three of the justices so ruling thought the relief should be denied for want of jurisdiction. 328 U. S. 549, 550, opinion of MR. JUSTICE FRANKFURTER.

[8] The discretionary exercise or nonexercise of equitable or declaratory judgment jurisdiction, see *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, 300; *Di Giovanni* v. *Camden Fire Ins. Assn.,* 296 U. S. 64, 70, in one case is not precedent in another case where the facts differ. *Hale* v. *Allinson,* 188 U. S. 56, 77–78, quoted in *Di Giovanni* v. *Camden Fire Ins. Assn., supra,* at 71.

[9] See note 3.

treated, the petition for rehearing which has been filed in *Colegrove* v. *Green* should be granted and that case should be set for argument with them.

No. 45, Misc. READ *v.* ZIMMERMAN; and

No. 46, Misc. EX PARTE LEE. October 28, 1946. Applications denied. MR. JUSTICE MURPHY took no part in the consideration or decision of these applications.

No. 47, Misc. EX PARTE EVANS. October 28, 1946. The motion for leave to file petition for writ of habeas corpus is denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 278, October Term, 1945. RECONSTRUCTION FINANCE CORP. ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL.;

No. 279, October Term, 1945. RECONSTRUCTION FINANCE CORP. ET AL. *v.* DENVER & SALT LAKE WESTERN RAILROAD CO. ET AL.;

No. 280, October Term, 1945. RECONSTRUCTION FINANCE CORP. ET AL. *v.* CITY BANK FARMERS TRUST CO., TRUSTEE, ET AL.;

No. 281, October Term, 1945. RECONSTRUCTION FINANCE CORP. ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL.; and

No. 282, October Term, 1945. RECONSTRUCTION FINANCE CORP. ET AL. *v.* THOMPSON, TRUSTEE, ET AL. October 28, 1946. THE CHIEF JUSTICE announced that MR. JUSTICE FRANKFURTER has filed an opinion setting forth the detailed grounds for his dissent from the opinion and

judgment of the Court entered June 10, 1946, in these cases.

Dissenting opinion reported in 328 U. S. at 536.

No. 369. SIOUX TRIBE OF INDIANS *v.* UNITED STATES. October 28, 1946. On petition for writ of certiorari to the Court of Claims. Dismissed on motion of counsel for the petitioner. *Ralph H. Case* and *James S. Y. Ivins* for petitioner. *Solicitor General McGrath* for the United States. Reported below: 105 Ct. Cl. 725, 64 F. Supp. 312.

No. 504. MARR, DOING BUSINESS AS MARR DUPLICATOR CO., *v.* A. B. DICK CO. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. November 12, 1946. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to that court for consideration of the question, raised by the Solicitor General in his memorandum, as *amicus curiae*, "whether respondent's prosecution of the instant case may not constitute a fraud upon the courts." *C. P. Goepel* and *Edward D. Bolton* for petitioner. *Robert W. Byerly* and *Ralph M. Watson* for respondent. *Solicitor General McGrath* filed a brief for the United States as *amicus curiae*. Reported below: 155 F. 2d 923.

No. 42, Misc. EX PARTE JAMES. November 12, 1946. The motion for leave to file petition for writ of certiorari is denied.

No. 48, Misc. EX PARTE NELSON; and

No. 56, Misc. EX PARTE MCMAHAN. November 12, 1946. The motions for leave to file petitions for writs of mandamus are denied.

No. 49, Misc. EX PARTE KATO;

No. 52, Misc. EX PARTE CHRISTIAN;

No. 53, Misc. EX PARTE ALLEN;

No. 54, Misc. EX PARTE REDIKER; and

No. 55, Misc. EX PARTE GROSS. November 12, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 51, Misc. EX PARTE WHITEFIELD. November 12, 1946. The application is denied.

No. 57, Misc. EX PARTE FLETCHER. November 12, 1946. The motion for leave to file petition for writ of mandamus is denied. THE CHIEF JUSTICE and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 45, Misc. READ *v.* ZIMMERMAN. November 12, 1946. Motion denied.

No. 176. SHOTKIN *v.* JUDGES, SUPERIOR COURT, ATLANTA CIRCUIT. See *post*, p. 828.

No. 582. STATES MARINE CORPORATION *v.* MILITANO. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. November 12, 1946. Dismissed on motion of counsel for the petitioner. *Corydon B. Dunham* for petitioner. Reported below: 156 F. 2d 599.

Nos. 645 and 646. NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. *v.* PENNSYLVANIA. Appeals from the Supreme Court of Pennsylvania. November 18, 1946. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for the want of a substantial federal question. *Robert M. Fisher* and *John Y. Scott* for appellant. *George W. Keitel,* Deputy Attorney General of Pennsylvania, for appellee. Reported below: 354 Pa. 388, 47 A. 2d 272.

No. 58, Misc. SHOTKIN, TRUSTEE, *v.* PENNSYLVANIA COMPANY. November 18, 1946. The petitions for appeal and certiorari are denied.

No. 60, Misc. EX PARTE JOHNSON. November 18, 1946. The motion for leave to file petition for writ of mandamus is denied.

No. 59, Misc. EX PARTE PRATHER;

No. 61, Misc. EX PARTE BLEDSOE; and

No. 62, Misc. EX PARTE WILLIAMS. November 18, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 9, original. ILLINOIS *v.* INDIANA ET AL. November 18, 1946. The Interim Report of the Special Master and his Special Report as to Shell Oil Company and The Texas Company are received and ordered filed.

No. 670. MOTORISTS MUTUAL INSURANCE CO. *v.* HENDERSHOT, ADMINISTRATOR. Appeal from the Supreme Court of Ohio. November 25, 1946. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Wilbur E. Benoy* for appellant. *James M. Hinton* for appellee. Reported below: 147 Ohio St. 111, 68 N. E. 2d 67.

No. 64, Misc. EX PARTE JEFFRIES. November 25, 1946. The motion for leave to file petition for writ of habeas corpus is denied.

No. 65, Misc. EX PARTE WILSON. November 25, 1946. The motion for leave to file petition for writ of habeas corpus and petition for ancillary writ of certiorari are denied.

No. 66, Misc. EX PARTE MITCHELL. November 25, 1946. The application is denied.

No. 681. W. H. TOMPKINS CO., NOW TOMPKINS MOTOR LINES, INC., *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Middle District

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of Tennessee. December 9, 1946. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted. *James W. Wrape* and *Harold G. Hernly* for appellant. *Solicitor General McGrath* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees.

No. 368. SIOUX TRIBE OF INDIANS *v.* UNITED STATES. On petition for writ of certiorari to the Court of Claims. December 9, 1946. *Per Curiam:* The petition for rehearing is granted. The order entered October 21, 1946, denying certiorari, *post,* p. 758, is vacated and the petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Claims in order to enable that court to determine whether the Act of August 13, 1946, 60 Stat. 1049, gives rise to any claims which petitioners may assert to affect the judgment heretofore entered in this cause, as to which this Court means to intimate no opinion. *Ralph H. Case* and *James S. Y. Ivins* for petitioner. Reported below: 105 Ct. Cl. 658, 64 F. Supp. 303.

No. 67, Misc. EX PARTE SMITH;
No. 69, Misc. EX PARTE GRECO; and
No. 72, Misc. EX PARTE MYERS. December 9, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 68, Misc. EX PARTE DECLOUX;
No. 70, Misc. EX PARTE GLASS; and

No. 73, Misc. Ex parte Lee. December 9, 1946. The applications are denied.

No. 71, Misc. Ex parte Haines. December 9, 1946. The motion for an injunction is denied.

No. 334. Fowler *v.* Gill, General Superintendent. See *post*, p. 791.

No. 369. Sioux Tribe of Indians *v.* United States. On petition for writ of certiorari to the Court of Claims. December 16, 1946. *Per Curiam:* The order entered October 28, 1946, dismissing the petition for certiorari, *ante*, p. 680, is vacated on motion of counsel for the petitioner. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Claims in order to enable that court to determine whether the Act of August 13, 1946, 60 Stat. 1049, gives rise to any claims which petitioner may assert to affect the judgment heretofore entered in this cause, as to which this Court means to intimate no opinion. *Ralph H. Case* and *James S. Y. Ivins* for petitioner. *Solicitor General McGrath* for the United States. Reported below: 105 Ct. Cl. 725, 64 F. Supp. 312.

No. 389. McLaren *v.* Nierstheimer, Warden. On petition for writ of certiorari to the Criminal Court of Cook County, Illinois. December 16, 1946. *Per Curiam:* On suggestion of the Attorney General of Illinois, the petition for writ of certiorari is granted; the judgment is vacated and the case is remanded for further proceedings.

Petitioner *pro se*. *George F. Barrett*, Attorney General of Illinois, and *William C. Wines*, Assistant Attorney General, for respondent.

No. 454. FLEMING ET AL., TRUSTEES, ET AL. *v.* TRAPHAGEN ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. December 16, 1946. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed on the authority of *Vanston Committee* v. *Green*, 329 U. S. 156. *W. F. Peter* for petitioners. *Daniel James* for respondents. Reported below: 155 F. 2d 889.

No. 571. SCHINE CHAIN THEATRES, INC. ET AL. *v.* UNITED STATES. Appeal from the District Court of the United States for the Western District of New York. December 16, 1946. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a final judgment. *Edward F. McClennen, Willard S. McKay* and *Arthur Garfield Hays* for appellants. *Solicitor General McGrath* for the United States. Reported below: 63 F. Supp. 229.

No. 572. SCHINE CHAIN THEATRES, INC. ET AL. *v.* UNITED STATES. Appeal from the District Court of the United States for the Western District of New York. December 16, 1946. *Per Curiam:* The appeal is dismissed for failure to comply with Rule 12 of the Rules of this Court. *Willard S. McKay* and *Arthur Garfield Hays* for appellants. Reported below: 63 F. Supp. 229.

No. 264. CANTOS *v.* STYER, COMMANDING GENERAL. Certiorari, *post*, p. 700, to the Supreme Court of the Philip-

pines. December 16, 1946. *Per Curiam:* The writ of certiorari in this case is dismissed for the reason that the case is moot. *John E. McCullough* for petitioner. *Solicitor General McGrath, Assistant Solicitor General Washington* and *Frederick Bernays Wiener* for respondent.

No. 145. UYEKI *v.* STYER, COMMANDING GENERAL. December 16, 1946. The stay order entered herein on June 10, 1946, 328 U. S. 825, is vacated except insofar as it stays execution of the sentence of death.

No. 41, Misc. EX PARTE WHITE; and

No. 77, Misc. EX PARTE HOUSE. December 16, 1946. The motions for leave to file petitions for writs of certiorari are denied.

No. 74, Misc. PHILLIPS *v.* RAGEN, WARDEN; and

No. 75, Misc. EX PARTE MILLER. December 16, 1946. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 76, Misc. EX PARTE GOBIN. December 16, 1946. The motion for leave to file petition for writ of mandamus is denied.

No. 80. PARKER ET AL. *v.* PORTER, PRICE ADMINISTRATOR;

No. 483. MURRAY *v.* PORTER, PRICE ADMINISTRATOR;

No. 512. RALEY ET AL., TRADING AS RALEY'S FOOD STORE, *v.* PORTER, PRICE ADMINISTRATOR;

No. 526. 315 WEST 97TH STREET REALTY CO., INC. ET AL. *v.* PORTER, PRICE ADMINISTRATOR;

No. 583. PORTER, PRICE ADMINISTRATOR, *v.* MOHAWK WRECKING & LUMBER CO. ET AL.;

No. 682. PORTER, PRICE ADMINISTRATOR, *v.* RHODES, SHERIFF, ET AL.; and

No. 694. VICTOR ET AL., TRUSTEES, *v.* PORTER, PRICE ADMINISTRATOR. December 16, 1946. Fleming, Temporary Controls Administrator, substituted for Porter, Price Administrator.

No. 63, Misc. EX PARTE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY COMMITTEES AND TRUSTEES. December 16, 1946. The motion for leave to file petition for writs of mandamus and prohibition is denied. *Walter J. Cummings, Jr.* for petitioners. *Acting Solicitor General Washington, John D. Goodloe* and *W. Meade Fletcher* filed a memorandum for the Reconstruction Finance Corporation.

Nos. 677 and 678. SENDEROWITZ ET AL., TRADING AS ROYAL MANUFACTURING CO., *v.* PORTER, PRICE ADMINISTRATOR. December 18, 1946. Fleming, Temporary Controls Administrator, substituted for Porter, Price Administrator, as respondent.

No. —. MEDLEY *v.* REID, SUPERINTENDENT; and

No. —. COPELAND *v.* REID, SUPERINTENDENT. See *post*, p. 794.

No. —. EX PARTE FISHER. December 19, 1946. The application for a stay of execution is denied. *Charles H. Houston* for petitioner.

No. —. MEDLEY *v.* UNITED STATES. December 20, 1946. Motion for stay of execution denied. *James J. Laughlin* for petitioner.

No. —. ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* STEDMAN ET AL. December 23, 1946. The application for a stay is denied. *William V. Hodges* for petitioner. *George D. Gibson, Leonard D. Adkins* and *Edwin S. S. Sunderland* for respondents.

No. 12, original. UNITED STATES *v.* CALIFORNIA. December 23, 1946. The motion of Robert E. Lee Jordan for leave to intervene is denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 80, Misc. EX PARTE MILLER. December 23, 1946. The motion for leave to file petition for writ of habeas corpus is denied.

No. 78, Misc. EX PARTE HICKS; and

No. 81, Misc. EX PARTE PRESSLEY. December 23, 1946. The motions for leave to file petitions for writs of certiorari are denied.

No. 145. UYEKI *v.* STYER, COMMANDING GENERAL. On petition for writ of certiorari to the Supreme Court of the Philippines. January 6, 1947. *Per Curiam:* The writ of certiorari in this case is dismissed for the reason that the case is moot. *John E. McCullough* for petitioner. *Solicitor General McGrath* and *Frederick Bernays Wiener* for respondent.

No. 780. CHRONICLE & GAZETTE PUBLISHING CO., INC. *v.* ATTORNEY GENERAL OF NEW HAMPSHIRE ET AL. Appeal from the Supreme Court of New Hampshire. January 6, 1947. *Per Curiam:* The motion to dismiss is granted, and the appeal is dismissed for the want of a substantial federal question. (1) *Nebbia* v. *New York*, 291 U. S. 502; *Olsen* v. *Nebraska*, 313 U. S. 236. (2) *Associated Press* v. *Labor Board*, 301 U. S. 103; *Associated Press* v. *United States*, 326 U. S. 1. MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that probable jurisdiction should be noted. *Stanley M. Burns* and *Elisha Hanson* for appellant. *Robert W. Upton* for appellees. Reported below: 94 N. H. 148, 48 A. 2d 478.

No. 82, Misc. EX PARTE BLANTON;

No. 84, Misc. EX PARTE MCMILLAN; and

No. 86, Misc. EX PARTE BANTZ. January 6, 1947. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 85, Misc. EX PARTE DAYTON. January 6, 1947. The motion for leave to file petition for writ of mandamus is denied.

No. 83, Misc. EX PARTE MCMAHAN. January 6, 1947. The motion for an injunction is denied.

No. 87, Misc. EX PARTE BUFORD; and

No. 89, Misc. EX PARTE SCHAFFER. January 6, 1947. The applications are denied.

No. 88, Misc. EX PARTE WATKINS. January 6, 1947. The motion for leave to file petition for certiorari is denied.

No. 626. MARKHAM, ALIEN PROPERTY CUSTODIAN, *v.* ALLEN ET AL. January 6, 1947. Clark, Attorney General, as successor to the Alien Property Custodian, substituted as the party petitioner herein.

No. 44, Misc. WRIGHT *v.* JOHNSTON, WARDEN. See *post*, p. 803.

No. 397. CLARKE *v.* SANFORD, WARDEN. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit dismissed on motion of the petitioner. Petitioner *pro se*. *Solicitor General McGrath, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 156 F. 2d 115.

No. 50, Misc. CLARKE *v.* SANFORD, WARDEN. January 6, 1947. Leave granted to withdraw the motion for leave to file petition for writ of habeas corpus on motion of the petitioner.

No. 334. FOWLER *v.* GILL, GENERAL SUPERINTENDENT. See *post*, 832.

No. 90, Misc. EX PARTE BAILEY. January 13, 1947. The motion for leave to file petition for writ of habeas corpus is denied.

No. 800. UNITED STATES *v.* BALOGH. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. January 20, 1947. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Circuit Court of Appeals. *Falbo* v. *United States,* 320 U. S. 549. MR. JUSTICE MURPHY is of the opinion that the petition for certiorari should be denied. *Acting Solicitor General Washington* for the United States. *Hayden C. Covington* for respondent. Reported below: 157 F. 2d 939.

No. 91, Misc. EX PARTE WATKINS;
No. 92, Misc. EX PARTE HAINES; and
No. 94, Misc. EX PARTE OWENS. January 20, 1947. The motions for leave to file petitions for writs of certiorari are denied.

No. 79, Misc. EX PARTE CANNADY;
No. 93, Misc. EX PARTE THOMAS; and
No. 95, Misc. EX PARTE KNEISLEY. January 20, 1947. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 813. MARTINI ET AL., DOING BUSINESS AS LAKESIDE CUT-RATE LIQUOR STORE, *v.* PORTER, PRICE ADMINISTRATOR. January 20, 1947. Fleming, Temporary Controls Administrator, substituted as the party respondent herein.

No. 840. KENNEDY, WARDEN, *v.* UNITED STATES EX REL. KULICK. See *post,* p. 712.

No. 839. HORSMAN DOLLS, INC. *v.* NEW JERSEY UNEMPLOYMENT COMPENSATION COMMISSION. Appeal from the Court of Errors and Appeals of New Jersey. February 3, 1947. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Nathan Bilder* for appellant. *Herman D. Ringle* for appellee. Reported below: 134 N. J. L. 77, 45 A. 2d 681.

No. 97, Misc. EX PARTE MEYERS. February 3, 1947. The motion for leave to file petition for writ of prohibition is denied.

No. 98, Misc. EX PARTE EATON. February 3, 1947. The motion for leave to file petition for writs of habeas corpus and certiorari is denied.

No. 99, Misc. EX PARTE EVANS. February 3, 1947. The motion for leave to file petitions for writs of habeas corpus and certiorari is denied.

No. 100, Misc. EX PARTE DELISLE. February 3, 1947. The motion for leave to file petition for writ of habeas corpus is denied.

No. 73. ESTATE OF DOMINICK ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. February 3, 1947. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is dismissed per stipulation of counsel.

Asa B. Kellogg for petitioners. *Acting Solicitor General Washington* for respondent. Reported below: 152 F. 2d 843.

No. 442. UNITED STATES *v.* ELCHIBEGOFF. Certiorari, *post,* p. 704, to the Court of Claims. February 3, 1947. The motion by respondent to enlarge the issues is denied. The writ of certiorari is dismissed on motion of counsel for the petitioner. *Solicitor General McGrath* and *Assistant Solicitor General Washington* for the United States. *Joseph Forer* for respondent. Reported below: 106 Ct. Cl. 541.

No. 101, Misc. EX PARTE FINLEY. See *post,* p. 817.

ORDERS GRANTING CERTIORARI, FROM OCTOBER 7, 1946, THROUGH FEBRUARY 3, 1947.

No. 220. BAILEY *v.* UNITED STATES. See *ante,* p. 670.

No. 141. CONFEDERATED BANDS OF UTE INDIANS *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Court of Claims granted. *Ernest L. Wilkinson, John W. Cragun* and *Francis M. Goodwin* for petitioners. *Solicitor General McGrath, Roger P. Marquis* and *Fred W. Smith* for the United States. Reported below: 106 Ct. Cl. 33, 64 F. Supp. 569.

No. 148. ALBRECHT ET AL. *v.* UNITED STATES;
No. 149. LINNENBRINGER *v.* UNITED STATES;
No. 150. PITMAN ET AL. *v.* UNITED STATES;

No. 151. OLIVER, EXECUTOR, ET AL. *v.* UNITED STATES; and

No. 155. Q. W. S. S. REALTY & INVESTMENT CO. *v.* UNITED STATES. October 14, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *George Eigel* and *William L. Igoe* for petitioners in No. 148. *Roscoe Anderson* for petitioner in No. 149. *William H. Allen* for petitioners in No. 150. *William L. Igoe* for petitioners in No. 151. *Samuel M. Watson* for petitioner in No. 155. *Solicitor General McGrath, Roger P. Marquis* and *Wilma C. Martin* for the United States. Reported below: 155 F. 2d 73, 77.

No. 208. TRANSPARENT-WRAP MACHINE CORP. *v.* STOKES & SMITH CO. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *R. Morton Adams* for petitioner. *Samuel E. Darby, Jr.* and *Virgil E. Woodcock* for respondent. Reported below: 156 F. 2d 198.

No. 209. ADAMS *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Sydney A. Gutkin* for petitioner. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Helen R. Carloss* and *William Robert Koerner* for respondent. Reported below: 155 F. 2d 246.

No. 229. PATTERSON, SECRETARY OF WAR, ET AL. *v.* LAMB. October 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Solicitor General McGrath* for peti-

tioners. *Samuel T. Ansell, Roger Robb* and *Mahlon C. Masterson* for respondent. Reported below: 81 U. S. App. D. C. —, 154 F. 2d 319.

No. 235. UNITED STATES *v.* STANDARD OIL CO. OF CALIFORNIA ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General McGrath* for the United States. *Frank B. Belcher* for respondents. Reported below: 153 F. 2d 958.

No. 241. CRAIG ET AL. *v.* HARNEY, SHERIFF. October 14, 1946. Petition for writ of certiorari to the Court of Criminal Appeals of Texas granted. *Marcellus G. Eckhardt, Charles L. Black* and *Ireland Graves* for petitioners. *John S. McCampbell* for respondent. Reported below: 150 Tex. Cr. —, 193 S. W. 2d 178.

No. 270. INDUSTRIAL COMMISSION OF WISCONSIN ET AL. *v.* MCCARTIN ET AL. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Wisconsin granted. *Mortimer Levitan* for petitioners. *Harold M. Wilkie* for respondents. Reported below: 248 Wis. 570, 22 N. W. 2d 522.

No. 335. WALLING, WAGE & HOUR ADMINISTRATOR, *v.* NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY. On petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit; and

No. 336. WALLING, WAGE & HOUR ADMINISTRATOR, *v.* PORTLAND TERMINAL CO. On petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. October 14, 1946. The petitions for writs of certiorari are

granted. *Solicitor General McGrath* and *William S. Tyson* for petitioner. *Edwin F. Hunt, Walton Whitwell* and *Wm. H. Swiggart* for respondent in No. 335. *Leonard A. Pierce* and *E. Spencer Miller* for respondent in No. 336. *Harold B. Wahl* filed a brief for the Jacksonville Terminal Co., as *amicus curiae*, opposing the petitions. Reported below: No. 335, 155 F. 2d 1016; No. 336, 155 F. 2d 215.

No. 377. FAY *v.* NEW YORK; and

No. 452. BOVE *v.* NEW YORK. October 14, 1946. Petitions for writs of certiorari to the Court of Appeals of New York granted. *Robert J. Fitzsimmons* and *Harold R. Medina* for petitioner in No. 377. *Moses Polakoff* and *Samuel Mezansky* for petitioner in No. 452. *Frank S. Hogan* and *Whitman Knapp* for respondent. Reported below: 296 N. Y. 510, 68 N. E. 2d 453.

No. 384. NEW YORK EX REL. HALVEY *v.* HALVEY, CUSTODIAN. October 14, 1946. Petition for writ of certiorari to the Court of Appeals of New York granted. *Robert S. Florence* for petitioner. *Emanuel N. Frankel* for respondent. Reported below: 295 N. Y. 836, 66 N. E. 2d 851.

No. 404. MEXICAN LIGHT & POWER CO., LTD. *v.* TEXAS MEXICAN RAILWAY CO. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Texas granted. *Carl G. Stearns* and *Chas. W. Bell* for petitioner. *M. G. Eckhardt* for respondent. Reported below: 145 Tex. 50, 193 S. W. 2d 964.

No. 429. UNITED STATES *v.* FULLARD-LEO ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit

Court of Appeals for the Ninth Circuit granted. *Solicitor General McGrath* for the United States. Reported below: 156 F. 2d 756.

No. 443. PAULY *v.* MCCARTHY ET AL., TRUSTEES. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Utah granted. *Calvin W. Rawlings, Parnell Black* and *Harold E. Wallace* for petitioner. *W. Q. Van Cott* and *Dennis McCarthy* for respondents. Reported below: 166 P. 2d 501.

No. 106. UNITED STATES *v.* THAYER-WEST POINT HOTEL CO. October 14, 1946. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General McGrath* for the United States. *Ernest J. Ellenwood* and *John S. Shedden* for respondent. Reported below: 106 Ct. Cl. 60, 64 F. Supp. 565.

No. 190. BOZZA *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Harold Simandl* for petitioner. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 155 F. 2d 592.

No. 265. CARDILLO, DEPUTY COMMISSIONER, *v.* LIBERTY MUTUAL INSURANCE CO. ET AL. October 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Solicitor General McGrath* for petitioner. Reported below: 81 U. S. App. D. C. —, 154 F. 2d 529.

No. 367. MYERS *v.* READING COMPANY. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *John H. Hoffman* for petitioner. *Wm. Clarke Mason* for respondent. Reported below: 155 F. 2d 523.

No. 371. UNITED STATES NATIONAL BANK ET AL. *v.* CHASE NATIONAL BANK ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Robert I. Rudolph* for petitioners. *William Dean Embree* for respondents. Reported below: 155 F. 2d 755.

No. 430. UNITED STATES *v.* OGILVIE HARDWARE CO., INC. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General McGrath* for the United States. *H. C. Walker, Jr.* and *Elias Goldstein* for respondent. Reported below: 155 F. 2d 577.

No. 432. AETNA CASUALTY & SURETY CO. ET AL. *v.* FLOWERS. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Clyde W. Key* for petitioners. Respondent *pro se*. Reported below: 154 F. 2d 881.

No. 94. UNITED STATES *v.* N. Y. RAYON IMPORTING CO., INC. (#2) ET AL.; and

No. 96. N. Y. RAYON IMPORTING CO., INC. (#2) ET AL. *v.* UNITED STATES. October 14, 1946. The petitions for

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writs of certiorari to the Court of Claims are granted. *Solicitor General McGrath* for the United States in No. 94. With him on the brief in No. 96 were *Assistant Attorney General Sonnett* and *Paul A. Sweeney*. *Wilbur H. Friedman* for respondents in No. 94 and petitioners in No. 96. Reported below: 105 Ct. Cl. 606, 64 F. Supp. 684.

No. 206. KOSTER *v.* (AMERICAN) LUMBERMENS MUTUAL CASUALTY CO. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Milton Pollack* for petitioner. *Frank W. Glenn* for respondent. Reported below: 153 F. 2d 888.

No. 207. LAND, CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, ET AL. *v.* DOLLAR ET AL. October 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. MR. JUSTICE BLACK took no part in the consideration or decision of these applications. *Solicitor General McGrath* for petitioners. *Gregory A. Harrison, Clinton M. Hester* and *Michael M. Kearney* for respondents. Reported below: 81 U. S. App. D. C. —, 154 F. 2d 307.

No. 264. CANTOS *v.* STYER, COMMANDING GENERAL. October 14, 1946. Petition for writ of certiorari to the Supreme Court of the Philippines granted. *John E. McCullough* for petitioner. *Solicitor General McGrath* and *Frederick Bernays Wiener* for respondent.

No. 287. BAZLEY *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Henry S. Drinker* for petitioner. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Helen R. Carloss* and *Helen Goodner* for respondent. Reported below: 155 F. 2d 237.

No. 400. NORTHERN PACIFIC RAILWAY CO. *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Lorenzo B. da Ponte* and *Marcellus L. Countryman, Jr.* for petitioner. *Solicitor General McGrath* for the United States. Reported below: 156 F. 2d 346.

No. 184. CONE *v.* WEST VIRGINIA PULP & PAPER CO. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted limited to the questions of federal procedure raised by the petition for the writ. *W. J. McLeod, Jr.* for petitioner. *Christie Benet, J. B. S. Lyles* and *Charles W. Waring* for respondent. Reported below: 153 F. 2d 576.

No. 470. RICE ET AL. *v.* GREAT LAKES ELEVATOR CORP. ET AL.;

No. 471. RICE ET AL. *v.* BOARD OF TRADE OF CHICAGO;

No. 472. ILLINOIS COMMERCE COMMISSION ET AL. *v.* GREAT LAKES ELEVATOR CORP. ET AL.; and

No. 473. ILLINOIS COMMERCE COMMISSION ET AL. *v.* BOARD OF TRADE OF CHICAGO. October 21, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals

for the Seventh Circuit granted. *Lee A. Freeman* for Daniel F. Rice et al., petitioners in Nos. 470, 471, 472 and 473. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for the Illinois Commerce Commission et al., petitioners in Nos. 472 and 473. *Ferre C. Watkins, Floyd E. Thompson, Carl Meyer, Leo F. Tierney* and *Louis A. Kohn* for respondents in Nos. 470 and 472. *Weymouth Kirkland* and *Howard Ellis* for respondent in Nos. 471 and 473. Briefs were filed by *Frederick G. Hamley* and *John E. Benton* for the National Association of Railroad and Utilities Commissioners, as *amicus curiae,* in support of the petitions in Nos. 470 and 471, and by *Everett C. McKeage* and *H. F. Wiggins* for the Railroad Commission of California, as *amicus curiae,* in support of the petition in No. 470. Reported below: 156 F. 2d 33.

No. 312. UNITED STATES *v.* SILK, DOING BUSINESS AS ALBERT SILK COAL CO. October 21, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General McGrath* for the United States. *Robert Stone* and *Warren W. Shaw* for respondent. Reported below: 155 F. 2d 356.

No. 457. ADAMS *v.* UNITED STATES. October 21, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *John W. Lapsley* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 156 F. 2d 271.

No. 140. DE MEERLEER *v.* MICHIGAN. October 21, 1946. Petition for writ of certiorari to the Supreme Court

of Michigan granted. *David W. Louisell* for petitioner. *Eugene F. Black*, Attorney General of Michigan, *Edmund E. Shepherd*, Solicitor General, and *Daniel J. O'Hara*, Assistant Attorney General, for respondent. Reported below: 313 Mich. 548, 21 N. W. 2d 849.

No. 417. UNITED STATES DEPARTMENT OF AGRICULTURE, EMERGENCY CROP AND FEED LOANS *v.* REMUND, ADMINISTRATOR. October 28, 1946. Petition for writ of certiorari to the Supreme Court of South Dakota granted. *Solicitor General McGrath* for petitioner. *Dwight Campbell* for respondent. Reported below: 70 S. D. —, 23 N. W. 2d 281.

No. 431. TESTA ET AL. *v.* KATT. October 28, 1946. Petition for writ of certiorari to the Superior Court for Providence and Bristol Counties, Rhode Island, granted. *Solicitor General McGrath* and *J. Raymond Dubee* for petitioners. *Paul M. Segal, Harry P. Warner, Henry G. Fischer, George S. Smith, Philip J. Hennessey, Jr.* and *John W. Willis* for respondent. Reported below: 71 R. I. 472, 47 A. 2d 312.

No. 498. UNITED STATES *v.* SMITH, U. S. DISTRICT JUDGE, ET AL. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General McGrath* for the United States. *Robert T. McCracken, Stanley F. Coar* and *C. Russell Phillips* for John Memolo, respondent. Reported below: 156 F. 2d 642.

No. 543. FEDERAL POWER COMMISSION ET AL. *v.* ARKANSAS POWER & LIGHT CO. October 28, 1946. Petition

for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Solicitor General McGrath* for petitioners. *P. A. Lasley, A. J. G. Priest* and *Sidman I. Barber* for respondent. Reported below: 82 U. S. App. D. C. —, 156 F. 2d 821.

No. 504. MARR, DOING BUSINESS AS MARR DUPLICATOR CO., *v.* A. B. DICK CO. See *ante*, p. 680.

No. 442. UNITED STATES *v.* ELCHIBEGOFF. November 12, 1946. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General McGrath* for the United States. *Joseph Forer* for respondent. Reported below: 106 Ct. Cl. 541.

No. 562. RUTHERFORD FOOD CORP. ET AL. *v.* WALLING, WAGE & HOUR ADMINISTRATOR. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *E. R. Morrison* for petitioners. *Solicitor General McGrath, William S. Tyson* and *Morton Liftin* for respondent. Reported below: 156 F. 2d 513.

No. 564. WALLING, WAGE & HOUR ADMINISTRATOR, *v.* GENERAL INDUSTRIES CO. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General McGrath* and *William S. Tyson* for petitioner. *Carl F. Shuler* for respondent. Reported below: 155 F. 2d 711.

No. 625. CALDAROLA *v.* ECKERT ET AL., DOING BUSINESS AS THOR ECKERT & CO. November 12, 1946. Petition

for writ of certiorari to the Court of Appeals of New York granted. *Isidor Enselman* for petitioner. *Raymond Palmer* for respondents. Reported below: 295 N. Y. 463, 68 N. E. 2d 444.

No. 483. MURRAY *v.* PORTER, PRICE ADMINISTRATOR. On petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit;

No. 512. RALEY ET AL., TRADING AS RALEY'S FOOD STORE, *v.* PORTER, PRICE ADMINISTRATOR. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia; and

No. 583. PORTER, PRICE ADMINISTRATOR, *v.* MOHAWK WRECKING & LUMBER CO. ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. November 12, 1946. The petitions for writs of certiorari in these cases are granted limited to the question whether the Emergency Price Control Act authorizes the Administrator to delegate to district directors authority to sign and issue subpoenas. *Robert W. Upton* for petitioner in No. 483. *C. L. Dawson* for petitioners in No. 512. *Solicitor General McGrath* and *David London* for the Price Administrator. *John W. Babcock* for respondents in No. 583. Reported below: No. 483, 156 F. 2d 781; No. 512, 81 U. S. App. D. C. 156, 156 F. 2d 561; No. 583, 156 F. 2d 891.

No. 544. NATIONAL LABOR RELATIONS BOARD *v.* KEYSTONE STEEL & WIRE CO. ET AL. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General McGrath* and *Gerhard P. Van Arkel* for petitioner. *Hugh Fulton* and *Theodore C. Baer* for the Keystone Steel & Wire Co., and *Frederick V. Arber* for the Inde-

pendent Steel Workers Alliance, respondents. Reported below: 155 F. 2d 553.

No. 453. PENFIELD COMPANY ET AL. *v.* SECURITIES & EXCHANGE COMMISSION. November 18, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Morris Lavine* for petitioners. *Acting Solicitor General Washington, Roger S. Foster* and *Robert S. Rubin* for respondent. Reported below: 157 F. 2d 65.

No. 320. ELLIS *v.* UNION PACIFIC RAILROAD CO. November 25, 1946. Petition for writ of certiorari to the Supreme Court of Nebraska granted. *L. Wm. Crawhall* for petitioner. *Thomas W. Bockes* for respondent. Reported below: 147 Neb. 18, 22 N. W. 2d 305.

No. 368. SIOUX TRIBE OF INDIANS *v.* UNITED STATES. See *ante*, p. 684.

No. 606. UNITED STATES *v.* BAYER ET AL. December 9, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General McGrath* for the United States. *Charles H. Tuttle* for Samuel Bayer; *Archibald Palmer* and *I. Maurice Wormser* for Elias Bayer; and *Samuel T. Ansell* and *Roger Robb* for Walter V. Radovich, respondents. Reported below: 156 F. 2d 964.

No. 626. MARKHAM, ALIEN PROPERTY CUSTODIAN, *v.* ALLEN ET AL. December 9, 1946. Petition for writ of

certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General McGrath* for petitioner. *Joseph Wahrhaftig* for respondents. *Robert W. Kenny,* Attorney General of California, and *Everett W. Mattoon,* Deputy Attorney General, as *amici curiae,* were also on the brief in opposition. Reported below: 156 F. 2d 653.

No. 658. PACKARD MOTOR CAR CO. *v.* NATIONAL LABOR RELATIONS BOARD. December 9, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Louis F. Dahling* for petitioner. *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien, Ruth Weyand* and *Joseph B. Robison* for respondent. Reported below: 157 F. 2d 80.

No. 593. COPE *v.* ANDERSON, RECEIVER. December 9, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Harold Evans* for petitioner. *Robert S. Marx, Frank E. Wood* and *Harry Kasfir* for respondent. Reported below: 156 F. 2d 972.

No. 656. ANDERSON, RECEIVER, *v.* HELMERS ET AL. December 9, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Robert S. Marx, Frank E. Wood* and *Harry Kasfir* for petitioner. *Murray Seasongood* for respondents. Reported below: 156 F. 2d 47.

No. 759. UNITED STATES *v.* UNITED MINE WORKERS OF AMERICA; and

No. 760. UNITED STATES *v.* LEWIS. December 9, 1946. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia granted. *Attorney General Clark* for the United States. Reported below: See 70 F. Supp. 42.

No. 497. 149 MADISON AVENUE CORP. ET AL. *v.* ASSELTA ET AL. See *post*, p. 817.

No. 369. SIOUX TRIBE OF INDIANS *v.* UNITED STATES. See *ante*, p. 685.

No. 389. MCLAREN *v.* NIERSTHEIMER, WARDEN. See *ante*, p. 685.

No. 454. FLEMING ET AL., TRUSTEES, ET AL. *v.* TRAPHAGEN ET AL. See *ante*, p. 686.

No. 690. INSURANCE GROUP COMMITTEE ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL. December 16, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Henry W. Anderson, George D. Gibson, John W. Riely, Morrison Shafroth, William Grant, Alexander M. Lewis, Edwin S. S. Sunderland, James L. Homire, Kenneth F. Burgess, Walter J. Cummings, Jr., W. A. W. Stewart* and *Arthur A. Gammell* for petitioners. *William V. Hodges* and *Frank C. Nicodemus, Jr.* for respondents. *Acting Solicitor General Washington, John D. Goodloe* and *W.*

Meade Fletcher filed a memorandum for the Reconstruction Finance Corporation. Reported below: 150 F. 2d 28.

No. 673. HARRISON, COLLECTOR OF INTERNAL REVENUE, *v.* GREYVAN LINES, INC. December 16, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Acting Solicitor General Washington* for petitioner. *Wilbur E. Benoy* and *Robert Driscoll* for respondent. Reported below: 156 F. 2d 412.

No. 781. UNITED MINE WORKERS OF AMERICA *v.* UNITED STATES; and

No. 782. LEWIS *v.* UNITED STATES. December 16, 1946. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia granted. *Welly K. Hopkins, Edmund Burke, T. C. Townsend, Harrison Combs, M. E. Boiarsky, Joseph A. Padway, Henry Kaiser* and *James A. Glenn* for petitioners. Reported below: See 70 F. Supp. 42.

No. 674. COMMISSIONER OF INTERNAL REVENUE *v.* MUNTER; and

No. 675. COMMISSIONER OF INTERNAL REVENUE *v.* MUNTER. December 16, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Acting Solicitor General Washington* for petitioner. *Samuel Kaufman* for respondents. Reported below: 157 F. 2d 132.

No. 680. CHAMPION SPARK PLUG CO. *v.* SANDERS ET AL., DOING BUSINESS AS PERFECT RECONDITION SPARK PLUG

Co. December 16, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Wilber Owen, Carl F. Schaffer* and *Samuel E. Darby, Jr.* for petitioner. *John Wilson Hood* for respondents. Reported below: 156 F. 2d 488.

No. 405. GAYES *v.* NEW YORK. December 16, 1946. Petition for writ of certiorari to the County Court of Monroe County, New York, granted. Petitioner *pro se*. *Nathaniel L. Goldstein,* Attorney General of New York, for respondent.

No. 418. NATIONAL LABOR RELATIONS BOARD *v.* JONES & LAUGHLIN STEEL CORP. On petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit; and

No. 419. NATIONAL LABOR RELATIONS BOARD *v.* E. C. ATKINS & Co. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. December 23, 1946. The petition for writs of certiorari in these cases is granted. *Solicitor General McGrath* for petitioner. *John C. Bane, Jr.* for respondent in No. 418. *Kurt F. Pantzer* for respondent in No. 419. Reported below: No. 418, 154 F. 2d 932; No. 419, 155 F. 2d 567.

No. 811. UNITED MINE WORKERS OF AMERICA ET AL. *v.* UNITED STATES. December 23, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Welly K. Hopkins, Edmund Burke, T. C. Townsend, Harrison Combs, M. E. Boiarsky, Joseph A. Padway, Henry Kaiser* and *James A. Glenn* for petitioners. Reported below: See 70 F. Supp. 42.

No. 731. BARTELS ET AL., DOING BUSINESS AS CRYSTAL BALLROOM, *v.* BIRMINGHAM, COLLECTOR OF INTERNAL REVENUE, ET AL.; and

No. 732. GEER ET AL., DOING BUSINESS AS LARRY GEER BALLROOMS, *v.* BIRMINGHAM, COLLECTOR OF INTERNAL REVENUE. January 6, 1947. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Clyde B. Charlton* and *Joseph I. Brody* for petitioners. *Joseph A. Padway* and *Chauncey A. Weaver* for Williams et al., respondents in No. 731. Reported below: 157 F. 2d 295.

No. 62. MORRIS *v.* JONES, DIRECTOR OF INSURANCE. See *ante*, pp. 545, 547.

No. 800. UNITED STATES *v.* BALOGH. See *ante*, p. 692.

No. 715. OKLAHOMA ET AL. *v.* UNITED STATES. January 20, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mac Q. Williamson*, Attorney General of Oklahoma, *Harry O. Glasser* and *E. S. Champlin* for petitioners. *Acting Solicitor General Washington, Assistant Attorney General Bazelon* and *Roger P. Marquis* for the United States. *A. B. Mitchell*, Attorney General of Kansas, filed a brief for that State, as *amicus curiae*, in support of the petition. Reported below: 156 F. 2d 769.

No. 793. UNITED STATES *v.* MICHENER. January 20, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Acting So-*

licitor General Washington for the United States. Respondent *pro se.* Reported below: 157 F. 2d 616.

No. 840. KENNEDY, WARDEN, *v.* UNITED STATES EX REL. KULICK. January 20, 1947. Alexander substituted as the party petitioner herein. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Acting Solicitor General Washington* for petitioner. *Hayden C. Covington* for respondent. Reported below: 157 F. 2d 811.

No. 535. SUNAL *v.* LARGE, SUPERINTENDENT. January 20, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Hayden C. Covington* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 157 F. 2d 165.

No. 755. MCCULLOUGH *v.* KAMMERER CORPORATION ET AL. February 3, 1947. The petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is granted limited to the first question presented by the petition for the writ. *R. Whelton Whann, A. W. Boyken, Robert M. McManigal* and *W. Bruce Beckley* for petitioner. *Frederick S. Lyon* and *Leonard S. Lyon* for respondents. Reported below: 156 F. 2d 343.

No. 540. FOSTER ET AL. *v.* ILLINOIS. February 3, 1947. Petition for writ of certiorari to the Supreme Court of Illinois granted. Petitioners *pro se. George F. Bar-*

rett, Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 394 Ill. 194, 68 N. E. 2d 252.

ORDERS DENYING CERTIORARI, FROM OCTOBER 7, 1946, THROUGH FEBRUARY 3, 1947.

No. 424. MEMPHIS NATURAL GAS CO. *v.* MCCANLESS, COMMISSIONER OF FINANCE & TAXATION, ET AL. See *ante,* p. 670.

No. 99. CROWLEY *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Court of Claims denied. *H. D. Driscoll* and *H. Russell Bishop* for petitioner. *Solicitor General McGrath, Assistant Attorney General Sonnett, Paul A. Sweeney* and *Abraham J. Harris* for the United States. Reported below: 105 Ct. Cl. 97, 62 F. Supp. 887.

No. 100. SILAS MASON CO., INC. ET AL. *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Court of Claims denied. *Samuel T. Ansell* and *Burr Tracy Ansell* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett* and *Paul A. Sweeney* for the United States. Reported below: 105 Ct. Cl. 27, 62 F. Supp. 432.

No. 104. KIRBY LUMBER CO. *v.* KOUNTZE ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Joyce Cox* for petitioner. *Everett L. Looney* for respondents. Reported below: 153 F. 2d 695.

No. 107. BYNUM *v.* PHILLIPS PETROLEUM CO. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *D. H. Culton* for petitioner. *Rayburn L. Foster, R. B. F. Hummer* and *C. B. Cochran* for respondent. Reported below: 155 F. 2d 196.

No. 108. THOMPSON *v.* GEORGIA. October 14, 1946. Petition for writ of certiorari to the Court of Appeals of Georgia denied. *Oliver C. Hancock* for petitioner. Reported below: 72 Ga. App. 852, 35 S. E. 2d 306.

No. 109. MERCHANTS & MANUFACTURERS ASSOCIATION OF LOS ANGELES *v.* NATIONAL LABOR RELATIONS BOARD. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Henry William Elliott* and *John F. Gilbert* for petitioner. *Solicitor General McGrath, Gerhard P. Van Arkel, Morris P. Glushien* and *Joseph B. Robison* for respondent. Reported below: 151 F. 2d 483.

No. 110. CROWHURST ET AL. *v.* GRASSO. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Clarence Fried* for petitioners. *Abraham J. Isserman* for respondent. Reported below: 154 F. 2d 208.

No. 111. TEXAS *v.* CHUOKE ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Grover Sellers,* Attor-

ney General of Texas, and *Wm. J. Fanning,* Assistant Attorney General, for petitioner. Reported below: 154 F. 2d 1.

No. 113. LEWELLYN *v.* FLEMING ET AL., TRUSTEES, ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mark Goode* for petitioner. Reported below: 154 F. 2d 211.

No. 116. WALTON-VIKING CO. *v.* WALTER KIDDE & CO., INC. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Paul R. Stinson* for petitioner. *Ludwick Graves* and *Irvin Fane* for respondent. Reported below: 153 F. 2d 988.

No. 117. WITTER ET AL. *v.* NIKOLAS ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Meyer Abrams* for petitioners. *Walter E. Wiles* for respondents. Reported below: 153 F. 2d 802.

No. 118. O'NEAL, ADMINISTRATOR, *v.* UNION PRODUCING CO. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Gilbert P. Bullis* for petitioner. *Allan Sholars* and *Geo. Gunby* for respondent. Reported below: 153 F. 2d 157.

No. 120. BLANCHARD *v.* OOMS, COMMISSIONER OF PATENTS. October 14, 1946. Petition for writ of certiorari

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to the United States Court of Appeals for the District of Columbia denied. *J. Preston Swecker* for petitioner. *Solicitor General McGrath, Assistant Attorney General Sonnett, Paul A. Sweeney, John R. Benney* and *W. W. Cochran* for respondent. Reported below: 80 U. S. App. D. C. 400, 153 F. 2d 651.

No. 121. DIECKHAUS *v.* TWENTIETH CENTURY-FOX FILM CORP. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *John Raeburn Green* and *Milton I. Goldstein* for petitioner. *John F. Caskey* and *Samuel W. Fordyce* for respondent. Reported below: 153 F. 2d 893.

No. 123. CALIFORNIA *v.* EDMONDSON. October 14, 1946. Petition for writ of certiorari to the Superior Court in and for the County of Los Angeles, California, denied. *Ray L. Chesebro* and *John L. Bland* for petitioner.

No. 125. BROOKS ET AL. *v.* UNITED STATES EX REL. BAYARSKY. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Thomas McNulty, Edward A. Markley* and *Elmer S. King* for petitioners. *Solicitor General McGrath* for the United States. Reported below: 154 F. 2d 344.

No. 126. REID *v.* NELSON ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *James A. Dixon* for petitioner. *Harold B. Wahl* for respondents. Reported below: 154 F. 2d 724.

No. 127. SEVEN UP CO. *v.* CHEER UP SALES CO. ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Frank Y. Gladney* and *John H. Cassidy* for petitioner. *Oliver T. Remmers* for respondents. Reported below: 153 F. 2d 231.

No. 128. LIBERTY MUTUAL INSURANCE CO. ET AL. *v.* PILLSBURY, DEPUTY COMMISSIONER, ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Theodore Hale* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett* and *Paul A. Sweeney* for the Deputy Commissioner, respondent. Reported below: 154 F. 2d 559.

No. 133. CHATZ, TRUSTEE IN BANKRUPTCY, *v.* MIDCO OIL CORP. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *William S. Kleinman* for petitioner. *Samuel A. Boorstin* and *M. K. Hobbs* for respondent. Reported below: 152 F. 2d 153.

No. 135. CONTINENTAL BANK & TRUST CO., TRUSTEE, *v.* WINTER. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Louis B. Fine* for petitioner. *David W. Kahn* for respondent. Reported below: 153 F. 2d 397.

No. 136. LLOYD *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit de-

nied. *Jesse R. Fillman* and *Wm. Clarke Mason* for petitioner. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Helen R. Carloss* and *Morton K. Rothschild* for respondent. Reported below: 154 F. 2d 643.

No. 137. THIRD NATIONAL BANK *v.* FEDERAL SAVINGS & LOAN INSURANCE CORP.; and

No. 138. THIRD NATIONAL BANK *v.* FEDERAL DEPOSIT Co. October 14, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *John J. Hooker* for petitioner. *Solicitor General McGrath, Kenneth G. Heisler* and *Ray E. Dougherty* for respondent in No. 137. Reported below: 153 F. 2d 678.

No. 143. SAN GERONIMO DEVELOPMENT CO., INC. *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Nelson Gammans* for petitioner. *Solicitor General McGrath* and *Roger P. Marquis* for the United States. Reported below: 154 F. 2d 78.

No. 144. CALVERT *v.* SMITH ET AL. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Samuel B. Brown* for petitioner.

No. 146. RIMBOW ET AL., DOING BUSINESS AS HUCKABY FUNERAL SERVICE, *v.* RIMBOW ET AL. October 14, 1946. Petition for writ of certiorari to the Court of Civil Appeals, 1st Supreme Judicial District, of Texas, denied. *F. S. K.*

Whittaker for petitioners. *Albert J. DeLange* and *Henry E. Kahn* for respondents. Reported below: 191 S. W. 2d 89.

No. 152. BARNES *v.* NEW YORK. October 14, 1946. Petition for writ of certiorari to the Court of Appeals of New York denied. *Thomas L. Newton* for petitioner. *Alan V. Parker* for respondent. Reported below: 295 N. Y. 979, 68 N. E. 2d 57.

No. 156. GEORGE-HOWARD ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *B. C. Howard* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett, Paul A. Sweeney, James M. Kane* and *Jerome Walsh* for respondent. Reported below: 153 F. 2d 591.

No. 157. HEDRICK *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Jeremiah F. Cross* for petitioner. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Helen R. Carloss* and *Hilbert P. Zarky* for respondent. Reported below: 154 F. 2d 90.

No. 158. J. E. HADDOCK, LTD. ET AL. *v.* PILLSBURY, DEPUTY COMMISSIONER, ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Frank J. Creede* for peti-

tioners. *Solicitor General McGrath, Assistant Attorney General Sonnett* and *Paul A. Sweeney* for respondents. Reported below: 155 F. 2d 820.

No. 161. CRAWFORD & DOHERTY FOUNDRY CO. *v.* PORTER, PRICE ADMINISTRATOR. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Robert Treat Platt* for petitioner. *Solicitor General McGrath, John R. Benney* and *David London* for respondent. Reported below: 154 F. 2d 431.

No. 162. H. MOFFAT CO. *v.* SOUTHERN PACIFIC CO.; and

No. 163. UNION SHEEP CO. *v.* SOUTHERN PACIFIC CO. October 14, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *George B. Thatcher* and *Wm. Woodburn* for petitioners. *James E. Lyons* for respondent. Reported below: 154 F. 2d 877.

No. 165. PEELER *v.* PEELER. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *William G. Cavett* for petitioner. Reported below: 199 Miss. 492, 24 So. 2d 338.

No. 166. VOLKRINGER *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Elliott M. Weiner* for petitioner. *Solicitor General McGrath, Roger P. Marquis* and *Kelsey Martin Mott* for the United States. Reported below: 154 F. 2d 224.

No. 177. ALFANO *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *George R. Sommer* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 155 F. 2d 520.

No. 185. ANCHOR SERUM CO. *v.* AMERICAN COOPERATIVE SERUM ASSOCIATION; and

No. 186. ILLINOIS FARM BUREAU SERUM ASSOCIATION *v.* AMERICAN COOPERATIVE SERUM ASSOCIATION. October 14, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *C. G. Myers* and *Paul E. Mathias* for petitioners. *Francis X. Busch* and *James J. Magner* for respondent. Reported below: 153 F. 2d 907.

No. 187. REALTY OPERATORS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 188. WILLIAM HENDERSON (PARTNERSHIP) *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 189. WILLIAMS, LIQUIDATOR, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *C. J. Batter* for petitioners. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Helen R. Carloss* and *Maryhelen Wigle* for respondent. Briefs were filed by *J. Sterling Halstead* for the South Coast Corporation, and by *Henry J. Richardson,* as *amici curiae,* in support of the petition in No. 187. Reported below: No. 187, 153 F. 2d 551; No. 188, 153 F. 2d 442; No. 189, 153 F. 2d 547.

No. 217. MISHAWAKA RUBBER & WOOLEN MANUFACTURING CO. *v.* PANTHER-PANCO RUBBER CO., INC. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Eugene Manning Giles, Jr.* for petitioner. *Melvin R. Jenney* for respondent. Reported below: 153 F. 2d 662.

No. 219. POWELL *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Theodore Lockyear* and *Paul Wever* for petitioner. *Solicitor General McGrath, W. Marvin Smith, Robert S. Erdahl* and *Andrew F. Oehmann* for the United States. Reported below: 155 F. 2d 184.

No. 221. GOIN *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Theodore Lockyear* and *Paul Wever* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Andrew F. Oehmann* for the United States. Reported below: 155 F. 2d 184.

No. 224. DUNSCOMBE *v.* LOFTIN ET AL., TRUSTEES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *T. T. Oughterson* for petitioner. *Russell L. Frink* for respondents. Reported below: 154 F. 2d 963.

No. 226. DYER ET AL. *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied.

Warren E. Miller for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett, Abraham J. Harris* and *Fendall Marbury* for the United States. Reported below: 81 U. S. App. D. C. —, 154 F. 2d 14.

No. 228. TROY LAUNDRY CO. ET AL. *v.* WIRTZ, CHAIRMAN OF THE NATIONAL WAGE STABILIZATION BOARD. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Charles P. McCarthy* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett, Paul A. Sweeney* and *Abraham J. Harris* for respondent. Reported below: 155 F. 2d 53.

No. 230. BEAUCHAMP *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Henry S. Sweeny* for petitioner. *Solicitor General McGrath, Frederick Bernays Wiener, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 154 F. 2d 413.

No. 236. LADREY ET AL. *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *James R. Kirkland* for petitioners. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 81 U. S. App. D. C. —, 155 F. 2d 417.

No. 239. MELTZER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit denied. *Sidney B. Alexander* for petitioners. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Helen R. Carloss* and *S. Dee Hanson* for respondent. Reported below: 154 F. 2d 776.

No. 243. WOLPE ET AL. *v.* PORETSKY ET AL. October 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *H. Winship Wheatley* and *H. Winship Wheatley, Jr.* for petitioners. *Louis Ottenberg* and *William C. Sullivan* for respondents. Reported below: 81 U. S. App. D. C. —, 154 F. 2d 330.

No. 244. SCHMOLL, SUCCESSOR ASSIGNEE, ET AL. *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Court of Claims denied. *Bernard J. Gallagher* and *M. Walton Hendry* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett, Paul A. Sweeney* and *Joseph B. Goldman* for the United States. *Alexander M. Heron* filed a brief for the Association of Casualty and Surety Executives, as *amicus curiae,* in support of the petition. Reported below: 105 Ct. Cl. 415, 63 F. Supp. 753.

No. 245. FITZGERALD *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Joseph W. Sharts* for petitioner. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Robert N. Anderson* and *Melva M. Graney* for respondent. Reported below: 154 F. 2d 1017.

No. 262. MAY DEPARTMENT STORES CO., DOING BUSINESS AS FAMOUS-BARR CO., *v.* NATIONAL LABOR RELATIONS BOARD. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Milton H. Tucker* and *Robert T. Burch* for petitioner. *Solicitor General McGrath, Gerhard P. Van Arkel, Morris P. Glushien* and *Isadore Greenberg* for respondent. Reported below: 154 F. 2d 533.

No. 267. BANK OF CALIFORNIA NATIONAL ASSOCIATION, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Allen G. Wright, Randell Larson* and *Edward Hale Julien* for petitioner. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Helen R. Carloss* and *William Robert Koerner* for respondent. Reported below: 155 F. 2d 1.

No. 268. LOWRY *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Owen Rall* for petitioner. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Helen R. Carloss* and *Harold C. Wilkenfeld* for respondent. Reported below: 154 F. 2d 448.

No. 269. GARDNER, TRUSTEE, *v.* GRISWOLD, ADMINISTRATRIX. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Harold A. Smith* for petitioner. *Royal W. Irwin* for respondent. Reported below: 155 F. 2d 333.

No. 279. KIRSCHENBAUM *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 280. BANNER *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Ferdinand Tannenbaum* for petitioners. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Helen R. Carloss* and *Morton K. Rothschild* for respondent. Reported below: 155 F. 2d 23.

No. 285. COOL *v.* INTERNATIONAL SHOE CO. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Luke E. Hart* for petitioner. *Lawrence C. Kingsland* for respondent. Reported below: 154 F. 2d 778.

No. 290. SWACZYK *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Alfred A. Albert* and *Hayden C. Covington* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 156 F. 2d 17.

No. 292. UNION METAL MANUFACTURING CO. ET AL. *v.* OOMS, COMMISSIONER OF PATENTS. October 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Edward R. Walton, Jr.* and *Joseph Frease* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett* and *W. W. Cochran* for respondent. Reported below: 81 U. S. App. D. C. —, 154 F. 2d 857.

No. 298. BYERLY *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Lee E. Joslyn, Jr.* and *Alan W. Joslyn* for petitioner. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Robert N. Anderson* and *William Robert Koerner* for respondent. Reported below: 154 F. 2d 879.

No. 306. TURNER ET AL. *v.* DEMING ET AL. October 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *George C. Gertman* for petitioners. *John U. Gardiner* for respondents. Reported below: 81 U. S. App. D. C. —, 155 F. 2d 181.

No. 307. LORENTZ *v.* R. K. O. RADIO PICTURES, INC. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Walter S. Hilborn* for petitioner. *Guy Knupp* for respondent. Reported below: 155 F. 2d 84.

No. 309. FRENCH ET AL. *v.* FRENCH. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Russell N. Pickett* for petitioners. *Robert C. Foulston* and *John F. Eberhardt* for respondent. Reported below: 161 Kan. 327, 167 P. 2d 305.

No. 317. ESTATE OF DECASTRO *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for

writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Laurence Graves* for petitioner. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, A. F. Prescott* and *Muriel S. Paul* for respondent. Reported below: 155 F. 2d 254.

No. 321. CHATZ, TRUSTEE IN BANKRUPTCY, ET AL. *v.* ARMOUR PLANT EMPLOYEES CREDIT UNION; and

No. 322. CHATZ, TRUSTEE IN BANKRUPTCY, ET AL. *v.* TODD ET AL. October 14, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Joseph Rosenbaum* for petitioner. *Ray E. Lane* for respondents. Reported below: 154 F. 2d 236.

No. 324. ESTATE OF VANDERLIP ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Edwin W. Cooney* and *John B. Marsh* for petitioners. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, A. F. Prescott* and *Berryman Green* for respondent. Reported below: 155 F. 2d 152.

No. 325. HUDSON ET AL., SPECIAL RECEIVERS, *v.* BROOKS, TRUSTEE, ET AL. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *J. Campbell Palmer, III,* for petitioners. *Lewis S. Pope, Whitworth Stokes* and *Fyke Farmer* for respondents. A brief was filed by the States of California, Delaware, Florida, Georgia, Iowa, Maryland, Michigan, Minnesota, Texas and West Virginia, ancillary receivers

of Indiana, Kansas, Kentucky, Missouri, Pennsylvania and Virginia, a deputy liquidator in Illinois, a special master commissioner in Ohio, and a contract holder of Wisconsin, as *amici curiae,* in support of the petition.

No. 328. COOMBS, TRUSTEE IN BANKRUPTCY, *v.* JERSEY CITY. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Max L. Rosenstein* for petitioner. *Charles A. Rooney* for respondent. Reported below: 156 F. 2d 62.

No. 330. CROSSETT WESTERN CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Carl E. Davidson* for petitioner. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Helen R. Carloss* and *Helen Goodner* for respondent. Reported below: 155 F. 2d 433.

No. 331. HAGAN, DOING BUSINESS AS EL REY CHEESE CO., ET AL. *v.* PORTER, PRICE ADMINISTRATOR. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Abraham Gottfried* for petitioners. *Solicitor General McGrath* and *David London* for respondent. Reported below: 156 F. 2d 362.

No. 339. MOSER *v.* NEW YORK LIFE INSURANCE CO. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Daniel B. Trefethen* for petitioner. *Raymond G. Wright,*

Clarence R. Innis and *Arthur E. Simon* for respondent. Reported below: 154 F. 2d 1018.

No. 341. SHARP & FELLOWS CONTRACTING CO. *v.* BASLER. October 14, 1946. Petition for writ of certiorari to the District Court of Appeal, 4th Appellate District, of California, denied. *Alex W. Davis* for petitioner. Reported below: 73 Cal. App. 2d 480, 166 P. 2d 403.

No. 342. DINGMAN *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *John F. Finerty* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 156 F. 2d 148.

No. 346. SILESIAN AMERICAN CORP. ET AL. *v.* MARKHAM, ALIEN PROPERTY CUSTODIAN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *George W. Whiteside, Leonard P. Moore* and *William Gilligan* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett, Harry LeRoy Jones, M. S. Isenbergh* and *Raoul Berger* for respondent. Reported below: 156 F. 2d 793.

No. 347. PHILLIPS PETROLEUM CO. *v.* JOHNSON. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Rayburn L. Foster* for petitioner. Reported below: 155 F. 2d 185.

No. 358. SUNCOOK VALLEY RAILROAD *v.* BOSTON & MAINE RAILROAD. October 14, 1946. Petition for writ of certiorari to the Supreme Court of New Hampshire denied. *Mayland H. Morse* for petitioner. *Jonathan Piper* for respondent. Reported below: 94 N. H. 81, 46 A. 2d 773.

No. 359. PHILADELPHIA COMPANY *v.* GUGGENHEIM ET AL.;

No. 360. PHILADELPHIA COMPANY *v.* PITTSBURGH;

No. 361. PHILADELPHIA COMPANY *v.* BAKER ET AL.;

No. 362. MONONGAHELA STREET RAILWAY CO. ET AL. *v.* GUGGENHEIM ET AL.;

No. 363. MONONGAHELA STREET RAILWAY CO. ET AL. *v.* PITTSBURGH; and

No. 364. MONONGAHELA STREET RAILWAY CO. ET AL. *v.* BAKER ET AL. October 14, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Thomas J. Munsch, Jr.* for the Philadelphia Company. *Wm. S. Moorhead* and *A. W. Henderson* for petitioners in Nos. 362, 363 and 364. *Joseph Nemerov* and *Maurice J. Dix* for Guggenheim et al.; *Anne X. Alpern* and *Leon Wald* for the City of Pittsburgh; and *H. F. Stambaugh* for Baker et al., respondents. *Solicitor General McGrath, Roger S. Foster* and *George Zolotar* for the Securities & Exchange Commission, in opposition to the petitions. Reported below: 155 F. 2d 477.

No. 372. WASSERBERGER *v.* RODNEY ET AL. October 14, 1946. Petition for writ of certiorari to Surrogate's Court, New York County, New York, denied. *Edwin B. Wolchok* for petitioner. *James N. Vaughan* for Rodney, respondent. Reported below: See 295 N. Y. 693, 894, 65 N. E. 2d 333, 67 N. E. 2d 525.

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No. 373. PETIT ANSE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Frank McLoughlin, Marion N. Fisher* and *Joseph S. Clark, Sr.* for petitioner. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, A. F. Prescott* and *I. Henry Kutz* for respondent. Reported below: 155 F. 2d 797.

No. 375. ARMOUR & CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Kenaz Huffman, Charles J. Faulkner, Frederick R. Baird* and *Paul E. Blanchard* for petitioner. *Solicitor General McGrath, Gerhard P. Van Arkel, Morris P. Glushien* and *Mozart G. Ratner* for respondent. Reported below: 154 F. 2d 570.

No. 386. THOMPSON *v.* ILLINOIS. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 392 Ill. 589, 65 N. E. 2d 362.

No. 387. ENSLEY BANK & TRUST CO. *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *B. A. Monaghan* and *Lee C. Bradley, Jr.* for petitioner. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Robert N. Anderson* and *Lee A. Jackson* for the United States. Reported below: 154 F. 2d 968.

No. 388. BOLLINGER ET VIR *v.* GOTHAM GARAGE CO. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *William C. Morris* for petitioners. *Walter X. Connor* for respondent. Reported below: 155 F. 2d 326.

No. 394. TRUST COMPANY OF CHICAGO, ADMINISTRATOR, ET AL. *v.* CHICAGO ET AL. October 14, 1946. Petition for writ of certiorari to the Appellate Court, First District, of Illinois, denied. *Weightstill Woods* and *Horace Russell* for petitioners. *Barnet Hodes* and *J. Herzl Segal* for respondents. Reported below: 327 Ill. App. 222, 63 N. E. 2d 615.

No. 399. WRIGHT ET AL. *v.* MITCHELL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *William N. McQueen,* Attorney General of Alabama, and *Richard T. Rives* for petitioners. *Thurgood Marshall* and *Arthur D. Shores* for respondent. Reported below: 154 F. 2d 924.

No. 401. BROOKLYN NATIONAL CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Meyer Kraushaar* for petitioner. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, Robert N. Anderson* and *Maryhelen Wigle* for respondent. Reported below: 157 F. 2d 450.

No. 402. LEDFORD ET AL. *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit

Court of Appeals for the Sixth Circuit denied. *Harry B. Miller* for petitioners. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 155 F. 2d 574.

No. 403. CHRISTIE *v.* COHAN ET AL., EXECUTORS, ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Max R. Simon* for petitioner. *Howard E. Reinheimer, Morris L. Ernst* and *Harriet F. Pilpel* for respondents. Reported below: 154 F. 2d 827.

No. 408. ORTON ET AL. *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Helen W. Munsert* for petitioners. *A. N. Whitlock* and *M. L. Bluhm* for Scandrett et al., and *Kenneth F. Burgess* and *Fred N. Oliver* for the Reorganization Committee, respondents. Reported below: 155 F. 2d 489.

No. 411. HERMAN *v.* NEW YORK EX REL. FITZGERALD. October 14, 1946. Petition for writ of certiorari to the Appellate Division, Supreme Court, First Judicial Department, of New York, denied. *Sol A. Herzog* for petitioner. *John J. Bennett* for respondent. Reported below: 270 App. Div. 891, 62 N. Y. S. 2d 603.

No. 420. DOBBINS *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *James A. Cobb* and *George E. C. Hayes* for petitioner.

Solicitor General McGrath, Robert S. Erdahl and *Sheldon E. Bernstein* for the United States. Reported below: 81 U. S. App. D. C. —, 157 F. 2d 257.

No. 421. STANDARD OIL CO. OF LOUISIANA ET AL. *v.* THE KONGO ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Wm. Marshall Bullitt, Chas. G. Middleton* and *Louis Seelbach* for petitioners. *Solicitor General McGrath, Assistant Attorney General Sonnett, Paul A. Sweeney, Oscar H. Davis, John D. Goodloe, Max Hersh* and *George H. Terriberry* for respondents. Reported below: 155 F. 2d 492.

No. 423. W. E. HEDGER TRANSPORTATION CORP. *v.* IRA S. BUSHEY & SONS, INC. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Horace M. Gray* for petitioner. *Christopher E. Heckman* for respondent. Reported below: 155 F. 2d 321.

No. 426. WESTERN AIRLINES, INC. *v.* BRATT ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Arthur E. Moreton* for petitioner. *William H. DeParcq* and *Parnell Black* for respondents. Reported below: 155 F. 2d 850.

No. 428. COMMISSIONER OF INTERNAL REVENUE *v.* BECK ET AL., TRUSTEES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Solicitor General McGrath* for petitioner. Reported below: 154 F. 2d 879.

No. 441. BENZ ET AL. *v.* CELESTE FUR DYEING & DRESSING CORP. ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Asher Blum* for petitioners. *Daniel L. Morris* for respondents. Reported below: 156 F. 2d 510.

No. 444. DUNPHY ET AL. *v.* GRAHAM, JUDGE, ET AL. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Ohio denied. Reported below: 146 Ohio St. 547, 67 N. E. 2d 321.

No. 115. PICKETT *v.* BOWLES, PRICE ADMINISTRATOR. October 14, 1946. Porter substituted for Bowles as respondent. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Byron G. Rogers* for petitioner. *Solicitor General McGrath* and *David London* for respondent. Reported below: 153 F. 2d 904.

No. 237. WOOD *v.* BOWLES, PRICE ADMINISTRATOR. October 14, 1946. Porter substituted for Bowles as respondent. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Wils Davis* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 155 F. 2d 727.

No. 319. MANNIE & CO. ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. October 14, 1946. Porter substituted for Bowles as respondent. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Nicholas J. Pritzker* and *Stanford Clinton* for peti-

tioners. *Solicitor General McGrath, John R. Benney* and *David London* for respondent. Reported below: 155 F. 2d 129.

Nos. 129, 130 and 131. COLUMBIA GAS & ELECTRIC CORP. *v.* UNITED STATES ET AL. October 14, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Wm. Dwight Whitney* for petitioner. *Solicitor General McGrath, Assistant Attorney General Berge, Charles H. Weston, Roger S. Foster, Theodore L. Thau* and *David Ferber* for the United States and the Securities & Exchange Commission; *Oscar S. Rosner* and *Jerome N. Wanshel* for the Green Committee et al.; and *Arthur G. Logan* and *Robert J. Bulkley* for Van Horn et al., respondents. Reported below: 153 F. 2d 101.

No. 147. EARL C. GIBBS, INC. *v.* DEFENSE SUPPLIES CORP. ET AL. October 14, 1946. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Wilbur La Roe, Jr.* and *Arthur L. Winn, Jr.* for petitioner. *Solicitor General McGrath, Robert L. Stern* and *John D. Goodloe* for respondents. Reported below: 155 F. 2d 525.

No. 154. ATLANTIC MEAT CO., INC. *v.* RECONSTRUCTION FINANCE CORP. October 14, 1946. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Lawrence*

Black for petitioner. *Solicitor General McGrath, Robert L. Stern* and *John D. Goodloe* for respondent. Reported below: 155 F. 2d 533.

No. 232. BLALACK *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Walter P. Armstrong, R. G. Draper* and *E. L. Gwinn* for petitioner. *Solicitor General McGrath, Robert S. Erdahl, Sheldon E. Bernstein* and *David London* for the United States. Reported below: 154 F. 2d 591.

No. 231. ARKANSAS NATURAL GAS CORP. *v.* SECURITIES & EXCHANGE COMMISSION. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Henry C. Walker, Jr.* and *John O. Wicks* for petitioner. *Solicitor General McGrath, Roger S. Foster* and *Alexander Cohen* for respondent. Reported below: 154 F. 2d 597.

No. 272. MILNER HOTELS, INC. *v.* PORTER, PRICE ADMINISTRATOR; and

No. 273. 101 EAST FIRST STREET INCORPORATED *v.* PORTER, PRICE ADMINISTRATOR. October 14, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *R. Lee Blackwell* and *Wm. Marshall Bullitt* for petitioners. *Solicitor General McGrath* and *David London* for respondent. Reported below: 154 F. 2d 1020.

No. 422. HONEYMAN, EXECUTRIX, ET AL. *v.* HUGHES, TRUSTEE IN BANKRUPTCY. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Elton Watkins* and *Sidney Teiser* for petitioners. *Robert F. Maguire* for respondent. Reported below: 156 F. 2d 27.

No. 160. HOWARD UNIVERSITY *v.* DISTRICT OF COLUMBIA. October 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE MURPHY is of the opinion that the petition should be granted. *George E. C. Hayes* for petitioner. *Vernon E. West* and *George C. Updegraff* for respondent. Reported below: 81 U. S. App. D. C. —, 155 F. 2d 10.

No. 183. CAHOON *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE MURPHY is of the opinion that the petition should be granted. *Hayden C. Covington* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 155 F. 2d 150.

No. 323. BUICE *v.* PATTERSON ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE are of the opinion that the petition should be granted. *Alfred A. Albert* and *Hayden C. Covington* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondents. Reported below: 155 F. 2d 429.

No. 176. SHOTKIN *v.* JUDGES, SUPERIOR COURT, ATLANTA CIRCUIT. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Georgia denied.

No. 178. TINKOFF *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. Petitioner *pro se.* *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 153 F. 2d 106.

No. 247. BENTZ *v.* MICHIGAN. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Michigan denied. Petitioner *pro se.* *John R. Dethmers,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 271. DEPADILLA, EXECUTRIX, *v.* DEPADILLA. October 14, 1946. Petition for writ of certiorari to the Supreme Court of the Philippines denied. *Arthur L. Quinn* for petitioner.

No. 274. TINKOFF *v.* WEST PUBLISHING CO. ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. Reported below: 152 F. 2d 754.

No. 289. MARTIN *v.* WAGNER, EXECUTRIX, ET AL. On petition for writ of certiorari to the Supreme Court of Alabama; and

No. 378. GRANT, DOING BUSINESS AS NO SLEET WINDSHIELD HEATER CO., *v.* GENERAL MOTORS CORP. ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. October 14, 1946. On consideration of the suggestions of a diminution of the records and motions for writs of certiorari in that relation, the motions for certiorari are denied. The petitions for writs of certiorari are also denied. *Erle Pettus, Sr.* for petitioner in No. 289. Petitioner *pro se* in No. 378. *James A. Simpson* for respondents in No. 289. *Drury W. Cooper, Louis Quarles* and *David A. Fox* for respondents in No. 378. Reported below: No. 289, 247 Ala. 591, 25 So. 2d 409.

No. 297. RUSSELL BOX CO. *v.* GRANT PAPER BOX CO. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Herbert A. Baker* and *George P. Dike* for petitioner. *Hector M. Holmes* for respondent. *O. Walker Taylor* filed a brief for Ensign Bickford Co., as *amicus curiae,* in support of the petition. Reported below: 154 F. 2d 729.

No. 301. GARCIA ET AL., EXECUTORS, ET AL. *v.* PAN AMERICAN AIRWAYS, INC. ET AL. October 14, 1946. The petition for writ of certiorari to the Court of Appeals of New York is denied for the want of a final judgment. *T. Catesby Jones* and *Francis X. Nestor* for petitioners. *Donald Havens* for respondents. Reported below: 295 N. Y. 852, 981, 67 N. E. 2d 257, 68 N. E. 2d 59.

No. 266. DOAK *v.* FEDERAL LAND BANK OF BALTIMORE. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied.

No. 101. COWEN *v.* HEINZE, WARDEN. October 14, 1946. Petition for writ of certiorari to the Supreme Court of California denied. *Elizabeth Cassidy* for petitioner. *Robert W. Kenny,* Attorney General of California, for respondent. Reported below: 27 Cal. 2d 637, 166 P. 2d 279.

No. 112. WALLER *v.* NORTHERN PACIFIC TERMINAL CO. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Frank C. Hanley* for petitioner. Reported below: 178 Ore. 274, 166 P. 2d 488.

No. 122. BROWN *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 132. UNITED STATES EX REL. RUSSO *v.* NIERSTHEIMER, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Wm. Scott Stewart* for petitioner. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 134. ANTONELLI FIREWORKS CO., INC. ET AL. *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *William J. Maloney* for petitioners. *Solicitor General McGrath, W. Marvin Smith, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 155 F. 2d 631.

No. 139. WRIGHT *v.* LOHR, ADMINISTRATRIX. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Elliott DeJarnette Marshall* for petitioner. Reported below: 154 F. 2d 616.

No. 153. SAUNDERS *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioner *pro se*. *Solicitor General McGrath, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 154 F. 2d 872.

No. 167. UNITED STATES EX REL. DAVIS *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. Reported below: 154 F. 2d 288.

No. 168. WAGNER *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 169. STARYAK *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court, Macoupin County, Illinois;

No. 170. STARYAK *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois; and

No. 171. STARYAK *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Supreme Court of Illinois. October 14, 1946. Denied.

No. 172. DUNCAN *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 173. BANKS *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 174. WILKIE *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Winnebago County, Illinois, denied.

No. 175. PITTS *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 179. JENKOT *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 181. FEDORA ET AL. *v.* ILLINOIS. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Bryan Purteet* for petitioners. Reported below: 393 Ill. 165, 65 N. E. 2d 447.

No. 191. MARR *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 192. KIMLER *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 193. SAMMAN *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Knox County, Illinois, denied.

No. 194. WITT *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Supreme Court of Illinois; and

No. 195. WITT *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois. October 14, 1946. Denied.

No. 196. MILLS *v.* RAGEN, WARDEN; and

No. 197. EVANS *v.* RAGEN, WARDEN. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 198. WROBLEWSKI *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 199. RISTICH *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois;

No. 200. RISTICH *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois; and

No. 201. RISTICH *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Supreme Court of Illinois. October 14, 1946. Denied.

No. 202. BARONIA *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Supreme Court of Illinois; and

No. 203. BARONIA *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois. October 14, 1946. Denied.

No. 204. GRACROS *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 205. DE VIERA *v.* NIERSTHEIMER, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Sangamon County, Illinois, denied.

No. 213. KERN *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 214. PISKORZ *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 215. MARTIN *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 216. PROVOST *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 218. WOLTER *v.* SAFEWAY STORES, INC. October 14, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. Reported below: 80 U. S. App. D. C. 641, 153 F. 2d 641.

No. 222. EVENOW *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 223. MILLER *v.* NEW YORK. October 14, 1946. Petition for writ of certiorari to the County Court of Onondaga County, New York, denied.

No. 227. WHITEHEAD *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. Petitioner *pro se*. *Solicitor General McGrath, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 155 F. 2d 460.

No. 233. COYLE *v.* CALIFORNIA ET AL. October 14, 1946. Petition for writ of certiorari to the Supreme Court of California denied.

727731 O—47——53

No. 234. DWYER *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Jefferson County, Illinois, denied.

No. 238. COVINGTON *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 240. RAMOS *v.* NEW YORK. October 14, 1946. Petition for writ of certiorari to the Court of General Sessions, New York County, New York, denied.

No. 242. KOBLEY *v.* RAGEN, WARDEN;

No. 248. MORRIS *v.* RAGEN, WARDEN; and

No. 249. PRIDGEN *v.* RAGEN, WARDEN. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 250. PRIDGEN *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois; and

No. 251. PRIDGEN *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Supreme Court of Illinois. October 14, 1946. Denied.

No. 257. RENO *v.* RAGEN, WARDEN;

No. 259. MCMARTIN *v.* RAGEN, WARDEN; and

No. 260. MINOR *v.* RAGEN, WARDEN. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 261. ROBINSON *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 263. RANDALL *v.* GEORGIA. October 14, 1946. Petition for writ of certiorari to the Court of Appeals of Georgia denied. *G. Ernest Jones* for petitioner. Reported below: 73 Ga. App. 354, 36 S. E. 2d 450.

No. 278. BUTZ *v.* SEARCY, CLERK OF COURT. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 281. MCKAY *v.* NEVADA ET AL. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Nevada denied. *Norman H. Samuelson* for petitioner. *Gray Mashburn* for respondents. Reported below: 63 Nev. —, 168 P. 2d 315.

No. 282. MASON *v.* NEW YORK. October 14, 1946. Petition for writ of certiorari to the Court of General Sessions, County of New York, New York, denied.

No. 283. FERGUSON *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 284. MILLER *v.* KANSAS. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Kansas denied. Reported below: 161 Kan. 210, 166 P. 2d 680.

No. 286. HICKMAN *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 293. ATER *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Warren County, Illinois, denied.

No. 294. LANE *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 295. BIANCONE *v.* BURKE, WARDEN. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied.

No. 299. PALUMBO *v.* JACKSON, WARDEN. October 14, 1946. Petition for writ of certiorari to the Court of Appeals of New York denied. Petitioner *pro se.* *Nathaniel L. Goldstein,* Attorney General of New York, and *Wendell P. Brown,* Solicitor General, for respondent. Reported below: 295 N. Y. 926, 68 N. E. 2d 33.

No. 300. EVERETT *v.* DOWNING. October 14, 1946. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. Petitioner *pro se.* *Louis Seelbach* for respondent. Reported below: 298 Ky. 195, 182 S. W. 2d 232.

No. 302. ANDERSON *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 303. SCUDIERI *v.* RAGEN, WARDEN; and

No. 304. LOTT *v.* RAGEN, WARDEN. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 305. JUDD *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 308. STUB *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Court of Claims denied. Petitioner *pro se.* *Solicitor General McGrath, Assistant Attorney General Sonnett* and *Paul A. Sweeney* for the United States. Reported below: 105 Ct. Cl. 397, 63 F. Supp. 748.

No. 310. CONNELLAN *v.* NEW YORK. October 14, 1946. Petition for writ of certiorari to the County Court of Westchester County, New York, denied.

No. 313. MARCINKOWSKI *v.* NEW YORK. October 14, 1946. Petition for writ of certiorari to the Supreme Court of New York denied Petitioner *pro se.* *Nathaniel L. Goldstein,* Attorney General of New York, and *Wendell P. Brown,* Solicitor General, for respondent. Reported below: 62 N. Y. S. 2d 757.

No. 314. SMITH *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 315. ADAMS *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 326. WOODS *v.* RAGEN, WARDEN; and

No. 327. DAVIS *v.* RAGEN, WARDEN. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 329. FLOOD *v.* NEW YORK. October 14, 1946. Petition for writ of certiorari to the County Court of Westchester County, New York, denied.

No. 332. COLEMAN *v.* RAGEN, WARDEN; and

No. 333. WILSON *v.* RAGEN, WARDEN. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 337. PIOTROWSKI *v.* NEW YORK. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Erie County, New York, denied.

No. 348. SEXTON *v.* NIERSTHEIMER, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, denied.

No. 349. KING *v.* RAGEN, WARDEN;

No. 350. SHAFFER *v.* RAGEN, WARDEN; and

No. 351. ALEXANDER *v.* RAGEN, WARDEN, ET AL. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 352. NOETH *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois;

No. 353. NOETH *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois; and

No. 354. NOETH *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Supreme Court of Illinois. October 14, 1946. Denied.

No. 357. HIPP *v.* UNITED STATES. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *James F. Kemp* for petitioner. *Solicitor General McGrath* and *Robert S. Erdahl* for the United States. Reported below: 156 F. 2d 58.

No. 365. CURRY *v.* RAGEN, WARDEN; and

No. 366. STOKER *v.* RAGEN, WARDEN. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 370. EGAN *v.* CALIFORNIA. October 14, 1946. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California; and

No. 436. EGAN *v.* CALIFORNIA ET AL. Petition for writ of certiorari to the Supreme Court of California. October 14, 1946. Denied. *Elizabeth Cassidy* for petitioner in No. 370. *Robert W. Kenny,* Attorney General of California, for respondents. Reported below: No. 370, 73 Cal. App. 2d 894, 167 P. 2d 766.

No. 379. HESLY *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois; and

No. 380. HESLY *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois. October 14, 1946. Denied.

No. 381. HARDWICK *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Scott County, Illinois, denied.

No. 382. FOG *v.* RAGEN, WARDEN; and

No. 383. JOHNSON *v.* RAGEN, WARDEN. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 390. BARNES *v.* MARYLAND. October 14, 1946. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *John F. Lillard, Jr.* for petitioner. *William Curran,* Attorney General of Maryland, and *Hall Hammond,* Deputy Attorney General, for respondent. Reported below: 186 Md. —, 47 A. 2d 50.

No. 395. EASON *v.* RAGEN, WARDEN; and

No. 396. CONWAY *v.* RAGEN, WARDEN. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 398. WADE *v.* ILLINOIS. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 406. ANDERSON *v.* RAGEN, WARDEN; and

No. 407. DAVIS *v.* RAGEN, WARDEN. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 409. SANDERS *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 412. ANDREWS *v.* ADERHOLD, WARDEN. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Georgia denied. Petitioner *pro se*. *Eugene Cook*, Attorney General of Georgia, for respondent. Reported below: 39 S. E. 2d 61.

No. 413. MOORE *v.* RAGEN, WARDEN;

No. 414. MASCIO *v.* RAGEN, WARDEN;

No. 416. TAIT *v.* RAGEN, WARDEN;

No. 434. COLEMAN *v.* RAGEN, WARDEN;

No. 437. JANOWICZ *v.* RAGEN, WARDEN;

No. 445. PAYNES *v.* RAGEN, WARDEN;

No. 446. KRUSE *v.* RAGEN, WARDEN; and

No. 459. UNITED STATES EX REL. WROBLEWSKI *v.* RAGEN, WARDEN. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 460. ROSS *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Marion County, Illinois, denied.

No. 477. CROWLEY *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 478. UNITED STATES EX REL. VON SCHERER *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of De Witt County, Illinois, denied.

No. 479. HILL *v.* HUDSPETH, WARDEN. October 14, 1946. Petition for writ of certiorari to the Supreme Court of Kansas denied. Reported below: 161 Kan. 376, 168 P. 2d 922.

No. 480. RIOS *v.* RAGEN, WARDEN; and

No. 481. FURMAN *v.* ILLINOIS ET AL. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 495. FLEEGER *v.* ILLINOIS. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 496. LEE *v.* DEPARTMENT OF PUBLIC WELFARE ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 499. ILLINOIS EX REL. HANSON *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 500. UNITED STATES EX REL. SHAFFER *v.* RAGEN, WARDEN, ET AL. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Kane County, Illinois, denied.

No. 507. JUDD *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 508. JONES *v.* RAGEN, WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 509. FERRIS *v.* RAGEN, WARDEN; and

No. 510. HAINES *v.* NIERSTHEIMER, WARDEN. October 14, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 225. LONG *v.* BUSH, ACTING WARDEN. October 14, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. Reported below: 140 F. 2d 195.

No. 311. S. J. GROVES & SONS CO. *v.* UNITED STATES. October 21, 1946. Petition for writ of certiorari to the Court of Claims denied. *O. R. McGuire* for petitioner. *Solicitor General McGrath, Assistant Attorney General Sonnett* and *Abraham J. Harris* for the United States. Reported below: 106 Ct. Cl. 93, 64 F. Supp. 472.

No. 368. SIOUX TRIBE OF INDIANS *v.* UNITED STATES. October 21, 1946. Petition for writ of certiorari to the Court of Claims denied. *Ralph H. Case* and *James S. Y. Ivins* for petitioner. *Solicitor General McGrath* for the United States. Reported below: 105 Ct. Cl. 658, 64 F. Supp. 303.

No. 439. WOOTTEN HOTEL CORP. *v.* NORTHERN ASSURANCE CO., LTD. October 21, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Joseph A. Ball* for petitioner. *Joseph S. Conwell* for respondent. Reported below: 155 F. 2d 988.

No. 449. ORDER OF RAILROAD TELEGRAPHERS ET AL. *v.* NEW ORLEANS, TEXAS & MEXICO RAILWAY CO. ET AL. October 21, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *R. Walston Chubb* for petitioners. Reported below: 156 F. 2d 1.

No. 450. MAY HOSIERY MILLS *v.* HOLD STITCH FABRIC MACHINE CO. October 21, 1946. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *John J. Hooker* and *A. Yates Dowell* for petitioner. *Cecil Sims* for respondent. Reported below: 184 Tenn. 19, 195 S. W. 2d 18.

No. 451. BELL *v.* SUPERIOR COURT, LOS ANGELES COUNTY, CALIFORNIA. October 21, 1946. Petition for writ of certiorari to the Supreme Court of California denied. *Russell E. Parsons* and *A. L. Wirin* for petitioner.

No. 455. MARTIN, TRUSTEE, *v.* CAMPANARO ET AL. October 21, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Alfred H. Wasserstrom* for petitioner. *Daniel Kornblum* for respondents. Reported below: 156 F. 2d 127.

No. 456. WEISS *v.* HOOD, WARDEN. October 21, 1946. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Paul Crutchfield* for petitioner. *Eugene Cook,* Attorney General of Georgia, for respondent. Reported below: 199 Ga. 722, 35 S. E. 2d 150.

No. 458. TODD SHIPYARDS CORP. *v.* DE GRAW. October 21, 1946. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Walter H. Jones* for petitioner. *Nathan Rabinowitz* for respondent. Reported below: 134 N. J. L. 315, 47 A. 2d 338.

No. 462. HENWOOD, TRUSTEE, *v.* CHANEY. October 21, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Wayne Ely* and *A. H. Kiskaddon* for petitioner. *William H. DeParcq* for respondent. Reported below: 156 F. 2d 392.

No. 468. GERMAN-AMERICAN VOCATIONAL LEAGUE, INC. ET AL. *v.* UNITED STATES. October 21, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *George C. Dix* for petitioners. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 156 F. 2d 235.

No. 469. EQUITABLE LIFE ASSURANCE SOCIETY *v.* MERCANTILE-COMMERCE BANK & TRUST CO. ET AL. October 21, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Lon O. Hocker* and *James C. Jones, Jr.* for petitioner. *Thos. H. Cobbs* and *Wm. H. Armstrong* for respondents. Reported below: 155 F. 2d 776.

No. 474. CAIN *v.* UNITED STATES. October 21, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Simeon E. Sheffey* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 156 F. 2d 8.

No. 475. MARTIN *v.* GEORGIA. October 21, 1946. Petition for writ of certiorari to the Court of Appeals of Georgia denied. *Robert R. Jackson* for petitioner. Reported below: 199 Ga. 731, 35 S. E. 2d 151.

No. 482. WATERMAN STEAMSHIP CORP. *v.* U. S. SMELTING, REFINING & MINING CO. October 21, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *James J. Morrison* and *R. Emmett Kerrigan* for petitioner. *F. Herbert Prem* for respondent. Reported below: 155 F. 2d 687.

No. 275. PANHANDLE EASTERN PIPE LINE CO. *v.* FEDERAL POWER COMMISSION ET AL. October 21, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Ira Lloyd Letts, John S. L. Yost, E. H. Lange* and *Russell Voertman* for petitioner. *Solicitor General McGrath, Assistant Attorney General Sonnett, Abraham J. Harris, Lambert McAllister* and *Melvin Richter* for the Federal Power Commission, respondent. Reported below: 154 F. 2d 909.

No. 438. HARRIS-STANLEY COAL & LAND CO. ET AL. *v.* CHESAPEAKE & OHIO RAILWAY CO. October 21, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Bailey P. Wootton* for petitioners. *LeWright Browning* for respondent. Reported below: 154 F. 2d 450.

No. 505. DE LA ROI *v.* CALIFORNIA. October 21, 1946. Petition for writ of certiorari to the Supreme Court of California denied. MR. JUSTICE MURPHY is of the opinion that the petition should be granted. *James M. Hanley*

for petitioner. *Robert W. Kenny,* Attorney General of California for respondent. Reported below: 27 Cal. 2d 354, 146 P. 2d 225.

No. 427. LAVENDER, ADMINISTRATOR, *v.* KURN ET AL., TRUSTEES, ET AL. October 21, 1946. Petition for writ of certiorari to the Supreme Court of Missouri denied for want of a final judgment. MR. JUSTICE BLACK and MR. JUSTICE MURPHY are of the opinion that the petition should be granted. *N. Murry Edwards, James A. Waechter* and *Douglas H. Jones* for petitioner. *Maurice G. Roberts, Cornelius H. Skinker, Jr., William R. Gentry, Charles A. Helsell* and *John W. Freels* for respondents. Reported below: 355 Mo. 168, 195 S. W. 2d 460.

No. 164. MOSELEY ET AL. *v.* UNITED STATES APPLIANCE CORP. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Walter Slack* for petitioners. *Philip Harper Allen* for respondent. *Solicitor General McGrath* filed a memorandum for the United States, as *amicus curiae,* in support of the petition. Reported below: 155 F. 2d 25.

No. 463. BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* THOMPSON, TRUSTEE, ET AL.; and

No. 552. THOMPSON, TRUSTEE, ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL. October 28, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Douglas F. Smith, Kenneth F. Burgess, E. C. Hartman, E. H. Burgess, Thomas P. Healy* and *Guernsey Orcutt* for petitioners in No. 463 and respondents in No. 552. *M. G. Roberts* and *Clyde W.*

Fiddes for respondents in No. 463 and petitioners in No. 552. Reported below: 155 F. 2d 767.

No. 484. BAKER ET AL. *v.* UNITED STATES;
No. 485. SILVERMAN *v.* UNITED STATES; and
No. 486. JOHNSON *v.* UNITED STATES. October 28, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Henry G. Singer, G. Wray Gill* and *Hugh M. Wilkinson* for petitioners in No. 484. *Warren O. Coleman* for petitioner in No. 485. Petitioner *pro se* in No. 486. *Solicitor General McGrath, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 156 F. 2d 386.

No. 489. GORDON *v.* PORTER, PRICE ADMINISTRATOR. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Louis H. Burke* for petitioner. *Solicitor General McGrath, John R. Benney, David London* and *Albert J. Rosenthal* for respondent. Reported below: 156 F. 2d 799.

No. 490. AMERICAN LECITHIN CO., INC. *v.* MCNUTT, FEDERAL SECURITY ADMINISTRATOR. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Donald Marks* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 155 F. 2d 784.

No. 491. BOSTON & MAINE RAILROAD *v.* MEECH, ADMINISTRATRIX. October 28, 1946. Petition for writ of

727731 O—47——54

certiorari to the Circuit Court of Appeals for the First Circuit denied. *Francis P. Garland* for petitioner. *Thomas H. Mahony* for respondent. Reported below: 156 F. 2d 109.

Nos. 493 and 494. DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL. *v.* PROVO CITY ET AL. October 28, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Waldemar Q. Van Cott* and *Dennis McCarthy* for petitioners. *Arthur H. Nielsen* for respondents. Reported below: 156 F. 2d 710.

No. 497. 149 MADISON AVENUE CORP. ET AL. *v.* ASSELTA ET AL. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Walter Gordon Merritt, Robert R. Bruce* and *John J. Boyle* for petitioners. *Wilbur Duberstein* and *Frederick E. Weinberg* for respondents. Reported below: 156 F. 2d 139.

No. 501. OKONITE COMPANY *v.* COMMISSIONER OF INTERNAL REVENUE. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Edmund S. Kochersperger* for petitioner. *Solicitor General McGrath, Sewall Key, Robert N. Anderson* and *I. Henry Kutz* for respondent. Reported below: 155 F. 2d 248.

No. 515. WHEELING STAMPING CO. ET AL. *v.* STANDARD CAP & MOLDING CO. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth

Circuit denied. *William H. Parmelee* for petitioners. *Dean S. Edmonds* for respondent. Reported below: 155 F. 2d 6.

No. 516. Rosselli *v.* Sanford, Warden. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Albert B. Koorie* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 155 F. 2d 427.

No. 522. Silverman *v.* Osborne Register Co. October 28, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Alvin L. Newmyer, David G. Bress* and *James P. Donovan* for petitioner. *Spencer Gordon* and *Gerhard A. Gesell* for respondent. Reported below: 81 U. S. App. D. C. —, 155 F. 2d 879.

No. 492. Frazier et al. *v.* Goddard et al. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. Mr. Justice Murphy took no part in the consideration or decision of this application. *Hugh A. Ledbetter* and *Guy H. Sigler* for petitioners. Reported below: 156 F. 2d 938.

No. 523. Estate of Pratt et al. *v.* Commissioner of Internal Revenue. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Mr. Justice Murphy took no part in the consideration or decision of this application.

Roland L. Redmond for petitioners. *Solicitor General McGrath, Assistant Attorney General McGregor, Sewall Key, J. Louis Monarch* and *L. W. Post* for respondent. Reported below: 156 F. 2d 235.

No. 448. CLEVELAND HOTEL PROTECTIVE COMMITTEE ET AL. *v.* NATIONAL CITY BANK OF CLEVELAND, SUCCESSOR TRUSTEE, ET AL. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Robert H. Jamison* for petitioners. *John T. Scott* for the National City Bank, and *J. Hall Kellogg* for the Cleveland Terminals Building Co., respondents. Reported below: 155 F. 2d 1009.

No. 356. DEAVER *v.* UNITED STATES. October 28, 1946. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Errett G. Smith* and *Robert H. McNeill* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 81 U. S. App. D. C. —, 155 F. 2d 740.

No. 503. TINNIN *v.* DUFFY, WARDEN. October 28, 1946. Petition for writ of certiorari to the Supreme Court of California denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Elizabeth Cassidy* for petitioner. *Robert W. Kenny,* Attorney General of California, for respondent.

No. 513. NIGHTINGALE *v.* BALDI, SUPERINTENDENT. October 28, 1946. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 554. KEMMERER *v.* MICHIGAN. October 28, 1946. Petition for writ of certiorari to the Supreme Court of Michigan denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 518. BOLDEN *v.* RAGEN, WARDEN. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 520. ZIMER *v.* RAGEN, WARDEN. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Peoria County, Illinois, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 521. ROHDE *v.* RAGEN, WARDEN; and

No. 529. SCOTT *v.* NIERSTHEIMER, WARDEN. October 28, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of these applications.

No. 530. INGERSOLL *v.* NIERSTHEIMER, WARDEN. October 28, 1946. Petition for writ of certiorari to the Cir-

cuit Court of Effingham County, Illinois, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 533. WAGGONER *v.* NIERSTHEIMER, WARDEN. October 28, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 545. WILSON *v.* RAGEN, WARDEN. October 28, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 546. GAWRON *v.* RAGEN, WARDEN; and

No. 547. PALMER *v.* RAGEN, WARDEN. October 28, 1946. Petitions for writs of certiorari to the Circuit Court of Will County, Illinois, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of these applications.

No. 549. PARKER *v.* ILLINOIS. October 28, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 550. ROBINSON *v.* RAGEN, WARDEN. October 28, 1946. Petition for writ of certiorari to the Criminal Court

of Cook County, Illinois, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 568. GARNER *v.* RAGEN, WARDEN;
No. 569. COLEMAN *v.* RAGEN, WARDEN;
No. 577. CASSIDY *v.* ILLINOIS;
No. 578. WATSON *v.* ILLINOIS; and
No. 579. JUDD *v.* RAGEN, WARDEN. October 28, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE MURPHY took no part in the consideration or decision of these applications.

No. 580. BOOKER *v.* RAGEN, WARDEN. October 28, 1946. Petition for writ of certiorari to the Supreme Court of Illinois, Circuit Court of Will County, and Criminal Court of Cook County, Illinois, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 581. HAINES *v.* NIERSTHEIMER, WARDEN. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 598. THOMPSON *v.* RAGEN, WARDEN. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 599. MATTHEWS *v.* RAGEN, WARDEN; and

No. 600. FOWLER *v.* RAGEN, WARDEN. October 28, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE MURPHY took no part in the consideration or decision of these applications.

No. 601. MILLS *v.* RAGEN, WARDEN. October 28, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 602. DAVIS *v.* RAGEN, WARDEN. October 28, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 614. HARRIS *v.* RAGEN, WARDEN. October 28, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 616. HOLMES *v.* RAGEN, WARDEN. October 28, 1946. Petition for writ of certiorari to the Circuit Court of Winnebago County, Illinois, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 636. JOHNSON *v.* OKLAHOMA. October 28, 1946. The motion for a stay is denied. Petition for writ of cer-

tiorari to the Criminal Court of Appeals of Oklahoma denied. MR. JUSTICE MURPHY took no part in the consideration or decision of these applications. *William J. Hulsey* and *Lena Hulsey* for petitioner. Reported below: 172 P. 2d 337.

No. 519. MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC. *v.* PORTER, PRICE ADMINISTRATOR. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *S. Hasket Derby* for petitioner. *Acting Solicitor General Washington, John R. Benney* and *David London* for respondent. Reported below: 156 F. 2d 296.

No. 527. LORRAINE COFFEE CO., INC. ET AL. *v.* LA TOURAINE COFFEE CO., INC. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Benedict Wolf* for petitioners. *Benjamin P. DeWitt* for respondent. Reported below: 157 F. 2d 115.

No. 528. LOGIN CORPORATION *v.* PORTER, PRICE ADMINISTRATOR. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Francis V. Keesling, Jr.* for petitioner. *Acting Solicitor General Washington, John R. Benney, David London* and *Albert J. Rosenthal* for respondent. Reported below: 155 F. 2d 623.

No. 536. KOZA ET AL. *v.* DREXLER ET AL. November 12, 1946. Petition for writ of certiorari to the Circuit Court

of Appeals for the Third Circuit denied. *Frank Keiper* for petitioners. *Ralph G. Lockwood, Elmer L. Goldsmith* and *Dwight B. Galt* for respondents. Reported below: 156 F. 2d 370.

No. 537. EASTERN SUGAR ASSOCIATES *v.* PUERTO RICO. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *John W. Davis* and *E. T. Fiddler* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Sonnett* and *Paul A. Sweeney* for respondent. Reported below: 156 F. 2d 316.

No. 539. PACMAN *v.* MEAD, SUPERINTENDENT. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Morris Lavine* for petitioner. *Solicitor General McGrath* for respondent. Reported below: 155 F. 2d 267.

No. 542. BURTON, ADMINISTRATRIX, *v.* BROWNING, TRUSTEE, ET AL. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *John J. Dowdle* for petitioner. *Henry S. Blum* for respondents. Reported below: 155 F. 2d 561.

No. 555. EMERY *v.* COMMISSIONER OF INTERNAL REVENUE. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Robert A. B. Cook* for petitioner. *Solicitor General McGrath, Sewall Key, J. Louis Monarch* and *Lee A. Jackson* for respondent. Reported below: 156 F. 2d 728.

No. 556. CITIES SERVICE GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Donald C. McCreery, Paul W. Lee, George H. Shaw* and *Glenn W. Clark* for petitioner. *Acting Solicitor General Washington, Melvin Richter, David M. Proctor* and *Louis E. Clevenger* for respondents. Reported below: 155 F. 2d 694.

No. 559. HUNTINGTON BEACH *v.* DENIO ET AL. November 12, 1946. Petition for writ of certiorari to the District Court of Appeal, Fourth Appellate District, of California, denied. *Walter O. Schell* for petitioner. *George P. Taubman, Jr.* for respondents. Reported below: 74 Cal. App. 2d 424, 168 P. 2d 785.

No. 560. DIXI-COLA LABORATORIES, INC. ET AL. *v.* COCA-COLA CO.; and

No. 561. COCA-COLA CO. *v.* DIXI-COLA LABORATORIES, INC. ET AL. November 12, 1946. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *W. Hamilton Whiteford* for petitioners in No. 560. *John A. Sibley* and *Charles Ruzicka* for the Coca-Cola Co. Reported below: 155 F. 2d 59.

No. 563. BARLOW *v.* FEDERAL LAND BANK OF BERKELEY. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *J. D. Skeen* for petitioner. *Richard W. Young* for respondent. Reported below: 156 F. 2d 360.

No. 565. FAIRFIELD STEAMSHIP CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Frank V. Barns* for petitioner. *Acting Solicitor General Washington, Sewall Key, J. Louis Monarch* and *Harry Baum* for respondent. Reported below: 157 F. 2d 321.

No. 567. VAN DER LOO *v.* PORTER, PRICE ADMINISTRATOR. November 12, 1946. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Charles W. Arth* for petitioner. *Acting Solicitor General Washington, Richard H. Field, William R. Ming, Jr.* and *Israel Convisser* for respondent. Reported below: 160 F. 2d 110.

No. 570. JOHN HANCOCK MUTUAL LIFE INSURANCE CO. *v.* UNITED STATES. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Garald K. Richardson* for petitioner. *Solicitor General McGrath, Assistant Attorney General Bazelon, Roger P. Marquis* and *Wilma C. Martin* for the United States. Reported below: 155 F. 2d 977.

No. 584. WATERMAN STEAMSHIP CORP. ET AL. *v.* PAN-AMERICAN TRADE & CREDIT CORP. ET AL. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Russell Conwell Gay* for petitioners. *Arthur O. Louis* for respondents. Reported below: 156 F. 2d 603.

No. 592. RIPLEY *v.* FINDLAY GALLERIES, INC. ET AL. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *George P. Dike* and *Cedric W. Porter* for petitioner. *Charles B. Cannon* and *Samuel Topliff* for respondents. Reported below: 155 F. 2d 955.

No. 638. ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* BREWSTER ET AL., AS FORT SCOTT BONDHOLDERS' COMMITTEE, ET AL.; and

No. 639. BROOKS, ADMINISTRATRIX, ET AL. *v.* BREWSTER ET AL., AS FORT SCOTT BONDHOLDERS' COMMITTEE, ET AL. November 12, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *William V. Hodges, Daniel Bartlett, C. O. Inman* and *Phil W. Davis, Jr.* for petitioners. *Edwin S. S. Sunderland, Thomas O'G. FitzGibbon, James L. Homire, Henry W. Anderson, George D. Gibson, John W. Riely, Robert T. Swaine, Leonard D. Adkins, Fitzhugh McGrew, Jesse E. Waid, Alexander M. Lewis* and *Orville W. Wood* for respondents. Reported below: No. 638, 156 F. 2d 161; No. 639, 156 F. 2d 158.

Nos. 391, 392 and 393. OKIN *v.* SECURITIES & EXCHANGE COMMISSION. November 12, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Samuel Okin* for petitioner. *Solicitor General McGrath* and *Roger S. Foster* for respondent. *John F. MacLane* filed a brief for the Electric Bond & Share Co., opposing the petition. Reported below: 154 F. 2d 27.

No. 534. SMITH *v.* UNITED STATES. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. MR. JUSTICE MURPHY is of the opinion the petition should be granted. *Hayden C. Covington, Curran E. Cooley* and *Grover C. Powell* for petitioner. *Solicitor General McGrath, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 157 F. 2d 176.

No. 541. ROWE ET AL. *v.* CHESAPEAKE MINERAL CO. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Francis M. Burke* for petitioners. *LeWright Browning* for respondent. Reported below: 156 F. 2d 752.

No. 488. MCCLANE *v.* CALIFORNIA ET AL. November 12, 1946. Petition for writ of certiorari to the Supreme Court of California denied.

No. 551. EINSOHN *v.* NEW YORK. November 12, 1946. Petition for writ of certiorari to the County Court of Kings County, New York, denied.

No. 553. CARTNER *v.* NEW YORK. November 12, 1946. Petition for writ of certiorari to the County Court of Onondaga County, New York, denied.

No. 576. TRACHER *v.* MARTIN, WARDEN. November 12, 1946. Petition for writ of certiorari to the County Court of Erie County, New York, denied. Petitioner *pro se*. *Nathaniel L. Goldstein,* Attorney General of New York, and *Wendell P. Brown,* Solicitor General, for respondent.

No. 604. LEWIS *v.* RAGEN, WARDEN. November 12, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 618. HINES *v.* NIERSTHEIMER, WARDEN. November 12, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 620. TOMANEK *v.* RAGEN, WARDEN. November 12, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 621. MINER *v.* RAGEN, WARDEN. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 622. WILLIAMS *v.* ILLINOIS. November 12, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 623. GAPINSKI *v.* NIERSTHEIMER, WARDEN. November 12, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 627. MORRIS *v.* RAGEN, WARDEN. November 12, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 629. VINCENT *v.* ILLINOIS. November 12, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 630. QUINN *v.* ILLINOIS. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 631. WOODWARD *v.* ILLINOIS. November 12, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 634. RITTON *v.* PENNSYLVANIA BOARD OF PAROLE. November 12, 1946. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied.

No. 647. SHEETS *v.* RAGEN, WARDEN. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 648. DEESE *v.* RAGEN, WARDEN. November 12, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 649. KAVAL *v.* ILLINOIS. November 12, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 650. HARRIS *v.* RAGEN, WARDEN. November 12, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 652. MONDER *v.* RAGEN, WARDEN. November 12, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 654. ROSS *v.* RAGEN, WARDEN. November 12, 1946. Petition for writ of certiorari to the Criminal Court of Will County, Illinois, denied.

No. 659. DONNELL *v.* STEWART, ACTING WARDEN. November 12, 1946. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 661. MCDONALD *v.* ILLINOIS. November 12, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

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No. 58, Misc. SHOTKIN, TRUSTEE, *v.* PENNSYLVANIA COMPANY. See *ante*, p. 682.

No. 316. MCARTHUR *v.* FAW ET AL. November 18, 1946. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *John H. Winston* and *Clyde W. Key* for petitioner. *Jas. H. Epps, Jr., Robert L. Taylor* and *Wm. E. Miller* for respondents. Reported below: 183 Tenn. 504, 193 S. W. 2d 763.

No. 410. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* FLEMING ET AL., TRUSTEES, ET AL. November 18, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *John Gerdes* and *Henry F. Tenney* for petitioner. *Wilkie Bushby, Alexander M. Lewis, Douglas B. Steimle, Edward W. Bourne, Jesse E. Waid, Edward K. Hanlon* and *Daniel James* for respondents. Reported below: 157 F. 2d 241.

No. 524. HARRISON ET AL. *v.* FLEMING ET AL., TRUSTEES, ET AL. November 18, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Loy N. McIntosh* for petitioners. *Wilkie Bushby, Alexander M. Lewis, Sanford H. E. Freund, Edward W. Bourne, Jesse E. Waid, Edward K. Hanlon* and *Daniel James* for respondents. Reported below: 157 F. 2d 241.

No. 517. SANDERS, DOING BUSINESS AS LEO SANDERS FUEL CO., *v.* OKLAHOMA TAX COMMISSION. November 18, 1946. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *John B. Ogden* for petitioner. Reported below: 197 Okla. 285, 169 P. 2d 748.

No. 573. KOHLER *v.* HUMPHREY, EXECUTRIX, ET AL. November 18, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Bertrand I. Cahn* for petitioner. Reported below: 156 F. 2d 908.

Nos. 590 and 591. F. A. GILLESPIE & SONS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. November 18, 1946. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *John E. Hughes* and *Harold E. Rorschach* for petitioner. *Acting Solicitor General Washington, Sewall Key, J. Louis Monarch* and *Hilbert P. Zarky* for respondent. *W. A. Sutherland* filed a brief, as *amicus curiae,* in support of the petition. Reported below: 154 F. 2d 913.

No. 594. GOTWALS *v.* UNITED STATES. November 18, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Malcolm E. Rosser* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Bazelon, Roger P. Marquis* and *Fred W. Smith* for the United States. Reported below: 156 F. 2d 692.

No. 607. CHICAGO PNEUMATIC TOOL CO. ET AL. *v.* HUGHES TOOL CO. November 18, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *William F. Hall, William S. Potter* and *Raymond G. Mullee* for petitioners. *George I. Haight, Robert F. Campbell* and *Arthur G. Connolly* for respondent. Reported below: 156 F. 2d 981.

No. 624. AMERICAN RAILROAD CO. OF PUERTO RICO *v.* ROMERO ET AL. November 18, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *James R. Beverley* and *Henri Brown* for petitioner. *L. E. Dubon* for respondents. Reported below: 157 F. 2d 255.

No. 642. TEXAS PACIFIC COAL & OIL CO. *v.* CALCOTE ET AL. November 18, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *David B. Trammell, William H. Watkins, P. H. Eager, Jr., Elizabeth Hulen* and *Thomas H. Watkins* for petitioner. *Charles F. Engle* and *Forrest B. Jackson* for respondents. Reported below: 157 F. 2d 216.

No. 487. TWIN FALLS CANAL CO. *v.* JOHNSON ET AL. November 18, 1946. Petition for writ of certiorari to the Supreme Court of Idaho denied. *James R. Bothwell* for petitioner. Reported below: 66 Idaho 660, 167 P. 2d 834.

No. 557. LAMONT *v.* COMMISSIONER OF INTERNAL REVENUE. November 18, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Walter S. Orr* for petitioner. *Acting Solicitor General Washington, Sewall Key, J. Louis Monarch* and *I. Henry Kutz* for respondent. Reported below: 156 F. 2d 800.

No. 558. TAYLOR *v.* PORTER, PRICE ADMINISTRATOR. November 18, 1946. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. THE

CHIEF JUSTICE took no part in the consideration or decision of this application. Petitioner *pro se*. *Acting Solicitor General Washington, Richard H. Field* and *Harry H. Schneider* for respondent. Reported below: 156 F. 2d 805.

No. 476. ILLINOIS PACKING CO. *v.* HENDERSON, ACTING ADMINISTRATOR, ET AL. November 18, 1946. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Irwin N. Walker* and *Peter B. Atwood* for petitioner. *Acting Solicitor General Washington, Robert L. Stern* and *John D. Goodloe* for respondents. Reported below: 156 F. 2d 1000.

No. 566. JONES *v.* TEXAS. November 18, 1946. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. *Arthur H. Bartelt* for petitioner. Reported below: 149 Tex. Cr. —, 194 S. W. 2d 766.

No. 664. FINN *v.* RAGEN, WARDEN;

No. 668. MORRIS *v.* RAGEN, WARDEN. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois; and

No. 669. EVANS *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Supreme Court of Illinois. November 18, 1946. Denied.

No. 65, Misc. EX PARTE WILSON. See *ante*, p. 683.

No. 609. DANA ET AL. *v.* DUNCAN, TRUSTEE, ET AL.; and

No. 610. EQUITABLE OFFICE BUILDING 1913 CO., INC. *v.* DUNCAN, TRUSTEE, ET AL. On petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit. November 25, 1946. So much of the respective petitions for certiorari in these cases as asks for a writ to review the order of the United States District Court for the Southern District of New York is denied. *Herbert J. Jacobi* for petitioners in No. 609. *Stuart McNamara* and *Charles Green Smith* for petitioner in No. 610. *John Gerdes, W. Randolph Montgomery, George T. Barker, Emanuel Redfield, Edward J. Ennis, Frank R. Bruce, Francis J. Quillinan* and *Sidney R. Nussenfeld* for the Debenture Holders, respondents. *Acting Solicitor General Washington, Roger S. Foster, Robert S. Rubin, George Zolotar* and *Myer Feldman* filed a memorandum for the Securities & Exchange Commission.

No. 589. EBLING BREWING CO., INC. *v.* PORTER, PRICE ADMINISTRATOR. November 25, 1946. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Herman Horowitz* for petitioner. *Acting Solicitor General Washington, Richard H. Field, Carl A. Auerbach, William R. Ming, Jr.* and *Seymour Friedman* for respondent. Reported below: 156 F. 2d 1012.

No. 605. TREW *v.* GARVEY, SECRETARY OF STATE. November 25, 1946. Petition for writ of certiorari to the Supreme Court of Arizona denied. *Henderson Stockton* for petitioner. *John L. Sullivan,* Attorney General of Arizona, for respondent. Reported below: 64 Ariz. —, 170 P. 2d 845.

No. 608. KENT *v.* UNITED STATES. November 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *M. A. Grace* and *Edwin H. Grace* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 157 F. 2d 1.

No. 613. GRANADA APARTMENTS HOTEL CORP. *v.* CITY NATIONAL BANK & TRUST CO. November 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Edward P. Morse* and *Isaac E. Ferguson* for petitioner. *Vincent O'Brien* for respondent. Reported below: 155 F. 2d 882.

No. 617. ESTATE OF BURR ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. November 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Alexander Halpern* and *Harry E. Ratner* for petitioners. *Acting Solicitor General Washington, Sewall Key, J. Louis Monarch* and *L. W. Post* for respondent. Reported below: 156 F. 2d 871.

No. 635. MCCRADY CONSTRUCTION CO. *v.* WALLING, WAGE & HOUR ADMINISTRATOR. November 25, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *John B. Nicklas, Jr.* for petitioner. *Acting Solicitor General Washington, William S. Tyson, Morton Liftin* and *George M. Szabad* for respondent. Reported below: 156 F. 2d 932.

No. 655. FINCH ET AL. *v.* ILLINOIS. November 25, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Scerial Thompson* for petitioners. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 394 Ill. 183, 68 N. E. 2d 283.

No. 502. NEW YORK EX REL. LUTZ *v.* MARTIN, WARDEN. November 25, 1946. Petition for writ of certiorari to the Supreme Court, Appellate Division, of New York, denied. Reported below: 65 N. Y. S. 2d 438.

No. 665. MYERS *v.* RAGEN, WARDEN. November 25, 1946. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 671. DAWSETT *v.* BUSH, WARDEN. November 25, 1946. Petition for writ of certiorari to the Supreme Court of Michigan denied. Reported below: 311 Mich. 588, 19 N. W. 2d 110.

No. 683. GREEN *v.* ILLINOIS. November 25, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 684. NEWMAN *v.* RAGEN, WARDEN. November 25, 1946. Petition for writ of certiorari to the Circuit Court of Bond County, Illinois, denied.

No. 685. Ross *v.* Ragen, Warden. November 25, 1946. Petition for writ of certiorari to the Criminal Court of Rock Island County, Illinois, denied.

No. 686. Sheets *v.* Ragen, Warden;
No. 691. Wofford *v.* Ragen, Warden; and
No. 692. Maciong *v.* Ragen, Warden. November 25, 1946. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 586. Reimann *v.* Clark, Attorney General; and
Nos. 587 and 588. Citizens Protective League et al. *v.* Clark, Attorney General. December 9, 1946. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. *James J. Laughlin* for petitioners. *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Stanley M. Silverberg* and *Thomas M. Cooley, II,* for respondent. Reported below: 81 U. S. App. D. C. —, 155 F. 2d 290.

No. 619. Grandview Dairy, Inc. *v.* Jones, War Food Administrator, et al. December 9, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Harry L. Marcus* and *Herbert L. Maltinsky* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Berge, Charles H. Weston* and *J. Stephen Doyle, Jr.* for respondents. Reported below: 157 F. 2d 5.

No. 632. Triumph Explosives, Inc. *v.* Giusti. December 9, 1946. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Ninth Circuit denied. *Harold C. Faulkner* for petitioner. *Chellis M. Carpenter* for respondent. Reported below: 156 F. 2d 351.

No. 633. Superior Packing Co. *v.* Porter, Price Administrator. December 9, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Theodore E. Rein* for petitioner. *Acting Solicitor General Washington, John R. Benney, George Moncharsh, David London* and *Albert J. Rosenthal* for respondent. Reported below: 156 F. 2d 193.

No. 640. Bailey Farm Dairy Co. et al. *v.* Anderson, Secretary of Agriculture. December 9, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Karl P. Spencer, Max O'Rell Truitt* and *William D. Donnelly* for petitioners. *Acting Solicitor General Washington, Assistant Attorney General Berge, Charles H. Weston* and *J. Stephen Doyle, Jr.* for respondent. Reported below: 157 F. 2d 87.

No. 641. Louisville Provision Co. *v.* Commissioner of Internal Revenue. December 9, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Chas. I. Dawson* and *A. Shelby Winstead* for petitioner. *Acting Solicitor General Washington, Sewall Key, J. Louis Monarch* and *Newton K. Fox* for respondent. Reported below: 155 F. 2d 505.

No. 651. Morris Investment Corp. *v.* Commissioner of Internal Revenue. December 9, 1946. Pe-

tition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Edward L. Blackman* for petitioner. *Acting Solicitor General Washington, Sewall Key, J. Louis Monarch* and *Newton K. Fox* for respondent. Reported below: 156 F. 2d 748.

No. 663. WILSON & CO., INC. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. December 9, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Richard C. Winkler* and *Frank G. Anderson* for petitioners. *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien* and *Ruth Weyand* for respondent. Reported below: 156 F. 2d 577.

No. 548. ZAYATZ *v.* SOUTHERN RAILWAY CO. December 9, 1946. Petition for writ of certiorari to the Supreme Court of Alabama denied. MR. JUSTICE BLACK is of the opinion that the petition should be granted. *George C. Dyer* and *Chelsea O. Inman* for petitioner. *H. G. Hedrick, Sidney S. Alderman* and *S. R. Prince* for respondent. Reported below: 26 So. 2d 545.

No. 376. PATTERSON *v.* FLORIDA. December 9, 1946. Petition for writ of certiorari to the Supreme Court of Florida denied. *Walter A. Shelley* for petitioner. Reported below: 157 Fla. 304, 25 So. 2d 713.

No. 465. DAVIS *v.* SMYTH, SUPERINTENDENT. December 9, 1946. Petition for writ of certiorari to the

Supreme Court of Appeals of Virginia denied. *William Alfred Hall, Jr.* for petitioner. Reported below: 184 Va. lxiv.

No. 506. REILLY *v.* PESCOR, WARDEN, ET AL. December 9, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. Petitioner *pro se. Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondents. Reported below: 156 F. 2d 632.

No. 657. PEETE *v.* CALIFORNIA. December 9, 1946. Petition for writ of certiorari to the Supreme Court of California denied. *Morris Levine* for petitioner. *Robert W. Kenny,* Attorney General of California, and *Frank Richards,* Deputy Attorney General, for respondent. Reported below: 28 Cal. 2d 306, 169 P. 2d 924.

No. 666. RICHARDSON *v.* NEW YORK. December 9, 1946. Petition for writ of certiorari to the Supreme Court, Richmond County, New York, denied.

No. 667. THOMAS *v.* RAGEN, WARDEN. December 9, 1946. Petition for writ of certiorari to the Circuit Court of Rock Island County, Illinois, denied.

No. 698. BROYLES *v.* OKLAHOMA. December 9, 1946. Petition for writ of certiorari to the Criminal Court of Appeals of Oklahoma denied. Reported below: 173 P. 2d 235.

No. 701. Cross *v.* Bush, Warden. December 9, 1946. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 709. Ross *v.* Nierstheimer, Warden. December 9, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 713. Prokop *v.* Ragen, Warden. December 9, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 714. Wilson *v.* Ragen, Warden. December 9, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 716. Abbott *v.* Pennsylvania Board of Parole. December 9, 1946. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied.

No. 334. Fowler *v.* Gill, General Superintendent. December 9, 1946. The motions for a restraining order, for joinder of party respondent, and to strike respondent's memorandum are denied. The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia is denied. Petitioner *pro se*. *Acting Solicitor General Washington* and *Robert S. Erdahl* for respondent. Reported below: 81 U. S. App. D. C. —, 156 F. 2d 565.

No. 355. BROWNE ET AL. *v.* UNITED STATES. December 16, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *David H. Cannon* and *Theodore E. Rein* for petitioners. *Solicitor General McGrath, Assistant Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 155 F. 2d 952.

No. 433. WELLS *v.* KENTUCKY. December 16, 1946. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *E. Selby Wiggins* for petitioner. *Eldon S. Dummit,* Attorney General of Kentucky, for respondent. Reported below: 302 Ky. 15, 193 S. W. 2d 645.

No. 660. UNION PRODUCING CO. *v.* WHITE ET AL. December 16, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *William A. Vinson* for petitioner. *Frederick J. Lotterhos* for respondents. Reported below: 157 F. 2d 254.

No. 672. SOEWAPADJI ET AL. *v.* WIXON, CUSTODIAN. December 16, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Harold M. Sawyer* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 157 F. 2d 289.

No. 676. GENERAL INDUSTRIES CO. *v.* 20 WACKER DRIVE BUILDING CORP. ET AL. December 16, 1946. Petition for writ of certiorari to the Circuit Court of Appeals

for the Seventh Circuit denied. *Ralph M. Snyder* for petitioner. *William C. Wines* for respondents. Reported below: 156 F. 2d 474.

No. 679. MARKET STREET RAILWAY CO. *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL. December 16, 1946. Petition for writ of certiorari to the Supreme Court of California denied. *Cyril Appel* and *Ivores R. Dains* for petitioner. *John J. O'Toole* and *Dion R. Holm* for the City and County of San Francisco, respondent. Reported below: 28 Cal. 2d 363, 171 P. 2d 875.

No. 689. THOMSON, ADMINISTRATOR, *v.* THOMSON. December 16, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Martin J. O'Donnell* for petitioner. Respondent *pro se.* Reported below: 156 F. 2d 581.

No. 124. GARDNER *v.* MONTGOMERY BAR ASSOCIATION. December 16, 1946. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. Petitioner *pro se. Joseph Knox Fornance* for respondent. Reported below: 354 Pa. 42, 46 A. 2d 579.

No. 695. HILL *v.* NIERSTHEIMER, WARDEN. December 16, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 723. HENDERSON *v.* RAGEN, WARDEN. December 16, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 727. AUSTIN ET AL. *v.* ILLINOIS. December 16, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 329 Ill. App. 276, 67 N. E. 2d 883.

No. 728. HYDE *v.* STEWART, ACTING WARDEN. December 16, 1946. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 736. DAVIS *v.* RAGEN, WARDEN. December 16, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 737. CONGDON *v.* RAGEN, WARDEN. December 16, 1946. Petition for writ of certiorari to the Circuit Court of Winnebago County, Illinois, denied.

No. 738. MINER *v.* RAGEN, WARDEN. December 16, 1946. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. —. MEDLEY *v.* REID, SUPERINTENDENT; and

No. —. COPELAND *v.* REID, SUPERINTENDENT. December 19, 1946. The motions for stay of execution are denied. Treating the papers as applications for writs of certiorari, certiorari is denied. *James J. Laughlin* for petitioners.

No. 252. JOHNSON *v.* GRAHAM, TRUSTEE, ET AL. December 23, 1946. Petition for writ of certiorari to the

Supreme Court of Tennessee denied. *John A. Armstrong* for petitioner. *Robert T. Kennerly,* Assistant Attorney General of Tennessee, for respondents. Reported below: 183 Tenn. 367, 192 S. W. 2d 832.

No. 538. BERMAN *v.* UNITED STATES. December 23, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *A. L. Wirin* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. *Julien Cornell, Ernest Angell* and *Osmond K. Fraenkel* filed a brief for the American Civil Liberties Union, as *amicus curiae,* in support of the petition. Reported below: 156 F. 2d 377.

No. 637. MCDONALD *v.* JOHNSTON, WARDEN. December 23, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioner *pro se. Acting Solicitor General Washington, Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 157 F. 2d 275.

No. 696. FIRST NATIONAL BANK OF CHICAGO, TRUSTEE, ET AL. *v.* DE KORWIN, EXECUTRIX. December 23, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *J. F. Dammann, William B. McIlvaine, Jr., Cranston Spray* and *David A. Watts* for petitioners. *Charles Rivers Aiken* for respondent. *Howard D. Moses, pro se,* filed a brief in opposition. Reported below: 156 F. 2d 858.

No. 697. FORT HOWARD PAPER CO. ET AL. *v.* FEDERAL TRADE COMMISSION. December 23, 1946. Petition for

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writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *John H. Hershberger, Richard C. Stevenson, William H. Leahy* and *Abraham L. Freedman* for petitioners. *Acting Solicitor General Washington, Assistant Attorney General Berge, Charles H. Weston, W. T. Kelley* and *Walter B. Wooden* for respondent. Reported below: 156 F. 2d 899.

No. 705. TRESSLER *v.* TRESSLER ET AL. December 23, 1946. Petition for writ of certiorari to the Supreme Court of Florida denied. *Joseph A. Fitzsimmons* for petitioner. *Thos. M. Lockhart* and *Robert J. Davis* for respondents. Reported below: 157 Fla. 881, 27 So. 2d 341.

No. 708. CLARK & CLARK ET AL. *v.* SMITH, KLINE & FRENCH LABORATORIES. December 23, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Arthur G. Connolly, Morton C. Haight* and *Nelson Littell* for petitioners. *George J. Harding* for respondent. Reported below: 157 F. 2d 725.

No. 597. MITCHELL *v.* NEBLETT, U. S. DISTRICT JUDGE. December 23, 1946. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. Petitioner *pro se. Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 157 F. 2d 328.

No. 693. STEELE *v.* NEW YORK. December 23, 1946. Petition for writ of certiorari to the Supreme Court, West-

chester County, New York, denied. Reported below: See 295 N. Y. 820, 66 N. E. 2d 590.

No. 706. SMALL *v.* MARTIN, WARDEN. December 23, 1946. Petition for writ of certiorari to the Supreme Court, Kings County, New York, denied.

No. 726. CANIZIO *v.* NEW YORK. December 23, 1946. Petition for writ of certiorari to the County Court of Kings County, New York, denied.

No. 749. MINER *v.* RAGEN, WARDEN;
No. 750. WITT *v.* ILLINOIS;
No. 751. BINKOWSKI *v.* ILLINOIS; and
No. 752. SHEETS *v.* RAGEN, WARDEN. December 23, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied. Reported below: No. 750, 394 Ill. 405, 68 N. E. 2d 731; No. 751, 394 Ill. 171, 68 N. E. 2d 304.

No. 753. KRETCHMER *v.* INDIANA. December 23, 1946. Petition for writ of certiorari to the Supreme Court of Indiana denied. Reported below: 224 Ind. —, 69 N. E. 2d 598.

No. 756. SIMMONS *v.* NIERSTHEIMER, WARDEN. December 23, 1946. Petition for writ of certiorari to the Circuit Court of Williamson County, Illinois, denied.

No. 762. GORDON *v.* RAGEN, WARDEN. December 23, 1946. Petition for writ of certiorari to the Circuit Court

of Appeals for the Seventh Circuit denied. Reported below: 157 F. 2d 766.

No. 769. CAGE ET AL. *v.* ILLINOIS;

No. 772. ROBINSON *v.* RAGEN, WARDEN; and

No. 773. PISKORZ *v.* RAGEN, WARDEN. December 23, 1946. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 774. HESKETT *v.* RAGEN, WARDEN. December 23, 1946. Petition for writ of certiorari to the Circuit Courts of Winnebago and Will Counties, Illinois, denied.

No. 775. DEADWYLER *v.* RAGEN, WARDEN. December 23, 1946. Petition for writ of certiorari to the Circuit Court of Winnebago County, Illinois, denied.

No. 776. POPPE *v.* ILLINOIS. December 23, 1946. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 394 Ill. 216, 68 N. E. 2d 254.

No. 288. RICHARDSON ET AL. *v.* KELLY, RECEIVER. January 6, 1947. Petition for writ of certiorari to the Supreme Court of Texas denied. *John M. Scott* for petitioners. *Charles L. Black* for respondent. Reported below: 144 Tex. 497, 191 S. W. 2d 857.

No. 525. COTNEY *v.* ALABAMA. January 6, 1947. Petition for writ of certiorari to the Court of Appeals of

Alabama denied. *G. Ernest Jones* for petitioner. *William N. McQueen,* Attorney General of Alabama, and *John O. Harris,* Assistant Attorney General, for respondent. Reported below: 26 So. 2d 608.

No. 700. BORG-WARNER CORP. ET AL. *v.* GOODWIN ET AL. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Max W. Zabel, Edward C. Gritzbaugh* and *Benton Baker* for petitioners. *Raymond L. Greist* for respondents. Reported below: 157 F. 2d 267.

No. 702. JOHNSON *v.* FLORIDA. January 6, 1947. Petition for writ of certiorari to the Supreme Court of Florida denied. *W. D. Bell* for petitioner. *J. Tom Watson,* Attorney General of Florida, for respondent. Reported below: 157 Fla. 685, 27 So. 2d 276.

No. 710. SCHWARZ ET AL. *v.* TOWNSHIP COMMITTEE OF MAPLEWOOD ET AL. January 6, 1947. Petition for writ of certiorari to the Supreme Court of New Jersey denied. *Adrian M. Unger* for petitioners. *Harry V. Osborne, Jr.* for respondents.

No. 712. CASSMAN, RECEIVER, *v.* KURZROCK ET AL. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Samuel Miles Fink* for petitioner. *George Furst* and *Samuel M. Hollander* for respondents. Reported below: 157 F. 2d 317.

No. 719. SPOKANE PORTLAND CEMENT CO. ET AL., EXECUTORS, *v.* SWANSON ET AL. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Laurence R. Hamblen* for petitioners. *Lawrence H. Brown* for Alice M. Swanson, Executrix, respondent. Reported below: 156 F. 2d 442.

No. 721. SABOURIN *v.* UNITED STATES. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Louis J. Castellano* for petitioner. *Acting Solicitor General Washington, Sewall Key, J. Louis Monarch* and *Ellis N. Slack* for the United States. Reported below: 157 F. 2d 820.

No. 730. REIGEL *v.* HARRISON ET AL. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Murray Seasongood* for petitioner. *Frank E. Wood* and *Robert S. Marx* for respondents. Reported below: 157 F. 2d 140.

No. 734. BAKER CASTOR OIL CO. *v.* INSURANCE COMPANY OF NORTH AMERICA. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Forrest E. Single* and *David S. Jackson* for petitioner. *D. Roger Englar* and *Martin Detels* for respondent. Reported below: 157 F. 2d 3.

No. 740. FOXBORO COMPANY *v.* TAYLOR INSTRUMENT COMPANIES. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Edward F. McClennen* and *Edward G. Cur-*

tis for petitioner. *Drury W. Cooper, D. Clyde Jones* and *Drury W. Cooper, Jr.* for respondent. Reported below: 157 F. 2d 226.

No. 526. 315 WEST 97TH STREET REALTY CO., INC. ET AL. *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. January 6, 1947. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Charles E. Hughes, Jr.* and *Curtiss E. Frank* for petitioners. *Acting Solicitor General Washington, Carl A. Auerbach* and *Harry H. Schneider* for respondent. Reported below: 156 F. 2d 982.

No. 653. NORTHWESTERN MUTUAL LIFE INSURANCE CO. *v.* SUTTLES, TAX COLLECTOR, ET AL. January 6, 1947. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Dan MacDougald* and *Robert S. Sams* for petitioner. *E. H. Sheats, Standish Thompson* and *W. S. Northcutt* for respondents. Reported below: 38 S. E. 2d 786.

No. 694. VICTOR ET AL., TRUSTEES, *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. January 6, 1947. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Henry N. Rapaport* for petitioners. *Acting Solicitor General Washington, John R. Benney, Carl A. Auerbach* and *Harry H. Schneider* for respondent. Reported below: 157 F. 2d 769.

No. 699. SWENT ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit

denied. *Nathan Moran* for petitioners. *Acting Solicitor General Washington, Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 155 F. 2d 513.

No. 722. McDONALD *v.* SHEPHERD. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Moe M. Tonkon* for petitioner. Reported below: 157 F. 2d 467.

No. 729. BEACH, EXECUTOR, *v.* BUSEY, COLLECTOR OF INTERNAL REVENUE. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Edwin H. Chaney, John J. Adams* and *Warner M. Pomerene* for petitioner. *Acting Solicitor General Washington, Sewall Key, Robert N. Anderson* and *Melva M. Graney* for respondent. Reported below: 156 F. 2d 496.

No. 733. INTERSTATE NATURAL GAS CO., INC. *v.* FEDERAL POWER COMMISSION ET AL. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *William A. Dougherty* and *Henry P. Dart, Jr.* for petitioner. *Acting Solicitor General Washington* and *Louis W. McKernan* for the Federal Power Commission, respondent. *Russell B. Brown, L. Dan Jones, Harold L. Kennedy, Donald C. McCreery, Charles I. Francis, Forrest M. Darrough, Hiram M. Dow, Walace Hawkins, L. G. Owen* and *Wm. H. Rector* filed a brief for the Independent Natural Gas Association of America et al., as *amici curiae,* in support of the petition. Reported below: 156 F. 2d 949.

No. 596. WRIGHT *v.* JOHNSTON, WARDEN. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit; and

No. 44, Misc. WRIGHT *v.* JOHNSTON, WARDEN. On motion for leave to file petition for writ of habeas corpus. January 6, 1947. The motion for leave to file petition for writ of habeas corpus is denied. The petition for writ of certiorari is also denied. Petitioner *pro se.* *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent.

No. 743. LINCOLN NATIONAL BANK ET AL., EXECUTORS, *v.* KINDLEBERGER, ADMINISTRATOR. January 6, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Arthur C. Keefer* and *F. Granville Munson* for petitioners. *Leslie C. Garnett* and *Samuel F. Beach* for respondent. *Lawrence A. Baker* filed a brief for the Life Insurance Association of America et al., as *amici curiae,* in support of the petition. Reported below: 81 U. S. App. D. C. —, 155 F. 2d 281.

No. 159. ROSS *v.* RAGEN, WARDEN; and

No. 180. TAYLOR *v.* ILLINOIS. January 6, 1947. Petitions for writs of certiorari to the Supreme Court of Illinois denied. Petitioners *pro se.* *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondents.

No. 258. RAYMOND *v.* RAGEN, WARDEN. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied. Petitioner *pro se.*

George F. Barrett, Attorney General of Illinois, and *William C. Wines*, Assistant Attorney General, for respondent.

No. 277. BUTZ *v.* NIERSTHEIMER, WARDEN. January 6, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied. Petitioner *pro se*. *George F. Barrett*, Attorney General of Illinois, and *William C. Wines*, Assistant Attorney General, for respondent.

No. 415. SINGER *v.* RAGEN, WARDEN. January 6, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied. Petitioner *pro se*. *George F. Barrett*, Attorney General of Illinois, and *William C. Wines*, Assistant Attorney General, for respondent.

No. 447. BENNETT *v.* RAGEN, WARDEN. January 6, 1947. Petition for writ of certiorari to the Criminal Court of Cook County and Circuit Court of Will County, Illinois, denied. Petitioner *pro se*. *George F. Barrett*, Attorney General of Illinois, and *William C. Wines*, Assistant Attorney General, for respondent.

No. 611. FAUCETTA *v.* NEW YORK. January 6, 1947. Petition for writ of certiorari to the County Court of Nassau County, New York, denied. *Jacob W. Friedman* for petitioner.

No. 704. JOHNSON *v.* MAYO, STATE PRISON CUSTODIAN. January 6, 1947. Petition for writ of certiorari to the Supreme Court of Florida denied.

No. 707. McMURTREY *v.* CLARK. January 6, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. Petitioner *pro se. Acting Solicitor General Washington, Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 81 U.S. App. D. C. 294.

No. 720. BROWN *v.* BUSH, WARDEN. January 6, 1947. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 757. DAVIS *v.* RAGEN, WARDEN;

No. 783. SCARPINATO *v.* RAGEN, WARDEN; and

No. 784. LEWIS *v.* ILLINOIS. January 6, 1947. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 785. EVANS *v.* RAGEN, WARDEN. January 6, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 795. KIMLER *v.* RAGEN, WARDEN. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 796. HOLLAND *v.* RAGEN, WARDEN. January 6, 1947. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 797. TAYLOR *v.* RAGEN, WARDEN. January 6, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 798. REED *v.* RAGEN, WARDEN; and

No. 799. BRILL *v.* RAGEN, WARDEN. January 6, 1947. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 703. RAPPY *v.* UNITED STATES. January 13, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Louis H. Solomon* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 157 F. 2d 964.

No. 717. TOWER *v.* WATER HAMMER ARRESTER CORP. January 13, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Harold Olsen* for petitioner. *Sidney Neuman* for respondent. Reported below: 156 F. 2d 775.

No. 744. SALZMAN *v.* LONDON COAT OF BOSTON, INC. January 13, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Maurice Palais* for petitioner. Reported below: 156 F. 2d 538.

No. 754. KORDEWICK ET AL. *v.* INDIANA HARBOR BELT RAILROAD CO. January 13, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Gotthard A. Dahlberg* and *Sarsfield Collins* for petitioners. *Sidney C. Murray* and *Marvin A. Jersild* for respondent. Reported below: 157 F. 2d 753.

No. 787. CHISHOLM, ADMINISTRATRIX, *v.* READING COMPANY. January 13, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *John H. Hoffman* for petitioner. *Wm. Clarke Mason* for respondent. Reported below: 157 F. 2d 768.

No. 758. FRAZER *v.* COMMISSIONER OF INTERNAL REVENUE. January 13, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *I. Newton Brozan* and *Aaron Holman* for petitioner. *Acting Solicitor General Washington, Sewall Key, J. Louis Monarch* and *Morton K. Rothschild* for respondent. Reported below: 157 F. 2d 282.

No. 786. RUBIN *v.* NEW YORK. January 13, 1947. Petition for writ of certiorari to the County Court of Orange County, New York, denied.

No. 788. FASANO *v.* NEW YORK. January 13, 1947. Petition for writ of certiorari to the County Court of Kings County, New York, denied.

No. 802. SMITH *v.* INDIANA. January 13, 1947. Petition for writ of certiorari to the Supreme Court of Indiana denied.

No. 807. STRONG *v.* RAGEN, WARDEN. January 13, 1947. Petition for writ of certiorari to the Circuit Court of Kane County, Illinois, denied.

No. 817. RUCKER *v.* RAGEN, WARDEN;
No. 828. WILLIAMS *v.* RAGEN, WARDEN; and
No. 830. NITTI *v.* RAGEN, WARDEN. January 13, 1947. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 435. DICKHEISER ET AL. *v.* PENNSYLVANIA RAILROAD CO. ET AL. January 20, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Archibald Palmer* for petitioners. *John Dickinson* and *John B. Prizer* for respondents. Reported below: 155 F. 2d 266.

No. 595. PERRINE ET AL. *v.* PENNROAD CORPORATION ET AL. January 20, 1947. Petition for writ of certiorari to the Supreme Court of Delaware denied. *Joseph B. Keenan, Leo Brady* and *Robert T. Murphy* for petitioners. *Gordon A. Block* for the Pennroad Corporation, respondent. Reported below: 47 A. 2d 479.

No. 603. FELDMAN *v.* PENNROAD CORPORATION. January 20, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Leo Brady* and *Mortimer S. Gordon* for petitioner. *Gordon A. Block* for respondent. Reported below: 155 F. 2d 773.

No. 662. LEE *v.* ALABAMA. January 20, 1947. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Samuel M. Johnston* for petitioner. *William N. McQueen,* Attorney General of Alabama, and *John O.*

Harris, Assistant Attorney General, for respondent. Reported below: 248 Ala. 246, 27 So. 2d 147.

No. 746. CORBITT COMPANY *v.* UNITED STATES. January 20, 1947. Petition for writ of certiorari to the Court of Claims denied. *Claude M. Houchins* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Sonnett* and *Paul A. Sweeney* for the United States. Reported below: 106 Ct. Cl. 827, 66 F. Supp. 129.

No. 747. JACKSON *v.* CARTER OIL CO. ET AL. January 20, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Finis E. Riddle* and *Joseph T. Dickerson* for petitioner. *L. G. Owen, Forrest M. Darrough, W. T. Anglin* and *W. M. Haulsee* for respondents. Reported below: 156 F. 2d 726.

No. 764. INTERSTATE HOTEL CO. *v.* REMICK MUSIC CORP.;

No. 765. PEONY PARK, INC. *v.* M. WITMARK & SONS;

No. 766. FOX *v.* CHAPPELL & CO., INC.; and

No. 767. INTERSTATE HOTEL CO. *v.* KERN ET AL. January 20, 1947. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *William J. Hotz* for petitioners. *Ralph E. Svoboda* for respondents. Reported below: 157 F. 2d 744.

No. 771. VANCE *v.* AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS ET AL. January 20, 1947. Peti-

tion for writ of certiorari to the District Court of the United States for the Western District of Missouri denied. Petitioner *pro se*. *Maurice J. O'Sullivan, Louis D. Frohlich* and *Herman Finkelstein* for the American Society of Composers, Authors & Publishers et al., and *Henry Arthur* for the Music Publisher's Protective Association, respondents.

No. 778. THOMAS FLEXIBLE COUPLING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. January 20, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Austin F. Canfield* for petitioner. *Acting Solicitor General Washington, Sewall Key, Stanley M. Silverberg, Helen Carloss* and *Carlton Fox* for respondent. Reported below: 158 F. 2d 828.

No. 779. ELADE REALTY CORP. *v.* UNITED STATES. January 20, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Louis L. Tetelman* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 157 F. 2d 979.

No. 790. R. R. DONNELLEY & SONS CO. *v.* NATIONAL LABOR RELATIONS BOARD. January 20, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Ernest S. Ballard* for petitioner. *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien, Ruth Weyand* and *Marcel Mallet-Prevost* for respondent. Reported below: 156 F. 2d 416.

No. 768. LINCOLN STORES, INC. *v.* NASHUA MANUFACTURING CO. January 20, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. MR. JUSTICE BLACK is of the opinion that the petition should be granted. *Samuel E. Darby, Jr.* and *Henry M. Huxley* for petitioner. *J. L. Stackpole* for respondent. Reported below: 157 F. 2d 154.

No. 842. MARTINE *v.* NEW YORK. January 20, 1947. Petition for writ of certiorari to the County Court of Kings County, New York, denied.

No. 853. PARKER *v.* INDIANA. January 20, 1947. Petition for writ of certiorari to the Supreme Court of Indiana denied. Reported below: 224 Ind. —, 69 N. E. 2d 176.

No. 856. DAVIS *v.* RAGEN, WARDEN; and

No. 858. MONTIEL *v.* RAGEN, WARDEN. January 20, 1947. Petitions for writs of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 791. AXELROD ET AL. *v.* FLEMING ET AL., TRUSTEES, ET AL. February 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Harry Kirshbaum* for petitioners. *Wilkie Bushby, Alexander M. Lewis, Sanford H. E. Freund, Edward W. Bourne, Jesse E. Waid, Edward K. Hanlon* and *Daniel James* for respondents. Reported below: 157 F. 2d 241.

727731 O—47——57

No. 792. GENERAL METALS POWDER CO. *v.* S. K. WELLMAN CO. ET AL. February 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *F. O. Richey* and *B. D. Watts* for petitioner. *George I. Haight* for respondents. Reported below: 157 F. 2d 505.

No. 814. LUCCHESE ET AL. *v.* MAUERMANN. February 3, 1947. Petition for writ of certiorari to the Court of Civil Appeals, 4th Supreme Judicial District, of Texas, denied. *Elmer Ware Stahl* for petitioners. *Carl Wright Johnson* and *Nat L. Hardy* for respondent. Reported below: 195 S. W. 2d 422.

No. 831. FLEMING ET AL., TRUSTEES, *v.* OKLAHOMA TAX COMMISSION. February 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *W. F. Peter, W. V. Hodges* and *Eaton Adams* for petitioners. Reported below: 157 F. 2d 888.

No. 833. AMATO, DOING BUSINESS AS M. AMATO & SON, *v.* PORTER, PRICE ADMINISTRATOR. February 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington* and *David London* for respondent. Reported below: 157 F. 2d 719.

No. 838. PENNSYLVANIA RAILROAD CO. *v.* MCCARTHY, ADMINISTRATOR. February 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh

Circuit denied. *Floyd E. Thompson, John Dickinson* and *R. Aubrey Bogley* for petitioner. *S. K. Frankenstein* for respondent. Reported below: 156 F. 2d 877.

No. 867. TOWNSEND ET AL. *v.* FIRST NATIONAL BANK & TRUST CO. ET AL. February 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Creekmore Wallace* and *B. E. Harkey* for petitioners. *Ezra Brainerd, Jr.* for respondent. Reported below: 157 F. 2d 852.

No. 816. PATTERSON *v.* VIRGINIA ELECTRIC & POWER CO. February 3, 1947. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. Reported below: 185 Va. lxviii.

No. 818. BASILE *v.* NEW YORK. February 3, 1947. Petition for writ of certiorari to the County Court of Albany County, New York, denied.

No. 826. BRUMMEL *v.* L. F. DIETZ & ASSOCIATES, INC. ET AL. February 3, 1947. Petition for writ of certiorari to the Appellate Division, Supreme Court of New York, denied. *Harold L. Lipton* for petitioner. *Kenneth H. Guild* for respondents. Reported below: 187 Misc. 758, 67 N. Y. S. 2d 725; 270 App. Div. 994, 62 N. Y. S. 2d 864.

No. 887. HUDSON *v.* UNITED STATES. February 3, 1947. The motion for bail is denied. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth

Circuit also denied. MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE are of the opinion that the petition for certiorari should be granted. *Hayden C. Covington* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 157 F. 2d 782.

No. 628. OLSON *v.* RAGEN, WARDEN. February 3, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied. Petitioner *pro se. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 739. PIERCE *v.* UNITED STATES. February 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Petitioner *pro se. Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 157 F. 2d 848.

No. 761. ANDERSON *v.* MICHIGAN. February 3, 1947. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 801. COYLE *v.* HEINZE, WARDEN. February 3, 1947. Petition for writ of certiorari to the Supreme Court of California denied.

No. 803. MCCANN *v.* NEW YORK. February 3, 1947. Petition for writ of certiorari to the County Court of Bronx County, New York, denied.

No. 808. GIBSON *v.* RAGEN, WARDEN. February 3, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 822. BUTZ *v.* STUBBLEFIELD, SUPERINTENDENT. February 3, 1947. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, denied.

No. 829. AUSTIN ET AL. *v.* RAGEN, WARDEN. February 3, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 835. HADLEY *v.* UNITED STATES. February 3, 1947. Petition for writ of certiorari to the Court of Claims denied. Petitioner *pro se*. *Acting Solicitor General Washington, Assistant Attorney General Sonnett* and *Paul A. Sweeney* for the United States. Reported below: 106 Ct. Cl. 819, 66 F. Supp. 140.

No. 844. NEW YORK EX REL. MUMMIANI *v.* JACKSON, WARDEN. February 3, 1947. Petition for writ of certiorari to the County Court of Clinton County, New York, denied. Petitioner *pro se*. *Nathaniel L. Goldstein,* Attorney General of New York, and *Wendell P. Brown,* Solicitor General, for respondent. Reported below: See 296 N. Y. 630, 69 N. E. 2d 240.

No. 864. PIFER *v.* UNITED STATES. February 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. Reported below: 158 F. 2d 867.

No. 873. ADAMS *v.* RAGEN, WARDEN. February 3, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 884. PARKER *v.* RAGEN, WARDEN. February 3, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Circuit Court of Will County and Supreme Court of Illinois denied.

No. 885. FURMAN *v.* RAGEN, WARDEN. February 3, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 886. ALLARD *v.* NEW YORK. February 3, 1947. Petition for writ of certiorari to the County Court of Schenectady County, New York, denied.

No. 896. WITT *v.* RAGEN, WARDEN. February 3, 1947. Petition for writ of certiorari to the Circuit Court of Kendall County, Circuit Court of Will County and Supreme Court of Illinois denied.

No. 898. STEINHARDT *v.* MICHIGAN. February 3, 1947. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 919. REYNOLDS *v.* ILLINOIS. February 3, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 920. PISKORZ *v.* RAGEN, WARDEN; and

No. 921. VAN PELT *v.* RAGEN, WARDEN. February 3, 1947. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 913. FINLEY *v.* RAGEN, WARDEN. On petition for writ of certiorari to the Criminal Court of Cook County, Illinois; and

No. 101, Misc. EX PARTE FINLEY. February 3, 1947. The petition for writ of certiorari is denied. The motion for leave to file petition for writ of habeas corpus is also denied.

ORDERS GRANTING REHEARING, FROM OCTOBER 7, 1946, THROUGH FEBRUARY 3, 1947.

No. 368. SIOUX TRIBE OF INDIANS *v.* UNITED STATES. See *ante*, p. 684.

No. 497. 149 MADISON AVENUE CORP. ET AL. *v.* ASSELTA ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. December 9, 1946. The petition for rehearing is granted. The order entered October 28, 1946, denying certiorari, *ante*, p. 764, is vacated and the petition for writ of certiorari is granted. *Walter Gordon Merritt, Robert R. Bruce* and *John J. Boyle* for petitioners. *Wilbur Duberstein* and *Frederick E. Weinberg* for respondents.

No. 572. SCHINE CHAIN THEATRES, INC. ET AL. *v.* UNITED STATES. January 20, 1947. Appeal from the

District Court of the United States for the Western District of New York. The petition for rehearing is granted. The judgment entered December 16, 1946, *ante*, p. 686, is vacated and probable jurisdiction is noted. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Willard S. McKay, Harold R. Medina, Arthur Garfield Hays* and *Osmond K. Fraenkel* for appellants.

ORDERS DENYING REHEARING, FROM OCTOBER 7, 1946, THROUGH FEBRUARY 3, 1947.*

No. 127, Misc., October Term, 1945. RESCO *v.* RAGEN, WARDEN. October 14, 1946. 328 U. S. 824.

No. 122, October Term, 1945. FISHER *v.* UNITED STATES. October 14, 1946. 328 U. S. 463.

No. 274, October Term, 1945. ROBERTSON *v.* CALIFORNIA. October 14, 1946. 328 U. S. 440.

No. 510, October Term, 1945. KNAUER *v.* UNITED STATES. October 14, 1946. 328 U. S. 654.

No. 719, October Term, 1945. PINKERTON ET AL. *v.* UNITED STATES. October 14, 1946. 328 U. S. 640.

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*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of the applications in the cases in which orders denying rehearing were announced October 14, 1946.

No. 732, October Term, 1945. HELWIG *v.* UNITED STATES. October 14, 1946. 328 U. S. 820.

No. 744, October Term, 1945. EVANS *v.* UNITED STATES. October 14, 1946. 328 U. S. 855.

No. 754, October Term, 1945. SEWELL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1946. 327 U. S. 783.

No. 790, October Term, 1945. AETNA INSURANCE CO. *v.* HOBBS, COMMISSIONER OF INSURANCE; and

No. 791, October Term, 1945. AMERICAN INDEMNITY CO. *v.* HOBBS, COMMISSIONER OF INSURANCE. October 14, 1946. 328 U. S. 822.

No. 843, October Term, 1945. SECURITIES & EXCHANGE COMMISSION *v.* W. J. HOWEY CO. ET AL. October 14, 1946. 328 U. S. 293.

No. 987, October Term, 1945. WILSON *v.* UNITED STATES. October 14, 1946. 328 U. S. 823.

No. 1055, October Term, 1945. BEECHER *v.* FEDERAL LAND BANK OF SPOKANE ET AL. October 14, 1946. 328 U. S. 871.

No. 1068, October Term, 1945. EASTMAN *v.* UNITED STATES. October 14, 1946. 328 U. S. 852.

No. 1071, October Term, 1945. CARPENTER ET AL. *v.* TITLE INSURANCE & TRUST CO. October 14, 1946. 328 U. S. 847.

No. 1102, October Term, 1945. GOULD ET AL. *v.* UNITED STATES. October 14, 1946. 328 U. S. 848.

No. 1108, October Term, 1945. BROOKS, ADMINISTRATRIX, *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. ET AL. (328 U. S. 867);

No. 1109, October Term, 1945. DIKIS, ADMINISTRATOR, ET AL. *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. ET AL. (328 U. S. 868); and

No. 1110, October Term, 1945. ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* CHASE NATIONAL BANK ET AL. (328 U. S. 868). October 14, 1946.

No. 1135, October Term, 1945. RUBIN *v.* NEW YORK. October 14, 1946. 328 U. S. 851.

No. 1162, October Term, 1945. MURPHY *v.* MURPHY. October 14, 1946. 328 U. S. 872.

No. 1172, October Term, 1945. LORENZO *v.* UNITED STATES ET AL. (328 U. S. 863);

No. 1173, October Term, 1945. ROSASCO *v.* UNITED STATES ET AL. (328 U. S. 863);

No. 1174, October Term, 1945. MARIANO MARESCA & CO. *v.* UNITED STATES ET AL. (328 U. S. 864); and

No. 1175, October Term, 1945. "Italia"-Societa Anonima Di Navigazione *v.* United States et al. (328 U. S. 864). October 14, 1946.

No. 1176, October Term, 1945. Societa Anonima Cooperative Di Navigazione Garibaldi *v.* United States et al.;

No. 1177, October Term, 1945. "Italia"-Societa Anonima Di Navigazione *v.* United States et al.;

No. 1178, October Term, 1945. "Italia"-Societa Anonima Di Navigazione *v.* United States et al.; and

No. 1179, October Term, 1945. "Italia"-Societa Anonima Di Navigazione *v.* United States et al. October 14, 1946. 328 U. S. 864.

No. 1223, October Term, 1945. Loomis *v.* United States et al. October 14, 1946. 328 U. S. 864.

No. 1180, October Term, 1945. E. C. Schroeder Co., Inc. *v.* Clifton et al. October 14, 1946. 328 U. S. 858.

No. 1201, October Term, 1945. United States ex rel. Karpathiou *v.* Jordan, District Director of Immigration and Naturalization. October 14, 1946. 328 U. S. 868.

No. 1220, October Term, 1945. Phillips et al. *v.* Baltimore & Ohio Railroad Co. October 14, 1946. 328 U. S. 871.

No. 1230, October Term, 1945. BEECHER *v.* FEDERAL LAND BANK OF SPOKANE ET AL. October 14, 1946. 328 U. S. 871.

No. 1233, October Term, 1945. E. L. ESSLEY MACHINERY CO. *v.* DELTA MANUFACTURING CO. October 14, 1946. 328 U. S. 867.

No. 1241, October Term, 1945. KAR ENGINEERING CO., INC. *v.* BROWN & SHARPE MANUFACTURING CO. ET AL. October 14, 1946. 328 U. S. 869.

No. 1242, October Term, 1945. MEDLEY *v.* UNITED STATES. October 14, 1946. 328 U. S. 873.

No. 1255, October Term, 1945. WEST PUBLISHING CO. *v.* MCCOLGAN, FRANCHISE TAX COMMISSIONER. October 14, 1946. 328 U. S. 823.

No. 1265, October Term, 1945. ROBERTS *v.* BOWMAN, SUPERINTENDENT. October 14, 1946. 328 U. S. 873.

No. 1266, October Term, 1945. SMALL *v.* WEBSTER, SUPERINTENDENT. October 14, 1946. 328 U. S. 873.

No. 342, October Term, 1945. ANDERSON ET AL. *v.* MT. CLEMENS POTTERY CO. October 14, 1946. 328 U. S. 680.

No. 880, October Term, 1945. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP. October 14, 1946. The motion for leave to file a fourth petition for rehearing is denied. 328 U. S. 881.

No. 893, October Term, 1945. SHAVER *v.* FIDELITY BANKERS TRUST CO., TRUSTEE. October 14, 1946. Second petition for rehearing denied. 328 U. S. 878.

No. 48, October Term, 1945. UNIVERSAL OIL PRODUCTS CO. *v.* ROOT REFINING CO. October 14, 1946. THE CHIEF JUSTICE, MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. 328 U. S. 575.

No. 109, Misc., October Term, 1945. IN RE MASSEY (327 U. S. 770); and

No. 1221, October Term, 1945. CROZIER ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. (328 U. S. 871). October 21, 1946. The motions for leave to file petitions for rehearing are denied. THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

No. 269, October Term, 1945. SABIN ET AL. *v.* HOME OWNERS' LOAN CORP. ET AL. (326 U. S. 812); and

No. 952, October Term, 1945. SABIN ET AL. *v.* HOME OWNERS' LOAN CORP. ET AL. (328 U. S. 880). October 21, 1946. The motion for leave to file a second petition for rehearing is denied. THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 404, October Term, 1945. DAVIS *v.* UNITED STATES (328 U. S. 582); and

No. 489, October Term, 1945. ZAP *v.* UNITED STATES (328 U. S. 624). October 21, 1946. THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

No. 625, October Term, 1945. HUST *v.* MOORE-MCCORMACK LINES, INC. See *ante*, p. 674.

No. 132. UNITED STATES EX REL. RUSSO *v.* NIERSTHEIMER, WARDEN. October 21, 1946.

No. 505. DE LA ROI *v.* CALIFORNIA. October 24, 1946. Motion for stay of execution and petition for rehearing denied. MR. JUSTICE MURPHY took no part in the consideration or decision of these applications.

No. 278, October Term, 1945. RECONSTRUCTION FINANCE CORP. ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL. (328 U. S. 495);

No. 279, October Term, 1945. RECONSTRUCTION FINANCE CORP. ET AL. *v.* DENVER & SALT LAKE WESTERN RAILROAD CO. ET AL. (328 U. S. 495);

No. 280, October Term, 1945. RECONSTRUCTION FINANCE CORP. ET AL. *v.* CITY BANK FARMERS TRUST CO., TRUSTEE, ET AL. (328 U. S. 495);

No. 281, October Term, 1945. RECONSTRUCTION FINANCE CORP. ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL. (328 U. S. 495);

No. 282, October Term, 1945. RECONSTRUCTION FINANCE CORP. ET AL. *v.* THOMPSON, TRUSTEE, ET AL. (328 U. S. 495); and

No. 916, October Term, 1945. SAUNDERS *v.* WILKINS. (328 U. S. 870). October 28, 1946. THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

No. 804, October Term, 1945. COLEGROVE ET AL. *v.* GREEN ET AL. October 28, 1946. THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. 328 U. S. 549.

No. 308. STUB *v.* UNITED STATES. October 28, 1946. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 33, Misc. STEPHENS, ADMINISTRATOR, *v.* UNITED STATES. November 12, 1946.

No. 100. SILAS MASON CO., INC. ET AL. *v.* UNITED STATES. November 12, 1946.

No. 112. WALLER *v.* NORTHERN PACIFIC TERMINAL CO. November 12, 1946.

No. 133. CHATZ, TRUSTEE IN BANKRUPTCY, *v.* MIDCO OIL CORP. November 12, 1946.

No. 134. ANTONELLI FIREWORKS CO., INC. ET AL. *v.* UNITED STATES. November 12, 1946.

No. 158. J. E. HADDOCK, LIMITED, ET AL. *v.* PILLSBURY, DEPUTY COMMISSIONER, ET AL. November 12, 1946.

No. 164. MOSELEY ET AL. *v.* UNITED STATES APPLIANCE CORP. November 12, 1946.

No. 185. ANCHOR SERUM CO. *v.* AMERICAN COOPERATIVE SERUM ASSOCIATION; and

No. 186. ILLINOIS FARM BUREAU SERUM ASSOCIATION *v.* AMERICAN COOPERATIVE SERUM ASSOCIATION. November 12, 1946.

No. 187. REALTY OPERATORS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 188. WILLIAM HENDERSON (PARTNERSHIP) *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 189. WILLIAMS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. November 12, 1946.

No. 217. MISHAWAKA RUBBER & WOOLEN MANUFACTURING CO. *v.* PANTHER-PANCO RUBBER CO., INC. November 12, 1946.

No. 230. BEAUCHAMP *v.* UNITED STATES. November 12, 1946.

No. 267. BANK OF CALIFORNIA NATIONAL ASSOCIATION, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. November 12, 1946.

No. 276. GENERAL TRANSPORTATION CO. ET AL. *v.* UNITED STATES ET AL. November 12, 1946.

No. 292. UNION METAL MANUFACTURING CO. ET AL. *v.* OOMS, COMMISSIONER OF PATENTS. November 12, 1946.

No. 300. EVERETT *v.* DOWNING. November 12, 1946.

No. 318. MOFFETT ET AL. *v.* COMMERCE TRUST CO. ET AL. November 12, 1946.

No. 321. CHATZ, TRUSTEE IN BANKRUPTCY, ET AL. *v.* ARMOUR PLANT EMPLOYEES CREDIT UNION; and

No. 322. CHATZ, TRUSTEE IN BANKRUPTCY, ET AL. *v.* TODD ET AL. November 12, 1946.

No. 323. BUICE *v.* PATTERSON ET AL. November 12, 1946.

No. 338. KUT *v.* BUREAU OF UNEMPLOYMENT COMPENSATION ET AL. November 12, 1946.

727731 O—47——58

No. 358. SUNCOOK VALLEY RAILROAD *v.* BOSTON & MAINE RAILROAD. November 12, 1946.

No. 378. GRANT, DOING BUSINESS AS NO SLEET WINDSHIELD HEATER CO., *v.* GENERAL MOTORS CORP. ET AL. November 12, 1946.

No. 412. ANDREWS *v.* ADERHOLD, WARDEN. November 12, 1946.

No. 479. HILL *v.* HUDSPETH, WARDEN. November 12, 1946.

No. 176. SHOTKIN *v.* JUDGES, SUPERIOR COURT, ATLANTA CIRCUIT. November 12, 1946. The application for the allowance of an appeal is also denied.

No. 232. BLALACK *v.* UNITED STATES. November 12, 1946. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 804. October Term, 1945. COLEGROVE ET AL. *v.* GREEN ET AL. November 18, 1946. The motion for reargument before the full bench is denied. THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 2, Misc. SLIVENSKY *v.* NEW JERSEY. November 18, 1946.

No. 218. WOLTER *v.* SAFEWAY STORES, INC. November 18, 1946.

No. 282. MASON *v.* NEW YORK. November 18, 1946.

No. 449. ORDER OF RAILROAD TELEGRAPHERS ET AL. *v.* NEW ORLEANS, TEXAS & MEXICO RAILWAY CO. ET AL. November 18, 1946.

No. 165. PEELER *v.* PEELER. November 25, 1946.

No. 484. BAKER ET AL. *v.* UNITED STATES. November 25, 1946.

No. 485. SILVERMAN *v.* UNITED STATES. November 25, 1946.

No. 486. JOHNSON *v.* UNITED STATES. November 25, 1946.

No. 501. OKONITE COMPANY *v.* COMMISSIONER OF INTERNAL REVENUE. November 25, 1946.

No. 531. COOK *v.* FORTSON, SECRETARY OF STATE, ET AL. November 25, 1946.

No. 532. TURMAN ET AL. *v.* DUCKWORTH, CHAIRMAN, ET AL. November 25, 1946.

No. 57, Misc. EX PARTE FLETCHER. December 9, 1946. THE CHIEF JUSTICE and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 880, October Term, 1945. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP. December 9, 1946. The motion for leave to file a fifth petition for rehearing is denied. THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 176. SHOTKIN *v.* JUDGES, SUPERIOR COURT, ATLANTA CIRCUIT. December 9, 1946. The motion for leave to file a second petition for rehearing is denied.

No. 299. PALUMBO *v.* JACKSON, WARDEN. December 9, 1946.

No. 642. TEXAS PACIFIC COAL & OIL CO. *v.* CALCOTE ET AL. December 9, 1946.

No. 659. DONNELL *v.* STEWART, ACTING WARDEN. December 9, 1946.

No. 58, Misc. SHOTKIN *v.* PENNSYLVANIA COMPANY. December 16, 1946.

No. 12. CLEVELAND *v.* UNITED STATES;
No. 13. CLEVELAND *v.* UNITED STATES;

No. 14. CLEVELAND *v.* UNITED STATES;
No. 15. DARGER *v.* UNITED STATES;
No. 16. JESSOP *v.* UNITED STATES;
No. 17. DOCKSTADER *v.* UNITED STATES;
No. 18. STUBBS *v.* UNITED STATES; and
No. 19. PETTY *v.* UNITED STATES. December 16, 1946.

No. 21. CHAMPLIN REFINING CO. *v.* UNITED STATES ET AL. December 16, 1946.

No. 534. SMITH *v.* UNITED STATES. December 16, 1946.

No. 536. KOZA ET AL. *v.* DREXLER ET AL. December 16, 1946.

No. 566. JONES *v.* TEXAS. December 16, 1946.

Nos. 590 and 591. F. A. GILLESPIE & SONS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. December 16, 1946.

No. 476. ILLINOIS PACKING CO. *v.* HENDERSON, ACTING ADMINISTRATOR, ET AL. December 16, 1946. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 342. DINGMAN *v.* UNITED STATES. December 23, 1946.

No. 502. NEW YORK EX REL. LUTZ *v.* MARTIN, WARDEN. December 23, 1946.

No. 676. GENERAL INDUSTRIES CO. *v.* 20 WACKER DRIVE BUILDING CORP. ET AL. December 23, 1946.

No. 657. PEETE *v.* CALIFORNIA. January 6, 1947.

No. 693. STEELE *v.* NEW YORK. January 6, 1947.

No. 334. FOWLER *v.* GILL, GENERAL SUPERINTENDENT. January 6, 1947. The application for a rule to show cause and the motion to substitute Donald Clammer for Howard B. Gill as the party respondent are denied. The petition for rehearing is also denied.

No. 556. CITIES SERVICE GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. January 6, 1947.

No. 3. FREEMAN, TRUSTEE, *v.* HEWIT, DIRECTOR OF GROSS INCOME TAX DIVISION. January 13, 1947.

No. 454. FLEMING ET AL., TRUSTEES, ET AL. *v.* TRAPHAGEN ET AL. January 13, 1947.

No. 496. LEE *v.* DEPARTMENT OF PUBLIC WELFARE ET AL. January 13, 1947.

No. 672. SOEWAPADJI ET AL. *v.* WIXON, CUSTODIAN. January 13, 1947.

No. 679. MARKET STREET RAILWAY CO. *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL. January 13, 1947.

No. 689. THOMSON, ADMINISTRATOR, *v.* THOMSON. January 13, 1947.

No. 42. VANSTON BONDHOLDERS PROTECTIVE COMMITTEE *v.* GREEN ET AL.;

No. 43. VANSTON BONDHOLDERS PROTECTIVE COMMITTEE *v.* EARLY ET AL.;

No. 44. VANHORN BONDHOLDERS PROTECTIVE COMMITTEE *v.* GREEN ET AL.; and

No. 45. VANHORN BONDHOLDERS PROTECTIVE COMMITTEE *v.* EARLY ET AL. January 13, 1947. MR. JUSTICE REED took no part in the consideration or decision of these applications. MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON are of the opinion that the petitions should be granted.

No. 74, Misc. PHILLIPS *v.* RAGEN, WARDEN. January 20, 1947.

No. 183. CAHOON *v.* UNITED STATES. January 20, 1947.

No. 538. BERMAN *v.* UNITED STATES. January 20, 1947.

No. 705. TRESSLER *v.* TRESSLER ET AL. January 20, 1947.

No. 708. CLARK & CLARK ET AL. *v.* SMITH, KLINE & FRENCH LABORATORIES. January 20, 1947.

No. 681. W. H. TOMPKINS CO. *v.* UNITED STATES ET AL. January 20, 1947.

No. 40. UNITED STATES *v.* CARMACK. February 3, 1947.

No. 53. UNITED STATES *v.* SHERIDAN. February 3, 1947.

No. 75. INTERNATIONAL HARVESTER CO. *v.* EVATT, TAX COMMISSIONER OF OHIO. February 3, 1947.

No. 79. STEELE *v.* GENERAL MILLS, INC. February 3, 1947.

No. 180. TAYLOR *v.* ILLINOIS. February 3, 1947.

No. 288. RICHARDSON ET AL. *v.* KELLY, RECEIVER. February 3, 1947.

No. 611. FAUCETTA *v.* NEW YORK. February 3, 1947.

No. 653. NORTHWESTERN MUTUAL LIFE INSURANCE CO. *v.* SUTTLES, TAX COLLECTOR, ET AL. February 3, 1947.

No. 700. BORG-WARNER CORP. ET AL. *v.* GOODWIN ET AL. February 3, 1947.

No. 704. JOHNSON *v.* MAYO, STATE PRISON CUSTODIAN. February 3, 1947.

No. 780. CHRONICLE & GAZETTE PUBLISHING CO., INC. *v.* ATTORNEY GENERAL OF NEW HAMPSHIRE ET AL. February 3, 1947.

No. 800. UNITED STATES *v.* BALOGH. February 3, 1947.

No. 167. UNITED STATES EX REL. DAVIS *v.* RAGEN, WARDEN. February 3, 1947.

No. 342. DINGMAN *v.* UNITED STATES. February 3, 1947. Second petition for rehearing denied.

AMENDMENT OF RULES.

ORDER.

It is ordered that Rule 2 of the Rules of this Court be amended by adding the following paragraph:

"6. An attorney, barrister, or advocate who is qualified to practice in the highest court of any foreign state which extends a like privilege to members of the bar of this Court, may be specially admitted for purposes limited to a particular case. He shall not, however, be authorized to act as attorney of record. In the case of such applicants, the oath shall not be required and there shall be no fee. Such admissions shall be only on motion of a member of the bar of this Court, notice of which signed by such member and reciting all relevant facts shall be filed with the Clerk at least three days prior to the motion."

NOVEMBER 18, 1946.

AMENDMENTS TO

FEDERAL RULES OF CIVIL PROCEDURE

To become effective at the time specified in Rule 86 (b)

The following amendments to the Federal Rules of Civil Procedure (308 U. S. 645) were adopted by the Supreme Court of the United States on December 27, 1946, pursuant to the Act of June 19, 1934, 48 Stat. 1064, by an order published *post*, p. 843. On January 2, 1947, they were transmitted by The Chief Justice to the Attorney General for report to Congress. *Post*, p. 841. On January 3, 1947, they were reported to Congress by the Attorney General. *Post*, p. 842.

Under Rule 86 (b), *post*, p. 875, these amendments are to become effective "on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress, but, if that day is prior to September 1, 1947, then these amendments shall take effect on September 1, 1947."

LETTER OF TRANSMITTAL.

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

JANUARY 2, 1947.

MY DEAR MR. ATTORNEY GENERAL:

By direction of the Supreme Court, I transmit to you herewith amendments of the Rules of Civil Procedure for the District Courts of the United States, which have been adopted by the Supreme Court pursuant to the Act of June 19, 1934, chapter 651 (48 Stat. 1064), with the request that these amendments be reported by you to the Congress at the beginning of the regular session on January 3, 1947.

I am requested to state that Mr. Justice Frankfurter joins in approval of the proposed amendments essentially because of his confidence in the informed judgment of the Advisory Committee on Rules of Civil Procedure.

I have the honor to remain,

Respectfully yours,

(Signed) FRED M. VINSON,
Chief Justice of the United States.

Honorable TOM C. CLARK,
Attorney General,
Washington, D. C.

LETTER OF SUBMITTAL.

DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

WASHINGTON, D. C.

JANUARY 3, 1947.

To the Senate and House of Representatives of the United States of America in Congress assembled:

I have the honor to report to the Congress under section 2 of the act of June 19, 1934 (48 Stat. 1064; 28 U. S. C. 723c), at the beginning of a regular session thereof commencing this 3d day of January, 1947, the enclosed amendments to the Rules of Civil Procedure for the District Courts of the United States.

By a letter of January 2, 1947, from the Chief Justice of the United States, a copy of which appears as a prefix to the amendments to the Rules transmitted herewith, I am advised that such amendments to the Rules have been adopted by the Supreme Court pursuant to the act of June 19, 1934, and I am requested by the Supreme Court to report these amendments to the Congress at the beginning of the regular session in January 1947.

Respectfully,

TOM C. CLARK,
Attorney General.

ORDER.

ORDERED:

1. That subdivisions (a) and (b) of Rule 80 of the Rules of Civil Procedure, be, and they hereby are, abrogated.

2. That Rules 6, 7, 12, 13, 14, 17, 24, 26, 27, 28, 33, 34, 36, 41, 45, 52, 54, 56, 58, 59, 60, 62, 65, 66, 68, 73, 75, 77, 79, 81, 84, and 86 of the Rules of Civil Procedure and Forms Nos. 17, 20, 22, and 25, be, and they hereby are, amended as hereinafter set forth.

3. That the CHIEF JUSTICE be authorized to transmit these amendments to the Attorney General with the request that he report them to the Congress at the beginning of the regular session in January, 1947.

MR. JUSTICE FRANKFURTER joins in approval of the proposed amendments essentially because of his confidence in the informed judgment of the Advisory Committee on Rules of Civil Procedure.

DECEMBER 27, 1946.

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AMENDMENTS TO RULES OF CIVIL PROCEDURE
FOR THE
DISTRICT COURTS OF THE UNITED STATES

Table of Contents

AMENDMENTS TO RULES OF CIVIL PROCEDURE
FOR THE
DISTRICT COURTS OF THE UNITED STATES

Table of Contents

AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

Rule 6. Time.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50 (b), 52 (b), 59 (b), (d) and (e), 60 (b), and 73 (a) and (g), except to the extent and under the conditions stated in them.

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

Rule 7. Pleadings Allowed; Form of Motions.

(a) Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who

was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS.

(a) WHEN PRESENTED. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4 (e). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the

option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)–(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application

of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) MOTION FOR MORE DEFINITE STATEMENT. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) MOTION TO STRIKE. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) CONSOLIDATION OF DEFENSES. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted,

the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.

RULE 13. COUNTERCLAIM AND CROSS-CLAIM.

(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

(g) CROSS-CLAIM AGAINST CO-PARTY. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(i) SEPARATE TRIALS; SEPARATE JUDGMENT. If the court orders separate trials as provided in Rule 42 (b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54 (b) when

the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

RULE 14. THIRD-PARTY PRACTICE.

(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY.

(b) CAPACITY TO SUE OR BE SUED. The capacity of an individual, other than one acting in a representative

capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Rule 66.

Rule 24. Intervention.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely appli-

cation may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

RULE 26. DEPOSITIONS PENDING ACTION.

(a) WHEN DEPOSITIONS MAY BE TAKEN. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) SCOPE OF EXAMINATION. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

RULE 27. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL.

(a) BEFORE ACTION.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(b) PENDING APPEAL. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may

make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN.

(a) WITHIN THE UNITED STATES. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

RULE 33. INTERROGATORIES TO PARTIES.

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may

serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the same extent as provided in Rule 26 (d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30 (b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

RULE 34. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING.

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the

property or any designated object or operation thereon within the scope of the examination permitted by Rule 26 (b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

RULE 36. ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS.

(a) REQUEST FOR ADMISSION. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when

good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

Rule 41. Dismissal of Actions.

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23 (c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court

727731 O—47——60

renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

RULE 45. SUBPOENA.

(b) FOR PRODUCTION OF DOCUMENTARY EVIDENCE. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(d) SUBPOENA FOR TAKING DEPOSITIONS; PLACE OF EXAMINATION.

(1) Proof of service of a notice to take a deposition as provided in Rules 30 (a) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b), but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45.

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

Rule 54. Judgment; Costs.

(b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim,

the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

RULE 56. SUMMARY JUDGMENT.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

RULE 58. ENTRY OF JUDGMENT.

Unless the court otherwise directs and subject to the provisions of Rule 54 (b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered

upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS.

(b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

RULE 60. RELIEF FROM JUDGMENT OR ORDER.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment,

order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.

(b) STAY ON MOTION FOR NEW TRIAL OR FOR JUDGMENT. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made

pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52 (b).

(h) STAY OF JUDGMENT UPON MULTIPLE CLAIMS. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54 (b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

RULE 65. INJUNCTIONS.

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

RULE 66. RECEIVERS APPOINTED BY FEDERAL COURTS.

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. A receiver

shall have the capacity to sue in any district court without ancillary appointment; but actions against a receiver may not be commenced without leave of the court appointing him except when authorized by a statute of the United States. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

RULE 68. OFFER OF JUDGMENT.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

RULE 73. APPEAL TO A CIRCUIT COURT OF APPEALS.

(a) WHEN AND HOW TAKEN. When an appeal is permitted by law from a district court to a circuit court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that

in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

(g) Docketing and Record on Appeal. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the appeal there docketed within 40 days from the date of filing the notice of appeal; except that, when more than one appeal is taken from the

same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of filing the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of filing the first notice of appeal.

RULE 75. RECORD ON APPEAL TO A CIRCUIT COURT OF APPEALS.

(a) DESIGNATION OF CONTENTS OF RECORD ON APPEAL. Promptly after an appeal to a circuit court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included. If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant.

(b) TRANSCRIPT. If there be designated for inclusion any evidence or proceeding at a trial or hearing which was stenographically reported, the appellant shall file with his designation a copy of the reporter's transcript of the evidence or proceedings included in his designation. If the designation includes only part of the reporter's transcript, the appellant shall file a copy of such additional parts thereof as the appellee may need to enable him to desig-

nate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed. The copy so filed by the appellant shall be available for the use of the other parties. In the event that a copy of the reporter's transcript or of the necessary portions thereof is already on file, the appellant shall not be required to file an additional copy. When the rules of the circuit court of appeals so require, the appellant shall furnish a second copy of the transcript for use in the appellate court.

(d) STATEMENT OF POINTS. No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.

(g) RECORD TO BE PREPARED BY CLERK—NECESSARY PARTS. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the circuit court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule

shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification.

(h) Power of Court to Correct or Modify Record. It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the circuit court of appeals.

(m) Appeals in Forma Pauperis. Upon leave to proceed in forma pauperis, the district court may by order specify some different and more economical manner by which the record on appeal may be prepared and settled, to the end that the appellant may be enabled to present his case to the appellate court.

(n) Appeals When no Stenographic Report Was Made. In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the state-

ment, with the objections or proposed amendments, shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the court in the record on appeal.

(o) Rule for Transmission of Original Papers. Whenever a circuit court of appeals provides by rule for the hearing of appeals on the original papers, the clerk of the district court shall transmit them to the appellate court in lieu of the copies provided by this Rule 75. The transmittal shall be within such time or extended time as is provided in Rule 73 (g), except that the district court by order may fix a shorter time. The clerk shall transmit all the original papers in the file dealing with the action or the proceeding in which the appeal is taken, with the exception of such omissions as are agreed upon by written stipulation of the parties on file, and shall append his certificate identifying the papers with reasonable definiteness. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so. After the appeal has been disposed of, the papers shall be returned to the custody of the district court. The provisions of subdivisions (h), (j), (k), (l), (m), and (n) shall be applicable but with reference to the original papers as herein provided rather than to a copy or copies.

Rule 77. District Courts and Clerks.

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice

for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73 (a).

RULE 79. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN.

(a) CIVIL DOCKET. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of Senior Circuit Judges, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) CIVIL JUDGMENTS AND ORDERS. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of Senior Circuit

Judges may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

(c) INDICES; CALENDARS. Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."

(d) OTHER BOOKS AND RECORDS OF THE CLERK. The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of Senior Circuit Judges.

RULE 80. STENOGRAPHER; STENOGRAPHIC REPORT OR TRANSCRIPT AS EVIDENCE.

(a) STENOGRAPHER. (Abrogated.)

(b) OFFICIAL STENOGRAPHER. (Abrogated.)

RULE 81. APPLICABILITY IN GENERAL.

(a) TO WHAT PROCEEDINGS APPLICABLE.

(2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States. The requirements of U. S. C., Title 28, § 466, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force.

(3) In proceedings under the Act of February 12, 1925, c. 213 (43 Stat. 883), U. S. C., Title 9, relating to arbitration, or under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), U. S. C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply to appeals, but otherwise only to the extent that matters of procedure are not provided for in those statutes. These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.

(6) These rules do not apply to proceedings under the Act of September 13, 1888, c. 1015, § 13 (25 Stat. 479), as amended, U. S. C., Title 8, § 282, relating to deportation of Chinese; they apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), U. S. C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 29, 1906, c. 3592, § 15 (34 Stat. 601), as amended, U. S. C., Title 8, § 738, remain in effect.

(c) Removed Actions. These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or

within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer, but in any event within 20 days after the filing of the transcript. If at the time of removal all necessary pleadings have been filed, a party entitled to trial by jury under Rule 38 and who has not already waived his right to such trial shall be accorded it, if his demand therefor is served within 10 days after the record of the action is filed in the district court of the United States.

(f) REFERENCES TO OFFICER OF THE UNITED STATES. Under any rule in which reference is made to an officer or agency of the United States, the term "officer" includes a collector of internal revenue, a former collector of internal revenue, or the personal representative of a deceased collector of internal revenue.

RULE 84. FORMS.

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

RULE 86. EFFECTIVE DATE.

(b) EFFECTIVE DATE OF AMENDMENTS. The amendments adopted by the Supreme Court on December 27, 1946, and transmitted to the Attorney General on January 2, 1947, shall take effect on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress, but, if that day is prior to September 1, 1947, then these amendments shall take effect on September 1, 1947. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

727731 O—47——61

APPENDIX OF FORMS

FORM 17. COMPLAINT FOR INFRINGEMENT OF COPYRIGHT AND UNFAIR COMPETITION.

1. Allegation of jurisdiction.

2. Prior to March, 1936, plaintiff, who then was and ever since has been a citizen of the United States, created and wrote an original book, entitled.....

3. This book contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

4. Between March 2, 1936, and March 10, 1936, plaintiff complied in all respects with the Act of (give citation) and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said book, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "March 10, 1936, Class....., No....."

5. Since March 10, 1936, said book has been published by plaintiff and all copies of it made by plaintiff or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of..... and all other laws governing copyright.

6. Since March 10, 1936, plaintiff has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said book.

7. After March 10, 1936, defendant infringed said copyright by publishing and placing upon the market a book entitled ....., which was copied largely from plaintiff's copyrighted book, entitled.....

8. A copy of plaintiff's copyrighted book is hereto attached as "Exhibit 1"; and a copy of defendant's infringing book is hereto attached as "Exhibit 2."

9. Plaintiff has notified defendant that defendant has infringed the copyright of plaintiff, and defendant has continued to infringe the copyright.

10. After March 10, 1936, and continuously since about..... ....., defendant has been publishing, selling and otherwise marketing the book entitled....., and has

thereby been engaging in unfair trade practices and unfair competition against plaintiff to plaintiff's irreparable damage.

Wherefore plaintiff demands:

(1) That defendant, his agents, and servants be enjoined during the pendency of this action and permanently from infringing said copyright of said plaintiff in any manner, and from publishing, selling, marketing or otherwise disposing of any copies of the book entitled.....

(2) That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of said copyright and said unfair trade practices and unfair competition and to account for

(a) all gains, profits and advantages derived by defendant by said trade practices and unfair competition and

(b) all gains, profits, and advantages derived by defendant by his infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars.

(3) That defendant be required to deliver up to be impounded during the pendency of this action all copies of said book entitled..... in his possession or under his control and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

(4) That defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

(5) That plaintiff have such other and further relief as is just.

FORM 20. ANSWER PRESENTING DEFENSES UNDER RULE 12 (b).

NOTE (REVISED)

The above form contains examples of certain defenses provided for in Rule 12 (b). The first defense challenges the legal sufficiency of the complaint. It is a substitute for a general demurrer or a motion to dismiss.

The second defense embodies the old plea in abatement; the decision thereon, however, may well provide under Rules 19 and 21 for the citing in of the party rather than an abatement of the action.

The third defense is an answer on the merits.

The fourth defense is one of the affirmative defenses provided for in Rule 8 (c).

The answer also includes a counterclaim and a cross-claim.

FORM 22. MOTION TO BRING IN THIRD-PARTY DEFENDANT.

(Form for motion remains unchanged.)

EXHIBIT A

(Form for summons as part of Exhibit A remains unchanged.)

United States District Court for the Southern District of New York

CIVIL ACTION, FILE NUMBER .....

A. B., PLAINTIFF
v.
C. D., DEFENDANT AND THIRD-PARTY PLAINTIFF
v.
E. F., THIRD-PARTY DEFENDANT
Third-Party Complaint.

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as "Exhibit C."

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.) Wherefore C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed:.....,
Attorney for C. D., Third-Party Plaintiff.
Address:.....

FORM 25. REQUEST FOR ADMISSION UNDER RULE 36.

Plaintiff A. B. requests defendant C. D. within ..... days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

(Here list the documents and describe each document.)

2. That each of the following statements is true.

(Here list the statements.)

Signed:.....,
Attorney for Plaintiff.
Address:.....

INDEX

I. In General.

1. *Construction and interpretation—Validity of Act of Congress—Avoiding decision as to constitutionality.*—Courts should not pass on question of constitutionality of Act of Congress unless unavoidable. Alma Motor Co. v. Timken-Detroit Axle Co., 129.

2. *Capital punishment—Second attempt to electrocute.*—Execution of murderer after accidental failure of electrocution not unconstitutional; claim of denial of constitutional rights not supported by record. Francis v. Resweber, 459.

II. Federal-State Relations.

Reserved powers of states—Polygamous marriage—Mann Act.—As applied to polygamous marriages, Mann Act not unconstitutional interference by Congress with police powers of states. Cleveland v. U. S., 14.

III. Legislative Power.

1. *Delegation—Administrative agency.*—Public Utility Holding Company Act did not unconstitutionally delegate legislative power to

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DATE DUE	BORROWER'S NAME

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