

UNITED STATES *v.* URBUTEIT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 640. Decided May 2, 1949.

In reversing the decision below in this condemnation proceeding under the Federal Food, Drug, and Cosmetic Act and remanding the case to the Court of Appeals, 335 U. S. 355, this Court decided that the separate shipment of certain machines and certain leaflets relative to their alleged diagnostic and curative value was immaterial because the movement of the machines and leaflets constituted a single interrelated activity; but it left for consideration by the Court of Appeals the question whether the evidence as to the falsity of the advertising as to the diagnostic capabilities of the machines was adequate to sustain their condemnation even though error in exclusion of other evidence were conceded. *Held*: The United States was entitled to a hearing on the latter question; and the Court of Appeals failed to follow the mandate of this Court when it remanded the case to the District Court for determination of a question as to which of the shipments might be considered a single interrelated activity. Pp. 804-806. 172 F. 2d 386, reversed.

After the decision of this Court, reversing the decision below and remanding this case to the Court of Appeals, 335 U. S. 355, the latter court remanded it to the District Court for further proceedings. 172 F. 2d 386. *Certiorari granted and judgment reversed*, p. 806.

*Solicitor General Perlman* for the United States.

*H. O. Pemberton* for respondent.

PER CURIAM.

The question presented by this petition is whether the Court of Appeals followed our mandate on remand of the cause in 335 U. S. 355.

The case when it was here earlier this Term appeared in the following posture:

A condemnation proceeding was instituted by the United States under the Federal Food, Drug, and Cosmetic Act (52 Stat. 1040, 1044, 21 U. S. C. § 334). Sixteen machines with alleged diagnostic and curative capabilities had been shipped in interstate commerce. Leaflets describing the uses of the machine had been shipped at a separate time. The Court of Appeals had held that the separate shipments of the machines and leaflets precluded a conclusion that the leaflets had accompanied the device in interstate commerce, and therefore the transaction was outside the reach of the Act. We reversed the Court of Appeals and held that the separate shipment of the machines and leaflets constituted a single interrelated activity.

On remand the Court of Appeals concluded that because there were several shipments of machines and a single shipment of advertising matter, it was not clear which shipments might be considered a single interrelated activity. Therefore, it remanded the case to the District Court for a determination of this fact. 172 F. 2d 386.

When the case was here before, we decided that the fact of separate shipments of machines and leaflets was immaterial. The controlling factors were whether the leaflets were designed for use with the machine and whether they were so used. Since the function of the leaflets and the purpose of their shipment were established, nothing more was needed to show that the movements of the machines and leaflets constituted a single interrelated activity. Moreover, the case is not complicated by shipments of machines and leaflets to different persons. One Kelsch was the recipient of both.

On remand the Court of Appeals adhered to its former ruling that the District Court erroneously excluded evi-

dence as to the therapeutic or curative value of the machines. When the case was here before we did not disturb that ruling. But we did leave to the Court of Appeals for consideration a further question—whether the evidence as respects the falsity of the representations regarding the diagnostic capabilities of the machines was adequate to sustain the condemnation even though error in exclusion of the other evidence were conceded. The United States is entitled to a hearing on that question.

The petition for certiorari is granted and the judgment is

*Reversed.*

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UNITED STATES EX REL. JOHNSON *v.* SHAUGHNESSY, ACTING DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION.

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

No. 506. Argued April 19–20, 1949.—Decided May 9, 1949.

1. A board of special inquiry appointed pursuant to § 17 of the Immigration Act of 1917 as amended, 8 U. S. C. § 153, is bound to accept as final a certificate that an alien is a mental defective of a class excluded from admission to the United States by § 3, 8 U. S. C. § 136 (d), where such certificate has been issued by a medical appeal board after a fair hearing in conformity with § 16, 8 U. S. C. § 152, and regulations of the Public Health Service prescribed pursuant thereto. P. 809.
2. A report of a medical appeal board appointed pursuant to § 16 of the Immigration Act of 1917 as amended, 8 U. S. C. § 152, to review a finding of two medical officers that an alien seeking admission to the United States is mentally defective, does not comply with the applicable law and regulations where it fails to show that the appeal board based its findings and conclusion “on its medical examination of the alien” and merely shows that it considered the appeal and, after “taking into consideration” the certificate of the medical officers who made the original examination and the testimony of an alienist employed by the alien, con-