No. 67 1945 Term
Thomas Paper Stock Co. v. Bowles

This is a motion by the gov't to dismiss the case as moot. As I indicated in a memordandum I prepared for you for the Ct the case is unquestionably moot. The issue was whether petit. could get a hearing on a certain issue in the Emergency ct by means of a protest filed with the resp. and an appeal the the Emer. App. The ct held that it could not, but held that it could entertain a complaint filed with it raising the same issue if leave were obtained from the DC in which enforcement proceedings brought by resp. were pending. This was done by petit. and in that case the Emer. ct held against petit. on the merits of the issue. That second case is now pending here on cert. (No. 578). Thus petit. no longer has any interest in whether he could obtain review by one method rather than another, since he has now obtained the review on the merits, which he sought.

There is some suggestion that the Emer. ct had no jurisdiction of the case coming directly from the DC made by resp. But there is nothing in this. The mere fact that the Em. App. erred (if it did) in holding it had no jurisdiction over the issue in the protest proceeding would not preclude it from having jurisdiction also over the case coming from the DC since the DC granted petit. leave to file the complaint. That is all that is necessary under the statute for the Em. App. to have jurisdiction.

DISMISS AS MOOT EGW

No. 87 1945 Term
Tucker v. Texas
Appeal County Ct of Medina, Tex.

Juris. SJ 2. Appeal timely: Motion for new trial overruled March 5, 1945; Statmment filed May 24, 1945

This case is almost identical to the Marsh Case No. 114. The only differencex is that here the village in which appellant sought to distribute literature from door to door was owned by the United States; it was built by the Fed. Public Housing Adm. as a defense housing project. Here too the manager of the village refused to permit appellant to enter the village and distribute. He was arrested on complaint of the manager of the ~~prm~~ village under a Texas statute like that of Alak making entry on premises owned by another subject to fine if the person refuses to leave after notice.

Appellant was fined one dollar under thex statute and this was affirmed by the county ct, the highest ct in Texas rendering a decision under present circumstances.

The case is similar to Martin v. Struthers 319 US 141 in which you dissented where a prohibition by a town on door to door canvasing was involved. Here of course the property is federally owned, but privately leased. That might make some difference. Other than this my comments on the Marsh case apply here.

Note Probable Jurisdiction EGW No. Opinion

No. 93 1945 Term
Hercules Gasoline Co. v. Commissioner
Cert. 5 Cir.

Juris. R. 3. Cert. timely: Rehearing denied April 19, 1945; cert. filed. May 28, 1945

The question here is whether a charter provision of petitioner's transferor corporation, incorporated by reference in preferred stock, which stated that no dividends on common shares could be paid until all the preferred stock was redeemed was a provision of a written contract prohibiting payment of dividends within the meaning of the undistributed profits tax of 1936, which permitted a credit for earnings so restricted. (§26(c)(1). The Tax Court held that a restriction in a charter or preferred stock certificate was not "a written contract" within the meaning of the act, conceding that there were CCA cases to the contrary. The CCA affirmed, Hutcheson, J. dissenting, largely on the basis of Helvering v. NW Steel Mills, 311 US 46. It felt that the ct there stated that the contract must set aside earnings for the payment of debts, and payment to preferred shareholders is not the payment of a debt. The dissent felt the Steel Mills case not in point, and that the certificates were a "written contract".

1. I think the ct's interpretation of the Steel Mills case is wrong. There the question was whether a provision in a state statute prohibiting payment of dividends could be read by implication as part of the corp.'s charter. The ct. held that the exemption was more narrow; that it must be written into the instrument. The expression relied on by the CCA concerning debts was made in reference to another clause of the statute with which we are not here concerned. Infact this ct recognized that a corporate charter is a contract. It merely held that the state statute could not, when read together with the charter, be treated as a provision of a written contract dealing with dividends.

2. There is a square conflict of cases on this point. Lehigh Structural Steel co. v. Comm., 127 F(2d) 67; cf. Monarch Theatres v. Helvering, 137 F.(2d) 588.

Grant EGW Op R. 114

No. 100, 1945 Term
Williams, et al. v. Green Bay and Western R. Co.
Cert. 2 Cir.

Juris: R. 3. Cert. timely: Rehearing denied, Mar. 5, 1945; cert. filed, May 31, 1945.

This issue is: did the federal DC in New York properly exercise its discretion in declining to take jurisdiction of a suit instituted by the petitioners, debenture holders of the respondent Wisconsin corporation, on the grounds of forum non conveniens?

Petitioners are class B debenture holders in the respondent corporation, Wisconsin corporation. Not only was the respondent incorporated in Wisconsin but practically all of its business assets were located in that state. However, five of respondent's six directors have a place of business in New York, two of three members of respondent's executive committeehave their place of business in New York, respondent's vice-president, its secretary-treasurer and its assistant secretary treasurer have offices in New York. Respondent has sufficient assets in New York to satisfy petitioner's claim.

Petitioners, debenture holders, instituted an action in a NY DC to obtain payment to them of certain surplus net earnings to which they were entitled under the terms of the debentures. The debentures provided that "surplus net earnings"(as defined in the debentures) "shall be paid to and distributed among the holders of Class B. Debentures...." The debenture also states that "the amount payable will be fixed and declared by the Board of Directors". The directors of the respondent had complied with the terms of the debentures in every year except three, 1932, 1933, 1934. In these years the directors withheld portions of the "surplus net earnings" and passed them to surplus.

Petitioners named only the corporation as defendant, omitting the directors who are thus not parties to the suit.

The DC dismissed the complaint on the ground that the case involved the internal affairs of a foreign corporation which could more appropriately be determined by the state of incorporation, Wisconsin. Wisconsin had never passed on this particular issue. The CCA affirmed, Frank, J., dissenting. The CCA felt that petitioners did not state a claim on a liquidated demand, that the debenture requirement that the directors declare the amounts to be paid did not constitute a mere formality, that the internal affairs of a corporation were involved, that the state of incorporation should amake the initial interpretation of the debenture provision.

1. Petitioner contends the CCA erred in holding the case involved the internal affairs of a foreign corporation. It is argued that the doctrine of forum n. con. does not even apply to the suit involved here.

It pitches its argument on the proposition that the debentures, by their very terms, created a fixed liquidated obligation due to the petitioners which did not involve the exercise of any discretion on the part of the directors, that the suit was like an action for debt. The CCA was not persuaded by this argument since it felt there was room for argument that the directors declaration of a dividend to debenture holders was not a merely ministerial act, that it might properly be held to involve a matter of discretion. I think it was right on this point. But there still remains the question whether even assuming the matter to be one involving director's discretion (an interpretation of the debentures which is pretty hard to sustain) one still has to overcome the hurdle of determining that forum non conveniens applies. This throws one into the problem of Rogers v. Guaranty Trust, 288 US 123. As will be recalled, that case was highly disputed and its validity has been seriously questioned. There this Court held directors determination to issue certain stock related to internal affairs and declined to take jurisdiction in New York of a New Jersey corporation matter. Stone and Brandeis dissented. Should this Court now wish to reconsider the Rogers case and enunciate a stricter rule relating to forum non conveniens or emasculate it, the instant case might well be taken now. Unlessthis should be the view of the Court, I think the instant decision perhaps lines up quite well with the present cases on the books and cert might well be denied.

2. Petitioner also argues that even assuming that the doctrine of forum non convieniens is applicable in the instant case, it was improperly applied. Petitioner pitches this argumen on the fact that the directors of the respondent have places of business in New York; the respondent has funds there; a good deal of the executive administration of the business emanates from there. The weight of these factors is offset to some extent by the fact that petitioner did not even join the respondent's directors in this action. The lower courts relied on the fact that the issue raised involves interpretation of respondent's charter and that a final definitive interpretation could best be given by the courts of Wisconsin. Reliance was also placed on the congestion of the New York courts as a reason for declinin jurisdiction. The first of these two reasons seems sufficient in my mind to support the DC's exercise of discretion in declinin jurisdiction, at least sufficient grounds to preclude reversal by a higher court.

Deny (?) BEK Op. R. 58

No. 102, 1944 Term
Raymond J. Grace v. Magruder, Collector
Cert. App. D.C.

Juris. R. 1, 26 Cert. Timely: Judgment entered March 19, 1945; cert. filed June 1, 1945

Petitioner sued to recover from the collector Social Security taxes assessed and levied against him. The sole issue is whether or not "coal hustlers" were employees within the meaning of the Social Security Act. If they are not the petitioner is not liable for the taxes. The coal hustlers come daily to petitioner's coal yard for the purpose of getting jobs storing coal. They have no regular hours; may come and go as they chose.; no quarters are furnished them. When coal is to be stored by a customer of petit. a hustler is offered a job which he may take or not as he choses. If taken, the hustler is given a card with the customer's name and address, and the tonnage of coal to be stored. He gets to the location in the company truck or by other means, and once there stores the coal which has been dumped in street of alley. After the work is complete the hustler obtains the customer's signature on the card, returns to the yard, where he is paid 50 or 75 cents per ton stored. This amount is previously added to the customer's bill, which is collected by the hustler on cash sales. Petit.ioner has no agreement or contract of any type with the men, reserving the right to supervise the work of storing or directing the manner in which it is done. The men supply their own tools. Petit. makes no profit on storage charges and carries no workmen's compensation insurance. The DC gave judgment for the respondent, and the CCA affirmed.

Petitioners sole aggument is that no relationship bef employer and employee existed between petitioner and the hustlers; that the storage charges paid them does not constitute wages. Petit. relies on Regulations 91 of the Int. Rev. Bureau. In general they make the test of lemployment the right on the part of the employer to control and direct the person who performs services not only as to the result to be accomplished, but also as to the manner and details of performance. Clearly, on all tests known to the common law relating to the distinction between servant and independent contracter , the hustlers do not qualify as servants. However, both the DC and CCA rejected the common law experience, terming the Social Security Act as creating a policy unknown to the common law, and holding that coverage is to be based on the purposes Congress had in mind in passing the Act. The CCA relied on the fact that "red caps" have been held employees under the FLSA, and news boys employees under the NLRA.

Both Petitioner and Respondent assert that the instant case and U. S. V. Vogue , Inc.,145 F(2d) 609 are in conflict with Glenn v. Beard, 141 F2d) 376, cert. den. which concerned the supplying of materials for making quilts etc. to women who worked at home. There the court took the strictly common law test for determining whether the employment relationship existed. However, respondent states that this alleged conflict was called to this court's attention in the cert. petition in the Vogue case, supra, Therefore it urges cert. be denied here. It seems to me that the factual context varies too greatly between the present and the Glenn case to make out a case of conflicting legal rules. The merits of the present case merely involve the application of somewhat vaugue legal standards to a particular factual situation and drawing inferences therefrom.

DENY EC W July 18, 1945

No. 115 & 116
US v. Johnson
US v. Sommers et al.
Cert. 7 Cir.

Juris. R. 28. Cert. timely: Judgment entered May 2, 1945; cert. filed June 6, 1945.

This is a further proceeding in US v. Johnson 319 US 503, where the ct upheld the validity of Resps.'x indictment. The present proceedings result from an amended motion for a new trial filed with the DC on the ground of newly discovered evidence that a principal witness for the gov't committed perjury. Resps. were indicted in 1940 for evasion of income taxes in #115, and aiding and abetting in #116. They were found guilty. On appeal the CCA reversed because, inter alia, the indictment was invalid. This ct. reversed, affirming the conviction. In 1943 resp. were permitted to file a motion for a new trial on the ground that the gov't's witness Goldstein committed perjury. After extensive examination of affadavits the DC denied the motion, and the CCA affirmed. ~~Resp.~~ resp. filed cert here and while it was pending they were informed that Goldstein's son had at the former's request filed an income tax return which tended to show that Goldstein has testified falsely with respect to a Bank Bilding which he had ~~xxxxxx~~ testified that Johnson owned. On motion this ct. withheld action on the cert. petition, and the resp. filed an amended motion for a new trial in the DC, on the basis of the tax return.

At the trial Goldstein's evidence had tended to prove that Johnson had expended money far beyond his declared means, and that the source of that money came from the ownership of gambling houses, which Johnson claimed were owned by others. The fact that Goldstein's son had filed a return with respect to the income of a building of which he was record title holder tended to show that he was not a mere straw man for Johnson but that he in fact was the beneficial owner. Thus, resp. alleged, the gov't's ownership and expenditure theories were weakened. It was also alleged in affadavits that Goldstein had admitted after trial that he lied with respect to Johnson's full ownership of certain other properties, and certain expenditures by Johnson. The affadavits and the evidence were conflicting at all points. The DC found after an exhaustive opinion that Goldstein had not perjured himself. It found that a number of the affadavits filed by resp. were not worthy of belief, and that the circumstances surrounding the filing of the tax return by the son, confirmed, rather than weakened Goldstein's testimony at the trial.

The CCA reversed and ordered a new trial. It made a finding of fact that Goldstein had lied, believing some of the affadavits which the DC had discredited. It felt that it was

in as good a postion as the DC to make the findings of fact on the affadavits and other ~~xx~~ items not presented at the trial. Having found that Goldstein lied, the ct. held that the DC had abused its discretion in denying the motion. It expressly refuse to follow the ordinary rule as to an examination of the effect the newly-found evidence would have on a new trial; it stated that in the case of perjury it must look ~~ax~~ to its effect on the trial already had. Minton, J. dissented, ~~xxxxxxxxxxxx~~ on the ground that the CCA had invaded the province of the trial judge by making a new finding of facts, rather than merely determining whether the DC had abused its discretion. He suggested there DC was reasonable in finding that Goldstein had not lied, and that therefore the DC had not abused its discretion in denying the motion for a new trial, particularly in view of the fact that much of the allegely new evidence had been previously considered on the original motion for a new trial at which time the CCA affirmed the denial of the motion.

1.The Petit. contends that not only was the CCA wrong in determining for itself that Goldstein committed perjury on the evidence before it, but that in reviewing the action of the the DC it failed to apply the proper standards. In this I think the petit. is correct. The CCA did not apply the rule that a new trial will not be granted where the newly discovered evidence is merely of an impeaching or cumulative character, unless it will probably result in acquitall on a new trial. It substituted its findings for that the of DC~~x~~ although on the evidence it is clear that the DC was ~~x~~ at least justified in finding that Goldstein had not lied, and in face of the fact that the CCA had passed on practically the same evidence in support of the ~~xxx~~ original motion for a new trial and affirmed the DC's denial thereof. If the test of the DC's action is abuse of discretion it is difficult to justify a finding of such abuse here.

2. Resp.'s attorney has not submitted a reply brief, but in a letter to the ct. it is pointed out that the gov't served the brief and petition for cert. on him 2 days after the 10 day period provided by the rules was up. Resp. refused to acknowledge proper service and therefore did not obtain a copy of the petition and brief. Rule 38(3) is hardly jurisdictional. As the petit.'s reply letter points out ~~xxx~~ resp.'s attorney has on occasion ~~fixxx~~ served a cert. petition late. I don't think the rule is sufficient reason to deny cert.

GRANT EGW Op. R. 208

No. 123 1945 Term
Williams v. U. S.
Cert. 9 Cir.

Juris: R. 2. Cert. timely: Rehearing denied May 14, 1945; cert. filed June 11, 945.

This case concerns the applicability of 2 federal criminal statutes. Petitioner was convicted of the crime of carnal knowledge of an Indian girl over 16 but under 18 years of age on an Indian reservation within exclusive federal jurisdiction in Arizona. §279 Criminal Code makes carnal knowledge with a girl under 16 a crime. §289 provides an act not criminal by federal law, ~~xxx~~ if criminal by the law of the state in which the place subject to federal jurisdiction is, shall be dealt with according to the applicable state law. Petit. contneds that the crime of carnal knowledge was made criminal by federal law under §279 of the code, but that petit. was not subject thereto because the girl was over 16. Petit. was tried under §289 on the theory that carnal knowledge with a girl over sixteen but under 18 was not a federal crime, although it was penal under Arizona law. The CCA affirmed the conviction, Healy J. dissenting, proceeding on the theory that §289 applied since carnal knowledge with a girl over 16 but under 18 was not specially made penal by federal law. Healy J. dissenting stated that Congress had undertaken to define and punish the crime of "statutory rape" fixing 16 years as the age of consent. He said that the statute exhibits a policy intended to control in all places under federal jurisdiction; if the state fixed an age of consent lower that the federal policy of 16, the federal act, §279, would govern. Healy contends that the converse would be true, and that §289 is inapplicable.

1. There is no case that seems to precisely govern the situation. Petit. of course contends that §289 does not apply since the crime of statutory rape has been made penal by federal law; thus the need for borrowing the state statute is not apparent. I think petit. is correct. Congress has specifically dealt with the field of statutory rape, fixing the age of consent at 16. It does not follow from the fact that the age of consent was not fixed at 18 that the crime "is not made penal by any laws of congress.." (§289). Us. v Press Publishing Co., 219 US 1 indicates that §289 was to adopt state criminal laws for federal territory only where

congress had not dealt expressly with the crime. Here it has done so, except that it has made the age of consent 16 rather than 18. But that variation does not make or create a separate and new crime, one for which Congress has not provided. §289 should not be so interpreted that every conceivable variation in the elements of a given crime specifically provided for by the Criminal Code takes it out of the code, and makes applicable a state statute precisely governing the acts done.

2. The government seems to agree that the coverage of §289 is doubtful in the present case, and hence the petition for certiorari is unopposed.

3. A confused argument as to statutory interpretation is made by petit. based on a wholly inapplicable statute--inapplicable because it relates to crimes committed by Indians. Petit. is a white man. The argument ~~xxxxxxx~~ was unecessary

GRANT EGW Op. R. 41

No. 139 1945 Term
Levinson v. Spector Motor Service
Cert. Ill. Sup. Ct.

Juris. R. 6. Cert. timely: Rehearing denied March 19, 1945; cert. filed June 19, 1945.

The case concerns coverage under the FLSA. Petit. was a checker of a gang which handled the loading and unloading of freight from interstate motor carriers. The checker goes into the office and gets bills to correspond with the freight load. He gets his gang of 3 men and they start unloading the freight The checker checks the freight, it is sorted and put where the checker directs. In loading too the checker supervises the operations, checking the freight as it is loaded. Petit. did not actually carry freight. He hired men, saw that their time and social security records were kept. Petit. sued in the Municpal Ct in Chicago for overtime on the basis of 87 hours per week. The defense was that petit. was exempt from the acts coverage because he was subject to the jurisdiction of the ICC as to hours. FLSA § 13(b)(1) exempts employees over which the ICC has jurisdiction under § 204 of the Motor Carriers Act. This ct. the Amer. Trucking Ass'n case has held that ICC has juridictio of the hours of service of employees whose activites affect the safety of operation. The trial ct found that the major portion of petit.'s activities did not affect the safety of operations, and therefore gave judgment for petit. The appellate ct reversed, apparantly on the ground that petit. was not exempt, since some part of his duties involved activities affecting safety of operations i.e. that he directed the loading of trucks and clearly the loaders who worked under him were exempt. The Wages & Hrs Admin. interpretation is that the FLSA covers those concerned with trucks the greater part of whose activities does not affect safety of operations. The Sup. ct affirmed on the ground that the appellate ct had the power to and did make a finding of fact that a substantial part of petit's activities did affect safety of operation., and therefore he was exempt. This was based on the ground that the men petit. supervised were clearly exempt since they loaded and unloaded, and therefore he was. The Administrator was denied permission to intervene as amicus curiae.

It seems to me the petit. is correct here, and that he is covered by the FLSA. We have an express

finding by the trial ct. what the greater part of petit.'s activities were non-exempt. The appellate ct made the test that petit. was exempt if any part of his activities affected safety of operation. The Sup. Ct didn't support that view but seemed to make the test a substantial part, contary to the Wages & Hrs Adminstrator's view. In view of the fact that the question involves thousands of employees, and the opinion seems clearly wrong, I think cert. should be granted.

GRANT EGW Op. R. 58

No. 139 1945 Term
Levinson v. Spector Motor Service Company
Supplemental Memorandum

In the Matter of Maximum Hours of Service of Motor Carrier Employees 28 ICC 125 (1941) the ICC ~~purported~~ to defined the employees whose hours were subject to regulation in that they affected the safety of operations. The general test was stated to be whether the employees devote a substantial part of ~~their~~ time to activities which directly affect the safety of operations. [131]

At 133 the ICC discussed specifically the question of the application of ~~the~~ its jurisdiction to loaders, dockmen or helpers, whose sole duties are to lead and unload motor vehicles and transfer freight between motor vehicles, and between vehicles and the warehouse. It found that the proper loading of a vehicle was important for the safety of its operation. ~~The~~ found that loaders devote a large part of their time to activities which directly affect the safety of operation of motor vehicles and that therefore it had power to establish maximum hours for loaders. No mention is made of supervisory employees who have some duties with respect to loading, but do not actually carry.

The Appellate Court made the test whether the employee performs any duties which substantially affect the safety of operation. This is a qualitative test and one not concerned with the amount of activity ~~x~~ affecting the safety of operation and it thus is contrary to the views of the Administrator and the ICC. ~~xxx~~

No. 142 1945 Term
American Surety Co. v. Sampsell
Cert. 9 Cir.

Juris. R. 2, . Cert. timely: Judgment entered April 24, 1945; cert. filed June 21, 1945

Petit. was surety for a building contractor who became bankrupt. The bond conformed to the Cal. code and was for the protection of laborers and materials men. The statute, whose terms were embodied in the bond required that claimants file a lien within a certain time in order to hold the surety on the bond. Petit. paid all those filing liens in time, and submitted a gen'l claim in the bankruptcy proceeding and sought subrogation. Several other persons who had claims arising from the building operation, but who failed to filed liens in time also filed claims in the bankruptcy proceeding. Petit. was not liable to them as surety under Cal. law. The bankruptcy ct, however, ordered that dividends be withheld from petit. and paid to the persons who had not filed claims until those claims were paid in full. The DC made this order because it felt that a surety may not share in the assets of the principal until the debts it was to protect were paid in full. The CCA affirmed on the ground that the Cal. statute did not govern the rights of petit. in the bankruptcy proceeding; the relative rights of creditors were said to be governed by federal law.

Petit. contends that both by the terms of the bond and of the Cal. statute it was not obligated to pay the claims of those who had not filed liens, and that the CCA erred in ignoring the state law, and withholding the dividends to which it was otherwise entitled until those claims had been paid. It seems to me that the CCA is right; that it has been held by this ct that a surety must stand aside until the creditors for whom the bond was given to protect should be paid before the surety, who to that extent must stand in the bankrupt's shoes. The creditors who failed to file liens were nonetheless among those for the benefit of whom the bond was originally given.

DENY EGW Op. R. 126.

Providence Ins. Co. v. Weis & Ferris

no. 145 1945 Term
Commissioner v. Flowers
Cert. 5 Cir.

Juris. R. 3. Cert. timely: Judgment entered March 23, 1945; cert. filed June 21, 1945.

Resp. is employed as general counsel of a railroad with principal offices at Mobile, Ala. Resp. resdies at Jackson, Miss. where has a law office. Resp. must be elected annually to the position of genral counsel. Resp. by agreement with the ry. is permitted to decide how much time he will spend at Jackson, and how much time at Mobile, on condition that he pay his own traveling expenses between the 2 placew, and his living expenses at both. The ry provided his office at Mobile, but not at Jackson. During 1939-40 resp. spent most of his time at Jackson: in 1939 203 days were spent at Jackson, 66 in Mobile; in 1940 168 days at Jackson and 102 in Mobile. Resp. deducted his exenses for meals and lodging while in Mobile and the expenses of traveling to and from Mobile and Jackson. ~~xxxxxxxx~~ IRC §23(a) provides that a taxpayer may deduct traveling expenses while away from home in the pursuit of a trade or business. Home is not defined by the regulations. The Tax Ct held the expenses non-deductible, treating them as personal expenses not deductible under §24(a)(1)~~xxxxxx~~ The Tax Ct. thus seemed to imply that ~~x~~ home means the place of business where the taxpayer is employed. The CCA reversed, treating the question as one of law, and holding that the word home should be given its ordinary meaning--i. e. place of residence or abode, one which is intended to be used permently.

1. This case seems to be in conflict with Barnhill v. Comm. (cca 4) unreported. There a judge resided in one part of the state, and the ct. sat elsewhere regularly. He sought to deduct his traveling and living expenses while at ct. The item was held non-deductible.

2. It seems to stretch the word home to construe it to mean the principal place of business of the taxpayer, but not the place in fact where he permenently resides. The question seems to be one of law, and one which this ct. should decide in view of conflicts already existing. The petit. urges that the word home refers to a place either where the taxpayer both lives and works, or at least has his principal place of business. I am not convinced.

To treat home as meaning principal place of business would be a distortion of the word, which to some extent has come to be a word of art, importing domicile.

GRANT EGW Op. R. 57

No. 158 1945 Term
People v. Martin
Appeal County Court of NY

Juris. SJ 4. Appeal timely: Judgment entered March 8, 1945; Application made May 5, 1945.

Petit. was convicted of murdering a white man in Salamanca, NY which is within the Allegany Indian Reservation. Petit. is white also. He sought a writ of habeas corpus in the DC and CCA, but was refused because he had not exhausted his state remedies. Thereafter he sought the present writ in the state ct. The city of Samamnca is built on land the title to which is owned by Indian tribes and leased by them. The Indians title to the land was established by several treaties between 1795 and 1842; neither of these expressly provides that the US retained exclusive jurisdiction of this territory. Petit. was convicted under a NY murder statute which was made applicable to the City of Salamnca by NY statute. SJ 4. Petit. claimed that the US retained exclusive jurisdiction over the place where the murder was committed. He relies on 24 USC §217 which provides that the general laws of the US as to punishment of crimes committed within the exclusive jurisdiction of the US shall extend to Indian Country. Murder is a crime provided for in The US code. In 1875 Congress provided with respect to the Seneca Nation tribes in NY that "all municipal laws and regulations of said State [NY] may extend over and be in force within said villages; " Among the villages specified was Salamnaca, and NY by law made its general laws applicable to the town.

The three NY courts which passed on the question of the jurisdiction of NY to try petit. for murder committed in the City held that that § 217 did not apply because the City was not Indian Country although the title to the land on which the city was built was held by the Indian Nations, and that in any event the statute was not meant to apply to a case where one white man killed another.; They also held that the Act of 1875 which permitted NY to extend its "municipal laws" to the villages meant its general laws, not merely those laws pertaining to municipalites and towns.

1. It is apparent that this is not a proper case for appeal; the validity of no NY statute is directly drawn into question. The issue is one, rather the US retained its jurisdiction over crimes committed in the City of Salamnca or whether such jurisdiction was ceded to the state. Lehman J. refused to grant the application for leave to appeal on this ground.

xx I think the appeal should be dismissed.

2. Treating the case as a petition for certiorari, I think cert. should be granted. The Act of 1875 dealt with leases made by the Tribes to white people, and highways through the reservation. It was in no sense a general law. It was argued below that the words "municipal laws" were used in their

co

conflict of laws sense as refering to all the infernal laws of a state. Petit. contends they just refer to the NY laws pertaining to municipalities, cities and the like. In this petit. has support. Un US v. Forness 125 F2 928 (CCA 2) the Nations sought to cancel certain leases on the reservation for nonpayment of rent. The lessees immediately tendered the money, and under NY law such tender bars an action for ejectment which was in substance the action brought by the US on behalf of the Indians in the DC. In arguing that the NY remedies governed, the lessees there relied on the phrase "municipal laws" as meaning that Congress had ~~ex~~ allowed NY to extend all its laws to the villages. Frank, J. however held that the phrase did not have that effect, but that it merely referred to the NY law of municipalities, not its law in general. This case of course involved the rights of Indians. The present case involves a murder of a white man by a white man. In such circumstances NY has long enforced its criminal laws in the City of Salamanca which is largely white in propulation. The question, however, is one of great difficulty of interpretation. There seems to be a conflict between the NY ct of Appeals and the CCA on the interpretation of the Act of 1875 which seems to govern the question of jurisidction. I think cert. should be granted.

GRANT EGW Op. SJ 52

No. 160 1944 Term
Elgin, Joliet and Eeastern Ry v. Burley
Petition for Rehearing

Nothing

DENY EGW

No. 163 1945 Term
Commissioner v. Wilcox
Cert. 9 Cir.

Juris. R. 2. Cert. timely: Judgment entered March 30, 1945; cert. filed June 25, 1945.

The sole question is whether embezzled money is taxable income. Resp. embezzled some of his employer's funds. The company never forgave or condoned this taking. Resp. was convicted and served a term in jail. He gambled with the stolen money and lost most of it. The Tax Ct on the basis of its previous decisions, although acknowledging a split in the CCAs gave judgment for petitioner. The CCA reversed, holding that there was no taxable income under §22(a). The ct said that there had been no change or transfer in the property rights of the owner of the money and that resp. was liable for it. It distinguishes a statement in N. Amer. Oil Co. v. Burnet, 286 US 417 that if a taxpayer receives money under a claim of right, he has received income, even though it be claimed that he is not entitled to the money and may be adjudged liable to restore its equivilent, on the ground that resp. did not take the money under a claim of right.

1. There is a conflict with Kurrle v. Helvering, 126 F(2d) 723 which also involved the question of embezzled money.

2. The government claims that the rationale of the N. Amer. case goes beyond the situation where money is received with aclaim of right. It might be argued, and I am inclined to agree that the embezzler, at least if the theft is discovered, receives no income because a commensurate debt arises in favor of the party from whom it was taken.

GRANT EGW Op. R. 30

No. 187 1945 Term
Cherry Cotton Mills v. US
Cert. Ct. Claims

Juris. R. 1. Cert. timely: Judgment entered April 2, 1945; cert. filed July 2, 1945.

The question is whether the US may counterclaim on the basis of a debt owed to the RFC by petit.

In 1939 the petit. owed the RFC $5,963.51 on a deficiency claim resulting from the foreclosure of a mortgage after the default of a loan granted petit. by the RFC and another bank. In 1942 the Commissioner of Int. Rev. allowed petit's claim for a refund of processing taxes of $3,104.87. The general accounting office issued a certificate of settlement requiring the refund to be paid to the RFC in partial payment of the debt, but the treasurer not knowing this issued a check to petit. which was stopped. This suit was brought to recover the tax refund without credit or setoff. The stat. provides that all counterclaims or other demands whatsoever on the part of the US gov't may be brought in the Ct of claims. The gov't counterclaimed on the debt of petit. to the RFC.

The Ct hald for resp. on the ground that the RFC was an agency of the gov't and hence the counterclaim was proper under the statute.

1. Petit. urges that the RFC is an independent corporation with power to sue and be sued and the petit's debt was to it alone and not to the United States and hence could not be used for a counterclaim by the latter. It is thus contended that the ct below exceeded its jurisdiction in entertaining the counterclaim as one on the part of the gov't of the US. The RFC has in many respects been treated like a private corporation. However, the gov't shifts its ground with respect to the nature of the RFC depending on the requirements of the particular situation. A comparable problem was raised in Defense Supplies Co v. US No. 222, where the question of whether a subrogee of the DSC could sue the United States was raised. The status of the gov't corporation is rather perplexing. While I think the result below was correct, perhaps the question should be settled by this ct.

GRANT(?) EGW Op. R. 15

No. 197 1945 Term
Commissioner v. Crawford
Cert. 9 Cir.

Juris. R. 3. Cert. timely: Judgment entered April 21, 1945; cert. filed July 3, 1945.

Respondent filed a petition in the Tax Ct. against an alleged deficiency in her taxes for 1938-40 asserted by the Comm. Resp. leased California Land to several oil companies for drilling purposes, which leases were terminable by breach of the drilling and other clauses. Resp. was entitled to royalty consisting of a percentage of the net profits of the lessee from its sale of oil taken from the land. Respondent deducted from her gross income from the royalties, 27 1/2% for depletion under § 114(b)(3) of the code. The Tax Court held that resp. retained an economic interest in the oil by virtue of the royalty interest retained in each lease. Thus the percentage of net profits received was part of her gross income from property, entitled to the depletion deduction. The CCA affirmed, holding that the royalty based on the percentage of net profits of the lessee was income from property, particularly in view of the rule in Cal. that despite the lease the lessor retained title to the oil in the ground.

Petit. asserts a conflict with Comm. v Kirby Petroleum Co, 148 F(2d) 80, cert. granted No. 1139 this temm, and seeks cert. on this case for that reason. The CCA felt too that there was a conflict on the point. There is no question but that cert. should be granted in this case also to determine whether a royalty based on the percentage of net profits made by the lessee from the oil extracted is subject to the depletion deduction.

GRANT EGW Op. R. 131

No. 198 1945 Term
M. Kraus & Bros. Inc. v. US
Cert. 2 Cir.

Juris. R. 3. Cert. timely: Judgment entered May 14, 1945; cert. filed July 5, 1945.

Petit. was convicted on information of a violation of the ceiling price governing live poultry because it sold chickens at ceiling prices, but required that the buyer purchase at the same time unwanted parts of chickens such as feet, gizzard etc. on which there was no ceiling. This is more commonly known as a tie-in sale and is forbidden by the price regulations. During the course of trial the DC refused to permit petit.'s counsel to examine certain affadavits made by hostile witnesses and which were being employed to refresh the recollection of those witnesses. The evidence being sought thereby was to connect the individual, Kraus with the price violations. He was acquitted. The DC also limited evidence by which petit. tried to show there was a regular market for the chicken parts which it required purchasers of whole chickens to buy at the same time. The prosecution in summing up stated that the maximum fine was $1000 on each count. Actually the maximum is $5,000 and petit. was fined $2,500 on each count.

The CCA affirmed, finding (1) that the refusal of the DC to permit petit's counsel to examine the affadavits while erroneous was not prejudicial error since the evidence related solely to the individual defendant Kraus who was acquitted. (2) It affirmed the exclusion of evidence as to a market in poultry parts. Hincks D. J. dissented on the basis of this point.

1. Petit. contends that the sale of the chickens at a ceiling price coupled with the required purchase of the unwanted parts is not a violation of the ceiling price on chickens. I think this is untenable. This seems to be merely a not-so-clever scheme to get more money for the chickens. When a buyer has to purchase something he does not want whether or not it has economic value in order to get something he wants he is in fact paying the larger sum for the scarce commodity. It is inflationary ineffect, and the OPA properly treats it as an evasionary practise.

2. For the same reason the exclusion of the evidence as to whether or not the chicken parts were dealt in was proper. The requirement that the parts be purchased with the chickens when the buyers wanted to buy the chickens only ~~xxxxxxx~~ was in practise the establishment of an illegally high price for the chickens. Otherwise the device of "tie-in" sales if it was widely practised would force consumers to pay higher prices for things they wanted even though items they didn't want were thrown into the bargain.

3. While the better practise is to permit opposing counsel to examine the affadavits which are being used to refresh

the recollection of hostile witnesses, the error here was harmless since it was an attempt to connect the individual Kraus with the overcharges and he was acquitted. The corporate defedant was not harmed.

3. Petit. also contends that the corporation is not criminally liable for the acts of its employees in making the tie-in sales. That is untenable. They were acting on its behalf, and the corp. received the illicit profits. A corporation is only a legal entity and could never be criminally liable but for the acts of its agents and servants.

4. The error of resp.'s counsel in stating the maximum fine under the EPCA was harmless, since the judge charged the jury they were not to consider the penalty in determination of guilt or innocence.

DENY EGW Op. R. 326

No. 203 1945 Term
Commissioner v.Estate of Holmes
Cert. 5 Cir.

Juris. R. 4. Cert. timely: Judgment entered April 14, 1945; cert. filed July 6, 1945.

In 1935 decedent transferred to himself as trustee 30 shares of stock, holding them for the benefit of his sons. The trust was to continue 15 years. The sons were to receive the income of the trust during its continuance, and on its termination the principle. If they died leaving issue under 21 the issue were to receive the income until 21, then the principle. If the issue were over 21 the trust was to terminate as to them and they were to receive the principle. There were contingent gifts to others in the event of no issue. The donor retained a power to terminate the trust by distributing to his sons the whole or part of the principle of the trust. §811(d)(2) of the IRC makes part of the gross estate transfers where the enjoyment thereof was subject to any change through the exercise of a power "to alter, amend, or revoke". The commissioner sought to include the value of the stock in the gross estate because of the retained power of termination. The applicable treasury regulation states that the word revoke in the statute includes the power of termination, and that the addition of the word terminate to the code as applied to transfers in 1936 and thereafter is delcaratory of existing law. The Tax Ct. held that the power to terminate as used in the gegulation must treated as embraced in the word revoke, enabling the donor to regain the ownership of the property, or an interet therein. Since the present power was not held to be of that nature, the ct held for resp. The CCA affirmed, McCord, J. dissenting, on the ground that the donor could not revoke and regain the property or name new beneficiaries. The ct refused to follow Mellon v. Driscoll, 117 f(2d) 477. The dissent felt that the decedent retained power to change what were contingent gifts of the ppinciple to the sons into absolute gifts.

1. The Petitioner claims conflict with Mellon v. Driscoll, which expressly held that prior to the amendment in 1936 the words "to alter, to amend and to revoke" in a case similar to this one, included the power to terminate, where the power as there used would not enable the donor to regain the property. I think there is a square conflict here over statutory interpretation.

2. I think that the regulation goes fairly far in covering a power of termination of the type here used in view of the fact that Congress did not add that word to the statute until after this transfer was made, and it was added propspectively only.

GRANT EGW Op. R. 65

No. 234 1945 Term
Mississippi Publishing Co. v. Murphree
Cert. 5 Cir.

Juris. R. J. Cert. timely: Judgment entered May 7, 1945, cert. filed July 17, 1945.

Resp., a resident of Miss. brought suit in the Northern District of Miss. against petit. for libel. Petit. is a Delaware corp. whose place of business is in the Southern District of Miss. It does no business in the Northern District. Resp. was found by the DC to be a resident of the Northern District. Petit. has appointed an agent for the acceptance of process in accordance with Miss. law; the agent is resident in the Southern District. Petit. was served with summons in the Southern district. It moved to dismiss for improper venue. The DC dismissed the complaint without prejudice. 28 USC §112(a) provides that except as provided in §113..in diversity cases suit may be brought in the district of the residence of the plaintiff or defendant. §113 provides that when a state contains more than one district, suit shall be brought where the defendant resides. Rule 4(f) of the FRCP states that all process other than a subpena may be served anywhere within the limits of the state where the district is located.

The CCA reversed, holding that the venue was properly laid in the Northern District since resp. was a resident there, and that §113, is an exception to §112 and applies only where the plaintiff does not sue in his own district. It held that under Rule 4(f) the DC could obtain jurisdiction over the person of petit. by service in the Southern District.

Petit. contends that it is subject to suit only in the Southern District. I think the result reached by the CCA is clearly right. Since petit. was doing business in Miss. and had appointed an agent there, it was subject to the jurisdiction of the DC. The question is wholly one of venue. Petit. confuses the issue by discussing the Nierbo case. But that was a case where neither the plaintiff's nor the defendant corporation's residence was in the district where the suit was brought. Here under §112(a) venue is properly laid in the Northern District where resp. lives, as well as in the Southern District where petit. has its agent, and carries on its business. Petit. argues that §113 is exclusive and that the suit may be brought only where it resides. But such a construction of the two sections is untenable. The general rule is that in a diversity case the plaintiff may bring a suit in his district, whether or not the state is divided into more than one district. The situation is different with patent suits where a special venue section [§109] governs.

The only other question is whether the summons was properly served on petitioner in the Southern District. Rule 4(f) expressly provides for such service. Service could not be made outside the district prior to that rule, but this fact was pointed out to this ct by the advisers, according to Moore, and the rule was included. Clearly it does not affect venue or jurisdiction, which are the same apart from the federal rules. The Nierbo case would only be involved if the resp. had brought suit in the Northern District, and if that district were not his residence. A question would then arise as to the limits of petit.'s consent to waive venue. Does it apply only to the district in which it is doing business, or elsewhere within the state. That question is not presented here.

DENY EGW Op. R. 52

No. 238 1945 Term
Hulbert & Bowles v. Twin Falls County, Idaho
Cert. Sup. Ct. Idaho

Juris. R. 4. Cert. timely: Time for leave to file cert. extended to July 18, 1945. cert. filed July 17, 1945.

The question is whether the Price Control Act applies to a state or its political subdivisions.

Petit. Hulbert is a farmer who bid for a used tractor owned and by resp. The price bid and accepted was higher than the ceiling price. Resp. sued to recover the price bid. Petit. is willing to pay only the ceiling price. The price administrator intervened. Petit. Julbert is willing now to pay any price up to the price he bid which is not in violation of the ceiling price.

The lower ct held the ceiling applied to the county and gave it judgment for the ceiling price. The Supreme ct reversed, and gave judgment to the county for the bid price, holding that the EPCA does not apply to a state.

The Act defines person to include the United States or any other government, or any of its political subdivisions.

Cert. should be granted in this case which involves the same issue as Case v. Bowles No. 261 in which cert. was granted last week. That case is in conflict with this one. There is a question whether the Idaho Ct and this ct have jurisdiction to consider this question, under §204 of the Act.

GRANT EGW Op. R. 48

No. 240 1945 Term
Weiss v. US
Cert. 2 Cir.

Juris. A. 2. Cert. timely: Judgment entered June 4, 1945; cert. filed July 18, 1945.

Petit. was convicted on numerous counts of violating the ceiling price on wholesale liquor. Moret, a wholesale liquor dealer testified that petit. called on him and told him that he could get some Scotch Whiskey for him; that the price was $25. 50, the billing price to be $11.82 and the balance to be in cash. Petit. was to write the firm supplying the goods and order them. There were several other transactions of a like nature. The whiskey was delivered in installments of 250 cases. Petit. was indicted both for offering to sell and for the sale of the liquor above ceiling prices. The judge charged the jury that if petit. acted only as an agent or a "finder" he could not be convicted; he stated petit. must be found to be a seller or an offeror. Petit. was sentended to six months in jail and to a fine of $5,000 on each of fixe counts. The EPCA provides for a maximum fine of $5,000 but the Stabilization Act of 1942 which extended the EPCA provides for a maximum of $1,000 for the violationx of regulations issued under it. §7 (b) of the Stabiliz. Act provides that the penalties of the EPCA shall be applicable to the violation of all regulations of the Price Administrator when made under the Stabiliz. Act pursuant to authority delegated to him.

The CCA held that the jury was warranted in finding that petit. was a seller under the EPCA, even though title to the liquor did not pass through him to Moret, since he had sufficient command over the goods to procure the transfer of title from the owner to the buyer; it also held that the $5,000 penalty of the EPCA applied even though the preamble to the regulation stated it was issued both under the EPCA and under authrotity delegated under the Stabilization Act.

1. Petit. first contends that the fines were unauthorized. But §7(b) of the Stabilization Act permits the EPCA penalties to apply to the violation of regulations issued by the OPA under the Stabilization Act. This was undoubtedly to keep uniform the penalties, regardless of which Act provided the source of the OPA's authority. The fact that the Stabilization Act has a separate provision for $1,000 fines for violations of regulations issued under it doesn't matter since regulations issued by the OPA are treated separately.

2. There is very little in petit.'s argument that he was not a seller or offeror within the meaning of the Act. The jury found against him on the point. The Act defines sale very broadly, including transfers and offers. The arrangment made was thus a sale, even though a third paty provided the goods.

DENY EGW

Op. R. 148

No. 254 & 255
S. R. A., Inc. v. Minnesots
Cert. Supreme Ct. of Minnesota

Juris. R. 3. Cert. timely: Judgment entered April 24, 1945. Cert. filed July 24, 1945 (time extended by order of this ct.)

The issue here is whether land sold by the US under an executory installment contract by which the US was to give a deed when the land was fully paid for can be taxed by the state or countxy in which it is situated.

The land was purchased by the US in 1867 and used for a post office. In 1939 the premises were sold to petit. under terms whereby it was not to receive the deed until the land was fully paid for. Petit. took possession of the land in 1941, razed the building thereon and built a new one which it let out to various tenants, and the rest was used for a parking lot. Petit. received all the rents. In 1940 and again in 1941 the land was assessed and a tax levied against it by Ramsey County, "subject to fee title remaining in the United States." The assessment was atttacked in the state DC, petitioner claiming immunity from taxation on the ground the fee was in the US. The DC held the assessment void, and this judgment was reversed by the Sup. Ct of Minn. on appeal. The two cases concern two separate tax years, 1940 & 1941. On remand the trial ct. held the tax valid and this was affirmed on appeal.

In the 1st appeal the ct took the view thatthe US merely had a security interest in the land, similar to a mortgagee, ~~and xxxxxx~~ under Minn. law. It held that Petit. had the equitable title to the land, one which might be reached by creditors or the state, subject always to the fee interest in the US. It felt that the ~~xxxx~~ petit.'s interest in the land was similar to the case where the state of Minn. sold public land. It is subject to taxation and the vendee's interest may be disposed of for taxes.

In the second appeal the ct distinguished land grant cases in this ct. which held that the state may not tax the land until legal title is vested in the grantee, on the ground that Congress had estblished a different set of legal relationships in those cases covering use of the land for a certain period etc and thereby preventing the grantee from acquiring an equitable title. It felt that the present case was an ordinary sale of land, and that an equitable interest did arise even against the US. Further it felt that the petit. was in no position to assert an immunity belonging to the US alone.

Since the state ct has held with respect to state law that the equitable interest of petit. may be separately taxed and even sold on execution for failure to pay taxes

without affecting the US's legal title, this ct. should not reexamine the state law on that point. Petit. however insists that the ~~xk~~ land grant cases apply. It points out that if US land under the facts of this case is subject to tax, it will diminish the price the US would otherwise receive. On the other hand, it is hard to see why the petit. should get a free ride from the state and not pay its shares of the cost of maintaining the local and state gov't; it is using the land for purely commercial purposes; the US does have a ~~bare~~ legal title, retained purely to secure the balance of payments. To exempt the thousands of acres of land which the US has recently bought and will resell from taxation on these facts will is to deal harshly with the local govt's concerned. Lincoln County v. Pac. Spruce Co. 26 F2 435 is contrary. The CCA using the analogy of land grant cases held that unless the US has a bare legal title, everything having been done by the vendee in compliance with the contract, the land is not subject to state taxation. I think such a view is wrong. In any event this question should be settled by this ct.

GRANT EGW

Op. R. 27, 52

No. 261 1945 Term
Case v. Bowles
Cert. 9 Cir.

Juris. R, 2. Cert. timely: Judgment entered May 28, 1945; cert. filed July 26, 1945.

The question is whether the Price Control Act applies to sales by states.

Petit. Commissioner of Public Lands in Washington state sold some timber from land owned by the state by competitive bidding. One company (Coos Bay) bid the ceiling price; the other (Soundview) bid above the ceiling. Petit. is required by state law to accept the highest bid. The State Court held that the Act was not applicable to sales by states in performance of their governmental function. The Administrator brought the present suit for an injunction against petit. to enjoin the alleged attempp to violate the price regulation.

The DC dismissed the complaint holding that the Act did not apply to the sale. The CCA reversed, holding 1) that the validity of a regulation can only be attacked in the Emergency Court; 2) it held alternatively that the Act Applied to a sale by a state.

In the Act person is defined as including the US or any agency thereof or any other government or any of its political subdivisions. Clearly it was meant to apply to states. Petit. contends that if it is construed to apply, the Act is unconstitutional.

The CCA's opinion is in conflict with the highest ct. of Washington, Idaho and Mich. Cert. has already been granted on the Idaho case, Twin Falls County v. Hulbert No. 238 1944 term.

Petit. contends that the Ct. was without jurisdiction since it was a suit agsint the state; it is also contended that there should have been a three judge district court. However, cert. should be granted and this case passed on in connection with No. 238; its importante is obvious. Sales by a state at above ceiling prices are no less inflationary than sales by a private individual.

GRANT EGW Op. R. 71

No. 263 1945 Term
Lusthaus v. Commissioner
Cert. 3 Cir.

Juris. as to 2. Cert. timely: Rehearing denied May 28, 1945; cert. filed July 26, 1945.

The issue is whether for income tax purposes petit. established a valid partnership with his wife.

Petit. owns and managed 2 furniture stores and his wife assisted him. The wife had a separate estate of $45,000. Petit. then decided to sell to his wife, as of Jan. 1., 1940 a half interest in the business for $105,000. In order to do this he gave her a gift of $50,000 and paid a gift tax thereon. Petit. then gave his wife a bill of sale for the undivided half interest in the business and in consideration thereof she gave him the $50,000 and eleven promissary notes for $55,000. The parties complied with Pa. in registering the name of the business. The bank was not notified to honor the wife's name till 1943. Social security tax returns were executed by petit. as owner till June 1941. The capital contributed by the wife is an income producing factor. She continues to assist in the store. Partnership income tax returns were filed for 1940. The commissioner determined a deficiency.

The Tax Ct held for resp. on the ground that the wife did not gain a separate interest of her own in the business by turning back the $50,000 gift.

The CCA affirmed, holding the Tax Ct justified in finding there was no real change in petit's economic interest, regardless of the fact that the arrangments might have constituted a partnership under Pa. law. Fake, J. dissented saying that there mere fact the arrangments were made to avoid taxes does not make them any less valid, since they complied with the applicable local law.

Resp. as well as petit. urge that cert. be granted in this case, on the basis of a conflict with Tower v. Comm., 148 F(2d) 388. In that case, the husband made a gift of stock in a copporation which was to be dissolved in order to form a partnership in order that the wife could contribute capital to the partnership. This was done. The CCA reversed the Tax Ct and held for the taxpayer on the ground that the gift was legitimate and not to be disregarded in assertaining the tax consequences of the resulting partnership.

GRANT EGW Op. R. 95

No. 274 1945 Term
Robertson v. People
Appeal Superior Ct of Cal.

Juris. A. 1. Appeal timely: Judgment entered May 29, 1945; appeal allowed May 29, 1945

The Cal. insurance code provides that acting as an agent for a nonadmitted insurer in the transaction of insurance business in the state is a misdemmanor; it also provides that a person may not act as an insurance agent, broker or solicitor without a license. SJ 2. Petit. was found guilty of a violation of these statutes. The First Nat. Benefit Society of Arizona sent cards through the mail to prospect. O'Lein signed a card indicating he was interested and returned it to the Society, which had Petit. go to O'Lein and the insurance application was signed and returned to the society.

1. Petit. contended that the statutes are invalid becuase they interfere with interstate commerce, relying on the Southeastern Underwriters case, last term. It seems clear however, that the states retain the power to regulate insurance companies, and agents who engage in the business of selling insurance in the absence of congressional action. The state must protect prospective insured from unscupulous persons who might act as agents and in order to do do effectively may require a license. It has been held before by this ct that a state may license a ticket agency selling tickets xxx for interstate travel in view of the possibilities of fraud etc.

Dismiss EGW Op. SJ 14

Nos. 278-82 1945 Term
RFC v. Denver & Rio Grande R. R.
Cert. 10 Cir.

JRxis: Petition not in record; Cert. timely: Judgment entered May 10, 1945; cert. filed July 30, 1945

This is a proceeding seeking review of an order of the CCA in disapproving a plan of reoganization under §77 of the Bankruptcy Act. This is the fourth reorganization of the debtor. The plan approved by the ICC and confirmed by the DC gave the Senior bondholders their full claims, but mostly in junior securites and in common and preferred stock. 10% of the common was given to the General Mortgage Bonds. General creditors and stockholders were excluded altogether. The General Mortgage Bonds rejected the plan, but the other classes voted to accept it. The debtor does not own Utah Fuel Co stock which was pledged under an underlying mortgage, the equity of redemption being held by the W. Pac. and Mo. Pac. rys which assigned their equity xxxxx so that xx dividxends should be paid the debtor as long as certain bonds remainéd outstanding, but no t thereafter. The Junction line is a subsidiary of the debtor, but it was not clear whether it was a party to the proceeding. For bonds on that section the ICC awarded almost 3 million in bonds, but the DC had the trustee purchase the old Junction bonds and motions to require the DC redistribute the securitxes provided for the Junction Bonds by the ICC were deneid.

The CCA disappxxved the plan. 1) It found that the ICC's method of valuation on the basis of earnings was proper, and that the stockholders were properly excluded, even though there had been increased wartime earnings. 2) The CCA found that the current assets position of the debtor was unusally large, and because of that it held that the General Bondholders were entitled to more than 10% of their claims; xxxxx it stated that the General Bondholders should be paid the excess current assets and excess war profits in cash, since it held that the ICC prqerly did not capitalize such excess assets as a basis for issuing securities thereon. 3) The CCA said that the Junction bonds should not be held in the debtor's treasury so as to benefit the senior claimants, but that the value behind such security should go the the General Bondholders. 4) As to the senior bondholders who had the Utah Fuel Stock as collateral, it felt that they should not receive the stock, plus new securities, but that they should foreclose on the collateral and receive new securities as to the balance only

1. Petit. RFC's main contention is that the CCA's requirement that cash be paid the junior claimants when the senior claimants have been largely paid in common stock violates the absolute pirority rule. They call the ct's attention to the fact that the new stock will not be worth in the market its par value, the basis on which the senixor claims were paid, and that unless

xxxxxxx

the senior claims have a right to unlimited dividends and a right to distributions from current assets they could not possibly receive their full claims. By the payment of cash from the current assets it is contended that the senior rights to unlimited dividends on the new stock is impaired. I think that in effect the CCA is substituting its judgment as to future earnings for that of the ICC in requiring the cash payments to the junion holders, something it may not do under the recent decisions of this ct. Also these current earnings were in part received after the effective date of the plan, and they should therefore go to the senior holders. The vice of the CCA's view seems to be that it regarded the senior holders as fully paid under the Case rule although they received mainly common stock which probably was not worth par on the market.

The same difficulty is apparent in the CCA's awarding to the junior holders the securities which were set aside by the ICC for the Junction Bonds, which were later purchased by the debtor. These should go first to the senior holders. Certainly the ICC has the principal task in making the plan and in particular in deciding the amount of necessary current assets that the debtor should retain.

2. Petit. RFC also contends that the bondholders to whom is pledged the Utah Fuel Stock as collateral should be entitled to participate in new securities without having first to sell the collateral stock, since the new securities, they would have received will be worth less than their face value. Such a disposition has been approved in other cases where the ICC did not require a prior realization on the colleral. It would seem to be a matter properly for the discretion of the ICC.

Several other petitions were filed; they were based mainly on the fact that the CCA found the old stock had no value. There is nothing in that.

GRANT EGW Up. R. 237

289 1945 Term
Allen, Collector, v. Trust Co. of Ga.
Cert. 5 Cir.

Juris. R. 7. Cert. timely: Judgment entered May 3, 1945; cert. filed August 2, 1945.

Decendent in 1925 and again in 1934 made gifts in trust t his son-in-law and daughter because of their impecunious situation; the transfers were irrevocable but the decedent retained a power to alter and amend with the consent of the beneficiary. These gifts were clearly not made in contemplation of death, and as the law then stood the power retained did not make the property transferred subject to the estate tax, since the beneficiary's consent was necessary. In 1935 Helvering v. City Bank was decided by this ct. which held that a retained power to amend even with the consent of the beneficiary made the property transferred a part of the gross estate under the estate tax. In 1937 when this called to decedent's intention, relinguished the power. Within two years thereafter he died at 82. The Comm. claimed that the power had been relinguished in contemplation of death under §302(d)(1) & (3) of the Rev. Act of 1926 as amended, the latter section creating a presumption of a relinguishiment in contemplation of death where the transferor dies within two years after the power is surrendered.

The DC found that the original gifts were not made in contemplation; that the power retained as the law then stood did not require that the property transferred be included in his gross estate; that the relinguishment was not in contemplation of death. The CCA affirmed, holding that the relinguishment was not testimentary in character, and that the fact that it was made for the purpose of avoiding the estate taxes towhich because of a change of law the transfer as it then stood was subject did not make the relinguishment in contemplation, where as here there is no proof that death was near as hand.

Petit. contends that the CCA erred in holding that the relinquishment was not made in contemplation of death since it was made to avoid estate taxes. On the facts of this case it would seem that the CCA was correct. The circumstances indicate no attempts at evasion. The original gifts were not made in contemplation. The decdent then retained nothing which would make the sums given part of his gross estate. Because of a change of law he took steps to meet the new situation. At the time of the relinguishment the ct. found that he was healthy; that he did not consider that death was near at hand.

Unless it can be said that where a settlor makes a bone fide gift not in contemplation, but as an incident thereto takes all necessary steps to prevent the transfer from becoming subject to the estate tax because of changes of law, such changes are necessarily in contemplation of death within the meaning of

the Act, the CCA is correct. I don't think the extreme position for which the petit. contends on the facts is tenable.

Petit. also contends that there is a conflict in the circuits because of this case. In Commonwealth Trust Co v. Driscoll 50 FS 949 aff'd per cur. 137 F2 653 a transfer was found to have been made only with the intention of avoiding the estate taxes. The ct. held that therefore the transfer was made in contemplation of death. In the present case the relinguishment was made, it is true, soley for tax avoidance purposes, but the CCA held that under all the circumstances it was not made in contemplation of death. I think this reveals a conflict. See also Fxirst Trust & Depostit Co v. Shaughnessy 134 F2 940.

GRANT EGW Op. R. 225

290

No. ~~220~~ 1945 Term
Halliburton Oil Well Cementing Co v. Walker et al.
Cert. 9 Cir.

Juris. R. I, 3. Cert. timely: Rehearing denied June 12, 1945; cert. filed August 2, 1945.

Resp. sued petit. for infringement of a patent concerned with the location of the level of a fluid in an oil well, or of obstructions therein. The novelty of the invention, the claim for which was held valid and infringed by the DC, was found to reside in the addition of an adjustible pipe which enables the operator of the device to filter out certain undesirable echoes while abling him to record the desirable ones. The important part of the claim, as sustained, is "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." The means employed by the patent for tuning is mechanical, whereas the infringing device was electrical.

The CCA held the patent valid and infringed. On petition for rehearing the CCA distinguished Gneral Electric Co. v. Wabash Appliance Co. 314 US 364 stating that there the claim was for a single element, and here for a combination of elements, implying that under present facts a claim made in terms of function is valid. Denman J. concurring in the denial of the petition stated that the claim consisted of a combination of means, none of which had before been combined.

1. Petit. argues that the description in the claim of the novel element as "means...for tuning" is functional and hence invalid under the General Electric Case, which you wrote. The language of the claim seems to fall within the G,E. case where there was insufficient structural description of the grains used in the filament. The CCA sought to differentiate that case on the ground that here there was a combination of means or elements which sufficiently define the limits of the invention, I think however that the case is contrary to the GE case in that the claim fails to state how the function is to be performed.

2. petit. claims the CCA also erred by ignoring the cancellation of resp.'s claim in a pending application for a patent on a similar device which tuned electrically rather than as here mechanically. It argues that the claims of a patent may not be so construed as to cover subject matter rejected by the patent office. But the pending application was rejected on the basis of resp.'s patent, the one here involved which was stated to cover both mechanical and electrical methods of tuning. (R. 1603). It is thus unlikely that the doctrine of Schriber Co. v. Cleveland Trust Co. 311 US 211 applies.

GRANT EGW

OP. R. VI, 1594, 1614

No. 292 1945 Term
Estep v. US
cert. 3 Cir.

Juris. Rx Appell. Appendix 1. Cert. timely: Judgment entered July 6, 1945; cert. filed August 3, 1945.

This is a selective service case involving a conviction of a member of the Jehovah's Witnesses. Petit. obeyed the order to report for his preinduction physical; he was accepted by the Navy. He obyed the local board's order to report for induction and fulfilled all the requirements except that he would not take the one step forward which under the Navy's procedure marks the actual induction into the Navy. Instead he explained that he was a xxxxxxxxx minister and entitled to be exempt. At the trial petit. endeavered to prove that the local board had acted arbitrarily and denied him due process in classifying him. The evidence xx indicated rather serious irregularities in the local board's procedure. However, this evidence was excluded.

On appeal and after reargument before the ct en banc the conviction was affirmed, Biggs and Leahy dissenting. The ct held that under the Falbo case the administrative process is not exhausted until actual induction, and that therefore in a criminal proceeding for failure to obey the local board's order evidence of procedural irregularities, or improper classification cannot be received in evidence. The Dissent felt that petit. had exhausted the administrative process; the only thing he had not done was to submit to actual induction. Had he taken the step forward required by the navy he would have voluntarily submitted to induction and hence would not be restrained so as to justify review of the board's action by habeas corpus.

The Falbo case is not clear as to whether actual induction is required in order to xxx fxx determine the end of the administrative process. Petit. had done everything short of that. Under the Billings case petit. does not have to submit to induction. If he does so voluntarily it may be that habeas corpus does not lie. If he does not he is subject to criminal prosecution and may not defend on the ground of improper local board action. The set up seems to be a trap indeed, unless the administrative action is final and not to be called into question in any judicial proceedings. That is a way out but a questionable result.

Resp. suggests that since Smith v. US No. 66 1945 Term has been granted cert. a decision on the cert. petition in this case should await that case. That case also involves the problem of whether induction is neceesary to the exhaustion of administrative remedies.

In view of the fact that the action of the local board in the present case seems to have been such that if its action could be reviewed on the merits it would have been reversed, and since the Smith case involving ~~practically the same~~ Estep & Sinclair guestion has been granted cert. I think cert. should be granted in the present case also as ~~xxxx~~ to settle the issue.

GRANT EGW Op. R. 281

. 305 1945 Term
Township of Hillsborough v. Duke
rt. 3 Cir.

aris. R. 8. Cert. timely: Judgment entered May 9, 1945; cert.
iled August 8, 1945.

Resp. brought suit for declaratory judgment that certain assessments on her intangible personal property, and that held by her as trustee was invalid since it infringed her rights under the 14th amendment. Resp. prior to the years for which the assessment was made had her domicile in Hawaii. In June 1941 the Township by resolmution found that resp. had ommitted intangible personalty from her return in the amount of 60 million dollars for 1940 and 1941, and that she was domiciled in the township. It also assessed her as trustee of Duke Endowment, a charitable trust, for some 160 million dollars in intangibles. The DC granted resp's. motion for summary judgment on the ground that under NJ law the assessment was improperly made, since no notice was given pesp. and rejected petit's. contention that the DC had no jurisdiction because a ~~pixiny~~ sppedy, adequate and efficient remedy in the state law.

The CCA affirmed, holding that the DC had properly exercised its discretion in taking jurisdiction under Great Lakes Co. v. Huffman, 319 US 293, where the ct had indicated that under certain circumstances the Declaratory Judgments Act should not be employed to contest state taxes. It found that an adequate remedy did not exist under state law, and that a federal right had been invaded by an intentional and arbitrary assessment of the otwnship. It also held that under NJ law the assessment was invalid.

The petit. contends that the DC and CCA abused their discretion in taking jurisdiction of this case, relying on the Great Lakes case. That case stated that the DC should not take jurisidction under the Declaratory Judgments Act to pass on the validity of state taxes except in exceptional cases. I think that the present case is exceptional. The petit. has clearly and intentionally discriminated against, as the CCA found, in that her property was assessed at its full value whereas other property was valued much lower. The CCA found that NJ does not afford relief against this situation, and there is nothing to indicate that its finding that the NJ law does not afford a plain and adequate remedy should be disturbed.

DENY EGW Op. A. 148

Granted

Next p.

No. 305 1945 Term
Township of Hillsborough v. Duke
Supplemental Memo

The DC and the CCA proceeded on two assumptions: 1) unconsitutional discrimination in assessment, 2) that the assessment was void procedurally under NJ law.

Jurisdiction was based on the first gmound but the courts passed only on the state question, finding that the assessment was procedurally invalid.

The jurisdictional issue under the declaratory Judgments Actx turns on whether the NJ provides a xxxxx speedy, efficient and adequate remedy with respect to improperly assessed taxes. This was the substance of the holding in the Huffman case. The CCA recognized that the state provided the machinery for resisting the illegal acts of taxpayers, and that at least as to the second argument above, the resp. would prevail in the state courts. But the court felt while the statexx had the proper legal procedures for resisting taxation resp. if she employed them could not prevail on the metits under the rulings of the state courts with respect to the federal right.

The real question then is whether the adequacy of the remedy xxxxxx turns on the fact that the state has provided the legal machinery for resisting improper taxation, or whether the taxpayer would prevail on the merits in urging a federal right. The state of NJ decisions while not completely clear, compare Central R. of NJ v. State Tax Dept. 169 Atl. 489 with Lehigh Valley R. v. State Board 174 Atl. 359 (both cases were written by the same judge) is such that the resp. could not prevail even if it were proved that her intaggible property were intentionally and arbitrarily assessed at its true value whereas other like property is systematically assessed much lower. Of course, resp. could raise the federal questionx below and xxxx obtain review in this court.

Union Pac. RR v. Board 247 US 282 seems to procede on the assumption that the test of the adequacy of the remedy is whether the state provided the proper machinery for the recovery of illegal taxes. There no question was raised with respect to whether the state would recognize a federal right if it was asserted. In Dawson v. Kentucky Distilleries & Warehouse Co. 255 US 288 it was not clear at the time the suit was brought that a taxpayer could have obtained a refund of the tax under then existing state procedures; in that sense the case is like the Union Pac. case. Accord, Spector Motor Service, Inc. v. Walsh 139 F2 809 Aff'd(on this point) 323 US 101. There the taxpayer on appeal could not raise the question of the consitutionality of the tax and an injunction was not available. See also Board of Comm'rs v. US 139 F2 248.

It seems to me that the fact that the NJ cts will not

recognize a federal right even if the facts indicate that it has been infringed impairs the adequacy of the state remedy even though the legal machinery for asserting that right in the state court exists. Of course this court on review can coorect the failure of the highest state court to abide by the decisions of this court; this court cannot however provide state machinery for resisting the tax where none exists.

No. 306 1945 Term
Mason v. Paradise Irrigation District
Cert. 9 Cir.

Juris. A. 1. Cert. timely: Judgment entered May 11, 1945; cert. filed August 8, 1945.

This case arises under the Municipal Bankruptcy Act. The only two creditors involved are petit. and the RFC. Petit. was offered $525.21 cash for each $1000 bond; the RFC was given ~~x~~ $1000 refunding bonds~~with~~ bearing ~~4%~~ 4% interest instead of cash, but otherwise petit. was treated equally. In 1934 the resp. failed, and the RFC agreed to loan resp. enough money to pay ~~it~~ $525.21 on each 1000 dollar bond, whereupon the RFC was to return the old bonds for cancellation and take in return $1000 refunding bonds.

The DC approved a plan requiring petit. to accept the cash rather than the equivilent in a bond. The CCA affirmed.

Petit. contends that the plan of composition discriminates unfairly in favor of the RFC since it gets a bond bearing interest while petit. gets cash. There is a conflict on the fairness of such a plan. See Texas v. Tabasco Consol Ind.school Dist. 132 F2 62, 133 F2 196, 142 F2 58. It would seem that to be perfectly fair petit. should get the cash settlement plus the ~~xigkx~~ value ~~of~~ now of the right to interest at 4% until the maturity of the refunding bonds, or the bonds themselves.

GRANt EGW Op. R. 215

No. 309 1945 Term
Unemployment Compensation Comm. of Alaska v. Aragon
Cert. 9 Cir.

Cert. timely:
Juris. R. 651./Judgment entered May 15, 1945; cert. filed August 10, 1945.

This proceeding was brought to review a decision of the Commission by resp.s who seek unemployment compensation under Alaska's Act. Various salmon canneries hire their employees for Alask an operations in San Francisco. The operation is seasonal and each year a new agreement is made between the employers and employees' union prior to the date for sailing. A new agreement was sought to be reached for the 1940 season. Higher wages were demanded by the employees. The fishing operations are seasonal and various deadlines were set by the employers for the reaching of an agreement if fishing for that season in various parts of Alaska was not to be abandoned. Negotiations continued at San Francisco and ~~xxxxx~~ Seattle, but no agreement was reached, and the operations for the year were abandoned. Resps. then filed their claims with the Alaska Comm. for unemployment compensation. The Act provides that "For any week with respect to which the Commission finds that his total unemployment is due to a labor dispute which is in active progress at the factory, establishement or other premises at which he is or was employed.." the ~~xxx~~ individual shall be disqualified, but such disqualification shall not exceed 8 weeks after the beginning of the dispute. The Act also provides for a hearing before a referee, and an appeal to the Commission; and after the administrative remedies have been exhausted, for ct. review.

The referee and the Comm. found that there was a labor dispute under the act, and deducted 8 weeks compensation; the DC affirmed, holding that there was a labor dispute, and that it was in active progress at the factories. The CCA reversed, Healy J. dissenting, on the ground that the labor dispute was not in active progress at the factories, which were in Alaska since the dispute took place in San Francisco, and Seattle. Healy dissented on the ground that resp. had not raised the question before the Commission that the dispute was not in active progress at the factory, and hence the DC and CCA could not consider it.

1. Petit.'s main contention is that the CCA decided on a ground that was not properly before it, since it was not raised or passed on in the administrative proceedings. The case was argued at the administrative level on the basis that there was no labor dispute, since the employment contratt had terminated and the question was as to the terms of a new one.

petit. claims that the CCA ~~to show that the question had been raised~~ lifted parts of the record out of context and emphasized arguments made in the statutory language of § 5(d) to show that the question of whether the dispute was in progress at the plant was properly raised. I think this is only partly true. In one instance at least before the referee the point appears to have been directly raised by resp. [R. 30] The Comm. made a finding that the dispute was in active progress at the plant in statutory terms. Neither the referee nor the Comm., however, discussed the point in their opinions. The DC did treat it as one of the two issues. The question was apparently implicitly or explicitly before the Comm. for the very terms of the section require a finding that the dispute be in active progress at the plant in order to properly deduct the 8 weeks compensation. I think on the whole the CCA was correct in finding that the issue had been raised by resp. at the administrative level and that hence it was free to pass on the question.

2. Petits. contend that the act should not be construed to require the physcial presence of the workers at the ~~plant~~ factory in order to allow the deduction. The petit. points to no high state ct. or CCA case involving a conflict [br. 23]. Many state acts have similar provisions. As a practical matter ~~as~~ petit. points out that negotiations must be complete prior to sailing to Alaska; they could not well be carried on there. But it does not follow that some disagreement as to the interpretation of the contract if made could not arise during the season in Alaska. The statute in terms seems to require "a labor dispute which is in active progress at the factory, establishment...". The CCA does not suggest the dispute must be on the employers land, but indicates the statute does not apply to a dispute taking place in California. I think that the Commission's construction to the contrary is unreasonable, but in view of the practical difficulties of disputing in Alaska the question is not free from doubt.

DENY(?) EGW Op. R. 770

No. 317 1945 Term
Commissioner v. Tower
Cert. 6 Cir.

Juris. R. 3. Cert. timely: Rehearing denied May 14, 1945; cert. filed August 13, 1945.

Resp. owned 425 shares in an iron works corporation. In 1934 he made a gift of 5 shares to his wife. In 1937 it was decided to dissolve the corporation and in order to save taxes it was decided that ~~xxxxxx~~ resp. would gife his wife 190 shares on condition that she contribute the assets which the shares ~~xxxx~~ represented to the partnership then to be set up. This was done and resp. paid a gift tax on the transfer of the shares. In the partnership the wife was made a limited partner, and as such had no share in the management of the partnership. The wife drew money from the partnership and kept it in her separate banking account; resp. continued to pay her a weekly household allowance. The commissioner sought to tax the wife's share of the partnership income to resp.

The Tax Ct. held that the gift of stock made was conditioned on the wife transferring the assets it represented to the partnership and that therefore the gift was invalid and the ~~xxxxxxxxxxxxxx~~ wife was not a bona fide partner since she had not made a capital contribution.

The CCA reversed, holding that though the gift was conditional, the condition was performed by the wife and thus the wife obtained full and complete title to the assets which were contributed to the partnership. It held the gift was valid and said that the fact it was made to lessen the amount of income taxes was beside the point. Martin J. dissented.

L. Petit. argues that cert. should be granted because the action of the CCA in reversing the tax ct. is contrary to the Dobson case. Just how much is left of the Dobson case after the Bingham case I am not sure, but the CCA seemed to treat the matter of whether there was a valid gift of the stock as a question of law.

2. Petit. also assetts a conflict. There is very little difference between this case and the Lusthaus case, No. 263 1945 Term. In that case the government urged that cert. be granted because of the conflict with the present case. There seems to be a square conflict and cert. should be granted to at least attempt to settle the question of the taxation of partnerships in which there is a gift to the wife who contributes the gift to the partnership capital.

GRANT EGW Op. R. 82

No. 318 1945 Term
Social Security Board v. Nierotko
Cert. 6 Cir.

Juris. R. 1. Cert. timely: Judgment entered May 14, 1945; cert. filed August 13, 1945.

The question is whether the amount received by an employee under a back pay order of the NLRB constitutes "wages" under the Social Security At for which the employee is entitled to credit. The NLRB finding that ~~pet~~ resp. had been discharged by the Ford Motor Co for union activity ordered him reinstated with back pay which amount to $3,500. Resp. sought to have this sum credited towards his old age insurance. This was refused by the Bureau, a referee on appeal, and the Appeals Council of the Board. This action was brought in the DC to review the decision of the Board. The Social Security Act defines wages as "all remuneration for employment", and employment as "any service, of whatever nature performed.. by an employee for the person employing him." §2(d) of the NLRA defines employee as ~~one~~ any individual whose work has ceased as a result of a current labor dispute or unfair labor practise. The DC affirmed the Board.

The CCA reversed; it rejected the petit.'s argument that wages as defined in the act referred only to remuneration for services performed and that no services were performed in connection with the back pay award. It found that back pay was wages both in common meaning and under the Act. It pointed out that wages under Social security have included vacation pay, sick pay, pay while on Nat'l Guard duty etc. It stated that back pay was awarded to ~~make~~ make whole the employee and that in order that to be complete the employee should receive Social Security credit for the amount of back pay received.

This case is novel. It is obviously of great importance. Large sums have been awarded in back pay by the NLRB and their status as regards social security is not clear. The Bur. Int. Rev. does not require the employer to withhold any amount for social security and the Security Board will not credit the employee with the back pay received. I think the result below is correct in that it correlates the two acts realistically and sensibly, but the question is one which should be settled by this ct.

GRANT EGW Op. R. 53

No. 319 1945 Term
NLRB v. Cheny Cal. Lumber Co.
Cert. 9 Cir.

Juris. R. 51. Cert. timely: Rehearing denied May 14, 1945; cert. file d Aug. 13, 1945.

Resp. was found by the Board to have violated §§8(1) & 8(3) of the NLRA in that it ~~refused~~ made many and varied threats of econmmic reprisal for union activity; it granted seniority rights in return for dropping union activity, and it discharged four men because of their union activity. Two of the four men discharged were fired on the eve of the election of a bargaining agent by the men.

The Board ordered the company to cease and desist from discouraging membership in the union ~~by~~ discharging or refusing th reinstate any of its employees or by discriminating in any other manner in regard to their hire etc. 2) in any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organizartion, to bargain collectivly etc. 3) To reinstate the four men and to make whole the loss they suffered by paying them an amount equal to the sum they would have earned to the date of offer of reinstatement less the net earnings during the period.

The Board sought enforcement of the order. The CCA modified the order by deletering number 2 above, and as to #3 providing that the term net earnings means those which the employee would have earned but has without excuse failed to earn. This last item was not raised by the resp. before the board. The modified order was enforced.

1. Petit. urges that its broad order contained in #2 above should have been enforced since there was a violation of both §§8(1) and 8(3) of the Act. They contend that the Express Publishing case 312 uS 426 does not support the present modification since there the only unfair practise was a refusal to bargain, whereas here there ~~are~~ are other unfair practises as well justifying the broad order. In the present case the resp. had resisted the union vigorously by threatening the shut down the plant, make reprisals against union members including the discharge of several, the granting of seniority privileges on condition union activity be dropped etc. It seems to me that the facts and findings in the present case justify the broader remedy employed by the Board and the failure of the CCA to enforce it is an abuse of discretion. It seems to me that the facts in the present case more strongly justify the order than those in the May Department Store Case, No. 39, and that that case is in conflict with this one.

2. Petit.

2. Petit. also urges that the CCA erred in modifying the back pay order. The resp. did not raise the question before the Board. §10(e) prevents the ct from considering any objection not raised before the Board. Marshall Field & Co v. NLRB 318 US 253.

Petit. argues that in any event the matter of wilful losses should have been left to the Board to consider on remand after proof and that the order should not have been modified by the BCA. The Phelps Dodge Case 313 US 177, 200 indicates that this is the proper procedure.

GRANT EGW Op. R. 349

No. 320 1945 Term
FTC v. A. P. W. Paper Co, Inc.
Cert. 2 Cir.

Juris. R. 2. Cert. timely: Judgment entered May 17, 1945; cert. filed August 13, 1945.

The FTC charged resp. with a violation of §5 of the FTCA in using the words " Red Cross" and the red cross emblem on its toilet paper and paper towels sold in commerce. The FTCA as amended in 1938 gives the Commission power to rpevent "unfair or deceptive acts or practises in commerce. There was ample evidence to support the Commission's finding that the use of the words and emblem as a trade mark confused the public into believing that resp.'s goods were sponsored or approved by the American Red Cross. Petit. found that additional words on the package stating the manufacture by petit. was insufficient to correct the erroneous impression. Resp. relied however on its right to use the emblem for a trademark on the Act of Jan. 5, 1905, as amended in 1910. This act prohibited the use of the red cross symbol, or the words by anyone other than the American Red Cross on articles and for advertising. A provisn permitted those who were actually using the emblem or words "for any lawful purpose" prior to Jan 5, 1905 to continue to use them. Petit. has been using red cross as a trade mark since 1897 on its toilet tissue.

The FTC ordered resp. to cease and desist from using the words and emblem for its trade mark because of the deception. On review the CCA reversed and modified, holding that the Act of 1905 giving resp. the right to use the words and emblem controlled, and that the later FTCA, as amended in 1938 did not impliedly repeal the 1905 Act. The ct. held however, that the FTC did not have power under its statute to prevent the deceptive use of the symbol and words such a making resp. state that the goods are not approved by the ARC on its package, but it could not forbid entirely the use of the symbol. Clark dissented, saying thet the 1905 Act did not legalize deception of the public and that if the use of the symbol did deceive the FTC had the power to prevent the use of the emblem under the 1938 amendment.

Petit. urges that the use of the words and symbol ipso facto tend to decieve the public regardless of explanatory words on the package that resp. is not connected with the ARC. It argues that because of this deception the FTC is empowered to order resp. to cease and desist from using the trademark, and that the 1905 Act was not intended to permit the use of the mark if it deceived the public. There are many pre 1905 users of the trademark on numbrous different products.

If the FTC prevails here it would mean that no advantage could be taken of the 1905 Act permitting previous users to retain the mark, since any use of it tends to deceive the public into thinking the product is connected with the ARC.

The question of statutory construction is a nice one. The CCA thought it found a way out by requiring resp. to state it was not connected with the ARC on its goods; this is insufficient according to the FTC. It seems to me that the 1905 Act, passed as it was prior to the FTCA can not be employed by resp. as a vehicle for practises which in their effect on the consuming public are deceptive. The 1905 Act had the limited purpose of merely protecting the American Red Cross from later users of the mark. The question is one which should be settled by this court.

GRANT EGW 9p. R. 458

Nos. 328 & 329 1945 Term
Wilson et al. v. Cook
Cook v. Wilson et al. Cross Appeal
Appeal Supreme Ct of Arkansas

Juris. SJ 2. ~~&~~ Appeal timely: #328 SJ 3.

These cases involve the validity of a state severance tax on timber which is cut by a private person under contract with the US from a National Forest.

Appellants since 1937 have from time to time severed timber from national forests under contract with the US which required them to remove all dead & diseased timber and all commercial lumber marked for cutting. The US retained title to the timber until the trees were felled, paid for, scaled & counted. Ark. imposes a license tax on each person engaged in the business of severing natural resources for commercial purposes from the soil of the state. In addition a licensed severer must pay a tax on timber of 7 cents per thousand board feet, the tax remaining a lien on the severed natural resources. The statute ~~m~~kes the producer actually engaged in severing responsible for the tax, and requires him to collect or withhold out of the proceeds of the sale of the article severed the proportionate part of the tax due by the respective owners of the natural resources at the time of severance.

Appellants contended below and argue here that the tax is unconstitutional as appliad here since it is a tax either on the US, or one which constitutes an interference with the functions of government.

The State Sup. Ct. treated the case as involving territorial jurisdiction and governmental immunity. It held that the tax was invalid because the state lacked tax jurisdiction over forests which were originally owned by the US and designated as national forests by the president; it held that the tax was valid as to those forests created by purchase or acquistion from the state since in such cases the state retained a residuum of jurisdiction and the legal incidence of the tax was not on the US but on the severer. ~~Xxxxxthx~~

1. The legal incidence of the tax is on the person who has the contract with the US, and is not on the US itself, although unquestionably the tax would tend to be an economic burden on the US since it would tend to lower the price which the US can obtain for its timber. But apparantly such ~~xxxxxx~~ economic burden is not the test of immunity. Rather it is legal incidence. See TR Powell's discussion of tax ~~imm~~unity in the July Harv. L. Rev. See James v. Dravo Contracting

Co. 302 US 134; Alabama v. King &xBxxxxx 314 US 1.

2. The ct. is probably correct under the Dravo case in finding that the state retained sufficient territorial jurisdiction over the forests ceded to the US to support the tax. As to the land which was originally owned by the US there is more question. The Cross Appellant, Cook, argues that the statte was given permission to tax under 16 USC §480 which provides that jurisidction, both civil and criminal, over persons within national forests shall not be affected by reason of their existence..the intent and meaning oxf this provision was stated to be that the state wherein any such national forest is situtated shall not by reason of its establishment lose its jurisdiction, nor the inhabitants be absolved from their duties as citizens of the state. The ct. felt that this provision did not authorize taxation of activities within such nati al forests. I think the provision is broad enough to cover taxing jurisxdction xxx as well as civil and criminal jurisdiction. The effect of the provision was to make applicable offenses against the US to persons therein, but not to detract from state jurisdiction in all its aspects.

3. I think that # 329 is not properly an appeal since the state statute was held invalid as against the contentions of the state Tax Commissioner. However, both cases should be considered togather.

328 Note probable Jurisdiction
#329 DISMISS
GRANT Cert.

No. 337 1944 Term
International Union of Mine Workers v. Eagle-Pitcher Mining and Smelting Co.
Petition for Rhearing and Clarification

Nothing

Deny EGW

No. 342 1945 Term
Anderson et al. v. Mt Clemens Pottery Co.
Cert. 6 Cir.

Juris. R. I, 8; Cert. timely: Judgment entered May 21, 1945; cert. filed Agust 20, 1945.

Petitioners sued to recover overtime pay under the FLSA. they based their action on the theory that they were required to report to work 14 minutes before the hour in the morning; that they immediately started productive work, but were only paid from the subsequent quarter hour. It was also claimed that they had to wrk 14 minutes after the hour at lunch, and at quitting time but were only paid from the hour. The facts appear to be that the employees punched the time clock as soon as they came into the pottery plant. They had to arrive in time to be at their place of work in the 8 acre plant by the hour. The time cards showed that the employees came in at a practically uniform rate during the first seven minutes that the clocks were open and that by 5 minutes before the hour 95% of the employees had rung in. In several of the departments employees worked by groups and production couldnot start till the entire group was in. The company deducted the time between arrival and the designated hour for commencing work in paying the employees. Petit. contended that this time was travel time for the benefit of the employer for which they should be paid. Elaborate proceedings were had befoe a special master who found that the employees were not required to report 14 minutes before the hour but only in time to be at their place of work in the plant at the even quarter hour set for the start of the shift. Production was not started till then. The time spent by the employee after punching in until the start of the shift was spent in getting to the place of work, and in activities not connected with work such a conversation etc. The master found the petits. had not kept a record of their own times of arrival, and that the only evidence was the time clocks which did not reveal when they arrived at their respective departments after punching in. Thus the master found that the petit. had not shown by a preponderance of the evidence that they were entitled to be paid for the time they ~~xxxx~~ spent between punching in and the start of the shift, or between the end of work and the time in which they punched out.

The DC re-jected the master's findings. Instead it employed a formula of its own. It held that of the fourteen minutes during which the clocks were open prior to the shift 7 minutes should be credited to the employer. That time consisting of the time it took to punch in and get to the places of work in the plant. It found that the remainder of the time was time worked since work commenced as soon as the employees arrived

at their places of work in the morning.

The CCA reversed, holding that under the Fed. Rules since the report of the master was not clearly erroneous it should be affirmed. It stated that the DC had substituted an arbitrary formula for evidence, and that the recent travel time decisions ~~fm~~ of ~~thes~~ ct. were not applicable.

Petit. contends that under the Tennessee Coal and the Jewell Ridge cases they are entitled to be paid for the time between the punching of the clock and the official start of the shift. This time can be divided into two parts. Of the fourteen minutes half is travel time and the other half is time spent prior to the shift. As to this latter half the evidence is disputed as to whether work was actually performed during the 7 minutes. The master found that it was not work; the DC found otherwise. The CCA reversed. This is a strictly factual matter and it should not be reexamined here.

Assuming, as the DC suggested, that 7 minutes was also spent checking in and getting to the place of work the question is how to characterize this time. It is settled that traveling under hazardous conditions between the entrance of a coal or iron mine and the location of ~~xxxxx~~ the mining operations is work under the FLSA. But it seems to me that there were special circumstances there not present here. In the Jewell case the tests of physical exertion, exersion controlled by the employer and exertion primarily for the benefit of the employer were established. It seems to me that the evidence does not bear out the contention that working through a large plant to one's place of work involves the difficulty, danger or control by the employer that riding underground in a small car in a coal mine necessitates. The fact that the employee must get to his particular place of work in the plant is a duty incident to qualifying the employee for work. It may perhaps be better to settle this issue one way or the other since it unquestionably will arise frequently unless now settled.

GRANT(?) EGW Op. R. 1588

No. 344 1945 Term
Bell et al. v. Hood et al.
Cert. 9 Cir.

Juris. ?? R. 3. Cert. timely: Judgment entered June 7, 1945; cert. filed Aug. 20, 1945.

Petitioners brought an action in the DC against certain members of the Federal Bureau of Investigation alleging that they conspired with each other to act beyond their authority to abridge petit.'s constitutional rights under the 4th and 5th amendments by arresting them without warrants and unlawfully searching their premises and taking numerous documents. Over a million dollars in damages was sought. Petits. have been convicted of sedition and their efforts to suppress the evidence taken was unsuccessful. There was no diversity of citizenship. Petit. based jurisdiction on a violation of rights given them by the constitution. The DC dismissed the action holding it was without jurisdiction.

The CCA affirmed holding that no federal question was raised in a suit for damages against federal officers who were acting outside the scope of their authority.

1. Petit. contends that since the suit grows out of the infringement of their constitutional rights by federal officers, the federal courts have jurisdiction over the tort action here brought. But Congress, unlike the situation under the Civil Rights Act has not given the DC jurisdiction over this type of action expressly. In Mitchell v. Harmony 13, How. 115 where a suit was brought against an army officer for the seizure of private properly in Mexico, the ct indicated that jurisdiction was based on diversity of citizenship. Peit. have certain remedies for the unlawful action here claimed. They may obtain suppression of the evidence. Cf. McNabb. v. US 318 US 332. They may sue in the state ct for trespass to person and property. But apparantly no federal cause of action exists. Viles v. Symes 129 F2 828 and see especially Taylor v. De Hart 22 F2 206 where the identical problem was raised and the ct held it had no jurisdiction. There is apparantly no conflict.

2. Amicus curiae argue that the resps. were acting for the US within the scope of their employment and that if the US was a party there would clearly be jurisdiction. But the complaint expressly states they were acting outside the scope of their authority. No claim is made by petits. against the US nor could one be made without the latter's consent. Petit. suggests that Tunstall v. Brotherhood 323 US 210 is relevant, but that case arose under the Commerce Clause and the Ry. Labor Act, which as construed gave petit. certain rights of which the union acting under that statute sought to deprive them.

The q

The question however is an interesting one and one which apparantly has not been decided by this ct. The result below I think is correct.

DENY(?) EGW Op. A. 168

No. 354 1945 Term
Howitt v. US
Cert. 5 Cir.

Juris. R. 2. Cert. timely: Rehearing denied July 18, 1945; cert. filed August 21, 1945.

Petits. are ticket sellers and a diagram clerk of the Florida East Coast Ry. They were convicted of conspiracy to violate the ICA by selling Pullman tickets for more than the applicable tariffs permitted., and giving undue preference to particular persons. The railroad knew nothing about this; petits. turned over the proper tariff to it, and kept the bribes of gratuities given them for tickets by those desiring to get seats from Miami, Fla. The ICA forbids discrimination and undue preferences by carriers. §10(1) provides " any common carrier subject to the provisions of this part, or, whenever such common carrier is a corporation, any director or officer thereof, or any ~~xx~~..agent, or person acting for or employed by such corporation who, alone or with any other corporation.. person, or party" does anything forbidden by the act shall be punished.

Petits. demurred to the indictment contending that the receipt of bribes, tips etc. for passenger tickets was not a crime under the Act, since the act dealt only with carriers and if the proper tariff was turned over to the carrier no crime was committed.

The CCA affirmed, holding that while the Act when passed was ~~pro~~bably not intended to apply to this situation, its terms were ~~bu~~oad enough to justify the application.

This is a somewhat troublesome case. It is a fairly novel point evidently. The first sections of the ICA are directed against carriers. There is some conflict in the DCs. I think that §10(1) is directed against carriers or agents who are acting within the scope of their employment. In other words who are acting for the carrier. Here the ticket sellers without the knowledge of the carrier exacted exorbitant prices for pullman tickets. While the act does cover an "agent or person..employed by a corporation.." I think when read in the light of the context of the section together with the other sections it does Not cover the offenses here charged. The CCA recognized that the act was probably not intended to cover the situation. Congress evidently thought so too since a bill is being prepared [pet. 6] to forbid the acts here charged.

GRANT EGW Op. R. 272

Nos. 361 ~~&c~~ 1945 Term
Burton*Sutton Oil Co. v. Comm.
Cert. 5 Cir

SUPPLEMENTAL MEMO

Juris. 3. Cert. timely; Judgment entered July 6, 1945; cert. filed Aug. 23, 1945

Petit. is the assignee of an oil and gas lease. The assignor purported to sell and assign such lease in consideration of the petit's payment of overriding royalties to the original lessors, and in addition in consideration of the payment to the assignor of 50% of the net profits derived from the operations under the assigned lease. The assignor reserved the right [R. 46] to obtain a reassignment of the lease to it if the assignee desired to cease operations under the ~~xxxxxx~~ the assigned lease.

The petit. sought to deduct the 50% net profit payment from its income from the property as rent or royalty under § 114 relation to pecentage depletion. The commissioner assessed ~~xx~~ a deficiency on the ground that the net profits payment was a capital investment, paid in consideration for the sale of the lease to it. He concluded that petit. was only entitled to deduct 27½% from the gross income from the property, including that part of the income paid over to the assignor.

The ~~CCxxx~~ Tax Ct affirmed on the ground that a payment ~~xxxxxxxxxxxxxx~~ of net profits where there has been a sale of a ~~xxxxxx~~ lease is is a payment for for a captial asset and not rent or royalty deductibel under the statute.

The CCA affirmed on the same ground, citing the Quintana Petrol. Co. case 143 F2 588.

The question is whether this case can stand in view of the Kirby decision of this court. I think it can under the opinion as written, but cert. should be granted in this case to spell out the differences. This case is very similar to the Elbe case, except for the fact that here the seller has retained a right to a reassignment of the lease. In Kirby the court holds that where there is a lease or a sublease, rather than ~~an~~ sale of the mineral interest a net profits provision gives the lessor an economic interest in the oil in place. Hence the lessee may deduct that net profit payment to the lessor and the latter may obtain percentage depletion on it. However, where the parties express the intention and the facts demonstrate that a sale rather than a lease has been paid in consideration of the payment of a percentage of net profits, the Kirby case indicates that the vendee ~~xxxx~~ cannot deduct the payment to the

vendor of the net profits as rent or royalty, but ~~must~~ can only deduct the 27½% depletion on the entire net income from the property before paying over to the vendor any part of the net profits.

My query is whether this distinction is substantial. Should the incidence of the tax turn on whether the parties express the desire to convey rights in the oil in~~k~~ terms of a lease of of a sale. There is no real difference in the rights obtained by a vendee or a lessee, or sublessee, or assignee of a mineral interest. These various kinds of conveyances only give the transferee the right to seek the oil and having found it continue to produce it so long as it is profitable. In my view in order to be fully consistent the Elbe case should be overruled.

GRANT EGW Op. R. 87

Nos. 361 & 362 1945 Term
Burton-Sutton Oil Co v. Commissioner
Cert. 5 Cir.

Juris. 3. Cert. timely: Judgment entered July 6, 1945; cert. filed August 23, 1945.

Petit. owns and operates an oil lease covering a section of La. land. The agreement by which petit. acquired its interest required it to pay 50% of the net profits to its transferor in addition to royalties. Petit. sought to deduct these profits from its gross income, but it was disallowed. In the course of a gov't survey for condemnation of certain land subject to mineral rights therein it was found that the section lines were improperly placed. Petit. sucessfully resisted this survey which would have had the effect of placing the leased property on barren ground. His actual oil rights however were not ought to be condemned by the gov't. In fighting this survey petit. incurred legal expenses which were disallowed.

The Tax Ct held the net profits paid over were not deductib since petit. had the only capital investment in the oil and it was subject to a depletion allowance; the transferer right to profits gave it none, and the payment of profits to it by petit. were thus part of its capital investment. 2) The tax Ct held that the legal expenses were deductibel as ordinary & necessary, 5 members dissenting.

The CCA affirmed as to the net profits but reversed as to the legal expenses, holding that they were capital expenses relating to the perfection of title.

1. The resp. does not oppose cert. in No. 361 which involves the deductibility of the net profits. The case ~~is~~ involves the same question as the Kirby Case No. 56 on which cert. has been granted and is contra to No. 197.

2. The tax ct seems to have erred as a matter of law in allowing the legal expenses to be deducted and the CCA so dealt with the problem. The question was not condemnation but involved the boundaries of petit's property. Thus the case which is asserted to be in conflict on this point 84 F2 996 is distinguishable. That case concerned attorney's fees for resisting an illegal condemnation. The deduction was allowed.

GRANT No. 361
DENY No. 362

EGW

Op. R. 87
No. 361

Sixx No. 365 1945 Term
Seas Shipping Co. v. Sieracki
Cert. 3 Cir.

Juris. A. 1. Cert. timely: Rehearing denied June 25, 1945; cert. filed August 23, 1945.

This was a suit at law by a longshoreman to recover against a third party, the owner of the vessel on which resp. was loading, The facts were that the steel shackle at the top of a boom broke and the boom fell injuring resp. The DC found that the defect in the metal of the shackle was a hidden one which could be found only by X-ray. He found that petit. was not negligent in not discovering the defect. Rxxixtx The DC rejected resp.'s argument that he should be treated as a seaman and that petit. should be liable because the vessel was unseaworthy.

The CCA reversed, holding that whether or not resp. was actually a seaman he can recover for a defect caused by the unseaworthiness of a vessel i. e. for the breach of the warranty of seaworthiness.

1. Petit. argues that the CCA in rejecting the test of reasonable care with respect to a stevedore or longshoreman goess too far. The CCA admitted that the result was not supported by any decision it could find and that when the question of the status of a stevedore arose in other connections the tendency seemed to be to hold that the owner of a vessel ahd a duty of reasonable care only. International Stevedoring Co v. Haverty 272 US 50 gives support to the result in that there Justice Holmes indicated that in the case of personal injuries a stevedore may be treated as a seaman. Of couse the Jones Act provided a different remedy for longshoremen as against their employer. I think the question of whether the admiralty rule should be applied in a suit at law for personal injuries to a stevedore should be settled by this ct.

GRANT EGW Op. R. 170

Misc.
No. 20-21/1945 Term
Cert. 3 Cir. Lober v. Morgan, Lewis etx al.
Juris. R. 1. Cert. timely: Appeal dismissed May 31, 1945; cert. filed August 29, 1945.

This case arises out xxx of the allowance of certain fees in a reorganization proceeding. One Petit. is a bondholder xxx and representative of a small minority in the reorganization of the Phila. & Reading Coal and Iron Co. After the reorganization plan was completed the DC made certain allowances of attorneys and other fees. Petit's attorney, Palmer, was denied compensation. The attorneys for several of the bondholders committees and other participants were allowed considerably more than reccommended by the SEC. Two petitions for leave to file appeal were filed in the CCA and are involved in these two cases. One xxx was from an order denying Palmer any compensation, and the other denied Lober's objections to the amount of fees awarded. The petitions for leave to file the appeals were denied. Petit. xcontends the the denial of leave to file under the circumstances was an abuse of discretion. The SEC supports petits. position.

The petits. oppose the allowance of attorney's fees in certain instances because of a breach of fiduciary duty to the estate. § 249 of the Act precludes compensation where a fiduciary deals in the securities or acquires a beneficial interest direct or indirect in the debtor. In one xxxxxxx case x the DC made an allowance made an allowance to a committee member whose wife after consulting the husband xxxx had purchased and sold securities of the debtor for the trust account of her daughter. [R. 45] In another case the ct made an allowance to a committee attorney whose wife traded in securities of the debtor for her own account, although the husband claimed he did not know of it. [R. 46] In the first instance cited above the husband was a senrior member of a stock exchange firm which bought and sold securities of the debtor for customers during the course of reorganization and after the senior member becar a committeeman. he firm received commissions for its work. The SEC and petit. Lober contend that the common law of fid and the Act itself preclude the allowance of compensation such circumstances. I think this is correct. Certainly t allow a benefit to be acquired by a close relative of a who is in a position to use his inside information is upon with extreme disfavor in the law of trusts; the true where the trustee is a member of a partnership commissions for dealing in trust assets. There was instance of this type of thing: an allowance was committeee member who while so serving accepted a third party in opposing claims on behalf of corporation against the third party. A disc of the transaction so the DC permitted the al

held that the ~~xxxxxxxxx~~ "direct or indirect" provision of § 249 did not apply to the case where the wife of other close relative dealt in securites of the debtor. In view of the history of that section I think the DC is wrong. The benefits of inside information may be realized although the fiduciary acts through his close relatives. There were other instances of this kind of self-dealing. The Resps. contend that the full record is not before this ct. so that an evaluation of the facts cannot be made, especially so as to determine whether the fees awarded were excessive. But I think there is enough in the record to make a showing that the CCA abused its discretion is not allowing the appeal.

2. Petitioner Palmer complains because he was not given any compensation. The DC refused him compensation apparantly on the ground that he represented only a minor fraction of the creditors who were already represented by committees. But It also felt he had made little contribution to the estate. The SEC feels he made a substantial contribution in in prosecuting successful appeals and other work, particularly in view of the fact that the Committees and the debtor worked together rather too closely.[Br. 17-18] The mere fact that the petit. Palmer represented a small minority of securities certainly shouldn not be the test of compensation under Ch. X. § 243. Apparantly Palmer was very active in the defense of the less powerful group of security holders and so caused extra litigation. It thus appears that the CCA should have granted petit.'s appeal; it would seem he was discriminated againt. Other attorneys and committee members of the character noted in No. 1 above were given far more compensation than the SEC reccommended, where as here the SEC reccommended $20,000 for petit. and he received nothing.

3. The jurisdiction of this ct to grant the writ although the appeal was not allowed is clear from In re 620 Church St. Bldg. Corp. 299 U. S. 24.

GRANT EGW Op. R. 118

No. 384 1945 Term
Smith v. Hoboken RR et al.
Cert. 3 Cir.

Juris. R. 15. Cert. timely: Judgment entered July 17, 1945; cert. filed Aug. 30, 1945.

Petit. is trustee of the debtor railroad, who operates a small switching line to the NY Harbor waterfront in Hoboken NJ. Most of the railroad property is leased from resp. under a 99 year lease. The lease contained a covenant whereby the debtor agreed that it would not sell or transfer the lease or underlet the premises without the previous consent of the lessor, and provided that this covenant shall also apply to any unauthorized sale or transfer thereof or any underlettings of the demised premises, or any part thereof whether made by the lessee in any proceeding whether at law or in equity or otherwise to which the lessee may be a party, whereby any od the rights, duties and obligations of the lessee shall er may be transferred, encumbered, abrogated or in any manner ion altered without the consent of the lessor; breach caused terminat/

The petit. filed a voluntary petition for reorganization largely because of a judgment for additional rent obtained against it by the lessor. Resp. then sought leave to file a notice on petit. terminating the lease claiming that the qualification of the trustee and his entering into possession of the property was an unauthorized transfer within the terms of the lease. The trustee elected to adopt the lease. The DC held that the lease had been breached by the transfer of the property to the trustee. Resp. then filed an application with the ICC to obtain a certificate of public convenience to operate the railroad. The ICC held that one was not required since the lessor had a continuing duty and responsibility for operating the road. Aftker the ICC ruling the DC permitted the lease to be terminated and directed the trustee to deliver to resp. all of its property subject to the later determination of conflicting claims. No plan of reorganization had been presented to the ct.

The CCA affirmed holding the lease was breached when the trustee adopted it; and that the order allowing reentry was not premature; that the order was not improvident in turning the debtor's property over to resp. when there were still some undetermined claims with respect to it.

1. The main contention is that the lease was not breached by the petition in reorganization or events thereafter. It is true that the lease doesn't refer to bankruptcy specifically but it is very broad in scope and reorganization seems clearly within its terms. Finn v. Meighan is not in point because there there was an express provision covering bankruptcy. However, that case did indicate a forfeiture clause operated against a company being reorganized. The fact the petit.

2.

was to be reorganized rather than liqquidated does not give it superior rights under the lease.

2. There is nothing in the argument that the termination was premature since no plan had been considered. The railroad was leased from the resp. There could be no reorganization without its consent. It had no outstanding bonds or other evidence of debt; it merely sought a lease on more favorable terms. Under these circumstances the reentry order was not improper. The Rock Island case 294 US 648 is not to the contrary since the railroad was very large with a complicated capital structure and premature sales of the collateral would have made a plan of reorganization difficult.

3. Petit. also objects to the order in that it turns over the property to resp. before all the debtor's claims have been litigated. But ample provision is made for settlement of any claims the debtor might have to part of the property; the patt is dispute is minor and unimportant to the operation of the road.

4. Last petit. contends that the DC should have required resp to obtain a certificate from the ICC under §1(18) of the ICA. But the resp. did go before the ICC which held it did not need the certificate. The DC was justified in treating this as evidence that the resp. had complied with the conditions precedent to the operation of the road.

There were other minor contentions.

DENY EGW Op. R. 116

No. 387 1945 Term
US v. Alcea Band of Tillamooks et al.
Cert. Ct. Claims

Juris. R. 2. Cert. timely: New trial denied June 4, 1945; cert. filed Aug. 31, 1945.

These Indians sued under a special jurisdictional act in the Ct. of claims. That act provided that the ct was given jurisdiction to decide any and all legal and equitable claims arising under the original Indian title upon lands occupied and described in unratified treaty treaties with respect to all Indians tribes, with certain exeptions in Oregon. In 1848 the Act establishing the territorial gov't or Oregon provided that nothing therin shallb e construed to impair the rights of person or property now pertaining to the Indians in the territory so long as those rights remain unextinguished by treaty. In 1855 a treaty was negotiatiated by which Resp. and other bands were to cede to the US all lands to which they claimed title and it provided that a partion of those lands should be set apart for petits. untill otherwise directed by the president. The treaty was never ratified by the Senate. The Ct found that this failure left petit. with a recognized original Indian title. By executive order in 1855 a conditional reservation was set up. Most of this was later taken and opened to settlement. No compensation was paid therfor. Later a small part of the tract was ceded by agreent (1892) and paid for.

The US claimed it had not recognized that resp. had any right of occupancy and thus they had no legal or equitable rights against the US, so that the ct had no jurisdiction to award compensation for the taking of original title.

The Ct. held found that resps. possessed Indian title by virtue of exclusive occupancy from time immemorial and that the US had taken them without compensation. It held that the jurisdictional act permitted it to base an award on an unrecognized original title, but that the US had recognized the title in the Act of 1848. The amount of compensation was reserved for a later date.

1. Petit. argues that the jurisdictional act gave the ct no jurisidction to award compensation if title were established., since the act did not admit liability. They argue such title must first be recognized by the US. The ct found that the Act was sufficiently broad to permit a suit on the basis of original title, and the question of title was one of fact. It distinguished jurisdiction acts based merely on claims arising under treaties. Cf. Johnson v. McIntosch 8 Wheat. 543, which indicates the nature of Indian title. Though the US contends that this is the first case where the US is under legal obligation to compensate for the extinction of original unrecognized title, the jurisdictional act is

different in that it permits that question to be raised. In any event the ct. held that the title was recognized by the Act of 1848, setting up the Orggon territorial gov't. US V. Santa Fe Pac. Ry 314 US 339 indicates that title need not be recognized to be effective. Petit. contends that in the Santa Fe case the ct was dealing with Indian title as against third persons, not the US. But in the present case the US gave its consent to be sued for the taking of original title. Thus it stands in the same position as a private person.

The petit. also argues that the Act of 1848 didn't recognize the original title. The language of that act, however, supports the finding of the ct. below.

DENY EGW Op. R. 61

No. 392 1945 Term
Meyer v. Fleming et al.
Cert. 7 Cir.

Juris. ~~Xx~~R. 2. Cert. timely: Judgment entered June 6, 1945; cert. filed Aug. 31, 1945.

Petit. a stockholder in the St. Louis Southwestern Ry in 1934 filed a claim in the Bankruptcy Ct in N. District, Ill. on behalf of the former for damages resulting from a conspiracy in which the Rock Island Ry, there being reorganized participated. In 1935 The St. Louis Ry. filed a petit. for reorganization in E.D. Mo. A trustee was appointed in 1936. Resp.s., trustees of the Rock Island objected that petit. could no longer prosecute the claim since title to the cause of action vested under §77 in the St. Louis trustee. That trustee has taken no action. A special master sustained the objection. The DC affirmed. §77(a) of the act porovides the reorganization ct has exclusive jurisdiction of the debtor and its property whereever located. §77(c) gives the trustee broad powers. The CCA affirmed.

The present suit is a stockholders suit. As such petit. has no personal interest in it except that of protecting the claim of the corporation in which he is a stockholder. The claim is property and the title under §77(a) vests in the trustee who holds title to the railroad's property. The CCA points out that if the trustee fails to act, the stockholders may request the DC to issue proper instructions to the trustee. It would therefore seem that the trustee is now the proper party to continue the claim against Rock Island and if he does not do so petit. has his remedy in the bankruptcy ct. §77(a) & (c)(2) certainly give full support to the result below. Title to all the debtor's property is given the trustee and he is given broad powers in dealing with it. §77(c)(9) required the trustee to report to him concerning any fraud or mismanggement etc. as ~~xhich~~ to which the debtor may have a cause of action against any person or corporation. All of these sections indicate the intetion of congress to may the trustee exclusively responsible for the pursesection of claims against others which are owned by the debtor.

There are apparantly no decisions in conflict here; the terms of the statute gives the trustee the exclusive power and right to prosecute claims againt others. It is true that a pending action will not abate merely because of the bankruptcy of the plaintiff. The trustee may continue it or the bankrupt may. 99F2 53, but the ~~skm~~ situation in railroad reorganization is somewhat different, because of the differnece in the statutory providions.

DENY EGW Op. R.

No. 393 1945 Term
Collins et al. v. Bowles
Cert. Emergency Ct.

Juris. R. 1. Cert. timely: Judgment entered August 9, 1945; cert. filed Aug. 31, 1945.

The question here involved is the same as in No. 400, namely whether the Emergency Ct. under §204 of the Act has jurisdiction to consider the validity of a regulation which was superseded at the time the protest was filed with the Administrator. Petit. desires to have the question considered in this case because of two civil suits which have been brought against them for selling liquor at over ceiling prices. In one suit petits. have obtained leave of the DC to file a complaint in the Emergency ct., but the present case is not moot according to resp. since certain of the issues which would be argued in the present case would not be available to petit. in the case filed in the Em. App. coming from the district ct. in which the damages suits were filed.

The Em. App. dismissed the case on the authority of the Thomas Paper Stock case, No. 67.

My discussion of No. 400, Utah Junk Co. v. Bowles is applicable to this case as well.

GRANT (?) EGW Op. R. 36

No. 399 1945 Term
Walker v. Esquire, Inc.
Cert. App. DC

Juris. R. Vol 4, 1867. Cert. timely: Judgment entered June 4, 1945; cert.filed Sept. 4, 1945.

This is the famous Esquire case. The Postmaster brought proceedings to cancel resp's second class mail privilege on the ground of inclusion of Obseene matter. After the hearing was under way, he changed his mind about this and pulled another rabbit out of his hat, relying on 39 USC §226 governing the conditions upon which senond class mail privileges are given. Inter alia it provides that the magazine "must be originated and published for the dissenination of information of a public character, or devoted to literature, the sciences, art or some special industry.." In the words of the ct below the Postmaster held a hearing to determine the magazine " was good for the public to read."[R. 1988] The record consists of the notions of morality and decency of a group of sundry people ranging from ministers, to writers. The Postmaster has made an attempt to read an improper meaning into various lines of the text or cartoons. It makes ludicrous reading and reveals the foolishness of the attempt to arrive at a standard of public propriety. The Postmaster issued an order revoking resp's second class mailing privilege which if sustained will cost resp. $500,000 more annually and have the effect of ruining the magazine.

The DC sustained the order, and the CCA reversed, on the ground that the statute did not authorize the Postmaster to determine what is good for the public to read, [illegible] and if it did so authorize the Postmaster it would be unconstitutional.

Petit. argues that the decision below leaves the Postmaster's duties in a very confused state; it argues that it is no longer clear what standards the Postmaster must employ in passing on second class mail applications. However there are indications that the Postmaster has never before attempted to classify matter, which is admittedly not obscene on the qualitative basis used here--i. e. setting up his personal judgment of what is good for the public. His job under the statute as the CCA properly held is merely to see that the publications come within the broad general terms of the statute, rather than to determine whether they are making a positive contribution to the public in the light of his peculiar standards of propriety. It is unquestioned that Esquire contains excellent fiction and articles on subjects of public interest, as well as cartoons which in the view of the Victorian era might not be fit subjects for drawing room

conversation.

Resp. also urges that the statute as applied by the Postmaster is not unconstitutional as constituting censorship. It states that the second ~~xxxxxx~~ class mail privilege is merely a subsidy and that the Postmaster is authorized to determine whether the applicant qualifies therefore. But The ct did not hold the statute invalid. It merely held that the petit. had exceeded his authority in applying the statute as he did. As a matter of fact ~~xxxxxxxxxxxx~~ denial of this mailing privilege to a magazine when its competitors are allowed to retain it means that the magazine cannot continue. Looking at it as a mere bounty is very unrealistic. It means in fact that the determination that a magazine no longer qualifies for the privilege on the ground that it is not good for the public means its economic death, and hence the public is deprived of the ideas it had to contribute. The fact that the resp. may mail its magazine at first class rates means little under such circumstances. In the Burleson case 255 US 407 the second class privilege was withdrawn because of the publication of seditious material. The matter by statute has made completely non-mailable although the Postmaster did not exercise his full powers. This ct sustained the revocation, Brandeis and Holmes dissenting. The CCA distinguished that case on the ground that the matter there, unlike the publication here was nonmailable. Amicus Curiae urge that cert. be granted and that case overruled. But I think it is distinguishable.

This is not the kind of case in which the usual administrative expertise exists. The action of the Postmaster invovles a finding as to opinions, social proprieties and beliefs; ~~xxx~~ in essence he asserts his own belief as the proper ones. This involves all the evils of previous restraint that the 1st amendment was designed to prevent.

I think the case was correctly decided below and that there is no need to grant cert.

DENY(?) EGW Op. R. IV, 1987

No. 400 1945 Term
Utah Junk Co v. Bowles
Cert. Emergency Ct of Appeals

Juris. R. 78. Cert. timely: Judgment entered Aug. 6, 1945; Cert. filed Sept. 5, 1945.

complaint

Petit. filed a ~~xxxxxx~~ with the Emergency ct. challenging the validity of a former price regulation governing the price of steel and iron scrap. Before the protest was filed with the administrator, that regulation was superseded by one which is admittedly valid, since it gives a $1.50 allowance for processing such scrap. The petit. did not challenge the validity of the original regulation when it was still outstanding, but allowed the 60 day period permitted for a protest to expire. Petit. says it did this because it did not know that the regulation in question applied to fluxing scrap. While the original regulation was in force it sold scrap between April 25, 1942 and Feb. 10, 1943 ~~xxx~~ at prices higher than the applicable ceiling. It has not been paid the difference between the ceiling price and the contract price because of the regulation.

The ct dismissed the complaint on the authority of Thomas Stock Paper Co. v. Bowles, No. 67.

This case involves the same issue as No. 67, namely whether the Emergency Ct has jurisdiction under §204(a) of the Act to consider the validity of a regulation which at the time of filing the protest with the administrator had been superseded by an admittedly valid regulation. The ct has held in the Thomas case that the only way the validity of a superseded regulation may be considered is under §204(e) of the Act where leave is obtained from a DC to file a complaint in the Em. App. after a proceeding has been brought by the administrator, for damages, an injunction, or where there is a criminal prosecution for violation.

This it seems to me does not raise any due process question even under the Act as interpreted below since the petit. had an opportunity while the regulation was still in force to question its validity in the Emergency ct. §204(a) speaks of setting aside and enjoining a regulation, which assumes its present effectiveness. The proceedings under that section were not designed to question the validity of a regulation which is no longer in effect.

However, since cert. has been granted in No. 67 (which may now be moot since the Em App. has now considered that case on the merits on a complaint filed from a district ct) I suppose cert. should be granted in this case also.

GRANT(?) EGW Op. R. 111

No. 402 1945 Term
Bruce's Juices, Inc. v. American Can Co.
Cert. ~~xxxxx~~ Supreme Ct. Fla.

Juris. ?? R. 4. Cert. timely: Time to file extended to Sept. 5, 1945; cert. filed Sept. 5, 1945.

Resp. sued on ~~ax~~ note given it by petit. ~~on~~ account of purchased of cans by petit. Petit's defense on the note was that ~~xxxx~~ resp. illegally discriminated against it in its sales of cans under the Robinson-Patman Act. It set up as defenses that resp. employed a discount system whereby large purchasers of cans to be used in processing were given a lagge discount whereas it was given none, although it purchased as many or more cans from the local plant of resp. as the larger purchasers. The discount was based on the aggregate of purchases all over the country from resp's many plants; ~~xxxxxxxx~~ no discount was given if the purchaser from a given local plant purchased more cans than did a nation-wide processor from the same plant. It was also alledged that resp. sold cans at discriminatory prices and gave favors and special services to certain of its large customers, such as equipment for closing cans and freight equalization which werewithheld from petit. Becauase of the alledged illegality of the sales for which the note was given petit. contended that it at least need pay no more than the reasonable value of the cans, which it claimed had already been paid, and that the note merely represented illegal profit.

The trial ct held a pre-trial conference and prior to the time it had ruled on all questions of evidence it held that the defense under the Robinson Pattman ~~act~~ was not available in the state ct. On appeal, the S. Ct. held the defense was available and reversed; however on rehearing a majority of the ct. held that "the defense attempted to be interposed was not available under the facts submitted ~~in~~ evidence to the ct below"[R. 621] and affirmed. One judge concurred, stating that the defense was not available in state cts. 3 judges dissented.

1. At the outset resp. contends this ct had no jurisdiction since there is no final order of the Fla. Sup. Ct appearing in the record. The opinion is there as well~~ix~~ as a stay of mandate, but not the judgment order. It appears that unless such a judgment appears this ct has no jurisdiction. Gersch v. Chicago, 226 US 451, Robertson & Kirkham §25.

2. Petit. urges that the ct below held that the defense was not available in the state. ct. The opinion on rehearing is to say the least cryptic, but I think it means that petit. had no made his case on the facts shown in the pre-trial conference. Its original opinion did hold that the

defense was available. But the difficulty with such a holding is that no trial was had. There was no motion for summary judgment. Petit. has not had a chance to prove his case in a proper proceeding. The record which is here merely consists of an unfinihsed pre-trial conference, unfinished because the trial ct held that the defense was not available in state cts. The Supreme ct could not consistent with procedural due process go ahead and hold on that state of the record that "the facts submitted in evidence to the ct below" did not make out the defense. Petit. has no had an opportunity to prove his defense since the trial ct held the petit. was confined to a remedy in the federal cts. A federal right should be treated with greater respect.

2. Even assuming that the question is whether the facts adduced in the record made out a case under the Robinson Patman Act, I think the ct below is in error. There is evidence to show that a ~~six~~ resp. maintained discount system which does not make due allowance for differences in cost of manufactmure or sale or delivery, but discriminates in favor of large buyers of cans, although they buy no more cans than resp. from the local Tampa Fla. factory. There was also evidence showing a price discrimination between petit. and a processor in Texas.

3. Petit. bases its main arguement on the avaiability of the defense in state cts. I think the Fla. ct is in accord with his contention on this score, but merely held on rehearing that he had not made out his case under the act.

DENY FOR LACKK OF JURISDICTION EGW Op. 594,621
OTHERWISE GRANT

No. 402 1945 Term
Bruce's Juice's v. Amer. Can Supplemental Memo

The questions to be dealt with here are two. (1). In view of the statutory remedies provided for the enforcement of the Clayton Act to which the Robinson-Patman Act is an amendment, can the Act itself be said to make illegal and unenforcible in any court a contract in violation of the Act, a remedy not provided in the Act.

The statutory remedies provided for the enforcement of the Robinson Pattman Act are: a suit for treble damages by a private person; a criminal suit brought by the U. S.; an injunction suit brought by the U. S. either of its own iniative, or on complaint of a private person; an FTC cease and desist order.

In Continental Wall Paper Co v. Voight & Sons, 212 US 227 it was held that section 1 of the Sherman Act made illegal and unenforcible a contract which was in violation of its terms. In so doing the Court relied on the common law doctrine of the invalidity of illegal contracts without discussing the argument that the statute provided its own and exclusive remedies. This argument was however discussed at length in the dissenting opinion of Justice Brewer in that case, who argued that since the Sherman Act created a new offense or gave a new right the punishment or remedy can be only what the statute prescribes. [272 ff] At least insofar as the Sherman Act is concerned the principle of illegality adopted in the Voight case has been followed without much question, although there has been difficulty in the application of the doctrine to particular cases. See Wilder v. Corn Products Co. 236 U. S. 165, Sola El. Co v. Jefferson El. Co. 317 U. S. 173, which are among the cases following the rule as applied to the Sherman Act. It seems to me that the doctrine at least as applied to the Sherman Act is correct, since that Act expressly declares that contracts made in violation of its provisions are illegal. But there is in Georgia v Evans, 316 US 159 a statement which seems to call for a contrary result. There the state sought to sue for damages under the Sherman Act. At. p. 162 the Court posed the question as being whether no remedy whatever is open to the state under the Act unless it was within the meaning of "person" and so could sue for treble damages. In so saying the court either overlooked or intentionally disregarded the possibility of the state using as a defense to a suit on the contract the violation of the Sherman Act.

Unlike the Sherman Act there is no express statement in the Robinson-Pattman Act that contracts in violation thereof are illegal. Moreover, unlike contracts in restraint of trade, price discrimination such as is alleged here was not illegal at common law. There is none of the background thus with reppect to the Robinson-Patman Act, that the common law supplied for the Sherman Act. For these reasons it seems to me that the view taken by Brewer in his dissent in Voight is much more strongly applicable here than with respect to the Sherman Act. It would be rather extraordinary to say that one who violates any of the many statutes dealing with some type of regulation of ecomonic affairs makes the violator an outlaw so that any one who receives goods from him in the ordinary course of business receives a present of them by the largess of the Federal Government and this Court.

2. Assuming, however, that the first question be answered in the affirmative, the problem arises whether the defense of illegality is avabable on the facts in this case which involves a suit on a note given for goods sold and delivered. Certainly viewed by itself the contract in question was peffectly valid. However, lurking in the background was the fact that resp. granted allegedly invalid and discriminatory discounts, which discounts were not available to petitioner. Petitioner asserts that the note in question was part of the transaction involving the illegal discounts and hence tainted thereby.

In Connolly v. Union Sewer Pipe Co. 184 US 540 The pipe company brought suit on a note given by Connolly for some pipe sold him. His defense was that the Pipe Co. was a trust engaged in violating the Sherman Act. The Court rejected the defense, holding that though the Pipe Co. might have been acting illegally, it could make a valid sale and the buyer had to pay for the goods sold to him. The court pointed out the mere fact that the Pipe Co's business was illegal did not affect its independent or collateral contract obligations.

In Continental Wall Paper v. Voight, supra, the case was much the same. There the Company sued to recover from Voight, a jobber, for merchandise. He alleged as a defense the violation of the Sherman Act, and also that he had been forced to sign a contract with the Company agreeing to purchase all his supplies from it at the enhanced prices made possible by the illegal combination. He claimed that the goods the price for which the Company was suing were sold in furtherance of the illegal activities of the Company. The Court held that defense good, treating the sale as part of the illegal activity. The point here is I think that the buyer was

was forced to make the purchases in question because of the illegal exclusive dealing contract he had signed and that fact that if he didn't buy from the company he coudn't get his supplies anywhere else. The sales in question thus fostered and advanced the illegal scheme. The Connolly case was distinguished as am suit on an independent or separable contract.

In Wilder MGF Co v. Corn Products Co. 236 US 165 the suit was for the price of corn syrup sold the defendant. The defense was that the Company was an illegal combination and that it squeezed out competitionxx by offering to those who bought exclusively from it a share in the profits made on the goods shipped to the buyer. The court's opinion adopts for the most part the reasoning of Justice Brewer in his dissent in the Voight case that the new remedies created in the Sherman Act exclude the use of other remedies not there specified [p. 175-76]. The Voight case is distinguished on the ground that there the particular contract of sale was illegal in view of the facts outlined in connection with that case. The distinction is fairly thin, but tenable, in view of the buyer's lack of choice in the Voight case and the fact he had been forced to sign an illegal exclusive dealing contract.

In the Sola Electric Co. case the suit was brought to enforce direcly the price fixing provision, illegal under the Sherman Act, unless the patent was valid. The licensee was held not to be estopped from attacking the patent and thus avoiding the suit on the ppice fixing provision. Thus in this Sola case in no sense was the provision of the contract sued on"collateral" to an illegal contract; it was illegal itself unless justified.

It must be admitted that the distinction between these cases is presently difficult. The question of what is an independent contract and what is so tainted with illegality as to be unenforcible is not a particularly good test here, but it appears to be the only test available if the doctrine of illegality is to be continued. Certainly there should be a strong showing that the actual contract sued on is of itself so violative of the provisions of the anti-trust laws as to be unenforcible. Unless this is done, many people will bring frivolous suits in order to try to get something for nothing and interfere with ordinary commercial and credit transactions.

No. 404 1945 Term
Davis v. US
Cert. 2 Cir.

Juris. R. 4. Cert. timely; Judgment entered June 8, 1945; cert. filed Sept. 6, 1945.

Petit. was convicted of unlawfully possession 168 "A" gasoline ration coupons. The only question concerns the validity of the search by which the gov't acquired the coupons. A motion to suppress their use as evidence was made.

Two NY detectives and 3 OPA investigators went to petit's gas station. Two of them purchased gas from the woman attendant, petit. was not then present, without coupons and marked money was paid. Later the men returned and questioned the attendant who said she sold them gas under petit's orders. Petit. then arrived, was confronted withthe attendant. He was asked where he kept the coupons received for gas. He stated they were in small metal containers near the pumps. The OPA men found that there were not sufficient stamps to account for the deficiency in gasoline in the tanks. Meanwhile petit. had given keys to the private office of the gas statiin to his partner. Petit. was told he was under arrest and was asked to unlock the door to the office. Petit. said he had enough coupons to cover the shortage. Finally after one detective flashed his flashlight in the office petit. obtained the keys to the office from the partner and opened the door. The investigators were apparently ready to go in anyway. Within, the gas coupons which constitute the offense were found.

Petit. contended that they gov't men obtained the coupons by unreasonable search and seizure of the premises.

The DC denied the motion to suppress on the ground petit. had consented to the search. The CCA affirmed, not on the basis of consent, but that the search was a lawful incident of the arrest, and took place near the scene of the crime.

P. Petit. contends that the search was unreasonable and that the evidecne should have been suppressed. Here the entry was made to the station office. The crime had taken place, namely the sale of gasoline without coupons and above lawful prices. The sales were made under petit's orders. The entry into the office was not exploratory. The investigators realized that since petit. had less coupons than he needed to make good the deficiency in gasoline, he must have them in his possession somewhere on the immediate premises. The search extended only over a narrow area. Marron v. US 275 US 192 supports the result. The coupons were in petit's immediate possession and control behind the locked door of his office.

DENY EGW Op. R. 210

Library

Supreme Court, U. S.

No. 410 1945 Term
MacGregor v. Westinghouse El. & Mgf. Co.
Cert. Supreme Ct Pa.

Juris.24. Cert. timely: Judgment final June 29, 1945; cert. filed Sept. 7, 1945.

Resp. sued petit. for royalties under a license agreement whereby petit. was permitted to use a certain patent relating to the manufacture of solders. The license agreement contained a provision fixing petit.'s prices for the articles he made which were covered by the license. There was no contention in the suit brought by resp. that the price-fixing provisions of the agreement had been violated. Petit's answer attacked the validity of the patent and claimed that the price fixing provision of the agreement were invalid as contrary to the Sherman Act.

The lower ct. held petit. estopped to attack the validity of the patent. The Sup. Ct. affirmed, holding that the mere presence of the price-fixing provision in the contract since it was not in issue and had not been complied with did not give petit. the right to attack the validity of the patent. The ct apparantly treated the price fixing provisions as severable from the remainder of the contract.

1. Petit. claims the decision is inconsistent with the Sola Electric Co. case, 317 US 173 which held that in a suit by the licensor to enforce price-fixing provisions the licensee was not estopped to attack the validity of the patent. This was treated as a question of federal law. Here the price-fixing provision is not in issue. The only question in the suit by resp. is the amount of the royalties. But the real issue is whether a price-fixing agreement taints the whole license contract to the extent that petit. may show the invalidity of the patent and so avoid payment of royalties. I think that the implications of the Sola case require that petit. be permitted to attack the validity of the patent. Otherwise, an owner of a patent could violate the Sherman Act with comparative impunity by use of the price-fixing provision and if the licensee violated that provision or sought to attack the validity of the patent as in this case the licensor would waive the price-fixing provision or failx to enforce it.

139 F2 291 (CCA 7) is apparantly in conflict. There the ct. held that the mere presence of a prive-fixing agreement permitted the licensee to attack the validity of the patent in a suit for infringement, even though the agreement had not been enforced. The ct held it was not separable from the rest of the license agreement.

The Pa. ct in the present case treated the price fixing provision as separable from the test of the contract. But local rules of separability should not be permitted to thwart statuses of the US any more than local rules of estoppel. Cf. the Sola case.

GRANT - Reversed EGW Op. R. 353
384

Nos. 412 & 413 1945 Term
Great Lakes Dredge & Dock Co. v. Walling
Bay State Dredging & Contracting Co v. Walling.

Juris. No. 412 R. 2; Juris. No. 413 R. 2. Certs. timely: Rehearing denied No. 412 June 9, 1945 cert. filed Sept. 8, 1945; Rehearing denied No. 413 July 20, 1945; cert filed Sept. 10, 1945.

The single question in this case is whether dredge workers are seaman exempted from the FLSA under §13(a)(20) of that act.

The facts in both cases are substantially the same. Petits. perform work on breakwaters, sea walls, docks, locks, and also dredge widen clear and fill channels in navigatible waters. The dredges contain pumps which such the soil and other material into pipes and the material is discharged into scows or on banks. The dredges are not inspected under Federal Statutes. They have no motive power and are anchored to the bottom of the sea or lake by columns called spuds. The dredges are transported by tugs and remain at a given place a long while. During the course of a tow the tug crew is in charge of navigation. None of the dredge employees need have a seaman's license rating. If the work is done close to either Chicago or Boston the dredge employees live at home and eat ashore. When the dredge is stationed elsewhere the men live and eat on the ship,; they pay for the food served them. In No. 422 the employees work 8 hour shifts and are paid hourly rates for a 48 hour week. On dredges there is normally a captain engineer, fireman deckhands, mess boys, electricians, oilers. In No. 413 one of the employees on a dredge is a mate in charge of the running lights. The operator maneuvers the dredge into position and operates the whistles by which other craft are signalled.

Both suits were commenced by resp. who sought an injunction against violating the act.

The CCAs in both cases held that the dredge workers were not exempt from the FLSA as seamen

1. The case is similar to No. 121 this term which held non exempt employees on ~~lighters~~ on barges engaged in loading and unloading cargo and transporting it to ship or shore. Cert. was denied.

2. Petits. urge that the employees are seaman. They are given some rights of admitted seaman such as the right to libel dredges for wages. But this is not conclusive in interpreting an exemption from a remedial act. Petits. rely on Ellis v. US 206 US 246 in which the question arose as to whether dredgemen were mechanics or laborers entitled under statute to work only an eight hour day. Holmes, J. held that

the men were seamen and hence exempt. Resp. points out that this interpretation was overruled by Congress to expressly cover dredgeman. The legislative history of the amendment indicated that it was for clarification since the original act was intended to cover dredgemen[Resp. Br. 412 10].

The situation is at best amgiguous. A number of decisions in other connections such as maritime liens and the Ellis case point one way, and the legislative history of the FLSA and its subsequent construction by the Administrator and the CCAs point to nonexamption.

If the test of whether the employees are seamen turns on whether they had navigational duties, cf. Norton v. Warner Co 321 US 565, it would appear that they do not qualify under the facts. The dredge has no motive power; it stays on one spot a long time; the principal duty of the men is to dredge the bottoms of lakes and bays etc. by operating the dredge machinery. The men are paid in No. 412 by the hour; they pay for their meals. They live at home when possible. they need not have seaman's ratings etc.

3. Petit. in 412 claims conflict with No. 413 in that in the latter case there was a statement [R. 26] that the resp. admitted that scowmen are seamen and hence exempt. Petit. states that there is no real difference in the duties of scowmen and employees on dredges except that the former accom pany the scow to the place where the material is dumped. But such a statement must be pushed rather far to make a conflict. Even if the resp. condeded the scowman question for the purposes of thet case it would not be binding here. But as the resp. points out [br. No. 412,12] certain employees on scows principally concerned with navigational duties would be exempt; if the scowmen's main duties are loading and unloading or dredging they would not be exempt.

4. The question will eventually have to be settled by this ct. However, there are no conflicts in the CCAs and the Manhattan Lighterage case No. 121 this term involved a very similar problem and cert. was denied. The result below seems correct. Therefore I think cert. should be denied.

DENY(?) EGW Op. 412 , 125
413, 23

Nos. 418-19
Duggan v. Sansberry
Cert. 7 Cir.

Juris. R. 44; cert. timely: Rehearing denied June 22, 1945; cert. filed Sept. 10, 1945.

The question involves the resolution of a conflict of jurisdiction between two bankruptcy cts.

On Dec. 27, 1943 Christopher Engineering Co. filed a petition for reorganization in the DC Mo. It was approved and petit. was appointed trustee. On Jan. 21, 1944 an involuntary petition in bankruptcy was filed against Nat. Aircraft Corp. in the DC Ind. On Feb. 8, 1944 National was adjudicated a bankrupt resp. was later elected trustee, took possession of the assets and on April 6, 1944 the referee ordered resp. to sell them. On April 19, 1944 the secretary of National caused an intervening petition for reorganization to be filed in the Christopher proceedings in Mo. alleging that National was a wholly owned subsidiary of Christopher. The petition disclosed the prior bankruptcy proceedings in Indiana, that the trustee had taken possession of national's assets and was to sell them the next day. The Mo. DC found that National was a wholly owned subsidiary of Christopher and hence was entitled to file the petition. The ct issued an injunction againt resp. and the sale of Nat'l's assets. But the sale proceeded and was approved by the referee. On May 10, 1944 petit. [since appointed trustee of National also] filed a petition in the Mo. ct to stay proceedings and to set aside all orders made by it after April 19, 1944, claiming that the filing of the reorganization petition by Nat'l in Mo. deprived the Ind. ct of jurisdiction. The stay was refused and the sale confirmed.

The CCA affirmed and held that National was not a subsidiary on Dec. 27, 1943, but became one only on April 19, 1945 by a transfer of stock to Christopher from the Individual owners; that National had no power under the bankruptcy act to file the petition in Mo. Briggle, J. dissented saying that the Mo. Ct's findings should not be collaterally attacked, and that under the act the petition was properly filed in Mo.

1. Petit. argues that the finding that National was a subsidiary of Christopher is not subject to collateral attack. §129 of the Act permits a subsidiary to file an original petition for reorganization in the ct which has approved the petition of the parent corporation. §149 provides that an order which has become final approving a petition filed under this chapter shall be a conclusive determination of the jurisdiction of the ct. The order of the Mo. ct approved National's petition has not been appealled from. Petit. argues that its finding that Nat'l was a subsidiary is

conclusive under §149 and under the ordinary rules relating to res judicata on questions of jurisdiction. I don't think the Mo. Ct's finding is necessarily res judicata since it was an ex parte proceeding and the issue was not contested.

2. The result below is wrong however because the Mo. ct found that it had jurisdiction. When the petition by National was filed it obtained exclusive jurisdiction of the property. The order operated as a stay of all other proceedings relating to the same property. The Mo. ct is the ct to ressolve the problem of jurisdiction. Congress desired to rehabilitate a debtor as a whole. The result below permits conflicting federal cts. to disregard that purpose. National is being sold at auction while Christopher is being regrganized. It is an unseemly result. If National is not a subsidiary of Chrisoher the Mo. ct should decide the question, not the Ind. ct by collateral attack. We are not faced here with two quasi soverëign states but one federal judiciary which under the Chandler act is supposed to coordinate its efforts.

§128 provides that if no bankruptcy proceeding is pending against the debtor it may file an original petition in the ct located near its principal place of business. §129 provides an original petition in reorganization may be filed either under §128~~,xxmx~~ by a subsidiary, or in the ct which has approved the parkent company's petiti n. But Nat'l filed its original petition for reorganization in the Mo. ct. The act provides that prior bankruptcy proceedings are to be stayed. The CCA held that the effect of the two sections was to prevent Nat'l from filing a petition in Mo. since it was not an original ~~xxx~~ petition. But it was the first petition for reorganizati n filed. The mere fact of the pitor bankruptcy proceedings should not affect the situation. Briggle, J. dissented on this ground, as well as on #2 above.

The question is one of importance to the administration of the act and shou d be resolved by this ct.

GRANT EGW Op. R. 91

Nos. 424 & 425 1945 Term

Kennecott Copper Corp. v. State Tax Comm.
Silver King Coaltion Mines Co. v. State Tax Comm.

Juris. R. 1-2; Cert. timely: Judgment entered July 23, 1945; cert. filed Sept. 12, 1945

Utah

The question is whether a/statute authorizing a suit "in any court of competent jurisdiction" includes a federal ct. Petit. paid an occupation tax on mining, and included in the gross amount taxed were sums received as federal production subsidies for the mining of copper and zinc. Petit, contending that such subsidies were not taxable by the state paid the tax under protest and sued to recover it in a federal DC. The state statute provides that taxes paid under protest shall be retained by the state treasurer and not covered into the general fund until it is determined they are valid. The taxpayer "may bring an action in any court of competent jurisdiction against the officer to whom the tax was paid, or against the state, country...".

The DC ~~xxxx~~ gave petit. judgment on the verdict and overruled a motion to dismiss for lack of jurisdiction that the state had not consented to be sued in a federal ct.

The CCA reversed holding that the suit was against the statate and that the statute did not authorize a suit to recover taxes to be brought in a federal ct. Phillips, J. dissented.

Petit. urges that the statute is in very general terms and that similar statutes have been construed to authorize a suit in a federal ct. First, it is clear that the suit is essentially against the state. The taxes are held by the treasurer and the state must pay the judgment. It seems to me that neither Great Northern Life Ins. v. Read 322 US 47 nor Ford Co v. Dept. of Treasury 323 US 459 quite cover this case, since the statute here has none of the limiting features contained in the statutory consents in the above two cases. In each of those cases the statute gave indication that suit in a state ct was referred to. In the Ford case the statute provided the state cts. shall have original jurisidction. In the Read case ~~xxxxxx~~ the statute set forth the type of judgment to be entered. Here there are no such limitations. The statute is in the broadest possible terms. It is clear that the only way petit can obtain review of this question of state law in in a federal ct. On the other hand the Read and Ford cases indicate that it is desireable that state taxpayers sue in state cts for the recovery of taxes. This is apparantly in line with the limitation on the use of declaratory judgments and injunctions with respect ot state taxes. For this reason alone I think cert. should be denied.

DE NY EGW Op. R. 159

No. 428 1945 Term
El Dorado Oil Co. v. US & ICC, General American Trans. Co.
Appeal DC N. D. Cal.

Juris. SJ 2. Appeal timely: SJ 2. Motion to affirm

This appeal is a further proceeding resulting from Gen'l Amer. Tank Car Co v. El Dorado Terminal Co. 308 US 422. It has been dragging on for 10 years. In 1933 appellant entered a contract with resp. by which the latter leased to it some tank cars at a fixed monthly rental. The Resp. was to collect the mileage fees from the railroads, credit the sum to the rental and pay over the excess to appellant. After July 1934 resp. refused to pay appellant the excess mileage allowance on the ground it was an unlawful rebate under the Elkins Act. Suit to collect it was brought in the DC in 1935. The DC held for resp. and was reversed by the CCA. This ct held that an administrative question within the ICC's jurisdiction was involved, and the DC was required to hold the case pending the ICC's determination of the administrative question. The ICC commensed on investiation to determine whether the practices under the lease were unlawful; the amount of the allowance to be paid by the railroads for cars furnished petit. etc [SJ 5]. The ICC found that any allowance by resp Tank Car Co to appellant in excess of the fixed car rental was an unreasonable preference, or rebate. The ICC then discontinued the proceeding by order.

In an applicatinn for rehearing the appellant urged that the order was inadequate, not supported by evidence, that it usurped the province of the ct and failed to make a finding on what is a reasonable allowance. This was denied, and appellant brought the present proceeding in a three judge DC under the Urgent Deficiences Act. The DC dismissed the the action on the ground of lack of jurisdiction, since the order of the ICC was not a reviewable order. The DC did not deal with the merits.

The only question is whther the action of the ICC was reviewable under the Urgent Deficiencies Act. The question is apparantly novel. The order of the ICC did not require action. But the decision of the ICC had the consequence of settling appellants suit against the Tank Car Company which was pending in the DC. Unless review may be obtained, appellant is apparantly bound by the determination of the ICC. The resp. halfheartedly urges that review of the ICC's determination may be obtained in the one judge district ct. in which the original suit is still pending. This is to say the least questionable. This Ct evidently assumed in the El Dorado case that the ICC would fix a uniform and reasonable rates of payment by the carriers to the shipper for the furnhishing of private cars. This the ICC failed to do.

The net result is that the ICC has determined that the appellant is not entitled to prevail in its suit. The DC in

the original case is bound by that determination under the El Dorado case in this ct. Certainly an order discontinuing proceedings under these circumstances is reviewable. The "order" of the FCC in the Columbia Broadcasting case was merely a statement of policy with respect to chain broadcasting. Review was permitted, although it did not command or forbid action, or even involve immediate legal consequences.

There are, it is true, certain types of orders--procedural orders, or orders which determine nothing which had been held not to be subject to review. But it seems to me that the order here in question determines petit's legal rights in its suit and unless it can obtain review under the Urgent Deficiencies Act it is remediless, since the original DC can do nothing more than hold for resp. Tank Car Co.

In 258 ICC 371 the case which resulted from the first El Dorado case 3 members dissented on the ground that the ICC should have fixed a uniform allowance applicable not only to appellant but all others in the same class.

Note Probable Jurisdiction EGW

Op. SJ 12

No. 435 1945 Term
Land v. Waterman Steamship Co.
Cert. App. Ct DC

Juris. R. 3. Cert. timely: Judgment entered June 18, 1945.
Cert. filed Sept. 18, 1945.

Resp. brought this suit againt petit., chairman of the maritime comm. in order to prevent him from proceeding to renegotiate certain of resp.'s contracts. Resp. is a large owner of steamships and on April 25, 1941 chartered with the approval of the petit. certain of its vessels to The British Ministry of Transport to carry war goods from the US to the Red Sea. It appears that the US later agreed with the British gov't to pay it for the sums it spent under the charter contract with resp. apparantly under lend-lease.

The renegtiation act applies when excessive profits are realized from a contract with any department of the US and the act extends to the maritime Commission. On Nov. 1943 the price adjustment board of the Maritime Comm. acting under the Renegotiation Act served the statutory notice on it for the commencement of renegotiation proceedings with respect to the Red Sea contracts. Waterman pointed out that the contracts were with a foreign gov't and not covered by the Act. The Petit. however contrued the contracts as being between it and resp. Petit. requested resp. to come to a conference and to furnish certain financial data. The letter pointed out that resp. could at the conference state reasons why it was not subject to renegotiation on these contracts. Resp. replied giving the reasons why it was not subject to the Act. The Board however replied by letter that the contracts were covered.

Resp. then filed an action in the DC for injunction and declaratory judgment, the former to enjoin requiring resp. to furnish the financial information and from initiating criminal proceedings and the latter to hold that the Red Sea Charters are not subject to renegotiation. The DC dismissed the complaint for failure to exhaust administrative remedies; the CCA revered, Arnold, J. dissenting, and remanded for the DC to determine whether the contracts were subject to renegotiation.

1. Petit. urges that the decision below halts renegotiation at the threshold and for considerable periods when ever the question of coverage is raised. It argues that resp. under the Myers case was bound to exhaust its administrative remdies first, and that at the present stage of the proceedings there is no immediate threat of invasion of legal rights such as to give rise to a case or controversey under the declaratory judgments act. This view is questionable however.

resp.

If petit. is not able to have the question of coverage decided it is forced to pursue and long and troublesome administrative proceeding of which there can be no judicial review. The only method of review of an order determining excessive profits is in the Tax Ct. and it is by no means clear that the tax ct. is given jurisdiction to consider any issue but the amount of excessive profits, though petit. argues it may consider jurisdiction issues as well. [pet. 15-16]. Its administrative remedy is to say the least uncertain. Meanwhile it is faced with the withholding of sums due it on other contracts; it might possibly raise the question of coverage in a suit on the contracts in the ct of claims, or in defense of a suit by petit. against it for the recovery of excessive profits. However, these methods are remote and depend on many contingencies. The motion to dismiss admits that the contracts are with the British gov't and not with the Petit. The Columbia Broadcasting case, 316 US 407 supports the result below. There proceedings to enforce the statement of policy of the FCC had not even been initiated. On the merits of coverage compare US v. Algoma Lumber Co. 305 US 415.

2. Petit. also argues that the DC would have been correct in dismissing the action as a matter of discretion since to proceed would be to delay and hamper the administration of the renegotiation process. But this requires a finding that the resp. will not be unduly harmed by the failure to restrain the administrative process. In this instance the injunction would seem justified because otherwise there must result a multiplicity of litigation, a witholding of large sums of money and a long drawn-out administrative prodeeding.

3. It is of course possible that if resp. had gone to the conference the petit. would have concluded it had no jurisidction over the contracts, or if it did have jurisdiction that there were no excessive profits. But if petit. held the other way respp. would have no clear judicial remedy. The determination of the crucial issue at the threshold thus seems proper. It seems clear that the proceedings have been initiated and that the notice and request for information are sufficient orders on which to base the request for judicial review. Cf. Shields v. Utah Cen. RR. 305 US 177. The case is of sufficient importance to jusify a grant although the result is correct.

GRANT(?) EGW Op. R. 58

No. 444 1945 Term
Bigelow et al. v. RkO Radio Pictures et al.
Cert. 7 Cir.

Juris. R. I, 5. Cert. timely: Judgment entered Aug. 3, 1945; cert. filed Sept. 21, 1945.

This was a suit for damages under the anti-trust laws for maintaining a monopoly and a price-fixing conspiracy as a result of which petit's movie theater was prevented from showing movies until they had been shown in resp's theaters. Resps. are major producers, distributors and exhibitors of motion pictures in Chicago and the US. It was proved that they maintaining an illegal system of distributing motion pictures. The system operated in the following manner: the first run of the picture was in the Loop area in theaters owned by resps. No other theater in Chicago could show these prictures until 3 weeks after the Loop run. The system then provided for showings in successive weeks, called A pre-release, B pre-release, C pre-release and then weeks of general release, the last starting on the 10th week. Petit's theater was able to obtain only general release on the 10th week although resp's comparable and competing theaters obtained release prior to that time. In addition minimum admission prices for each week of release were fixed by resps. The purpose of this system was to induce patrons to attend Loop runs which yielded resp.'s the highest profit, and suppress competition for later run neighborhood theaters. This so-called Chicago release system has been employed from at least 1927. However, prior to 1937 resps. exhibited only single features, and petit. was able occassionally to obtain "clear" pictures which had not been shown elsewhere previously. These were inferior pictures. Petit. proved that after resps commenced the use of double features in 1937 it suffered a decline in profits because even these inferior pictures were governed by the release system and could not be bid for on the market. The loss indicated came to about $120,000.

Petit. was however unable to show the amount of damage caused by the fact it could not obtain pictures by bidding in the open market for the reason that the illegal conspiracy had long since destroyed such market.

The petit. obtained a verdict in a jury trial of $120,000; the DC overruled motions for a directed verdict, new trial or judgment n. o. v. and entered judgment for $360,000.

The CCA reversed, and entered judgment nov. The ct found that the verdict was premised on a finding of damage because of the conspiracy to fix minimum prices and restrain

competition. It found that there was substantial evidence to support the finding of an illegal conspiracy. However, it said since there was no evidence to show the profit petits. would have made by bid for pictures in the open market, they had not provide damages. It rejected as irrevalant the proof of the decline in profits after the institution of resps. of double featur s in 1937.

1. Petit. and the US as amicus curiae contend that the judgment below is erroneous. Petit's theory with respect to damages was as follows. There was and had been no open market for pictures for at least 15 years prior to the action. However, prior to 1937 there had been a partial open market for such inferior pictures as resps. did not desire to run as single features. It was proved that after resps. employed the double feature system, because of which petit. could no longer even obtain inferior pictures prior to the general release date, petit's profits declined to the extent of at least $120,000. The petit. and the US argue that the result of the cts decision is to make impregnable resp's position, since as a result of the illegal conspiracy there is no open market by which normally damages could be proved. The illegal conduct has thus made it impossible to bring forth the only kind of proof the ct below would accept. Resp's brief admits this and emphasizes it. It is true of course that petit. must show it was actually damaged as a result of the illegal action. But the ct's rigid insistence on the best possible proof, admittedly unobtainable seems improper. The proof that was offered certainly was relevant and had a tendency to show at least the damages sustained as a result of resp's shutting off a partially free market for films in advance of the ordinary release date.

2. The ct below treated the case as though there was no proof of damage, not that the amount of damage was not clear. But in this I think the ct. is clearly wrong. The case is similar to Story Parchment Cov. V. Paterson P. Paper Co. 282 US 555 where the ct said that where the tort is such as to preclude the ascertainment of damages with certainly, it would be unjust to deny all relief to the wronged person. See also Eastman Kodak v. Southern Photo Supply 273 US 259. The case is of importance since this case would prevent similar suits in Chicago, and hamper such suits thoughout the country.

GRANT EGW Op. R. III,
2263

No. 447 1945 Term
US v. Anderson
Appeal US D. Ct. W. D. Wash.

Juris. SJ 2; Appeal timely

Resp. was indicted for refusing to submit to induction under the Selective Service Act, which contains nothing with reference to the venue of the DCs for violation ~~for~~ of the Act. The induction station to which resp. was forwarded for induction is in the Western District. The local board of resp. is in the Eastern District. Resp. apparantly refused to submit to induction unless the army waived its vaccination requirements. Resp. filed a demurrer to the indictment on the ground that the ct lacked jurisidction because the offense if any was committed it the Eastern District where the local board is located.

The DC after ~~e~~examining the statute and the regulations thereunder held it was without jurisidction.

It is clear that the actual act constituting the offense occurred at the induction station. However, the regulations apparantly make it the duty of the registrant to abey the local board's order; that order not only includes a requirement that resp. report for induction but that he submit to induction, if accepted. ~~If~~ The ct thus held that since the local board alone had power under the regulations to order the induction a failure to obey the order was ~~committed~~ a crime committed in the district where the board is located.

The question is an important one.

Note Probable Jurisdiction EGW Op. SJ 9

44
A-Z 8 1945 Term
t al. v. Watson
al DC Fla.

Juris. SJ 1. Appeal timely SJ 2.

Appellant brought suit in a 3-judge district ct to set aside and enjoin on the ground of irreparable injury a new provision in the Fla. constitution which provides "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization;...", commonly called the anti-closed shop ~~xxxx~~ provision. It amounts to a ringing declaration of independence by the National Assoc. of Manufacturers et al.

After the amendment was adopted there followed public and private threats of civil and criminal prosecution, and the ~~xxxx~~ resp. instituted quo warranto proceedings against corporations which continued to observe existing union shop agreements. Appellants are local and national unions who are parties to or who seek to enter such agreements. The statute under which the three judge ct was convened provides for a 3 judge ct to restrain the enforcement of a state statute; here a state constitutional provision was sought to be ~~enforced~~ enjoined. The DC indicated it had doubts whether it had jurisdiction or whether the suit should be before a single judge. It seems to me that the policy which requires a 3 judge ct to enjoin the enforcement of a statute certainly applies to a constitutional provision which is even higher in authority. The ct held that it had jurisdiction however.

~~Xxxxx~~ Appellants made numerous contentions: that the provision impaired the obligation of existing contracts, violated the 1st amendment, violates the due process clause of the 14th amendment; violates the supremacy clause in that it is in conflict with the laws and policies of the NLRA and the Norris-laGuardia Act.

The DC held the ~~xxxxxxxxxxxxxx~~ provision valid on the regard it had before it. Apparently no particularark contract was alleged to be impaired, nor was any particular interference with rights under the NLRA shown.

The question is whether the ~~xxxxxx~~ provision is invalid on its face. Much as I dislike the policy behind such an amendment it is hard to see why it is invalid in general. In particular applications it may be: it may impair existing contracts; it may in certain instances interfere with the rights of collective bargaining given by the NLRA. I don't think the first amendment precludes the provision in question; while it is unwise, it is hard to see that the provision is so arbitrary or unreasonable that it violates due process. Certainly it represents the ~~xxxxx~~ beliefs of a majority

.ose voting for it in Fla. At common law in certain ..es like Mass. a closed shop contract was either invalid .. not enforcible. Presumably it is perfectly proper for a state to outlaw the banding together of employers to restrain competition or monopolize a market in any kind of commodity; so also it would seem that the state may insist on ~~xxx~~ free and open competition for ~~xxxxx~~ jobs, a competition ~~xxx~~ impaired by the need for joining a union.

Of course, this provision gives the employer the whip hand. It may over a period of time see to it that non-union labor only is employed; the union has no right under the law to protest effectively; it permits non union labor to obtain a "free ride" in that they obtain the benefits attributable to collective bargaining without assuming any obligation with respect thereto. But this goes to the lack of wisdom and essential unfairness of the amendment, rather than its constitutional invalidity.

Note Probable Juris. EGW Op SJ 14

No. 449 1945 Term
Rubenstein v. US
Cert. to 2 Cir.

Juris. as to 4. Cert. timely: Judgment entered Aug. 25; cert. filed Sept. 24, 1945.

Petit. was tried for conspiring to obtain entry to the US of Alice Spitz, a Czech, by means of a false and misleading petition filed with the immigration officials. The other parties pleaded guilty. Spitz was here in 1939 and desiring to remain she arranged through a friend to meet Sandler, an American citizen who married her with the understanding a divorce would be obtained in 6 months. After the marriage petit. met Spitz who asked him to prepare the necessary papers for her entry. Petit. was informed of the intention to get a divorce after her entry. In preparing the papers for the immigation officials petit. did not state that Spitz would obtain a divorce and he falsified facts concerning Sandler. After Spitz's entry through petit's efforts Spitz obtained a divorce. Petit. objected generally to all the evidence relating to the divorce, but the gov't was permitted to show that petit. in obtaining the divorce for Spitz suborned perjury by obtaining another to execute a false affadavit of service on Sandler of the summons and complaint in the divorce action; a false affadavit of non-military service by Sandler; to swear falsely before the referee in the divorce action that he discovered Sandler in a room with a partially dressed women. Petit. moved to strike out all this evidence but not on the ground that it was prejudicial in that it indicated that petit. was guilty of other crimes. Petit. was convicted.

The CCA affirmed, Frank, J. dissenting. The ct held that while the crime ended with the entry of Spitz the fact that a divorce was later obtained was relevent and the evidence of petit's perjury was proved as part of the divorce; the ct also indicated that even if the admission of the evidence was error and prejudicial, it was harmless since petit. was guilty. Frank J. wrote an excellent dissent on the CCA's theory that so long as the CCA thought the petit. was guilty it did not matter that prejudicial matters went to the jury.

Here the fact of the later divorce was relevant, but it could have been proved without showing that petit. engaged in the suborning of perjury in order to secure it. The crime was ended at the time the divorce took place. The relevance of the suborning of perjury was indeed slight. The fact of divorce could have been proved without it. But the proof of the perjury undoubtedly tended to prejudice the jury against petit. just as proof of other crimes

would naturally tend to do. In view of the fact that its relevance, if any, was greatly outweighed by its prejudice to petit. the evidence should have been admitted. Indeed the CCA seems to admit this. However, the CCA affirmed for the reason that, even excluding such evidence it would have found petit. guilty. But the question is whether the petit. was so prejudiced by the improper evidence that the jury would have found him innocent without it. Frank brings this approach of Hand et al. out very forcefully in his dissent. The L. Hand approach was characterized as the "bastards theory" by someone recently. If the ct thinks the defendant is guilty the fact that substantial or prejudical error was committed in the course of a trial is treated as "harmless.". The question is what effect the improper evidence would tend to have on a jury, not what the appellate ct would find by excluding such evidence from its consideration. The latter approach as Frank points out substitutes a trial by the ct for a trial by jury in violation of the constitution.

The approach of the CCA is in conflict with Weiler v. US 323 US 606, 611 where this ct said that error is not harmless just because the ct might think the defendant guilty. In the instant case the error or defect was not merely technical; it affected the substantial right of petit. regardless of whether the CCA thought him guilty. See Bruno v. US 308 US 287. Numerous CCAs are contrs.

GRANT EGW Op. R. 210

No. 452 1945 Term
Comm. v. Fisher et al.
Cert. 6 Cir.

Juris. R. 4. Cert. timely: Rehearing Judgment entered June 25, 1945; cert. filed Sept. 24, 1945.

This case involves facts were similar to Comm. v. Wheeler last term. In 1929 an a tax free exchange resps. transferred to a corporation in exchange for all of its shares certain securities which had a market value at the time very much in excess of the cost to the transferors. In 1934 the corporation distributed some 43,000 shares of stock. If in the computation of earnings or profits out of which taxable dividends are issued the cost to the transferor is employed by the corporation the distribution is taxable. If the market value of the shares transferred in 1929 is used the corp. had an operating deficit equal to the value of the shares distributed in 1934. It is clear that the Wheeler case would govern and the shares would be taxable as dividends but for certain statutory complications. The present case was pending before the BTA on Sept. 20, 1940. §501(c) of the Act which governs the present transaction and calls for the use of the transferor's cost in computing earnings or profits on securities received and later disposed of by a corporation provided that for the purposes of the Rev. Act of 1938 or any prior act the amendment instituting the cost rahther than the market value test should apply; itx also stated that nothing in this subsection shall affect the tax liability of any taxpayer for any year which on Sept. 20, 1940 was pending before or was theretofore determined by the BTA. TD 5024 recognized this exception, but stated that the rules stated in the regulations are applicable to such cases inasmuch as such rules are a proper interpretation of the law as it existed prior to the enactment of §501. The limitation in §501(c) has application only to such taxpayer and in the case of such taxpayer only with respect to the tax liability for the specific year actually so pending on Sept. 20, 1940.

The Tax Ct prior to the Wheeler case had held for resp. The CCA affirmed, after the Wheeler case had been brought to its attention, on the ground that the effect of §501(c) and the TD was to except resp. from the operation of the amendment and the prior regulations.

The argument is confused and confusing--on behalf of the gov't. The particular question here involved was not considered in the Wheeler case; the Tax Ct is in accord with the present result. Petit. contends that the regulations sustained in the Wheeler case were in force in 1934, and that that case upheld their application on

similar facts. But the meaning of the exemption in the last sentence of §501(c) was not in issue, nor argued. [Resp. 9]. It would appear that congress did not intend to affect the tax liability of those who had either obtained final judgments prior to Sept. 20, 1945; or had cases pending before the Tax Ct. at that time. The TD was interpreted by the Ct below to give relief from the retroactive application of the regulations to those who had pending cases, even though those regulations were otherwise applicable to the pending cases. [R. 161] I think that is the only reasonable interpretation of the Treasury Decision. Its language is not too clear, but it seems it meant to give relief to the taxpayers who had pending cases, even though the regulations would otherwise apply to them.

If we put aside the treasury regulations sustained by the Wheeler case, and the Wheeler case itself, as the TD implies should be done, the Tax Ct. reached a result which is not in conflict with any other CCA, and cert. should be denied.

DENY EGW Op. R. 151, 160

Nos. 457 & 458 1945 Term
Kotteakos & Lekacos v. US
Regenbogen v. US
Cert. 2 Cir.

Rehearing denied
Juris. R. 3. Cert. timely: ~~[illegible]~~ Aug. 28,1945;
cert. filed Sept. 26, 1945.

Petits. and numerous others were indicated on a single count of conspiracy to make fraudulent applications for loans under the National Housing Act. The evidence revealed that according to the CCA there were 8 or more separate conspiracies with only the single figure of Brown running through all of them. Brown undertook for a fee to negotiate loans under the FHA. During the course of his dealing he handled numerous applications by various groups of people who were not connected with one another; many of the loans he negotiated he knew to be fraudulent. Among such loans were those of petits. The indictment charged overt acts relating to petits. and to other groups and persons named in the indictment. Brown pleaded guilty and testified to all the various applications. The testimony of Brown as to petits. was sufficient to prove a separate conspiracy as to them. Brown stated that most of the transactions were independent of each other and that the various defendants did not know each other.

The Charge inter alia stated that there was only one conspiracy and that the jury must find that each defendant was a member of it. You cannot divide it up. He charged that the jury must consider as to each defendant separately in arriving at a verdict. He charged that the acts and declarations of any coconspirator were the acts and declarations of every other co-conspirator.

Petits. urged below a material variance between indictment and evidence, and and that the several conspiracies proved could not be joined in one indictment.

The CCA said that the DC was in error in admitting evidence as to petits. which related to other applicants who had acted fraudulently, since there were at least 8 separate conspiracies, connected only by Brown. He also committed error it said in stating that the jury must find only one conspiracy to convict; nonetheless the Ct held that under the Berger case the combination of several conspiracies in one indictment was not fatal since petits. were not thereby prejudiced; the conspiracies could have been joined in several counts of a single indictment.

1, Petits. urge that there was a fatal variance between the single conspiracy charged and the 8 or more proved. The Berger Case, 295 US 78 held that it was not fatal to prove two conspiracies in a single indictment, where the two conspiracies were connected by a single person.

But the holding was limited to the facts of that case, expressly. Here we have a situation where on the DC's theory the acts and admissions as related by Brown of any one of the group of 17 charged became evidence against any of the others. The cumulative effect of the illegal acts of others who dealt with Brown, but had no connections with petits. it seems to me prejudiced petits. The case is more complicated and with more ramifications than the Berger case. If the jury chose to ~~xxxxxx~~ disbelieve part of the testimony of Brown with respect to petits. but believed it as to other independent defendants that evidence under the theory of the DC bound petits. Under the indictment petits. were prepared to defend only against the single conspiracy charged, not against 8 of them admittedly independent of petits.'acts. Resp. [9] admits that the evidence did not establish a single conspiracy. While the conspiracies were all similar and centered about the same man, Brown, it is at least unlikely that they could be tried as separate counts of a single indictment without prejudicing petits. But if so joined at least the acts of one gruup of conspiractors would not be admissable against all the ~~x~~ groups.

2. In view of the fact that the DC erred in adopting a view that there was only a single conspiracy and charging to that effect when there were 8 or more, it would seem more than reasonable to suppose that the jury could not and did not keep the acts of the ~~x~~ conspiracies separate, but lumped them together. Such a procedure would seem prejudicial. Also under the DC's theory only one overt act relating to any particular conspiracy would have to be ~~xxxxxxxxx~~ proved in order to convict petits. even though the overt act pertaining to petits. were not proved, or the evidence was disbelived by the jury. In view of the fact the second circuit has not shown a scupulous adherence to the procedural niceties of criminal law, cf. BohlenBach v. US No. 41 I think cert should be granted.

GRANT EGW Op. R. 1294

No. 473 1945 Term
Pennekamp et al v. State of Fla.
Cert. Sup. Ct. Fla.

Juris. R. 10. Cert. timely: Judgment entered July 24, 1945; cert. filed Oct. 1, 1945.

Petit. and the Miami Herald were fined for contempt for publishing certain editorials and a cartoon concerning the disposition of certain local criminal cases.

The editorial was with reference to the cases which involved gambling and rape, and was quite inaccurate.

Rape Case: A motion to quash these indictments as defective was presented and the state att'y agreed. The indictments were quashed by Judge Barns. The editorial critisizing this action did not mention the assent of the state's attorney. New indictments were forthwith brought.

Brooks Club Case: An equity case was pending againt the club to padlock it for gambling. An answer was filed and the case was at issue. After notice to the state the case was set down for hearing after 7 days notice. The state did not appear, and a decree of dismissal was entered. The editorial implied that the Judge was aiding the defense. It did not state that the hearing was held after notice to the state. A cartoon was published [R. 8A] in connection with all three cases.

Teepee Club case: Gambling here was the issue and the state sought a temporary injunction under statute. The judge refused to issue the injunction or to set aside his order denying it on the ground that the use of affadavits in obtaining it was improper.

The editorial charged generally that the judges were seizing on every technicality to protect the defendants, and to thwart the prosecution [R. 2] The generally idea of the editorial was to imply that the judges were not doing their duty, but were in league with the criminal defendants.

After the publication the contempt citation was issued. Petits. were fined. On appeal the Sup ct. affirmed, several judges dissenting, on the ground that there was ample power under the law of Fla. to hold petits. in contempt for the publication. The ct. apparantly did not recognize the Bridges case as governing. [R. 170]

1. The contempt citation stated that the editorial would tend to prejudice a fair and impartial action of the ct in respect to the pending cases. Petits contend that this view conflicts with the clear and present danger test of the Bridges case. It is not wholly clear that the cases were pending when the editorial were published. The Brooks case had been finally dismissed; the rape cases were dismissed and the new indictments were not yet filed. In theTEepee Club case the temproary

injunction was refused. It is true that the editorial and cartoon did not refer to the litigation and the action of the judges therein accurately or fairly; but the cases in the literal sense were not sub judice. It would seem that the effect of the contempt proceedings would prevent the criticism of the judiciary in action it has taken. It seems to me that this is contrary to the Bridges case. It is true that in that case, Cal. law was not at all clear contempt outside the ct. room was punishable. In Fla. according to the state ct. the power to punish has existed for a long time. It is hard to see that this makes a substantial difference. Freedom of the press is interfered with whether the state statute provides the power to punish for contempt expressly or not. The judges may have their libel action for unfair comment, since it would not be privileged. On the other hand, if the publication is to be subjected to contempt proceedings it will tend to prevent a zealous seeking out of judicial corruption by the public press. People v. Broadhurst 148 F2 636 is a similar case; there a contempt citation and conviction arising in the DC of the Virgin Islands was reversed.

2. Petit. also relies on numerous otherx cases involving freedom of the press. It is difficult to see that on the facts of the present case there is a clear and present danger ~~xxxx~~ the substantial evil of interfering with the administration of justice

GRANT EGW Op. R. 152.

No. 474 1945 Term
US v. Carbone et al.
Appeal DC Mass.

Juris. SJ 2. Appeal timely SJ 1.

Resps. were indicted for conspiracy to violate the Anti-Kickback statute. They are officers in a hod carriers union. The indictment charged that they made a contract with several employers who were engaged in construction projects for the gov't whereby the latter agreed to employ only such persons as were approved by resps and to discharge any employees at their request. 40 persons were to be employed as shop stewards and resps. were given at office at the site of the construction. After this resps. approved for work only members of the union or such others who paid resps. $5.00 per week to work. The resps. represented that the payment was towards the initiation fee into the union. The employees had to pay $5 per week until the total initiation fees wer paid. They were given receipts for the payments, good for one week only. The resps. directed the stewards to obtain the payments under threat of dismissal; they knew and intended that the laborers would make the payments out of their weekly earnings. Resps. kept no records of these payments, except that when the employee had made sufficient payments his name would be recorded as a union member.

Resps. did not report to their local or to others the amounts received, nor were such sums recorded in the Financial Secretary's books as was required by the International's rules. Resps. purportedly acted for the local, but withheld from the unions the sums collected from laborers who did not pay their full initiation fees.

Resps. moved to dismiss the indictment. The statute provides "That whoever shall induce any person .. to give up any part of the compensation to which he is entitled under his contract of employment..by threat of procuring dismissal from such employment.."

The DC held that the statute did not apply to union officials who acted as the defednants did here and dismissed.

There are several DC cases in which similar indictments have been sustained. The statute is is in extremely broad terms. The Laudani case, 320 US 543, however did not limit the impact of the act to the employer or those under him who had the power to hire and fire. Here the resps. by contract with the employer had the power to procure the dismissal of any employee who did not pay the resps. the weekly sum for the right to work. Although the resps. acted under the color of their positions in the union the money received is alleged to have been retained by them for their private benefit. It seems to me that the act

covers ~~dixxx~~ exploitation of this nature as well as the use of threats by the employer or supervisory employees. Resp's power was as absolute as that of the employer himself.

Note Prob. Juris. EGW Op. SJ 11

No. 482 1945 Term
Hanauer v. Comm.
Cert. 2 Cir.

Juris. R. 4. Cert. timely: Judgment entered July 5, cert. filed Oct. 3, 1945.

Decedent and his wife created two reciprocal trusts on June 3, 1932 just before the gift tax was passed. They were indentical in terms. Each made the other trustee, and the trustee was given power to alter and amend. The trusts received a life estate and there were various gifts over. Decedent thought of creating the trust first. Both used the same attorney. When the wife learned that the husband was to make the trust she decided to also. The corpus of the two trusts were almost the same. The Tax ct found that the two trusts were not created independently and apart but each created the trust in consideration of the other. The decedent gross estate was thus augmented bythe trust created by the wife since the one had furnished the res for the other. It was viewed in the same light as if each had created the trust for himself and retained the power to alter and amend.

The CCA affirmed.

Petit. contends that the trusts were created independently and that the finding of the tax ct that they were created in consideration of each other was erroneous. But this is a matter of fact with respect to which the finding of the tax ct is final. Numerous CCAs support the result below. There is evidence to support the finding of the tax ct and that is sufficient.

DENY EGW Op. R. 124

No. 484 1945 Term
Poff v. Penna. Ry.
Cert. 2 Cir.

Juris. R. 3. Cert. timely: Judgment entered July 9, 1945; cert. filed Oct. 4, 1945.

The is an FELA case. Petit. is the first cousin of decent who was killed by the negligence of resp. She was wholly dependent on decedent and lived with him. Decedent had surviving him two sisters and a nephew none of whom were at all dependent on dededent.

The statute [45 USC §51] provides that a ry. shall be liable in damages in the case of the death of an employee to his personal representative, " for the benefit of the surviving widow or husband and children of such employee; and if none then of such employee's parents; and if none then of the next of kin dependant upon such employee..".

Petit. recovered a verdict in the DC; on appeal the judgment was reversed on the ground that the next of kin under Penna. law where the accident occurred were the sisters and nephew and since they could not recover because they had suffered no loss, petit. was barred.

1. Petit. contends that the statute should be read as "next of dependent kin". Thus although under state law petit. would not be entitled to an intestate share, that under the Federal statute next of kin who are not dependent on decedent should be treated as nonexistent for purposes of recovery. It is clear that to be entitled to recover a pecuniary loss must be proved. The sisters, since they could not show any may not recover; but it seems exceedingly harsh to bar petit. who can show loss because she is not a next of kin under Penna. law. The statute fairly construed it seems to me supports petit.'s contention. The CCA felt it was going too far to go down the line of kin no matter how remote to find one who is dependent. But it is the decedent who in a sense makes the choice as to who is to recover by supporting the relative. It is clear that a nearer relative who is dependent in some degree absolutely bars a further removed relative who is also dependent. I think that is the holding in N. O. &N.E. Ry. v. Harris, 247 US 367, 372. There is no indication that the widow there though missing could not have shown some small degree of loss so as to bar decedent's wholly dependent mother.

2. The case is squarely in conflict with Notti v. Grear Nothern Ry 110 Montana 464, where it was held a complaint stated a good cause of action where it was alleged that decdent's sons where next dependent and the mother of decedent sued under the act. The Wells-Dickey case 275 US 161 is not relevant since there the mother who died

after decedent but before appointment of an administrator was held to have a vested cause of action which barred a cause of action in the sister. Here no cause of action accrued at all unless it was in petit.

GRANT EGW Op. R. 24

No. 489 1945 Term
Zap v. US
Cert. 9 Cir.

Juris. R. 2. Cert. timely: Rehearing denied Sept. 13, cert. filed Oct. 8, 1945.

Petit. was convicted of presenting false claims to the gov't. Petit. was engaged in avaition work for the navy und-er a contract. He estimated to the Navy that the cost of a test pilot would be $4000. In fact he had arranged with the pilot to pay him $2,000. He had the pilot endorse a blank check which was then made out under petit's instructions in the sum of $4,000. The pilot was paid $,2000 in cash and petit. retained the rest. The check which was introduced in evidence was given to gov't agents, including an FBI man while they were auditing petit's books as they had a right to do both under the contract provisions and executive order relating to inspections of books of gov't contractors. Several weeks thereafter a search warrant was issued to search the business premises of petit. and certain records were seized. There were several other searchs under warrants made not relevant here. The gov't concedes [resp. 12] that the search warrant issued for the search of the business premises was ~~xxx~~ legally deficient, for the reason that it failed to set forth grounds for believing that petit. had committed an offense.

The petit. was convicted on 3 counts; the CCA affirmed as to two and reversed as to one.

~~xxxx~~ The petition and supporting brief do not meet the requirements of conciseness. The petition is 27 pages long and the brief is 83 pages long. Cert. should be denied on this ground alone. The issues actually are simple although petit. raises no less than 32 questions presented.

1. The main contention is that the check was inadmissable in evidence since it is claimed it was unlawfully seized. It is clear that the gov't officials had a right to examine the books and records of petit. relating to gov't work. They were required to be open to inspection. The check was given an FBI man who was cooperating with the navy by an employee of petit. It would seem arguable that there was consent to its taking. But the gov't does not suggest that there was consent to the seizure of the check. Instead it suggests that since the gov't officials had a right to inspect petit's quasi public records it had a right to seize ~~evidence~~ documents revealing the commission of a crime without a warrant, particularly where as here the check was an instruementality of the crime in that it was used to cover it up. The gov't view in this case

is to say the least questionable. It cites only one case directly on point 55 F. Supp. 88. It is true that in Wilson v. US 221 US 361, 380 the Ct distinguished between private and quasi public records which are required by law to be kept, stating that as to the latter the defense of self-crimination does not apply and the gov't officials have the right to inspect them. Cf. Bowles v. Glick Lumber Co. 146 F2 566, 571. But here the gov't pushes the doctrine further by saying that it may not only inspect or search the "quasi public" records, but it may also seize all or part of them that evidence crime. The self-crimination privilege and the search and seizure privleges are separate. Of course, it is true that the gov't did obtain a search warrant, but as it admits, it is legally defective. Furthermore the check in question was taken prior to that time. It seems to me that the result here goes somewhat far. But on the other hand petit. was probably not prejudieced by the admission of the evidence, since there was testimony relating to the crime and the manner of its execution which was untainted by illegality; the evidence was obtained legally by means of the inspection which was lawful both under the constractual consent and the executive order.

Numerous minor contentions are made.

DENY(?) EGW Op. R. 805

~~XXXXX~~

No. 496/1945 Term
Heiser v. Woodruff et al.
Cert. 10 Cir.
Juris. R. 1. Cert. timely: Judgment entered Aug. 11, cert. filed Oct. 10, 1944.

This case raises a substantial question of res judicata and full faith and credit.

~~XXXXXXXXX~~Petit. a British subject brought an action against Leonard Woodruff in the DC of S. Cal. for the alleged conversion of certain gems owned by petit. Woodruff, a resident of Cal. was not served personally, but the summons was left at his house. A valid default judgment was entered in 1939 against Woodruff for $164,000 with interest and costs. A few days thereafter Woodruff moved to vacate the judgment. The ground of the motion does not appear. [R. 27] It was denied by the DC [R. 264]. By stipulation of the parties however the DC took evidence on the value of the gems. An elaborate hearing was held which lasted 10 days. The ct affirmed its original determination of value [R. 275].

Thereafter Woodruff filed a voluntary petition in bankruptcy in the DC in Okla. Petit. entered his judgment as a claim. It was contested, and the trustee was authorized to go to Cal. to have the judgment set aside. The main contention that was made was that petit. had used perjured testimony with respect to the value of the gems. The bankrupt joined in the action of the trustee in moving that the judgment be set aside in the Cal. ct. The judgment was attacked on the grounds among others that there was improper service, that the complaint was defective and that a fraud was practiced on the ct. with respect to the entry of the judgment [R. 277]. The motion was denied by the DC. [R, 286]. The CCA 9 affirmed the judgment denying the motion to vacate on appeal. The CCA ~~xxxx~~ stated that the charge that the judgment was obtained by fraud was denied and not proved; that ground was abandoned on appeal. [R. 291 ff].

Despite the fact that Woodruff had twice tried to set aside the judgment, the validity of the claim on which the judgment was based and the judgment itself was reexamined by the referee. The defense of res judicata was duly raised by petit. The referee after a full reexamination of the merits disallowed petit's claim based on the judgment. The DC reversed, holding that the judgment was res judicata.

The CCA reversed (Huxman dissenting on the ground of res judicata) on the ground that since the precise issues on which the claim was contested before the referee were not of record presented to the Cal. DC in the several motions the judgment was not resjudicata.

I think it is clear that the ct below is way off base in holding that the judgment of damages for conversion is not res judicata in the bankruptcy ct. That judgment has been the subject of the most intensive reexamination in the ct which rendered it. It has been attacked on the general ground of fraud, lack of proper service, failure to state a cause of action etc. Not only the issues which were raised with respect to the validity of that judgment but all those which might have been raised are barred from reexamination in the bankruptcy ct where in that judgment has been filed as a claim. The idea that the validity of a judgment may be repeatedly reexamined and in piecemeal fashion such as is permitted by the ct below is contrary to the rules of res judicata and the full faith and credit clause if that clause applied to federal judgments. It does not but a rule just like it does. Whatever fraud there was, if any, in obtaining the original judgment is based on the alleged perjured tesiimony of petit. That is not the type of fraud which vitiates a judgment in collateral attack on it. Furthermore Woodruff had an opportunity to and might have presented such ground to the ct that rendered the judgment under the general charge of fraud made in the motion to set it aside. He did not. That cause of action and the present claim basedon the judgment are the same. It is res judicata in every sense of the word.

There is nothing in Pepper v. Litton 306 US 295 to the contrary. There no question of the validity of the state judgment was raised. The only question was whether the bankruptcy ct could disallow a judgment obtained by fraud and collusion. The ct indicates in note 13 that the bankruptcy ct cannot reexamine the merits of the claim if the plea of res judicata is made. Of course it is free to decide whether the claim should be subordinated, or allowed in accordance with the equities of the case. But it cannot as the CCA did below reexamine the merits. Accord, Beneficial Loan Co v. Noble, 129 F2 425.

GRANT EGW Op. R. 1293

No. 505 1945 Term
Holmberg v. Armbrecht & Miller et al. Executors
Cert. 2 Cir.

Juris. R. 4. Cert. timely: Judgment entered July 13, cert. filed Oct. 12.

Petits. sought to impose on resps. stockholders' liability after the failure of a joint stock land bank in 1932. The suit was brought under a federal statute which imposes double liability. Resp. Armbrecht was the nominee for Bache who owned a number of the shares beneficially. Petits. had previously made an effort to impose liability on the financial firm of which Bache was a member. The suit is one cognizable only under the equity jurisidction of the ct. NY has a 10 year statute of limitiations which would apply to actions of this type if brought in state cts.

Resps. contended that petits. were barred by the state statute of limitations. Petits. contended in the DC and on appeal that the state statute did not apply, and that they were not guilty of laches asserting that Bache concealed his beneficial ownership under the name of his nominee.

The DC held that the state statute did not apply and that petits. were not guilty of laches. Accordingly it gave judgment for petits.

The CCA did not pass on the question of laches; instead it reversed on the ground that the rationale of York v. Guaranty Trust and Russell v Todd required it to apply the state statute of limitations.

The cause of action here is one created by federal statute; but there is no applicable statute of limitations. Ordinarily, a federal ct may apply the statute of the state in such circumstances. Cf. Russell v. Todd 309 US 280. But there is no case which requires the federal ct to apply the state statute to a federal cause of action in every instance. Certainly there is nothing in the York case which requires such a procedure. On the contrary the ct expressly did not so hold. It seems to me that the CCA went much too far in saying that it was bound to apply the state statute in every case in which there was a federal cause of action and no applicable statute of limitations. Suppose for example a state had a statute of limitations requiring that suits to enforce a statutory liability be brought within 2 months after the cause arose. Assume a suit in a federal ct under the FLSA. Can it be doubted that an application of such a statute to a federal cause of action would subvert federal policy, even assuming the state statute was not directly aimed at FLSA cases. Surely the federal ct is not required to apply the statute.

In the present case petit. argued that only the doctrine of laches applied in a federal ct under these circumstances, and that it was not guilty of laches. Whether there was merit in this contention or not is irrelevant here. But the CCA did not even consider this contention since it felt itself bound by the state statute.

The CCA makes the argument that under the York case a statute of limitations goes to substantive rights. Thus to avoid a situation like that prevailing prior to Erie Ry v. Tompkins the federal ct should apply the state statute, since in the same suit in a state ct it would be applied. But that is a case of the tail wagging the dog. The situation here is the converse of Erie Ry. The correct view would be that if the statute of limiations is substantive and inhers in the cause of action, the federal policy of laches must be applied in any suit in a state ct. on a federal cause of action. Furthermore, it may be that Congress by omitting the limitations in this or the FLSA meant there to be no time limitation on suits other than that existing under the federal common law of laches, or perhaps a reasonable time.

In Russell v. Todd supra there was an identical cause of action brought in NY. In that case it was stated that a federal ct may properly apply a state limitation, but there is no indication that it was bound in all circumstances to do so in suits of equity. The question was was expressly left open. See p. 294. From what I have said I think the CCA was wrong in holding itself bound to apply the state statute rather than ordinary doctrines of laches, even though the state would have applied its statute in the same case. The question should be settled here.

GRANT EGW Op. R. 113

No. 510 1945 Term
Knauer v. US
Cert. 7 Cir.
Juris. R. 1. Cert. timely: Time to file extended to Oct. 15. Cert. filed Oct. 15, 1945.

This is a proceeding to revoke a naturalization order on the ground of fraud. Petit. xxx a German by Birth was naturalized in 1937. The evidence in this case overwhelmingly tends to show that both before and after naturalization he continued to give allegiance to the German gov't and its Nazi doctrines. In 1931 petit. expressed approval of Nazism. In 1934 he went to Germany, met Hitler and arranged with German officials to provide German films for a German society in Wisconsin. 1934-35 he contributed to German Winter Relief, an offical gov't agency and sought the contributions of others; Petit. was a member of the German American Federation and in 1935 he sought to have it display the swastika and made a motion to that effect at a meeting of the Federation. In 1936 the swatika was hoisted and petit. sought to have the meeting approve its use. There formed in 1937 a new society known as Friedns of New Germany; the members were those who did not want to be openly known as Bund members. Petit. became a member; the articles of the organization provided that its assets on dissolution were to become the property of an offical German propaganda agency. Petit. became a member 55 days before naturalization and was a member of its executive committee. He was elected master of ceremonies for a German day celebration on the day he was naturalized. He was a violent anti-semite. Petit. was a devoted adherent and member of the German American Bund a notorious Nazi organization devoted to bringing nazism here. It had the usual nazi parephenalia-uniforms, storm troops and the rest It sought to publicize Hitler and Germany and its members treated Germany as their homeland. The DC found that the Bund was un-American, subversive and that its teachings were contrary to our principles. In all these activities petit. took an active part prior to his naturualization. He attended its district conventions. Next to the local leader of the bund petit. was found to be its most active member. He wrote letters to Hitler ending with "In blind obedience". He wrote articles for the local nazi paper and read "Facts in Review" put out by the German information service. He worked in cooperation with German consuls to obtain German nationals to return to Germany for work there. He enrolled his daughter in youth movement of the Bund.

In 1937 the German American Alliance was formed for nazi extremeists. Petit. took an active part. It was a front for the Bund. He dominated and controlled it. He

knew Kuhn and others at the head of the Bund. In his speeches after 1937he stressed the unity of the German people stating that with the rise and fall of the German nation we rise and fall. In 1938 he said the Bund represented "the Fuehrer's grip on American Democracy" He said his American citizenship was a good thing to hide behind when asked how he reconciled his views with his citizenship. He was already ready to rush to the defense of the bund in any criticism or action taken againt it. He wrote scurrilous letters to the judge who convicted Kuhn.

The above is not all the evidence, but it conveys a large part of it.

The DC found that he obtained citizenship by fraud. The CCA after detailing the evidence above and more affirmed holding that there was clear and convincing proof that the certificate of naturalization was procured by fraud.

1. Petit. contends that the ct had no jurisdiction to revoke his citizenship on the ground of fraud. But the Baaumgartner case seems to have settled that issue. There is nothing to the contrary in any case. The statute gives the district attorney the right to bring proceedings to set aside citizenship on the ground of fraud. Clearly congress intended or understood that the cts should have such power.

2. Petit. also contends that the proof in this case does not meet the requirements of the Baumgartner and Schiedermann cases. It is hard to conveive of a clearer case than this one. The evidence is clear and convincing that petit. both before and after his naturalization adhered to the German Gov't, Hitler and all that it represented. For him the highest good was Germany and nazism. Such a view is incompatible with the oath of allegiance to the US and the ct below correctly so held. Unlike the Baumgartner case the evidence is equally strong both before and after naturalization. There is no break in the continuity of petit's beliefs or action. Certainly the events transpiring after petit's naturalization were relevant in view of his actions prior to that time. Unlike the Schiedarmann case no long period occurred between the grant of citizenship and the start of the present action. It seems to me that the result below is correct and should not be reexamined here.

DENY ECW Op. R. 83

No. 517 1945 Term
D. A. Schulte, Inc. v Gangi
Cert. 2 Cir.

Juris. R. 2. Cert. timely: Judgment entered July 20; cert. filed Oct. 17, 1945.

This is an FLSA case. Petit. owns a building in NY which contains a number of tenants engaged in manufacture of ladies garments. They are known as contractors and do certain operations for others such as sewing, pleating, trimming etc. Only a very minor portion of them ship goods in interstate commerce, but the goods they work on are in large part shipped by the owners thereof in commerce. Resps. are maintenance men in the building. After the Kirshbaum case, the DC found that a genuine issue as to coverage arose [R. 317]; the parties negotiatiated with respect thereto and an accord and satisfaction was entered into whereby each resp. received the overtime compensation to which he was entitled. No liquidated damages were paid. Later resps. brought this suit to recover the liguidated damages. Petit. set up the release and accord and satisfaction. The DC dismissed. The CCA reversed on the basis of the O'Neil case and held that the resps. were covered by the act.

As I read the O'Neil case the question was left open as to whether there could be an accord and satisfaction of a genuine dispute with respect to coverage, so long as actual overtime was paid. I think this case raises the question there left open. We have an express finding by the DC that there was a genuine dispute [R. 317] and arms length negotiation resulting finally in a settlement. On the facts of this case it is still clear that coverage is open to some doubt. Only a minor percentage of the tenants actually produce goods for interstate commerce. The rest work on goods for others which the others may or may not ship in interstate commerce. Cf. Warren-Bradshaw Drilling Co v. Hall 317 US 88. Perhaps the tenants may reasonably expect the goods they work on to be so shipped. In any event the matter was one that could be a subject of real dispute. The implications of the O'Neil case are that if there is a genuine dispute there can be a binding accord and satisfaction. Of course it may be that the facts themselves must be subject to dispute, not the legal effect of those facts--i. e. there may be a dispute as to the number of tenants engaged in production of goods for commerce, the amount of labor actually performed etc., but the question should be settled here.

GRANT EGW Op. R. 322

Nos. 518 & 519 1945 Term
McGoldrick v. Carter & Weekes Stevedoring Co.
McGoldrick v. Clark & Son

Cert. Sup. Ct. NY.
Juris. R. No. 518, 121, # 519 183. Judgment entered July 19, cert filed Oct. 17, 1945.

New York City imposes a general business tax on gross receipts. The two repondents are stevedoring firms, engaged in the business of loading and unloading ships in NY harbor. The work is clearly interstate and foreign commerce. Almost all their work is carried on within the city limits. Their offices are in the city.

The cts. below held a tax on the gross receipts derived from work performed within the city limits was unconstitutional as a burden on interstate commerce. under Puget Sound Stevedoring Co. v Tax Comm. 302 US 90.

The only question is whether the Puget Sound case is good law today or should be overruled. In that case Washington imposed a privilege tax measured by gross receipts. On identical facts this ct held that tax invalid. Petit. contends that subsequent cases have indicated that the Puget case is no longer good law. The present tax is on transportation. It is true there is no possibility of double taxation on the taxpayer, but inso far as the various stevedoring cos. can add the tax to their price they increase the cost of transporting the goods. It is true that the tax is not discriminatory; it is levied on all businesses equally. It may be that the Puget case and this case are distinguishable on the ground that in that case the tax was on the privilege of engaging in the business. Here the tax is on mere business activity. The tax in terms at least implies no privilege. But I think such a distinction is pretty thin, Lockhart, 57 Harv. L. Rev. 40, 64 finds difficulty in supporting the Puget case except on the ground that all taxes on interstate transportation are forbidden. I think that this is still true. Petit. relies on the numerous cases (#519, p. 12) after Western Live stock Bureau as limiting the Puget case. But those cases dealt with aspects of taxing sales or gross receipts derived from interstate commerce. They do not quite ocver the situation of a tax on transportation itself. Petit. points to language in the Gwin, White case 305 US 434 which indicates that if the gross receipts tax is apportioned to the business attributable to the taxing state it would be valid. But But there is a distinction between taxes on transportation itself and taxes on recipts

from interstate sales. The test with respect to the latter is whether interstate sales are likely to be or are being subjected to cumulative burdens. The test with respect to the former is whether the tax is "on" transportation. It may be that the economic burdnn test should be the only test for both types. If so, the Puget case should be overruled, since the cumulative burden on interstate commerce is not so readily apparant here as in the sales tax and use tax cases.

In any event I think cert. should be denied unless the ct. is willing to reexamine the Puget cases.

DENY(?) EGW No Opinions

No. 528-33
US ex rel TVA v. Welch et al.
Cert. 4 Cir.
Juris. R. 1. Cert. timely: Judgment entered July 21, cert. filed Oct. 19, 1945.

TVA construcged Fontana Dam on the Little Tennessee river. In doing so it flooded highway 288 which ran along the river and provided the only means of access for 216 families living on 44,000 acres. This land was not flooded and was not needed for the dam or resevoir. The xrmacxixx land in question is within Great Smoky National Park, but N. C. had not purchased that land for inclusion in the park. N.C. maintained highway 288. The country is very rugged and mountainous. By reason of the flooding TVA became liable to the property owners for cutting off their means of access, and also the state. It was found that the reconstruction of the highway would be too costly and was impossible during the war. Replacing it would cost $1,400,000. To condemn the highway was considered but was rejected, since TVA would have had to pay the cost of rebuilding it and would still be liable to the property owners. Thus this procedure would have cost over two million. Swain county had issued bonds in part payment of the road. The solution which was worked out with N. C. provided that TVA was to acquire by condemnation or otherwise all land served by highway 288; that the land so acquired would be transferred to the Nat. Park Service in fulfillment of N. C's obligation;x the Park Service eventually was to build a road through the area; Swain county was to receive from TVA $400,000 to be used in paying off part of the bonds issued for the road. The immediate cost to TVA from this contract was less than the above possibilities, but the ultimate cost to the US will be greater in view of the promise to eventually build a raod through the area.

TVA soght to condemn resps' land under the following statute: [TVA] shall have power to acquire real estate for construction of dams, reservoirs, transmission lines, powerhouses, and other structures and navigation projects at any point along the Tennessee River of its tributaries, and in the event the owner won't sell at a fair price, then the copporation may proceed to exercise the right of eminent domain , and to condemn all property it deems necessary for carrying out the purposes of the Act. TVA has large powers, among them power to hold and acquire real estate; power to condemn for the acquisition of land necessary to carry out the provisions of the act.

Resps. xx resisted condemnation on the ground it was not authorized by the act. Two resp. have renouneed all claims on account of the flooding of the road and ask only to retain their property.

Thus the only question presented is whether TVA may condemn property for the purpose of ~~xxxxx~~ saving money for itself, where it has no need or use for the land and where the ultimate cost to the public (including the new road to be built by the Park Service) will be greater than the cost of paying the landowners for taking their means of access and the cost of replacing the present road.

The DC held that the TVA had no power to condemn the land and the CCA affirmed.

The power of eminent domain it seems to me should be employed as sparingly as possible. Property owners should be left in possession if the substantive operations of the TVA are not interfered with. Here the only benefit to the TVA itself is that it saves some money for the present. It may be that the statute left the power to do this in the Corporation. It may condemn for acquisition of land necessary to carry out the purposes of the act, in addition to more specific powers set out above. But it is hard to see how this furthers a purpose of the act. It is true that the Congress could condemn any land so long as it was for a public purpose. Here I think the purpose is public, but the TVA is not congress, and it is limited in its powers by the statute. The CCA found that the taking here was in excess of its requirements. It need only have taken, as it did the rights of access and the road itself. Actually it is trying to take 44,000 acres of land and dispossess the perons living there rather than pay for the road and the rights of access. This seems to go fairly far. Petit. argu~~e~~ US v. Meyer 113 F2 387 is in conflict. But I don't think it is. There the Secretary of War was authorized to condemn landto improve rivers and harbors. There the lands were condemned and fee taken. Most of them were to be flooded. The owner claimed that only a flowage easement was neccessary rather than the fee, but the fee was taken for the additional ~~xxx~~ purpose of making a recreational area out of the flooded land. The ct upheld the taking. But in our case the land is not needed for any purpose except to save TVA money. The question as tox the land here is not whether a fee or an easement shall be taken, but whether the land may be taken at all. On the other hand petit. points to some legislative history supporting its present action [resp. 12-13]. The Board acted in good faith. But that has no bearing on its statutory power. Brown v. US 263 US 78 relied on by petit. is not in point. There condemnation was upheld where land was condemned to replace a flooded townsite. Petit. is not seeking the land here to replace the road. Dohany v. Rogers 281 US 362 was similar to the Brown case. There the taken land was to replace a ry. right of way which was purchased so that a highway could be widened.

No. 540 1945 Term
Angel v. Bullington
Cert. 4 Cir.
Juris. R. 1. Cert. timely: Judgment entered July 19, cert. filed Oct. 19, 1945.

Resp. entered a contract with petit. whereby the former agreed to sell and the latter to buy certain realty located in Virginia. Petit. delivered purchase money notes secured by a deed of trust on the Va. property. The contract was to be performed in Va. ~~Nxxxxxxx~~ Petit. defaulted. The Va. property was foreclosed and resp. sued petit. in a North Carolina Ct. for a deficiency judgment. N. C. has a statute which provides "In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust..or where judgment or decree is given for the foreclosure of any mortgage .. ~~xxxxxxxxxxxx~~ to secure payment of the balance of the purchase price of real property, the mortgage or trustee or holder of the notes secured by such deed of trust shall not be entitled to a deficiency judgment on account of such deed.. Petit. is a citizen of N. C. The ct. dismissed the N. C. action. Then resp. brought the present suit in the DC for No. Car. Petit. relied on the statute. The DC gave judgment for resp. and the CCA affirmed. It found that the N. C. Ct. treat the statute as merely jurisdictional and procedural; it thus held that the statute did not affect the jurisdiction of the federal ct, and that it was not required to apply the statute under Erie. Ry v. Tompkins.

Petit. contends that under Guaranty Trust Co. v York and the Erie case the statute should be applied. The statute is not expressly in terms of jurisdiction. Furthermore the characterization of a statute ~~xx~~ or law as procedural or substantive by a state ct. is not conclusive on the federal cts. Sampson v. Channell 110 F2 754. Guaranty Trust Co. v. York. The federal ct must determine whether the Erie Ry1 policy would be better complied with if what a state ct. treats as procedural or jurisdictional should be treated as substantive. The effect of the ruling of the ct is that ~~xxxxxx~~ resp. can obtain a judgment in a federal ct where it can't obtain in in a state ct. But I have no difficulty with such a holding. It seems to me that the statute merely expresses the public policy of the state ct. that no deficiency judgments shall be issued by state cts. The statute does not purport to destroy the obligation of the contract: it applies to intrastate and extrastate causes of action.

If for the purposes of argument the DC treated the statute as substantive immediately constitutional questions

would arise which should be avoided if possible. The cause of action did not arise in N. C. The contract was to be performed in Va. and is connected with land located in Va. There a deficiency judgment may be obtained. It would seem to be a clear denial of full faith and credit to the law of Va. if an out of state cause of action were to be voided by a state which has no real concern with the transaction. But N. C. does not go that far. It merely treats the statute as jurisdictional. It refuses to provide a forum for this type of action. Under such circumstances it would seem that the result below was correct. The ct properly held the statute procedural and jurisidctional. As such it was not bound to apply it either under Erie Ry v. Tompkins or the statutes governing federal jurisdiction. To do otherwise as above indicated would create a host of difficulties.

DENY EGW Op. R. 30

No. 550 1945 Term
Lavender v. Kurn et al.
Cert. Sup. Ct. Mo.
Juris. R. 2. Cert. timely: Time for filing extended to Nov. 2, cert. filed Oct. 22, 1945.

This is an FELA case in which the ct below reversed a verdict for petit. on the ground there was not sufficient evidence to go to a jury.

Decedent was a switch tender. On the night he was killed in the performance of his duties he had opened a switch to let an interstate Frisco Line train back into the station at Memphis. As he stood near the rail where the switch was he was struck in the back of the head by a small, round fast moving object. The train backed up about 8-10 miles an hour around a curve. It was petit's theory that he was struck by something protruding from the train, namely a mail hook on the mail car. There was evidence that these can swing out some 30 inches or so if loose and are about 80 inches about the rail. Decedent was 5 feet 7 1/2 inches tall and there was evidence that near the rail there were piles of cinders some 18 inches high on which he might have been standing. Around a curve a trail can sway some 2 1/2 feet. There was a curve here. Petit. was found lying according to petit. some 5 to 6 feet from the rail and parralell to it with his head in the direction of the movement of the train. But the resp.'s evidence as to his position completely contradicted this. One of petit's witness stated that he heard a stranger say that petit. was struck by something from the train. This was admitted at trial as part of the res gestae. There were, however, no eye witnesses[Petit. 6]. There was also an issue as to who decedent's employer was. Petit. sued the Ill. Central and the Frisco, but there was some evidence that he worked for the Yazoo Road a subsidiary of the I.C. and that the other two paid part of decedent's wages. Resps' theory was that petit. might have been struck by some hoboes or others loitering around the tracks in order to get a ride. The vicinity was dark, and the place of work of uneven surface. Petit. in his complaint and at trial also advanced the theory that his employer had not provided him with a safe place to work.

The ct below reversed on the theory that the res gestae statement was inadmissable since it did not qualify under that exception to the hearsay rule, and that there was otherwise insufficient evidence to go a jury on the ground of negligence.

Petit. contends that there was sufficient evidence to go to a jury on the question of resps' negligence. It is true that this ct. has generally left the question to the jury, but in this case I think the result is correct. The

hearsay statement was clearly inadmissable. Statements under the res gestae exception are admissable only if the declarant personally observed the event. If he did statements made within a short time of the event are admissable. But here petit. admits that there were no eyewitnesses. The statement then was either based on surmise or was itself based on hearsay.

Without that statement it would seem that there was not sufficient evidence to go to a jury. There was no showing by petit. that a mail hook had been loose on the mail car. Resps.'s evidence indicated that it had not, and that the car had been inspected soon after the accident. The ct below was correct then in saying that the verdict was based on mere speculation rather than any eividence to show that resps's were negligent in fulfilling any duty owed decedent.

DENY EGW Op. R. 321

No. 556 1945 Term
Order of United Comm. Travelors v. Wolfe
Cert. Sup. Ct. S. D.

Juris. R. 9. Cert. timely: Leave to file extended to Oct. 26, cert. filed Oct. 23, 1945.

Petit. is a fraternal benefit association, with its principal office in Ohio. It insured Shane of S. D. against accidents. Shane died as the result of an injection of a usually harmless anesthetic. The policy, which was made in Ohio, has a provision valid in Ohio limiting the time within which suit may be brought on the policy to 6 months after the date a claim under the policy is disallowed. In S. D., where the suit was brought by an assignee of the beneficiary, such a provision is by statute void.

Petit. claimed that S.D. was required by the full faith and credit clause to apply the limitation provision despite a statute of its own to the contrary, since such provision was good in Ohio were the contract was made.

The Ct. held the limitation provision void, and found that under Ohio law resp. could recover.

1. Petit. contends that under the full faith and credit clause S.D. was bound to give effect to the law of Ohio which permitted the time limitation. Here the insured was a resident of S. D. He died in S. D. The assiggee of the beneficiary is also a resident there. There are thus numerous contacts with South Dakota. Petit. contends that the entry into the beneficial association bound the insured and that another state has no right to change such obligations. Petit. relies on Sov. Camp. v. Bolin 305 US 66 where this ct held that a substantive right under an insurance contract with a fraternal benefit co. could not be ignored by another state without violating the full faith and credit clause. But here were have only a procedural right involved, namely a time limitation in the contract; Also there is not a great deal left of the case after Pink v. AAA Highway Express, Inc. 314 US 201 which held that Ga. public policy was sufficient to enable it to ignore the enforcement against a resident of Ga. of liability imposed by NY law. Cf. Pac. Employers Insur. Co v. Acc. Co. 306 US 493. The S. D. ct characterized the provsion voiding the limitation in the contract as procedural and hence applieable to an out of state contract. Of course the state's characterization of the provision or its law is hardly conclusive of the federal question.

2. Petit. relies on Home Insurance Co v Dick 281 US 397. There The cinsurance contract had a similar provision and the state law was similar. But the ct relied on the due process clause in holding the state statute invalid as applied. The ct emphasized the fact that ~~neither~~ there were no ~~conflicts~~ with contacts with Texas were the suit was brought. Here the

situation is different. The insured was a resident of S. D. and presumably that state may apply its local policy with respect to the insured despite the validity of the limitation provision in Texas. Furthermore, petit. does not rely on the due process clause, but only on the ~~xxthxxxxxxxxxxx~~ full faith and credit clause.

3. Last, petit. contends that the ct below ignored the law of Ohio, the place where the contract was made. This ct has stated that choice of law problems dom not create federal questions, even though the wrong law is applied to the transaction. Kryger v. Wilson. In addition in the present case the S. D. ct did carefully examine Ohio law and found that resp. could recover under that law for the type of accident which killed the insured. No more is required under any circumstances.

Cert. Fees
~~DENY~~

EGW

Op. R. 53

No. 572 1945 Term
Girouard v. US
Cert. 1 Cir.
Juris. A. 2. Cert. timely: Leave to file extended to Oct. 30, cert. filed Oct. 30, 1945.

Petit. was born in Canada in 1902 and came to the US in 1923 and lives in Mass. In his application for naturalization he stated he was willing to take the oath. In answer to the question of whether he was willing to take up arms in defense of his country he replied "No (non-combatant) Seventh Day Adventist." It appears that petit. were he not overage would be willing to serve in the armed forces as many of his coreligionists do in a noncombatant capacity but he is unwilling to take human life. The Selective Sefvice Act provides for the induction of this type of person. In 1942 congress amended the Nationality Act by excusing a person, not a citizen, who has served in the US armed forces and is lawfully admitted to the US from filing a declaration of intention and certain other requirements. The act provides that it shall not apply to any conscientious objector who performed no military duty whatever, or refused to wear a uniform. The same oath which is used under the Nationality Act is employed under the 1942 amendment, and a number of noncombatant members of the armed forces have been admitted to citizenship under the 1942 amendment.

The DC admitted petit. to citizenship and the CCA reversed, Woodbury J. dissenting, on the ground the case was controlled by the Schimmer, MacIntosch and Bland cases which held that one who for religious scuples opposed defending the US could not meet the requirements of the oath.

Petit. advances two grounds of argument:

1. The petit. urges that the 3 cases dom not apply for certain slight factual differences, such as the fact that petit. is willing to serve in the armed forces, but is unwilling to bear arms. Petit. does not advance the contention that the three cases should be overruled. But I think the time has come for a reexamination of those cases. They were rendered over the vigorous dissent of Hughes, Stone, Brandeis, and Holmes and Sandford. They have been bitterly criticized as among other things reading into the requirements more than congress insisted on. Although the Nationality Act was revised in 1940 I don't think it can be said that the mere fact that Congress said nothing on the subject indicated that it accepted the holdings of these cases, since they have been subjected to continous criticism and in view of the dissents in those cases.

2. Those cases were based on the implied requirements of

the oath of allegiance that the applicant be willing to bear arms in defense of his country. The 1942 amendment to the Nationality Act by implication permits conscientious objectors who do serve in the armed forces as noncombatants & a way in which petit. is willing to serve) to become citizens. These permits admitted under the 1942 amendment take the same oath. That oath cannot mean two things at the same time, namely a requirement that a civilian applicant be willing to bear arms, and a failure to require that a noncombanant member of the arms forces bear arms. Thus it is argued that the 1942 amendment has removed the basis for the decisions in the above three cases; that congress by inference has modified the requirement that an applicant for citizenshpp be willing to bear arms. Some DCs have so held with respect to noncombatant applicants. In Re Kinloch 53 F Supp. 521; In re Sawyer 59 F. Supp. 428. This argument certainly affords a reasonable basis for granting petit. his citizenship, if the ct. is unwilling to overrule the three cases mentioned above.

GRANT EGW Op. A. 26

No. 578 1945 Term
Thomas Stock Paper Co. v. Bowles Oct. 5
Cert. Em. App.
Juris. R. 1. Cert. timely: Judgment entered Sept. 7, cert. filed Nov. 3, 1945.

Petits. were indicted for violating a regulation of resp. dealing with wastepaper. The regulation provided that unsorted mixed wastepaper might not be sold to consumers at a price highmer than the maximum price for No. 1 mixed paper. It is conceded that the regulation constituted a standardization of unsorted paper. The alleged violations took place between July 16 and Sept. 11, 1943. On July 16/1943 EPCA was amended by the so called Taft amendment to provide "Nothing is this Act shall be construed..(3)as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine with repect to such standardization that no practicable alternative exists for securing effective price control with respect to such commodity.."

Petit. apparantly assuming that this amendment in and of itself invalidated the price regulation sold at above ceiling prices until Sept. 11, 1943 when the Administrator formally made the determination called for in the Taft amendment by an amendment to the price regulation.

After petit. was indicted for the above violations he filed under §204 of the ACt a protest with the administrator contending in part that the regulation was invalid between July 16 to Sept. 11 when the formal determination was made. When the protest was denied an appeal was taken to the Emergency ct. which held it had no jurisdiction under §204(a) [petit. 28-9] to pass on the validity of a regulation whose defect was obviated prior to the time the protest was filed with the Administrator. Thus the protest was held untimely filed, and treated by the ct as though it had never been filed. The ct pointed out petit. could obtain review by leave of the DC under § 204(e) in the criminal case then pending. Cert was granted to review the dismissal of the appeal, and is now pending on a motion to dismiss as moot [No. 67].

Not being daunted petits. tried again. They obtained leave of the DC to file a complaint raising the indentical issue in the Em. App. It is to review the decision in that case dismissing the complaint on the merits that the present cert. is sought.

The Emergency Ct. held that the Taft amendment did not make the regulation invalid between the time the amendment became effective and the actual determination of the Administrator. Lindley J. dissented.

Other portions of the Taft amendment permit standardization if in general use in the industry prior to the regulation or if required by another gov't agency. The Em. Ct. felt that in view of the alternatives the amendment was not be treated as itself invalidating the regulationx, but rather to be construed as giving the Administrator time to make the determination, and during that interval the regulation was treated as not affected. Accord, US v. Pepper Bros. 142 F2 340.

I have had serious doubts about this case all along. When a statute requires that an administrator officer make a finding or determination in order to keep a regulation in effect and puts it in terms that the act shall not be construed as authorizing such regulation unless he makes such determination, it seems to me that the act itself makes that regulation invalid until the administrator determination is made. Here the Administrator delayed two months in making the determination. He might have waited a longer time. Does that mean pending that time the regulation is still in effect despite the amendment? If so the statute becomes meaningless. True it is that no ct. other than the Emer. ct could hold that regulation invalid since the Emer. Ct has exclusive jurisdiction. That accounts for the holding in the Pepper Bros. case, supra. But the Emer. ct is empowered in this case to decide whether the regulation was invalidated by the Act pending the time the Administrator made his determination. It seems to me that petit. had a right to rely on that amendment unless and until the Administrator made the requisite determination. Otherwise the Administrator could have his cake and eat it too. The regulation would be valid both before and after he made his determination. Clearly that is not what Congress intended. Petit. contends that to subject them to penalties for alleged violations of a regulation at a time when it was contrary to the statute denies them due process. I don't think it is necessary to deal with any constitutional questions in this case, since the matter is purely one of statutory interpretation. If the statute, properly construed, means the regulation was made invalid, of course petits. may not be tried for violating it.

GRANT EGW Op. R. 50

No. 603 1945 Term
First Iowa Hydro El. Cooperative v. FPC & State of Iowa
Cert. App. DC
Juris. R. 38. Cert. timely: Judgment entered Aug. 13, cert. filed Nov. 13, 1945.

Section 9(b) of the Fed. Power Act provides that an applicant for a license shall submit to the FPC "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage" in the power business.

Petit. filed a declaration of intention with the FPC for a run of river power project on the Cedar River, Ia. The FPC found that it was a navigatible river and required a license. A license was applied for and refused on the ground that petit. had not complied with §9(b) of the Act.

Iowa has a comprehensive statute dealing with power projects and dams on navigatible rivers. [Petit. 26 ff] No dam can be constructed on a navigatible river in the state without a permit from the executive council. The application to be made for the permit is elaborate; a hearing is to be held; the permit will not be granted if the project materially obstructs navigation, or materially affects other public rights; or is deliterious to fish; the permit may be granted on specified conditions. Petit. did not attempt to comply with the state requirement, contending that since it could not comply with both the state and the Federal law, the latter could not stand. The FPC in its memorandum too thinks the state statute is unconstitutional.

The Ct below held that petit. had not exhausted its administrative remedy; that it should have applied to the executive council for a permit and have the state cts interpret the statute definitively before seeking to attack its constitutionality in a federal ct.

Petit. argues that it could not possibly comply with the terms of the state statute and it is not bound to under §9(b); it further argues the state Act is invalid.

1. The legislative history of §9(b) is ambiguous; see petit. 34 ff. Apparently state consent was not a requisite for a federal permit, but there was to be some showing that the state's cooperation was enlisted in the project. Here however, the state has assumed complete control over power projects on navigatible waters--a subject wholly within congressional power. It is certainly unlikely that §9(b) meant to delegate the control of power projects to the states. The FPC's powers were created for precisely the opposite purpose. To require a state permit in order to obtain a FPC license seems a clear interference with the rights

congress intended to give applicants to the FPC.

On the other hand, even though application to the state executive council might be futile in the present case, petit. should have made that application. That at least §9(b) requires. If the permit was not granted petit. could then carry the question to the state cts, which might hold that the act did not apply to navigatible waters under federal control. Certainly §9(b) does not require state consent. The FPC feels, however, there must be a good faith attempt to meet the state's requirements. That was not done here. In the present posture of the case it might be premature to decide the constitutional questions involved. It would be better to allow the state to authoritatively interpret the statute first. Spector Motor Co v. McLaughlin. The FPC while urging that the state statute is invalid feels that this case would be an inappropriate one in which to decide the question, since petit. had not exhausted its state administrative and judicial remedies.

It must be remembered however that all this takes time. Petit. applied for the license in 1941. It is now 1946; by the time petit. applies to the state ex. and is refused and applies anew to the FPC it will be 1949. Such delay is an evil to be avoided if possible. It might be better to decide the issue of statutory interpretation or constitutionality now. The state is is clearly invalid unless saved by §9(b). It would appear unlikely that congress by that section intended to authorize so extensive a control of the federal domain as as is involved in the Iowa Statute.

GRANT(?) EGW Op. n. 54

No. 605 1945 Term
Jacob Siegel Co. v. FTC
Cert. 3 Cir.
Juris. R. 656. Cert. timely: Rehearing denied Sept. 20, cert. filed Nov. 15, 1945.

Petitioner is an overcoat manufacturer using the trade mark "Alpacuna". The mark was derived from the fact that petit. uses a large proportion of alpaca wool in its coaxts. The FTC contending that the trademark was deceptive and misleading because it imported that the coats contained fiber of the vicuna commenced the present proceeding. The evidence showed that most consumers had never heard of the vicuna fabric; that a coat made out of it cost about $900 whereas petit's coats cost $40; the Vicuna comes from Chile; is very rare and in order to obtain the wool the animal must be killed. There were however some experts such as buyers for department stores etc. who testified that Alpacuna meant to them that the fabric contained vicuna fiber. There was little or no evidence of actual confusion. Petit. is a nationally known manufacturer of overcoats and has used the trademark for over 15 years. The most that can be said of the record is that there is some slight evidence supporting the FTC's position that the trademark is misleading to the consumer.

However, the FTC ordered petit. to completely discontinue the use of its trademark "Alpacuna", one which has great value and has been widely advertised. I may say parenthetically that I have never heard of the vicuna and when I bought one of these coats several years ago I was not misled.

The CCA affirmed and enforced the order; it pointed out the injustice of compelling the complete discontinuance of the use of the trademark, in view of the fact that a slight modification of the order was all that needed to correct any possible deception: the mark could be changed to read that the coats contained no vicuna. The ct held however that it had no power to so modify the order.

I think this case is a perfect example of irresponsible administrative action. Here the deception is slight if any. Petit. does not argue that there was not some evidence to support the finding of deception. It does argue that the order is far too broad in its nature and goes beyond anything needed to correct the alleged deceptive practice. It suggests that all that is needed is for the mark to state that the coat contains no vicuna. Under Federal law all garments must have a label bearing the fiber content of the garment. The label petit. uses clearly shows that no vicuna is used in its manufacturer. There is not the slightest possibility of deception if the mark is corrected and the garment so labeled. Most of the other law clerks feel the way I do about this case. Here a valuable piece of business property

is completely destroyed without justification therefore. Cts frequently modify administrative orders. The May case is one which supports a modification; also the Ex press case. FTC orders have been modified because too broad and too sweeping in requiring the elimination of part of a trademark in FTC v. Royal Milling Co. 288 US 212. Petit. relies on that case. There Royal merely mixed blends of flour which it purchased already ground. It was not a milling company in the true sense. The FTC order required Royal to discontinue the use of the word Milling in its name. This ct. modified the order by eliminating that requirement. In its place this ct required that the company state it did not mill flour.

In Parke, Austin & Lipscombe v. FTC No. 392 1944 Term in which cert was denied the FTC required the elination of "Smithsonian Institution" from the name of a bookselling company. Salesmen led people to believe the Smithsonian Institute put out the books. The name is inherently deceptive and a mere corrective statement is probably not sufficient. But that is far from the situation in the present case. Alpacuna is not inherently deceptive. The eixidence shows that practically no ordinary consumer ever heard of a vicuna. A corective statement on the mark is all that is needed.

GRANT EGW Op. R. 891

R

No. 625 1945 Term
Hust v. Moore-McCormack Lines, Inc.
Cert. Sup. Ct. Oregon
Juris. R. 5,7. Cert. timely: Time for filing extended to Nov. 28, cert. filed Nov. 26, 1945.

Petit., a seaman sued his alleged employer for negligent injuries under the Jones Act. The issue is one of law, whether resp. is the employer. The injury occurred while the ship was at sea. Petit. fell into an unlighted unguarded hatch. The ship was owned by the War Shipping Adm. and operated by resp. under an Agency Agreement. The agreement that resp. should be an agent of the US to manage and conduct the business of the vessels assigned to it for the US and under the latter's direction. It agreed to maintain the vessels in such trade as the US directs, equip, victual and maintain the vessels under US direction; §3A(d) of the agreement provided that the resp. shall procure the Master of the vessel subject to US approval; that the master was to be an agent and employee of the US who was to engage officers and men procured for that purpose by resp.; the officers and members of the crew were subject solely to the orders of the Master. The US under the agreement was to pay the crew and insure against all risks, saving resp. harmless, including claims for injuries to persons. Previously resp. had a contract with the Union, which however by later declaration of policy recognized the US as the new employer.

Public L. 17 provides that members of the crew employed on US ships as employees of the War Shipping Adm. shall 2) as to death, injuries, illness etc have all the rights under the law applicable to citizens of the US employed as seamen on privately owned and operated US vessels.

A verdict was won by petit. which was reversed on appeal on the ground that the US and not resp. was the employer of petit; hence no action lies under the Jones Act.

The question involves the interpretation of the agreement and the statute. §3A(d) expressly makes the Master the employee of the US. It is he alone who actually hires the crew and gives them orders. Since he is an employee of the US and the chain of command runs from him it would tend to show that the petit. as a crewmember was subject only to orders of the US and that the US was his employer. This is born out by the fact that the US paid petit. On the other hand the agreement gives resp. as agent considerable power of management of the business of the vessel, but such power does not extend to the control of the crew. That is the sole function of the master. Public law 17 is relied on by petit. as whowing that he was given his ordinary private rights. That is true, but his remedy

as provided by the statute is against the US. The suits In Admiralty Act is made applicable. No such statute would be needed if the general agent were liable. The provision in the agreement whereby the US agrees to insure all risks and makes good all claims for injury points the same way. Thus the statute merely permits a suit under the Jones Act against the US. The legislative history of the Act bears this out.

Petit. relies on certain evidentiary items such as the fact that the withholding tax receipt bore the name of resp., not the US; also the ~~xxxpay~~ fact that his pay was received in envelopes bearing the name of resp. But these mean very little in the face of the above. IRC 1621 states that those employed by the WSA are employees of the US; that section deals with the withholding tax.

Petit. relies on Brady v. Roosevelt SS Co. 317 US 575. There a customs inspector was ~~injured~~ killed while boarding a vessel owned by the US and managed by an agent. He brought suit in Admiralty against the agent. The agent relied on the fact that under the Suits in Admiralty Act suit could have been brought agaist the US as conferring immunity on it. The ct found that the tort was an independent one of the agent for which the US would not have to exonerate him. It held that the agent was liable for the death. But that cases does not control this. That case did not deal with the question of whether an agent was an employer under the Jones Act and the contract of agency in that case did not have a clause like §3A(d). Here the tort was not that of the resp. It was the result of the fact that a bulb had burned out in the hatch and not been replaced, and that no guard chain was up. These nonfeasances took place while the vessel was at sea and under the control of the master who was an employee of the US. Resp. had no control of this, since the ship was in good shape when it left port.

Because of the novelty and importance of the question I think cert. should be granted although the result is correct.

GRANT EGW Op. R. 13

No. 627 1945 Term
Hall v. US & ICC
Appeal DC Ala.
Juris. SJ 1-2; Appeal timely: SJ 2.

This is an appeal under the Emergency Deficiencies act from the action of the DC which refused to enjoin an order of the ICC, granting in part a certificate of public convenience to a trucking firm under the grandfather clause. This ct reviewed ~~xxxxx~~ aspects of this case in Howard Hall Co v US 315 US 495. Appellant sought a certificate as an irregular route carrier over a wide range of territory in the south and northeast as well as within a 100 miles of Birmingham. In the Hall case this ct. sustained the geographical limitations in the certificate found by the ICC to be proper, but reversed as to the commodity restrictions because of a lack of basic findings of fact.

The ICC on remand held a hearing de novo. It limited the radial base operations to 65 miles of Birmingham whereas in the first order it had limited them to 10 miles. This latter limitation was sustained by this ct. The ICC denied appellant the right too to operate ~~xx~~ between the radial base and points and places in the northeast such as New York state (except for the city) Ohio, Indiana, Ky, La.etc.

The grandfather clause requires truckers to have maintained bona fide operations ~~x~~ within the territry on June 1, 1935, and thereafter.

The DC dismissed the bill.

There is no substantial question raised by this appeal. The question of whether petit. qualified for the particular territory claimed under the grandfather application is a matter of fact under the circumstances of this case. With respect to findings of ~~xxxx~~ fact and inferences therefrom the ICC action is not subject to review. This ct in the Hall case approved a much stricter limitation geogrphically than the ICC made in its new order on the application. The Hall case stated that the precise geographical pattern for future operations is a product of an expert judgment based on evidence as to prior operations, etc.(p. 489).

Furthermore it is at least arguable that the question of geographical scope of operations is now res judicata in view of the Hall decision. In any event no substantial question is raised by this case.

AFFIRM EGW Op. SJ 5

No. 630 1945 Term
~~Causby~~ US v Causby
Cert. Ct Claims
Juris. R. 1. Cert. timely Judgment final Oct. 1, cert. filed Nov. 29, 1945.

This action was brought by resp. in the ct of claims for a taking of their land. Petit. leased the Greensboro NC airport in 1942 for one year with a right to renew to 1967 or six months after the national emergency whichever should first occur. Resps. owned a parcel of land on which they lived and ran a chicken raising business, which was 2,200 feet from the airport. Bombners flew over their house constantly sometimes touching the tips of the trees, and ~~xxxx~~ usually at an altitude of 83 feet. The bombers interfered with their sleep and frightened the chickens so badly, causing the death of many, that they had to go out of the chicken business. The evidence tended to show they ~~xxxxx~~ place became uninhabitable but that they continued to live there because there was no place else to go and they had no money. In addition there were a number of crashes on the ~~fiix~~ airport near their home and they were in constxant fear of sudden death.

They sued for a permentnt taking of the fee. The ct, Madden dissenting, held that there was a permenent taking of an easement by petit. and gave $2000 damages or half the value of the fee.

The petit. contends that there was not such a taking that would justify recovery under the Tucker Act; rather it is contended that there was a nuisance, a tort, for which the gov't is not liable to suit. The ct below recognized that there is no aboslute ownership of all the airspace above land. It took the modemn view that only the airppace to protect the right to air, light view or safe and peaceful occupation and enjoyment of the land is capable of ownership. The ct found that the heavy bombems which flew over the land 18 feet above the trees trespassed continually on the land, and that this was evidence of a taking, relying on the Portmouth Habor Co case, 250 US 1 which held that the use of anther's land by the gov't to fire cannon over at will was a taking.

Madden's view that the above facts are merely the result of modern advances in civilization seems to me unaccpptable. Of course with certain things everyone must

put up. But the price of advances should not be shifted to a few in society who are least able to bear them. The evidence shows that the land was wholly worthless for the purposes for which it was used. It is not merely consequential damages that are involved here but a direct and unmistable taking of the land.

There are generally two theories of the nature of rights in airspace. One is that it is a property right, not all the way up, but at least so far as potential use and enjoyment is concerned; the other is that there are no rights other than the right to be free of nuisance. The former is widely accepted. If the facts here merely show a nuisance, the ct of laims has no jurisdiction. But we have more than a nuisance here. We have a definite adverse used of the airspace above the farm and this indicates a taking.

It appears that there is a conflict in principle with the Hinman case 84 F2 755 which held as an original question of Cal. law that there could be no ownership of nor an easement acquired in airspace just above the groundx. Here presumably the law involved is that of NC or federal law. The Hinman case was not against the US but against private airlines. While I think it distinguisable, it would be best for this ct to consider the question, and settle it. It would be persuasive in state cts and binding in federal cts where federal action is involved.

I think the ct was probably wrong in giving damages for a permenent taking, since the lease was not indefinite in duration, but would terminate at the end of the war. But the ct does point out that the US would proably make some permenent arrangement to use the field even after the war.

GRANT EGW Op. R. 11

No. 636 1945 Term
Winters v. People of NY
Appeal Ct Special Session, NYC

Juris. SJ 2. Appeal timely: SJ 2.

Appellant, a bookseller who sold copies of a magazine called "Headquarters Dectective, True Cases from the Police Blotter" was convicted for selling such magazines under the following statute:

"A person..Who..

2. Prints, utters, publishes, sells, lends, gives away distributes or shows or has in his possession with intent to sell, lend, give away, distribute or show or otherwise offers for sale, loan, gift, or distribution, any book, phamplet, magazine,newspaper, or other printed paper devoted to the publication and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime...Is guilty of a misdemeanor. The statute was enacted in 1884 and this is the first prosecution under it.

The magazines in question are made of of deeds of crime and bloodshed luridly presented. No issue was raised as to whether they are true or not, as they purport to be.

Petit. duly claimed that the statute violated the 14th amendment in that the statute is too vague and indefinite in defining the prohibited acts, and also that it violates freedom of the press.

The conviction was sustained in 3 cts below, the ct of appeals holding that the act which is part of the NY law of indecency is valid; the ct held that the statute did not establish a personal taste standard, uncertain, indefinite and ex post facto in its practical operation; it held that public morals vary with the tastes of the community; it also said it was no violation of freedom of the press.

I am troubled by this statute. Petit. urged that the statute literally tre ted makes no distinction between truth, fiction and statistics provided they consist of criminal news, police reports or accounts of criminal deeds. Thus it appears literally to apply to detective stories, all detective magazines, sociological treatises on crime, cases books on crime, any newspaper devoted principally to reporting crime; "deeds of bloodshed" would seem to bar much war news, such as the attrocity stories in Germany and Japan. To dismiss such intention on the part of the legislature as absurb is no answer to the plain meaning of the statute. The statute enacted in 1884 could not have been aimed at the distorted glorification of crime and criminals of some publications, publications which might tend to incite to crime. The statute is not so limited in its terms, nor has the ct so limited it.

Even if the magazines in question in this case are of the type that most clearly come wit in the statute, consisting of such stories as "Bargains in Bodies, Girl Slave to Love Cult etc it seems to me that petit. has a right to argue that the statute is invalid on its face, since it much broader in its application that the legislature has a right to make it constitutionally; it does not make the test a tendency to incite to crime. It prohibits everything true, or fiction, good or bad so long as it mainly deals with crime. Thus a magazine dealing with the illegal activites of public officials--taking bribes, corruption etc would equally fall under the ban, even though the public had a right to know the facts involved. It is no answer to the invalidity of such a statute to say that the legislature might have drawn a valid statute more limited in its operations and scope.

Here as in Thornhill v. Ala. 310 US 88 the statute may be treated as invalid on its face. The charge was general as was the finding. The braod terms of the statute limited in some undefined way to a sensible rather than an Absurb interpretation creates an arbitrary weapon in the hands of the police against publishers; it creates a risk of w type which should not apply to the press.

It seems to me that the statute is too vague and uncertain in its operation if not taken literally, and if taken literally it is an unconstitutional limitation of the freedom of the press.

Note Pob. Juris. EGW Op. SJ 11

No. 675 1945 Term
Bihn v. US
Cert. 2 Cir.
Juris. R. 4. Cert. timely: Judgment entered Nov. 15, cert. filed Dec. 17, 1945.

Petit. and another were indicted for conspiracy to violate the 2nd War powers Act and regulations thereunder by unlawfully acquiring, possessing and transferring gasoline ration coupons. Petit. worked in a bank where her duties were largely concerned with rationing and bookkeeping therefor. She received the coupons deposits, placed them in a file. Other employees had access to the file. She would every 2 weeks put the coupons in a box and forward them to the OPA. She did not count the amount in the box but compiled the figures from the deposit sheets. One such box sent to the OPA was found to be short a large number of coupons.

Petit. lived in the same house with defendant Bennett. The facts show that she brought him a large number of cupons from time to time to sell. Bennett later married and moved. Petit. went to his house and there was a quarfel during which she made an incriminating admission.

During the charge to the jury the trial judge (Moscowitz) said: "Who would have a motive to steal them [the stamps]? Did she take those stamps? ...Did she steal them? Who did if she didn't? You are to decide that." He gave the usual conspiracy charges and the charges on burden of proof in a criminal case. Petit. objected to the part of the charge noted above, saying that it is not part of the jury's duty. [R. 21-22]. The court did not understand the exception and made some irrelevant answer, to which petit. responded "That is not the point of my exception, your Honor." No more was said about the point in the trial ct.

The CCA affirmed, Frank J. dissenting, partly on the ground that petit's counsel did not press the nature of his exception, so that the trial judge was made aware of it, and that the ct actually meant by the charge, not that the jury had to find out who actually stole the coupons, but to decide whether she or someone else stole them and to consider that in determining whether she was guilty of the conspiracy.

Petit. argues that the charge in effect put the burden of proving who committed the theft on petit. and that to put the burden of proving her innocence on the accused is contrary to law. The CCA admitted that if this is the interpretation to be given the charge the DC was in errer, since the burden is wholly on the resp. While these I think the CCA's interpretation is a fair one, namely that the jury must find wether petit. or another stole the the coupons, but it need not find who in fact stold them in order to acquit the accused. The fact, however, that the

the charge was quite ambiguous and may have misled the jury might be sufficient reason for review here under the Bollenbach case. Frank's dissent was based on ~~the~~ his usual aversion to the 2nd circuit's harmless error doctrine.

One defense of petit. was that others had equal access to the loose coupons while they were in the bank; all she need ~~to~~ do to raise a reasonable doubt as to her guilt was to stress that fact sufficiently, but if the jury had to determine who in fact stold them petit's defense would be deprived of all weight since she would have to show who inf fact did steal them. The evidence in the record is more than sufficient to justify the verdict. I think the case is probably wrong under the Bollenbach deicsion.

GRANT(?) ECW Op. R. 33

Nos. 696-97 1945 Term
US v. Holpuch Co.
Cert. Ct. Claims
Juris. R. 1. Cert. timelY: New trial denied Oct. 1, cert. filed Dec. 27, 1945.

Resp., a contracting company, entered 2 contracts in 1933 to build officers quarters at Fort Sam Houston Texas. ARTicée 3 of the specifications directed resp. to excavate for footings down to the depth and levels shown on the drawings. Authorized increase or decrease in the amount of excavation was to be paid for or credited to the US as per amount mentioned for excavating under Unit prices of bid. Article 4 of the specifications said for estimating purposes the depth of the foundations is 37' 6". The ct found, however, that the drawings showed the depth as 33 feet and that it was on this basis that resp. made its bid. Excavations were less than 37 ft 6 inches and the gov't withheld the proportionate difference in the contract price. Article 15 of the contract provides that all disputes except labor disputes, concerning questions arising under this contract shall be decided by the contracting officer subject to administrative appeal. Article 2 provided that in the case of a difference between the drawings and specifications the latter govern.

The contract also provided that skilled labor was to receive $1 per hour and that in the event the prevailing hourly rates prescribed in collective on April 30, 1933 is higher that shall govern. The minimum rates shall be subject to change by the Fed. Emer. Admin on recommendation of the Board of Labor Review, and if the FEA establishew different rates the contract price shall be adjusted accordingly. The Board of Labor Review was given control of labor issues arising under the contract. In 1934 the Board held that bricklayers were entitled to $1.25 in connection with another nearby project. Resp. was told by the constructing quartermaster that it was to pay the same; resp. protested and said it expected to be reemburded. No appeal to the Board was taken.

Resp. sued to obtain the amounts withheld for the excavation and for the increased labor costs.

The ct held that as to the first Article 15 didn't govern since it was not a dispute as to what work the contract and its specification required, but merely one as to how the contract price is to be computed; on the second it held that no appeal was necessary since the contract provided an automatice price increase to cover increased labor costs.

1. As to the withholding of the excavating monies it seems to me that the question is hardly important enough to justify a grant, whether the ct was right or wrong. The contract and specifications were manifestly inconsistent.

The resp. was reasonably misled into believing that it could base its bid on the 33 foot depth. The ct. of claims points out that the question is one merely of how the contract price is to be computed. The contract on its face states that it is to be paid by the Army Finance officer. His was the responsibility and the contract did not provide that his decision was to be final; Article 15 did provide that the contracting officer's decision was to settle disputes subject to administrative appeal. But apparantly the latter officer had no binding authority to determine how the contract price was to be computed, since that was the finance officer's job. Thus article 15, as the ct found, does not preclude the suit on this issue. It seems to me that the ct of claims which deals mainly with gov't contracts should be given some area of finality similar to Dobson as to the construction of routine gov't contracts. Certainly the construction here made is reasonable and permissable. As to the superiority of the specifications to the drawings the answer is that the contract provided that excavation was to be made in accordance with the drawings. Resp. bid on that basis. Here thus the contract itself and not only the drawings were inconsistent with the specifications. Article 2 is not controlling in such situation.

2. Labor costs were increased because of the Labor Board of Review's action with respect to a nearby project. Resp. was told by the contracting officer to pay the higher rate and it did so under protest and stated that it expected to be reembursed. It is true that the FEA did not directly require the insrease, but appeal to the Board would have been futile and not particularly to the resp's interest, since that Board had ordered the instant increase. Thus the gov't is in the position of being generous to labor at the expense of resp. The contract also provided that the prevailing rates under labor contracts shall be the minimum rates. Since they were raised petit. was authomatically entitled to the increased cost. Petit. did not have to appeal the question to the contracting officer, since it was entitled to reembursement under the contract--Article 18 (c).

DENY EGW Op. R. 43
696

No. 700 1945 Term
Harris v. US
Cert. 10 Cir.
Juris. R. 1. Cert. timely: Rehearing denied Nov. 28, cert. filed Dec. 28, 1945.

This case involves another aspect of the unlawful search and seizure problem dealt with in Davis V. US, No. 404 and Zap v US No. 489 this term.

Two warrants were issued for petit's arrest, one on the basis of using the mails to defraud and the other for causing a forged check to be transported in interstate commeree. With these two warrants two FBI agents went to petit's apartment and arrested him. 3 more FBI agents then arrived. They proceded methodically to search thw whole apartment from top to bottom for a period of five hours in the presence of petit. who was handcuffed. The mem stated that they were seeking to discover any means that might have been used to committ these two crimes, burglars tools, pens etc, especially two $10,000 checks which were cancelled, which had been stolen from the offices of an oil company. In the course of the search the agents opened a bureau drawer in the bedroom and under some clothes found an evelope marked, with petit's name--"personal papers". This was opened and therein were contained eleven Registration Certificates for the Selective Service and eight incorrectly stamped Notice of Classification cards.

The possession fo these cards formed the basis of the indictment for which petit. was convicted on 16 counts. The crimes for which the arrest warrants were issued are not here involved.

Petit. duly made a motion to suppress the introduction of the cards or evidence relating to them at the trial. The motion was overruled and petit. was convicted.

The CCA affirmed, held the evidence was not unlawfully obtained and was properly admitted.

Under Gouled v. US, 255 US 298, 311-12 the evidence if properly obtained in connection with one crime may be used in a trial for a different offense than that named in the warrant. Thus we must turn to the cases to determine whether the search and seizure in the present case were lawful under the 4th amendment.

It seems well established that in the course of a lawful arrest some incidental searching and seizing may properly be done. But that is the extent of the clarity of the law on the point. Thereafter all is confusion. The Davis case which was argued today illustrates the uncertainties. In Marron v. US 275 US 192 the Court held that books which were discovered in a closet in the saloon while the agents were looking for liquor described

in the search warrant wase properly seized in the course of a proper search for things used to carry on the crime which was being committed in the presence of the officers. The court stated they were under the petit's immediate presence and control; it also said officers could search all parts of the premises used for the unlawful purpose.

In the Lefkowitz case, 285 US 452 the Court held unlawful a general search of an office for evidence of a crime charged in the warrant of arrest which conemned the use of the presmise for taking orders for liquor. The court cut down the broad language of the Marron case, stating that the books were visible in the Mar on case. Of course they were in a closet. The court stated that there may be no general searches for evidence of crime, even with a search warrant. The GoBart case is similar, 282 US 344, and also held that general searches are unconstitutional. There there was no valid arrest, nn no search warrant, and no crime was being committed.

Petit. contends that as an incident of arrest officers could only search the person of petit. and whatever is found in his immediate control. Here the draft papers were found hidden away in a sealed envelope in a drawer in the bedroom after a long search. As in the Davis case, xxxx where the possession of the coupons was the crime charged, so here the possession of the stolen draft cards, and their altered or counterfeited appearance was the crime. The FBI didn't remotely suspect such a crime; however, the very possession of these cards was not merely evidence of a crime, but the very crime itself, or at the very least the instruments of the crime. It is hard for me to see how petit. could gain immunity from his offense because the constable may have erred in uncovering this crime. However, I think that this is probably the purport of the Lefkowitz and Go-Bart cases. It would seem that the proper test is that if petit. is lawfully arrested in his home, that home may be searched for the instruments of the crime charged in the arrest warrant, and if in the course of that search the instruments of a crime till then unknown are found they may be properly seized and used in evidence. Suppose the body of a murdered FBI man were found under the bed, could it be contended that petit. could go unpunished because the fact of the discovery could not be used against him? The case is important however; the law is far from clear; hence cert should be granted or at least held until the Davis and Zap cases are decided.

GRANT OR HOLD FOR NOS. 404 & 489 EGW

Op. R. 145

Jackson 96 US 727 - sealed letter.

Lawson - search & seizure

No. 704 1945 Term
Morgan v. Va.
Appeal Sup Ct. Va.
Juris. SJ 2-4. Appeal timely: SJ 4.

Virginia has a statute applicable to all motor vehicles, including buses requiring segregation between negro and white passengers. Equal accomodations are to be provided for each. A duty is put upon the carriers to enforce this law by designating the seats to be taken by members of each race, and the driver is given the right to arrest passengers who refuse to comply with the seating arraggements. Appellant, a negro, bought a thru ticket from Norfolk, Va. to Baltimore via Washington. SHe had taken a seat toward the fwont of the Greyhound bus, which was making a through trip, and was requested by the driver to more to the rear where there were vacant seats so that white passengers who were standing could sit.

She refused to do so, and was arrested on a warrant procured by the driver. The violation of the segrexgation law was a misdemeanor. Appellant duly raised the question that the statute was unconstitutional as a burden on interstate commerce. She was convicted and fined.

The ct below upheld the statute and affirmed the conviction.

The question of whether the application of segregation laws to interstate passengers burdens unduly interst te commerce is an open one, so far as I can see. Of course the statute is not a violation of the 14th amendment, since it expressly provides that the facilities be equal. But the question remains whether there is something in the commerce clause which precludes states from enforcing segregation laws against interstate passengers or interstate vehicles. Some state cts have held that ~~xxx~~ such a statute is invalid as applied. SJ 23. The leading case in this ct is Hall v. DeCuir 95, US 485. There La. had a statute forbidding segregation. DeCuir was a negro passenger on Hall's interstate ship on the Miss. Hall had a rule enforcing segregation on his boat and refused to assign her a cabin reserved for whites in La. She sued for damages. Hall claimed the statute f was an unconstitutional burden on commerce and the Ct agreed. In our case the tables are turned. The state requires segregation, the carrier obeys that command but the passenger refuses to do so. Just what the answer is I am not sure.

It conceivably might be held that while the statute was a regulation of commerce it was not forbidden by the commerce clause itself unless congress acts, which it has failed to do. On the other hand the Hall case would be against that conclusion. True here the statute

did not interfere with a rule of the carrierss, but I don't think that affects the case.

As the ct below points out to have a non segregation rule applied to interst te passengers and a different one to intrastate passengers would cause such confusion as to prevent the enforcement of the statute. I can't get too upset about that, but it would seem to me to be better to say that the statute cannot apply constitutionally to interstate vehicles, rather than individual passengers.

Whether there is something in the commerce cl. itself that forbids segregation is not clear. In the Negro firemen cases last term, the Steele case etc. the ct said there was a serious constitutional question if the congressional act be construed so as to permit a ~~pass~~ a statutory bargaining agent to discriminate against negroes. That case arose under the commerce power of Congress.

In S. Pac. v. Arizona last term the Hall case was cited with approval with the statement that the commerce clause has been held to invalidate local police power laws regulating segregation of negro and white passengers. Certainly a cumulation of these laws in each state of the south, each with different requirements would constitute a burden on the carrier which might be found to interfere with interstate commerce .

Note Prob. Juris. EGW Op. SJ 17

No. 707 1945 Term
Prudential Insur. Co v. Benjamin
Appeal S Ct. S. C.
Juris. SJ 3-4. Appeal timely: SJ 4.

This appeal raises a problem very important to the understanding of the Federal system.

Appellant is a nation-wide insurance co. and as such is engaged in interstate commerce. It sells a large amount of insurance in S. C. The insurance commissioner of that state refused to license it to do business in the year 1945-46 unless it paid the state tax here in question. SC levies a tax of 3% of the premiums received from within the state on every foreign insurance company. There is no like tax on domestic insurance companies. Contending that the tax constituted an unconstitutional discrimination against interstate companies appellant brought this suit to enjoin collection of the tax.

The McCarran Act passed in Feb. 1945 provides that the silence of Congress shall not be construed to impose any barrier to taxation of the insurance business by the states. The business of insurance was to be subject to state taxation laws.

The Ct below relying largely on the McCarran Act held that tax valid.

This case of course arises as a result of the Southeastern Underwriters Case. There can be no question that appellant was engaged in interstate commerce or that the state tax discriminates against foreign companies doing business in interstate commerce in favor of domestic companies. The tax if applied to any interstate business but insurance would clearly be invalid as a discrimination against interstate commerce. Welton v. Mo, Robbins v. Shelby County. If a different rule is to be applied to interstate insurance it is only because Congress has the power to and has authorized discriminatory state taxation.

In the past Congress by its express consent has authorized states to enact legislation which would otherwise be invalid as a burden on commerce. This has been especially true of the liquor question. Compare Leisy v. Hardin 135 US 100 with In re Rahrer, 140 US 545. These cases caused some reexamination of old doctrine. Since Cooley v. Board it had been mooted whether it was the commerce clause itself which forbad states from making laws interfering with that aspect of commerce which required nation-wide rules, or whether the Cooley formula was just a means of interpreting the silence of Congress. After the Rahrer case it could not be the commerce clause itself, for Congress could not delegate its commerce power to the states. Thus one commentator, T. R. Powell concluded that the states have concurrent power over interstate commerce

with the proviso that the state may not exercise that power over subjects requiring a uniform rule in the absence of Congressional consent. See 56 Harv. L Rev. 507. On his view nothing in the commerce clause itself precludes any state statute affecting or discriminating against commerce so long as congress consents. Another view is that the commerce clause was one of the main reasons leading to the union and that in and of itself it strikes down state statutes discriminating against ~~xxxx~~ interstate commerce or unduly burdening it. Apparantly this ct has leaned in favor of the view, that within limits, the commerce clause itself has little effect, but that congressional action thereunder is supreme. or silence

In dealing with the McCarran act the first question is whether it intended to authorize in so far as it constitutionally could, discriminatory state taxation. True the statute could be construed so as not doing so. But I don't think such a view is realistic, since statutes of the type in question are very common. See SJ p. 8 n. 1. Many states which had such statutes have repealed them recognizing their invalidity under the Southeastern decision. SJ 11 n. ~~xx~~ 3. Congress must have been aware of this situation in passing the Act and must have meant to permit it.

Assuming that the Act is construed to permit discriminatory state taxation the question is whether Congress has constitutional power to do so. ~~xxxxxxxx~~ The question has been dealt with in a note in Nov. 1945 Col. L. Rev. 927 which is included with this memo. The writer comes to the conclusion that under the theory above outlined congress could permit discriminatory state taxation of foreign insurance companies. Since because of the Act, as construed we can't rely on the silence of congress to strike down the state law under the Commerce clause some other reason must be found. The ~~xxx~~ one that seems most compelling to me is that the commerce clause itself has some force which Congress cannot deprive it of~~f~~ by any legislation, namely that taxes or other legislation which discriminates, as distinguished from merely burdening commence cannot be validly enacted because they are barred by the clause itself. That clause is basic to the very existence of the Federal system and was a main motive in its creation. To say that Congress by its own say so can withdraw the protection of the clause is to destroy the very premise of that union. There are dicta in support of this position. S C Highway Dept. v Barnwell Bros. 303 US 177, 187. I think this position is sound and should be accepted by the ct. The McCarran Act should be held ineffective insofar as it authorizes discriminatory state taxation.

Note prob. juris. EGW Op. SJ 14

See 41 HLR 200

No. 719 1945 Term
Pinkerton & Pinkerton v. US
Cert. 5 Cir.
Juris. R. 2. Cert. timely: Rehearing denied Dec. 1, cert. filed Jan. 4, 1946.

Petits. were indicted on 10 substantive counts and one conspiracy count of violating the revenue laws by unlawfully possessing, removing, concealing etc. liquor on which the tax had not been paid. The petits. are brothers and live on adjoining farms both of which are owned by Daniel. There was evidence of frequent associati n, and ample evidence that there were dealings in liguor. The only substantive counts of the indictment in which Daniel was charged with a crime were withdrawn by the DC from the jury. The conspiracy count however included ~~xxxxx~~ ~~xx~~ as overt acts most of the offenees charged in the substantive counts.

The DC charged that if the jury find that the defendants were engaged in a conspiracy then they could convict also on the substantive counts provided the acts referred to in the substantive counts were acts in furtherance of the conspiracy.

The petits. were sentenced to two years on the conspiracy count and to 30 months on the substantive counts, concurrently.

The CCA affirmed.

1. Petits. argue that the effect of the charge ~~xxx~~ ~~xx~~ and the CCA's opinion was to make conspiracy counts out of the substantive counts, and since there was only one continuing conspiracy, petits. urge the sentence should not exceed two years, the maximum for such an offense. But here substantive offenses in addition to the conspiracy were charged. Petits. could be convicted on both. This is not like the situation where a single conspiracy is chopped into bits and made into separate counts in an indictment. Cf Braverman v. US 317 US 49. There is no ~~xx~~ merger of the ~~xxx~~ substantive counts into the conspiracy count

2. The second contention is more difficult. Daniel was charged with substantive offenses only in the counts which were dismissed as to him. The only way he could be convicted on the other substatnive counts in which there was no evidence relating to him would be to prove that he was a participant in the conspiracy, and that as such, by reason of agency he became guilty in the substantive counts by reason of the acts done by the other conspirators as to whom there was proof that they committed the acts charged in the substantive counts. This was the theory that the DC used in charging the jury. The Resp. does not oppose cert. as to Daniel because it has doubts whether the mere fact that he was a member of

the conspiracy is sufficient to justify convicting him on substantive counts in which there is no evidence that he participated. It would seem that the charge of the DC amounts to lifting onesself by his bootstraps. You have an indictment charging substantive offenses and a conspiracy by X and Y. There is ample proof of the conspiracy count; but no evidence that Y did the acts charged in the substantive counts, but only evidence that X did. Can Y be convicted on the substantive counts because he was a member of the conspiracy and because X committed the offenses charged in the substantive counts. I doubt this. It seems to me direct proof that Y committed that substatntive offenses charged is necessary. Otherwise Y is subject to greater jeopardy than is warranted by the conspiracy count alone on proof merely of conspiracy as to him. It seems, as the gov't points out, that there is a conflict on this point with US v. Sall 116 F2 747 rc. Cert. should be granted as to Daniel. There is ample direct evidence as to the other brother. While Daniel might be treated as an aider & abettor, this theory was not us

Nos. 749-750 1945 Term
People of Ill. v. US
People of Ill. v. Campbell, Collector
Cert. Sup. Ct. Ill.
Juris. R. 5, 14 respectively. Cert. timely: Time to file extended to Jan 16, cert. filed Jan. 15, 1946.

The facts of these two cases while similar will be set out separately; both deal with the relative priorities of Ill. and the US for Social Security taxes.

No. 749. In Jan 1939 the Advertising Review Publ. Co. made a general assignment of its assets in trust for creditors. The Assets were reduced to cash. The Collector filed claims with the trustee for $58 in capital stock taxes, over $1000 for Fed. Insurance Contributions Taxes and a similar amount for federal unemployment taxes, all of which accrued prior to the assxiggment. The Director of the Ill. Labor Dept. also filed claims for unemployment compensation contributions due under the state tax.

The trustee brought interpleader in the state ct. Under Ill. statute a lien on the assets for the state unemployment tax is provided. A notice of lien was filed. The funds assets which were insufficient to meet the federal claim wer held by the state ct. The lower ct. hald for petit. awarding it priority. The Sup. Ct. reversed, holding the US was entitled to priority.

No. 750. Here again the state Director sought to foreclose a lien for Ill unemployment taxes of an insolvent state company, the Chicago Waste & Textile Co. Notice of lien was filed. A receiver was appointed. The US presented a claim of $1,400 for employment insur. taxes and $522 for fed. insurance contributions taxes plus interest. The assets were $677. The Fed. Unemployment tax act permits a 90% credit for state taxes paid within a certain time; otherwise the full Fed. tax must be paid. The ct below held that the US was entitled to full priority for the Fed. Insurance Contrib. Tax (old age) but priority for only 10% of the unemployment tax due since 90% was still creditable under the statute.

The Statute the interpretion of which is involved in both cases is RS §3466, set out in #749 p. 25. It provides that when any person indebted to the US is insolvent, the debts due the US shall first be paid. It includes assigments for the benefit of creditors.

The Ct below held that this statute applies to taxes, which it clearly does, and that there was no legislative indication that it was not meant to apply to Federal Social Security taxes. Petit. points out that the Fed. Unemployment Insur. Act is administered mainly by the states, and that the 10% retained by the US is just to cover grants

to the states for administrative expenses. He argue thus that there is no reason for applying the priority provisions of the statute to the state taxes involved here. But the statute clearly covers the claim of the US and no exception was made. Furthermore, the old age tax is wholly federal and nothing is paid over to the states. In 749 the time for obtaining a credit for payment of the state tax has expired. Hence the whole tax is owed the federal gov't, regardless of what it will do with the money received later.

In Rivard v. Bijou Furniture Co 67 R. I. 251 the ct. held on similar facts that the priority statute does not apply to unemployment taxes. The Resp. while recognizing the conflict, urges that it is so erroneous as not to be a basis for certiorari. I am inclined to agree.

Petit. argues too that it obtained a perfected lien on the assets which the US priority need not defeat. But the Ct below held as a matter of state law that the lien was not perfected and could not bar the fed. priority. US v. Waddill Co. 323 US 353 supports this view.

In general the result is supported by US v. NY, 315 US 510, although that case involved priority in bankruptcy rather than priority under the above statute. The tax claims of the state and US were the same.

DENY(?) EGW Op. R. 42 # 750.

No. 754 1945 Term
Sewell & ~~Smith~~ Sewell v. Commissioner
Cert. 5 Cir.
Juris. R. 9. Cert. timely: Judgment entered Nov. 9, cert. filed Jan. 16, 1946.

Petitioners are two of three brothers who owned almost all the stock in a manufacturing company. In 1935-36 the petits. decided to give a good part of their stock to their wives. Accordingly, the stock was so registered on the books of the company. A gift tax was paid. The resp. now seeks to tax to petits. the dividends received on the stock by the wives in 1935-37 on the ground that no valid gift was made, since the petits. retained control and dominion of the stock.

The issue was tried before the Tax Ct which made careful findings of fact to the effect that the dividends were taxable to petits. because non bona fide and final gift had been made. The judgment of the Tax Ct was entered in Oct. 1944. Thereafter a declaratory judgment action was brought by the wives in a Ga. state ct against petit. and the corp. paying the dividends. A decree was entered by that ct in 1945 holding that petits. had made a complete and valid gift to the wives.

Petits. had meanwhile appealed the tax ct decree and after the state ct judgment they moved in the CCA to remand the case to the tax ct for the consideration of the state ct decree so that the Tax Ct could consider its effect.

The CCA affirmed and refused the remand on the ground that the judgment of the state ct as to the ownership of the legal title was not conclusive on the income tax consequences.

Petit. contends that as to ownership the facts found by a state ct are conclusive where the federal act makes the taxability of income depend upon ownership. Petit. relies on on Blair v. Comm. 300 US 5, which said that the questin of validity of assignments is one of local law; also Sharp v. Comm. 303 US 624, where this ct per curiam reversed on the ground a state suit was controlling on whether certain items were part of the trust estate or decedents estate. The question was one of fact. The present case seems clearly in conflict with Helvering v Rhodes Estate, 117 F2 509, despite what resp. says. There a state ct judgment was held conclusive as to whether decedent owned certain stock. This is true of Nashville Trust Co. v. Comm. 136 F2 148 where the question involved the binding effect of a state judgment as to the value of certain personal services.

While the resp. argues that there is no real conflict, it does not oppose cert. since it points out that taxpayers are increasingly using state suits to challenge determinations

of federal tax liability. Clarification is needed.

The issues involved are whether the federal ct may take into consideration the circumstances of the state suit. For example in the present case the state suit was not adversary in any real sense. Apparantly the only motive of going into the state ct was to get a judgment to be used in avoiding income tax liability; The gov't argues, too, that state suits which involve determinations of state law , as distinguished from fact, are binding on federal cts where taxes are concerned, and that here as in the Rhodes and Sharp cases the questions involved were ones of fact. I don't see how the two can be adequately separated. Problems of ownership, for example, involves both questions of fact and law. The state judgment incorporates both. The Blair case itself involved the interpretation of a testamentary instrument. Lastly, the gov't says the taxpayer must also show that Congress intended that the incidence of the tax should be determined by reference to state law. It seems to me that the really relevant issues are whether the suit was adversary in nature, and whether the Act implies reference to state law. The question of whether the state ct judgment involves law or fact is obviously fraught with the greatest difficulty.

Of course cert. could be denied here on the ground that petit. was untimely in its use of the state ct judgment. It was not considered by the tax ct as it came too late. But the CCA didn't go on that ground. Rather it said the state ct judgment isn't binding on tax matters.

The question should be dealt with but I am not sure the present case is the perfect vehicle in which to do it.

GRANT(?) EGW Op. R. 269

No. 769 1945 Term
Queenside Hills Realty Co v. Wilson
Appeal ~~from Ct~~ Ct Appeals NY
Juris. SJ 2-3; Appeal timely: SJ 4.

Appellant ~~Petitx~~ is the owner of a lodging house which was built in 1940 ~~as~~ allegedly modern and fireproof with fire escapes and watchman service. However, it has no sprinkler system.

A statute effective in 1944 provides that lodging houses of non fire-proof construction existing prior to the enactment of this act shall comply with certain conditions including the provision of automatic wet pipe sprinkler systems. Appellant ~~xxxxxx~~ house is subject to this statute which it was contended below denied it due process under the 14th amendment in that it required the outlay of $7,500 without appreciable benefit.

The cts below dismissed ~~petitx~~ the suit brought by ~~petitx~~ appellant to enjoin the enforcement of the act without opinion; the Ct below certified the federal question.

Petit. largely contends that the statute was intended to deal with lodging houses built before 1929 which are of inferior construction and do not comply with the usual ~~xxxx~~ fire prevention precautions. Petit. insists its building is relatively new and not within the evil sought to be corrected by the statute. He further claims that houses built after the date of the statute need not meet its requirements.

There is no merit in this case. The statute is obviously one within the police power of the state-- the protection against the hazards of fire in multiple dwellings. It may put appeallant to some expense in meeting the requirements, but that is the price it must pay for owning a house in a congested city where the threat of fire is a great hazard. As to the alleged improper classification, ~~the~~ it is not clear that later constructed lodging houses need not comply with some statutes other than the one in question which require sprinkler systems. Appellant points to none which have been built since without su ch systems. It would seem ~~xxxxxx~~ unless the classification is arbitrary and capricious the matter is one for the legislature and not for this court.

DISMISS
DENY EGW No Opinion

No. 782 1945 Term
Ballard v. US
Cert. 9 Cir.
Juris. R. 3. Cert. timely: Judgment entered Dec. 26; cert. filed Jan. 28, 1946.

This is another chapter in the case, one issue of which was decided by this ct last term. The Ct held that the truth or falsity of petit's religious beliefs was not a jury question. It thus affirmed the action of the DC in excluding them from the jury and reversed the CCA remanding the case to it to consider the other issues. These other issues are now presented.

1. The indictment sets forth a number of representations as to religious beliefs of the "I am" cult and then charges that the petits "well knew" that they were false. Petits. contends that the indictment is bad since it put in issue the truth or falsity of petit's religious experiences which this ct held may not be done consistent with the First Amendment. But the DC and the CCA interpreted the indictment to mean that the petit's misrepresented their beliefs, their state of mind, in that they falsely represented that they believed these representations as to religious experience.

2. During the course of the prosecutions argument to the jury a number of remarks were made which tended to cast ridicule and reflected the disbelief of the prosecution in the doctrines of the cult, and that they were not to be believed. See. R. 1656, 1657-58. The DC however a number of times indicated that the question of the truth or falsity of the representations of religious experience was not a n issue for the jury. They were told to confine themselves to the evidence and not the remarks of the prosecutor.

3. By rule prevailing in the DCs in Cal. women were excluded from the jury. Objections to this practice were duly raised. Petits. contend that they were deprived of rights under the 5th and 6th amendments for this reason.

The CCA, Denman dissenting, found no error and affirmed the judgments of conviction.

1. Unless the ~~in~~ the indictments here are held good it would seem that the ct has erected a constitutional protection for crack pots and slick confidence men to pray on credulity of the foolish; they become impregnible in both state and federal cts. Here the indictment did not in so many words state that that they mispepresented their belifs in the ~~re~~ representations. It did say they knew that the misrepresentations were false which must mean also that they did not believe the representations. The petits. were not mislead since the DC expressly construed the indictment to mean that they did not believe the representations. Petits. argue that so to construe

amounted to an amendment of it in which the grand jury did not participate. Hence it was bad. But I think the indictment fairly read includes the charge they did not believe the pepresentations, that they misrepresented their state of mind. To wo contrue it did not go beyond the authority of the DC. If as the petits. urge neither the truth of their religious beliefs, nor their sincerity can be called into question in a jury trial we would have the situation where any confidence man could say that the worldd was going to end tomorrow, and people better give their property to him because they wouldn't need it any longer; or he could mail letters to the same effect. Although he mulcted the foolish he could not be prosecuted, even though he never believed the world would end, or as in this case that persons could become visible or invisible at will or precipitate goldd etc from the air. This ct in the last Ballard case never so held and I don't think the First Amendment calls for such a conclusionx.

2. It is claimed that petits. were prejudiced by the remarks of the prosecutor. It is true that he heaped ridicule on much of the alleged beliefs of petits. which is understandable on the facts of the case. He suggested that the representations were unbelievable which is also understandable. It is not clear however that petits. were in any way prejudiced. Opposing counsel was given plenty of time to meet each point; the DC instructed the jury to consider only the evidence in the case and to disregard the irrelevant remarks of the prosecutor. Of course much of what he said was perfectly proper on any theory. Petits. were being tried for using religion as a means to defraud. The references to them as frauds or fakers was strong but proper. That the jury was not misled is indicated, as resp. points out, by the fact that 4 of the defendants were acquitted though they were active in the cult.

3. It has not been decided that the 6th amendment requires a jury panel to which women are equally admitted. For most of the history of the federal cts. only men sat on juries and it is hard to work out some prejudice now where they are excluded as a general rule in the DC. There is no way to show that women are more religious than men or more gulable. This is not like exclusion for race, class, or religion. In Glasser v US 315 US 60, 83-4 the women who were allowed on the panel were drawn from only the league of women voters or so it was alleged. The ct indicated that the jury should be representative of the community. It did not hold that women must be allowed to serve on juries. The question however is novel and should be dealt with here.

GRANT ON NO. # 3 EGW Op. R. 1645

No. 786 1945 Term
NLRB v. Donnelly Garment Co. et al.
Cert. 8 Cir.
Juris. Cert. timely: Judgment entered Oct. 29, cert. filed Jan. 29, 1946.

This case is the culmination of a long effort by the petit. disestablish an alleged company dominated union at resp's plant and permit the selection of a bargaining agent under the Act. The Record is contained in 13 large volumes.

The case first came to the CCA in 1940 and 1941 in order to review the action of the Board. The case was remanded with directions to admit certain evidence which the trial examiner had excluded. On remand, evidence was admitted consisting of testimony by 11 company employees that they had voluntarily joined the Donnelly Garment Workers Union. An offer to allow all 1200 employees to so testify was rejected on the ground it was cumulative, thus treating such further evidence as though it would have been to the same effect. The trial examiner which had presided at the case before remand did so afterwards, although he had stated that he regarded such evidence as immaterial and irrelevant on the issues of company domination of the union and coercion

The facts as found by the petit. start with the first attempts of the ILGWU to organize the company. There was evidence that at this time the supervisory personel of the company discouraged membership and discharged workers who had joined the union. Though there was no finding then that the discharges were discriminatory the Board did find that the action of the company made the employees afraid to join. In 1935 2 of the companies supervisory employees formed a Loyalty League whose purposex was to oppose the ILGWU. All employees, supervisory and other, except members of the ILGWU were admitted. After the NLRA became effective supervisory employees encouraged membership. After the ILGWU announced a second campaign in 1937 the company obtained a written pledge from its employees not to join the union. They were circulated at work and at the di ection of the company president. The president at a meeting of the Loyalty league held during working hours praised the meployees for signing the pledge and promised to protect the employees from alleged threats of violence from the ILGWU. The company's attitude toward the

outside union was thus made dlear. An employee who was named an ILGWU delegate was demonstrated against by the employees with the acquiescent of the company. Another with an ILGWU pin was sent home. The Board found that two supervisory employees with the blessing of the company then set about founding the company union aas a means of fighting the ILGWU. A meeting of the workers was called during working hours to do so. The organizational meeting was planned by and under the control of company officials. Employees wer told by their instructors to attend. The meeting was attended both by supervisory officials and the employees under them. The employees voted unanamimously to join it. Supervisory employees of the company ran the union, especially a Miss Todd who seemed to have a roving commission with the company. All supervisory employees except executives were eleigble. The same persons who represented the union with respect to piece work rate setting also represented the company. [petit. 18] in 1937 a closed shop contract was signed. When the ILGWU announced a drive for a 16 dollar minimum wage the company's minimum was raised to $16.50. A check off agreement was signed.

The company lent financial support to the union by paying them while at meetings during working hours, furnsihed a desk and services to the union prepresentative, who was also paid a xixx salary by the company. The instructors who the board found to be supervisory employees were active in the goverment of the union. The Board found that Todd and the instructors were acting fot the company in founding the union.

The board found violations of §8(1), (2) & (3) and ordered it to cease and desist from dominating or interfering or supporting the DGWU, from discouraging membership in the ILGWU and to desist from other coercion etc.

The fact remains that the workers themselves apparantly approve the DGWU and would support it if allowed to vote. But the Board apparantly found that this was due to the coercion of the company and the fact that their superiors chekced up on them at union meetings etc. Their testimony at the hearing is suspect for like reasons and that is probably why the trial examiner regarded it as immaterial.

During the course of the hearings before the trial examiner, as stated above the examiner stated that the testimony of the employees that there was no interference of domination of the union was immaterial although he admitted evidence to that affect. Evidence was excluded as immateria; with respect to the provisions of contracts made with others by the ILGWU; evidence that the ILGWU admitted persons to the union which the board here treats as supervisory; evidence of misconduct or violence in other plants by the ILGWU was excluded;

Nos. 786-87 1945 Term

The CCA in an long opinion which shed much heat but little light held, Woodroughk dissenting, that the board's order would not be enforced because the company had been denied due process because of the claimed bias of the examiner and the exclusion of the evidence set out above. The ct did not pass on the questi n of whether there was substantial evidence to support its order.

It seems clear that the ct below seriously overstepped its bounds in holding that thb board dneied due process to the company. The ILGWU was not on trial before the board and evidence as to its activities, violent or non violent, elsewhere was irrelevant as the bmxrdx examiner ruled. The provisions in its contracts even if used for phe purpose of comparing them with the ILGWU was also irrelwvant as to the issues as framed by the board. The trier of fact's discretion min admitting this kind of evidence is very great. The evidence first excluded with respect to the testimony of the employees that the union wasn't company dominated was admitted although the xsame examiner heard bohh cases. But even though he thought it was immaterial the first time that does not make him biased and prejudiced on remand any more than is a judge who has been reversed for excluding evidence. The evidence was in the record and it was there for the Board to read before it arrived at its decision. Furthermore mere error in dealing with evidence at the administrative level does not dany due process as the ct here so vehemently inkists. It is difficult to read the opinions, and briefs in this case without becoming convinned that there was more than enough evidence to support the order of the board and that the exclusions of evidence objected to were improper. The case really comes down to a question as to whether the Board may cause a company union to be disestablished even though most if not all its employees favor that union. The further issue is whether an outside union should be under such circumstances be given the right to seek to organize a plant whose employees are in the company union under a closed shop contract.

GRANT EGW Op Vol. XIII
p. 2

No. 793 1945 Term
Bowles v. Warner Holding Co.
Cert. 8 Cir.
Juris. R. 2. Cert. timely: Judgment entered Oct. 31, cert. filed Jan. 30, 1946.

The question is whether a DC under the Emer. Price Control Act in addition to granting petit. an injunction may order the resp. to make restitutions to tenants who were overcharged in rents.

The Act makes it unlawful to charge more than the maximum rent. §205 provides that the Aministrator may apply for "an order enjoining such acts or pracites, or for an order enforing complaince with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permenent or temporary injunction, restraining order, or other order shall be granted.." §205(e) prior to its amendment in 1945 provided that a consumer who purchased not in the course of business at prices or rents over the ceiling could bring an action for treble the amount of the overcharge. As Amended the section provides that if the consumer does not bring or the person is not entitled to bring an action within thirty days for the overcharges the Administrator may bring it.

The petit. sought both an injunction and an under under §205(e) compelling resp. to repay the overcharges to the tenants. The DC granted only the injunction.

The CCA affirmed on the ground that the act gave a separate right both to the tenants and the petit. to sue separately for the overcharges and hence repayment could not be compelled by order.

There is a square conflict on this point with Bowles v. Skaggs, 151 F2 817 as well as with several FLSA cases in which restitution as well as an injunction was given. 146 F2 222. The question is clearly important to the administration of the act.

As to the merits: §205 permits the DC to grant an injunction and "other order". It would seem that the Adminstrator has been given a vast arsenal of enforcement remedies, and that the CCA has here interfered materially with one of them. No question is involved as to discretion. The CC A held that the order could not be made as a matter of law. The legislative history [pet. 9] indicates that the DC was given power to make any order appropriate in the particular case. Here after the DC found that the overcharges had occurred, it was proper for it to order that restitution be made to the tenants. The fact that §205(e) was amended to give the Adminstrator an additional remedy, mamely a suit for damages if the consumer did not bring one within a certain period is no basis for saying that a remedy which was clearly available to petit.

prior to that time has been withdrawn. It seems to me that the analysis of the CCA is wrong and should be reversed;

GRANT EGW Op. R. 67

No. 804 1945 Term
Colegrove et al. v. Green
Appeal DC Ill.
Juris. SJ 2. Appeal timely: SJ 3.

This is an appeal from a 3 judge district court in which was brought into question and held valid an apportioning statute of the state of Ill. In 1901 the state by statute set up the present districts for the election of members of congress. It has not been changed since and because of shifts of population etc. the districts are now grossly unequal. The effect of this has been to create a number of rotten boroughs in Illinois, and the question is whether anything in the federal statutes or Constitution requires the state giving proper representation to its citizens in the House of Representatives.

Petits rely on Art I §§2 & 4; the 14th amendment, RS §23 and the Northwest Ordinance and the enabling Act of Congress admitting Ill. into the Union.

The DC's opinion indicated that it would have liked to have held the Ill. Statute invalid but that it was bound by this ct's decision in Wood v Broom 287 US 1.

I think that there is a real question here as to the validity of the Ill. statute but I confess in having difficulty in knowing how to hold it invalid. In the Wood case reliance was put on on §3 of the Act of Aug. 8, 1911 which provided that districts shall contain as nearly as practicable an equal number of inhabitants. But the Wood case held that that act had expired by force of later reapportionment acts. Now petits, rely in part on RS §23 which provided the same thing with respect to subsequent Congresses. The major difficulty with reliance on that statute is that it has been expressly repealed. 47 Stat. 1428. It was repealed in 1933.

But I think that in principle the idea embodied in that statute is incorporated into the Constitution itself as a necessary part thereof. It was part of the the compromise that made the Constitution possible that one House directly represent each state equally and that the other house be representative of the actual population in each state. Each state has been divided into congressional districts and it follows that each district should contain practically the same number of persons. Otherwise the representative principle is departed from and the institution of rotten boroughs is made possible. The privileges and immunities clause it seems to me would support a reversal. The Wood case did not deal with the constitutional aspects of the question, but it does support the equitable jurisdiction of the court below since the problem was considered on the merits. The NW ordinance embodied in the Ill. statute supports the same conclusion. There is no interference here

with purely state policy since the matter is of vital concern in federal elections.

EGW Op. SJ 15

Nos. 809-11 1945 Term
US v. Lovett
US v Watson
US v Dodd
Cert. Ct. Claims
Juris. R. 1. Cert. timely: Judgment entered Nov. 5, cert. filed Feb. 5, 1946.

This is the kind of case which requires one to probe deeply into the nature of our gov't. The Dies Committee decided on the basis of its usual suspcion and inaccuracy that the resp.s were subversive and not fit to work for the gov't. Lovett was executive assistant to the Governor of the Virgin Islands, Wtason and Dodd were with the FCC. Their only crime was that they were liberals. The House pursuant to resolutiinn on Feb. 9, 1943 set up a subcommittee on appropriations to investigate ~~xxxxxx~~ charges that certain persons were "unfit to continue in such employment" in the executive branch. The committee found resps. to be "unfit". An amendment was offered to the 1943 Urgent Deficiency Appropriation Bill and enacted as §304. It provided that no part of any appropriation, allocation or fund which is made available under this Act or which is now or which is hereafter made available under or pursuant to any otherAct to any agency of gov't shall be used after Nov. 15, 1943 to pay any part of the salary or other compensation for the personal services of Watson, Dodd, or Lovett unless prior to such date such person has been appointed by the President with the Senate's consent; there were exceptions for jury and military service. Lovett continued in office Till March 13, 1944 and Watson and Dodd remained about a week after Nov. 15. The president signed the bill because the appropriations were needed, but he said that the section was discriminatory, and unconstitutional as a bill of attainder and as an encroachment on the authority of the ~~xxxxxxxxxxxx~~ executive and judicial branches. The Attorney General said he agreed that the section was unconstitutional, and suggested that Congress hire its own counsel which it did.

A suit for back salary was brought in the Court of Claims.

The Ct unanimously held for resps., but on varying grounds. Whaley said that the section was a mere direction to disbursing agencies not to pay the salary and was not binding on the ct of claims; he relied on the fact that appropriations were available for the offices. # 3 judges held that the section was unconstitutional as a bill of attainder, interference with the president's removal power and as a permenent deprivation of the right to work for the gov't which was discriminatory and denied due process.

The petitioners do not moppose cert. and of course it should be granted to settle the issues involved. May Congress by specifally naming persons who have been guilty of no offense disqualify them forever from seeking employment with the gov't by directing executive agencies not to pay them, even though appropriations are available for the offices? If the test of unconstitutionally is whether the act makes you want to puke, this statute meets that test. The petit. insists that the constitutional must be faced, rather than going off on Whaley's grounds since the clear intention of the legislature was to remove the resps. from office rather than merely denying payment of their salaries. I agree. I think the statute is unconstitutional on any of several grounds: 1) interference with the president's power of removal of executive officers under the Meyers case; it is a bill of attainder imposing legislative penalties on specific individuals, namely the right of seeking a position with the gov't; this act is permenent in its effect and bars resps. indefinitely. As is pointed out by Madden it makes second class citizens of them by legislative fiat, although they have committed no wrong; the statute is arbitrary and discriminatory in the very real sense and violates the fifth amendment.

GRANT EGW Op. R 33

No. 812 1945 Term
US v. Carmack
Cert. 8 Cir.
Juris. R. 2. Cert. timely: Judgment entered Nov. 6, cert. filed Feb. 6, 1946.

This case involves the power of the US to condemn as a post office site part of a public park in the city of Cape Girardeau, Mo. The statute permits the Postmaster General and the Federal Works Administrator, acting jointly, to acquire by condemnation such cites as they may deem necessary. The park was established by a conveyance by the owner to the city in 1820 to use the land forever for public purposes. The city gov't is agreeable to the transfer of the land to the US in exchange for the present federal building. Certain of the residents of the ~~m~~town oppose the transfer, but the resp. is an ~~h~~ heir of the original grantor and is the only parson opposing the condemnation in this case. The park site has on it the city courthouse and municipal gov't building as well as a library and a monument, all of which will be taken down or removed when the US obtains the tract.

It appears that originally an contract was made with the city whereby the park site would be transferred to the US in exchange for the present federal building. A question arose as to the power of the city to convey the property, however, so that this condemnation suit was brought. It appears that the park site was approved by the voters of the city at a special election

The gov't inspector who examined the various sites in the city reccomended as first choice the present site of the federal building. The park site was the second choice. The latter site is not so centrally located and the city is developing in the other direction.

The DC dismissed the condemnation suit on the ground that the US had no statutory authority to take local public property and that the US had acted arbitrarily and capriciously in selecting the site in view of the interference with local gov't operations and the consequent destruction of city park.

The ~~E~~ CCA affirmed on the ground that the US lacked statuory authority.

There seems to be no question that the US has acted unwisely in selecting as a site for a new post office a public park on which the city's municipal buildings are located. Its own site agent made his first choice the present site of the federal building together with adjacent land which would readily be purchased. But the city gov't wants to obtain the present federal building and is willing to sacrifice the park. A vote in the nature of a Gallup poll approved the choice, although the dissent

was apparantly vigorous. All this however does not interpret the statutory power of thhe Federal Works Administrator. He is authorized to condemn such sites as he may deem necessary for public buildings. He has exercised his choice together with the P$_{o}$stmaster General after a careful survey of available sites. It is difficult to say that the chice is arbitary. The statute is unlimited in terms. It does not expressly confer power to condemn land already devoted to public purposes, but insofar as the federal gov't is concerned I would think that municipal property is to be treated as any other private property. The CCA held however that express authority is needed to condemn land ~~fmx~~ already devoted to public purposes by a city. In this I think the CCA erred. The statute is general in its langugage and there is no particular reason for exempting land already devoted to public purposes from its ~~sweep~~. There are apparant conflicts in principal with cases cited by petit. 11-12. The recent TV~~A~~ case it seems to me is contrary to the result reached. There the ct indicated that there could be no judicial review of the necessity of taking the particular site. The statute there was similar to the one involved here. There is of course no question as to the public purpose of the taking here.

A question is also presented as to the standing of resp. to oppose the condemnation. Resp. is an heir of the original grantor of the park. No gift over however exists in her favor if the park is not ~~used~~ as such. She has no pecuniary interest in the condemnation award. She is little more than an ordinary private citizen, inhabitant of the town. The UCA did not even discuss this point but it seems clear that an ordinary private person, even the heir of the grantor of the property, has no standing to oppose condemnation of land in which he has no interest.

GRANT EGW Op R. 658

No. 821 1945 Term
Pyramid Motor Freight Co v. Ispass et al
Cert. 2 Cirl
Juris. R. 4. Cert. timely: Judgment entered Dec. 28, cert. filed Feb. 7, 1946.

This is a suit under the FLSA for overtime and damages. Resps. are known as truck loaders. Petit. operates a large interstate trucking business. The trucks come into a terminal in the garment district in NY. In the case of incoming trucks petits held unload the trucks and then take the packages by hand cart to their various destinations in the garment district. In the case of outbound trucks the resps. actually load and stack the packages on the trucks. The proportion of time spent in loading the trucks was not shown.

The DC dismissed the complaint on the ground that petit was operating under the ICC and that resp's hours of service were subject to its jurisdiction.

The CCA reversed. It held that to bring pesp.'s within the exemption in the FLSA petit must show that the proportion of work devoted to safety of operations was substantial and this it had not done.

This case raises issues similar to those in Levinson v. Spector Motor Service, No. 139 and Comet Carriers v Walling, No. 609. The question is the nature of the test for determining whether loaders or drivers have been deprived of the benefits of the FLSA. In 28 MCC 125 the ICC has expressly held subject to its jurisdiction loaders (p. 134) since they devote a "large part" of their time to activities directly affecting the safety of operations. It points out that loaders, as it defines them, have the sole duty of loading and unloading trucks and transfering the loads between motor vehicles and between the trucks and the terminal. Here of course resps. spend much of their time actually delivering the freight by hand truck to the consignees in the garment district. But the fact remains resps. are loaders, and the ICC has expressly held them subject to its jurisdiction.

Petit. insists the Adminstrator and the Second Circuit are engaged in whittling down the exemption afforded to it with respect to drivers, loaders and helpers. It says that the ct has no power to review collaterally the decision of the ICC above referred to. The remedy it states is for the resps. to go before the ICC and have their status there adjudicated. But the problem is not that easily disposed of. There is a real conflict of jurisdiction, a no man's land between the sweep of the FLSA and the Motor Carrier's Act. Cts are given jurisidction with respect to the former and the ICC with respect to the latter. Whichever

tribunal decides the question there is bound to be a conflict unless and until settled by this ct. The FLSA is a remedial statute. Exemptions are strictly construed and the one who relies on them must show that they are clearly within their terms. As the CCA found, petit. did not make that showing. The facts review that resps. did load, but the facts apparantly did not reveal whether the time spent in loading was substantial. It may be that substantiality is not the test. It may be that if one does any work affecting the safety of operations, the ICC has power to presribe their maximmm hours. The test is power, not its exercise. This ct is divided on the question, and the Spector case awaits rearguemtn before a full ct. That may not occur this year. Thus cert. should be granted, rather than merely holding the case. It seems to me that in the present case the CCA probably went too far.

GRANT EGW Op. R. 84

No. 843 1945 Term
SEC v. WJ Howey Co & Howey-in-the-Hills Service Inc.
Cert. 5 Cir.
Juris. R. 2. Cert. timely: Judgment entered Nov. 13, cert. filed Feb. 12, 1946.

Petit. sued in the DC to enjoin resp. from selling certain securities as defined in the Act without filing a registration statement with the SEC. Resps. run a rather interesting organization. Howey Co. is the owner of a large amount of land on which it grows citrus fruit in Fla. The Service Co. engages in the business of maintaining the citrus groves --fertilizing, planting etc. Howey Co. sells tracts of land in its groves to persons from all over the US who have personally visited the land. These tracts vary from less than an acre to much larger. $1000 per acre is paid for bearing trees, and less for land with young non bearing trees. The land is sold under a contract of sale, and a warranty deed is given when the consideration is paid. At the same time the Service Co. seeks to persuade the purchaser (who usually knows nothing about citrus farming) to enter a contract with it for the cultivation of the tract for ten years. The Service Co. is given full possession of the land as tenant for a nominal rent and it uses its discretion and knowledge in farming it. It arranges for the sale of fruit either on the tree or picked, deducts the expenses and transmits the net proceeds to the owner. Net profits range from 10 to 20 percent. The resp. is a perfectly legitimate organization of long standing. In its negotiations it points out that there are other service organizations available, but it seeks the contract for itself. It is paid about $30 per acre of bearing trees for cultivating, spraying etc. in addition to the cost of the materials. Tracts are sold even though no service contract is entered into, but 85% of the purchasers enter such contract.

The SECA provides it is unlawful to use the mails to instruments of interstate commerce unless a registration statement is filed as to a security. Security is defined as among other things an "investment contract".

The DC refused the injunction and the CCA affirmed on ground that the transactions were not promotional but were sales of specific orange groves having established value; the fact that the service contracts were also entered into the ct felt did not make a sale of an interest in a general entreprise of grove cultivation and marketing. Profits were paid to each owner from his specific grove.

The SEC contends that the broad term "investment contract" includes the transaction here in question where the buyer is dependent on the promotional services of the resp. for a return on his investment. The present case is more of a doubtful one than the Joiner Leasing Corp. 320 US 344. There the lands

were almost valueless if the test oil well was not drilled. Furthermore there was a finding of fraud. Here the enterprise is legitimate and the goves sold have a large value apart from the ~~xxxxxxx~~ servicing arrangements. They can be sold to ~~xx~~ others, and others ~~t~~han resp. can be and have been hired to cultivate them. However, it is impossible to disregard the intimate connection between the two companies here involved, the selling corp. and the servicing corp. and the fact that the owner is generally dependent on the latter for a return on his investment while he owns it. It seems to me that the transaction is within the broad terms of the SECA. Cemetery lots promotions, interests in oil leases, sale of land bearing tung trees among others have been held by various cts to be "investment contracts". [pet. 10] The fact that his entreprise is legitimate of course makes no difference. The next one may not be. There is a difference in approach between the ct below and the Ninth circuit 128 F2 463, 465 where the test of the SEC has been adopted, namely that investment contracts include agreements where the purcahsers look entirely to the efforts of the promotors to make the investment profitable. This is a reasonable administrative construction and has weight. The mere fact that here the thing sold has value in and of itself should make no difference, since to produce an income the efforts of resp. are necessary also.

It may be that because of the rather limited factual situation cert. should not be granted, but I think it is better to grant to clarify the problem.

GRANT(?) EGW Op. R. 123

Nos. 848-49 1945 Term
American Fuel & Power Co v. Green et al.
Cert. 6 Cir.
Juris. R. 1. Cert. timely: Rehearing denied Nov. 26, cert. filed Feb. 14, 1946.

This case involves an interesting conflicts of law issue. Petits. own bonds of the Inland Gas Co. which have overdue interest coupons. The bonds are payable in NY or at the option of the bearer in Illinois. The Indenture was executed in NY and the principal assets of the corps including the mortgaged property is in Kentucky. The mortgage provides that the trustee may recover on default the total amount due including interest both on the bonds and on the coupons. The Inland Co. is presently in Chapter X reorganization proceedings. Petits. sought interest on the coupons; there are funds to pay it if "interest on interest" may be validly paid under the applicable law. Under the law of KY and Ill. the provision is good. In NY it is bad and unenforcible.

The DC allowed the interest and the CCA reversed. It held that in determining what law to apply the Ky conflicts rule governed under Erie Ry. v Tompkins. Since Ky would apply NY law it did so and denied the recovery of interest.

Here the ct has jurisdiction because the case arises under the bankruptcy laws. As far as the general rule of conflict of laws go there are differences of opinion. Some authority says that the law of the place of contracting governs--New York. Others, the place of payment, which would in this case be NY or Ill. Another view is that rights are determined by the place the mortgaged property is located. Here Ky. This Ct has said the federal rule is that the law of the place which upholds the validity of the contract will be applied. Seeman v Phila Warehouse Co. 274 US 403. It seems to me that under the circumstances of this case the policy of Erie Ry. is not relevant. Rights here arise under federal law--under the bankruptcy power. The federal cts should have a uniform conflict of laws rule where there is, as here, a multi-state transaction. No particular policy of Kentucky is relevant where more than the law of that state is concerned. Why should the 6th circuit follow the ky rule which makes the law of the place apply, whereas the 7th in another bankruptcy case may follow the Ill. rule which is perhaps that the place of performance governs. The federal cts should have in this situation their own conflicts rule established by this ct. It has never been made clear whether the Erie case applies in non diversity situations, partcularly in bankruptcy or reorganization. There must be some test to determine which state created the rights

s

sought to be enforced. See D'Oench Co v. FDIC 31 5 US 447, 456-7, qwhere this whole issue was left open.

It may be on the facts that only the law of NY could apply even under the federal rule since only that state had significant contacts with the transaction. But I think the issue is important and interesting enough to settle now.

GRANT EGW Op. R. 376

No. 864 1945 Term
Richfield Oil Corp. v. State Board of Equalization
Appeal Sup. Ct. Cal.
Juris. SJ 3. Appeal timely: SJ 6.

Appellant xxxxx. entered a contract in New Zealand with the New Zealand Gov't Stores Control Board for the sale of fuel oil to be transported by a vessel of that gov't to New Zealand, the purchase price to be fob Los ANGELES. New Zealand sent a tanker to Long Beach, Cal where xxx appellant delivered to the boat a large number of barrels of oil. The bill of lading consigning the oil to the officer in charge was provided in the contract was made out and a shipper's export declaration in the US customs office. Appellee levied on this sale its 3% xx tax on the gross purchase price which appellant paid under protest and sued to recover. The facts are agreed.

The tax is imposed "for the privlege of selling tangible personal property at retail" as defined. Sales means any transfer, exchange or barter for a consideration. Gross receipts means the total amount of the sale price of the retail sales.

Appellant specifically contended in thetrial ct [sj 7] that the tax statute as construed was invalid under the commerce clause, and also under the clause prohibiting states from laying imposts or duties on exports.

The lower state ct held the tax invalid.

The Ct below affirmed, but on rehearing reversed with 2 judges xxx dissenting. The reversal without directions under Cal. practice ordinarily requires a new trial.

At the outset certain jurisdiction issues are raised, the main one of which is that the judgment below is not final. Under state practice a reversal without directions means a new trial. But this ct must determine for itself whether the judgment was final. Appellee points out that appellant might amend its pemplaint alleging new facts. But in Cal. to recover a state tax a claim must be filed in 90 days setting forth the grounds for such refund. The time has expired and appellant could not now change its grounds under state law. Hence no new trial could be had. Thus the reversal in this case merely means that the xx lower ct will perform the ministerial act of entering judgment against appellant. No issues remain to be litigated. Thus the judgment is final for purposes of appeal. See Robertson & Kirkham §§ 29-30. There is no merit in appellee's contention that the valadity of the state statute was not drawn into question and held valid as applied to the facts. See SJ 7.

The constitutionx gives Congress power to regulate foreign commence and it prohibts the states from levying imposts or duties on exports. The Ct below preceded on the thhory that title to the oil passed on delivery of the oil to the boat and before any actual transportation had begun. The idea suggested

xx

No. 876 1945 Term
Behrens v. Smith
Cert. Sup Ct Washington
Juris. ?? Cert. timely: Judgment entered Dec. 17, cert. filed M Feb. 21, 1946.

Petit. brought this writ of habeas corpus in the state ct on the ground he was improperly convicted and sentenced. An information was filed against petit. charging carnal knowledge of a girl of 14 years, between Jan 24, 1937 and Jan 34, 1938. A judgment of conviction and sentence was entered on an amended information which petit. claims was never filed in ct. Petit. was sentenced to a term for not more than life. Prior to June 9, 1937 the statute provided that the crim e should be punished not less than 5 years. Thereafter it was amended to provide that when committed by an adult male on a child under 15, the sentence shall be for life. Washington had a parole set up and a requirement that the judge fix only the maximum sentence; this gave jurisdiction to fix a maxium term of life for the instant offense.

The Ct below held petit. properly convicted and sentenced.

Petit. committed the crimes during the time that the statute defining the crime and punishment was amended. As the ct below points out the sentence was proper under the original or revised statute. At both times there was power in the ct to fix a maximum punishment of life, although after the amendment that punishment was made mandatory.

The ct said that the judgment was entitled to the presumption that the amended complaint was filed. In any event it pointed out the original complaint which was filed charged the same offense and petit. was fully informed of the crime charged.

It is difficult to see what federal question is here involved. None is suggested. The amatter appears to be whooly one of state law.

DENY EGW Op. R. 12

No. 892 1945 Term
Rothensies v. Electric Storage Battery Co.
Cert. 3 Cir.
Juris. R. 1. Cert. timely: Judgment entered Nov. 27, cert. filed Feb. 26, 1946.

This case involves the doctrine of recoupment in tax matters. Between 1919 and 1926 resp. erroneously paid excise taxes on sales of storage batteries. It deducted these taxes for income tax purposes and received a tax benefit. In 1926 resp. filed a timely refund claim for the excise taxes paid between 1922 and 1926. The payments between 1919 and 1922 were then barred by the statute of limitations. Resp. finally succeeded in obtaining by compromise after litigation most of the excise taxes paid between 1922 and 1926 in 1935. On its 1935 income tax return resp. treated as income only that portion of the refund as represented interest accruing in 1935. The Commissioner held that the whole refund was income in 1935 and assessed an additional tax of $229,000. After payment a timely refund claim was filed. Resp. alternatively claimed in its refund claim that the refund in 1935 was not income in 1935 or at all, or if it was resp. should be permitted to recoup the amount of excise taxes collected between 1919 and 1922.

The DC held the refund was 1935 income but permitted recoupment after allowance for tax benefit derived from deudcting the excise taxes from income in those years.

The CCA affirmed.

Bull v. US 295 US 247 first announced the doctrine of recoupment where the barred claim arose out of the same "transaction" as the main claim. The doctrine is based on the injustice of permitting the gov't to collect additional taxes when it wrongfully holds money of the taxpayer which can be used to reduce the amount sought. That case, however, was denided prior the the 1928 Rev. Act. impact on the problem. The ct held that the recoupment arose out of the same transaction as the main claim, since the main claim for ~~additional~~ refund of income taxes was concerned with the erroneous collection of excise taxes by petit. for the years 1919-1926. The petit. contends that the main suit and the recoupment claim were not so closely related was to be part of the same transaction. But logcially they are related. They are both concerned with the payment of the excise taxes and the consequences arising therefrom.

In McEachern v. Rose, 302 US 56, this ct held that the 1928 Act prevented the gov't from using the doctrine of recoupment against the taxpayer. The question here is whether it also bars the taxapyer. The statute provides that a refund shall be considered erroneous (and subject to recovery by the US) if made after the expiration of the limitation statute and a credit for such overpayment which is barred is void.

But as in the Bull case the facts giving rise to the recoupment claim occurred prior to the 1928 Act. The CCA rejected the arguemtn based on the statute, pointing out that it has been used only against the gov't, not the taxpayer since the taxpayer must pay his tax first and litigate afterwards. He should be in no worse position if he pays and seeks a refund, than if the gov't proceeds against him for the tax. In such a case the taxpayer would not have paid the tax and hence would not be foreclosed in defedding on the merits. The ct also relies, as stated, on the fact that the right to recoupment rose prior to the 1928 Act. Such right is treated as substantive and unaffected by the 1928 Act. It is not retoractive. This seems a proper conclusion in view of the reluctance to make statutes operate retroactively.

The last contention of the gov't is based on the fact that resp. sued a different collector for the refund than collected the tax on which a refund is now barred. Thus it contends the recoupment doctrine doesn't apply. Clearly it applies when the US is sued in the ct of claims. By statute now suits against the collector are res judicata on same causes brought against the US. This reveals a statutory intention to make the suits alike. Moreover as the CCA points out the collector receives taxes on behalf of the gov't, not himself. If erroneously collected the taxpayer may sue him as an individual, but that doesn't make the tax receipts his personal property. Thus recoupment was permitted against the present collector. The ct pointed out it has on y the effect of reducing the gov't's claim. It is only a defense to what the collector asserts.

The petit. asserts that the cases are not clear on the use of recoupment and that the law should be clarified. The gov't points to a conflict with the Ct of claims. 43 F. Supp. 130. It is true that such a conflict exists. I think however that the instant decision is correct.

GRANT EGW Op. R. 2

No. 902 1945 Term
US v. Howard P. Foley Co.
Cert. Ct Claims
Juris. R. 1. Cert. timely: Judgment entered Dec. 3, cert. filed March 1, 1946.

Resp. brought this suit for damages for delaying its completion of a contract because of acts of petit. Resp., an electrical contractor, entered a standard contract to furnish materials for and construct a field lighting system for the National Airport in Washington, DC. The work was to be completed within 120 days from the date of receipt of notice to proceed. Notice to proceed was given on July 15, 1940 and work was completed April 18, 1941. The site was constructed on land created out of dredged materials. The problem of the gov't was to stabilize the land so made within a year, rather than the 5 years it usually took for it to settle. Work was released to resp. in sections, as the field was completed and paved. However, because of the difficulties in preparing the field sections were released so far apart that pesp. contended its time for performance was extended unduly and unreasonably. The contracting officer granted extensions of time to resp. but that does not satisfy the resp. which sought damages for the unreasonable delay. No intervening contractor is involved. The whole delay is attributable to work done by the gov't itself.

The contract provided that resp. was not liable for delays due to the gov't nor for unforeseeable causes beyond the control of the contractor.

The ct held petit. liable on the ground that the contract obligated it to make performance within 120 days possible and that it had failed to do so.

The gov't is here seeking to avoid any obligation under the contract which could be viewed as requiring it to make possible the performance of resp. Obviously the gov't could not drag out a 120 contract for five years where no stop orders were issued, without having to pay for the delay it caused. While perhaps the delay was unavoidable due to the nature of the ground being prepared, it certainly was foreseeable, as the ct found. It was the chief problem the gov't engineers had to face. Yet despite this the notice to proceed was given resp. who was subjected to a number of delays because the gov't took so long in completing its part of the job. The 120 day provision while primarily imposing a duty on the contractor, also gives him certain rights. Where that amount of time is not merely provisional and no fault of an outside contractor is involved, the gov't should properly be held to the time limit it sets for others. That delay increases expenses is obvious. No stop or change orders where made. Resp. was apparantly expected by the gov't to sit idly by while the petit. went about performing its tasks. For this resp. should be

paid. The gov't argues that Crook Co v. US 270 US 4 is in conflict. But that cases seems to have been adequately distingusiehd by the ct below. The contract date in that case on its face was provisional, as this ct pointed out, since the gov't reserved the right to make changes and interrupt the continuuity of the work. Furthermore an indepdent contractor preceded the appellant there was was responsible for the delay; the ~~xxx~~ ct found the ~~xxxx~~ time provision here was not provisional; there was no indepdent contractor involved. The gov't had no unlimited time for performance. The mere fact the contracting officer found the conditions arising to be unforeseen, as the ct points out is far from finding that they are unforeseeable.

DENY EGW Op. R. 16

paid. The gov't argues that Crook Co v. US 270 US 4 is in conflict. But that cases seems to have been adequately distingusiehd by the ct below. The contract date in that case on its face was provisional, as this ct pointed out, since the gov't reserved the right to make changes and interrupt the continuuity of the work. Furthermore an indepdent contractor preceded the appellant there was was responsible for the delay; the ~~xxx~~ ct found the ~~xxxx~~ time provision here was not provisional; there was no indepdent contractor involved. The gov't had no unlimited time for performance. The mere fact the contracting officer found the conditions arising to be unforeseen, as the ct points out is far from finding that they are unforeseeable.

DENY EGW Op. R. 16

No. 909 1945 Term
Fiswick et al v. US
Cert. 3 Cir.
Juris. R. 10. Cert. timely: Rehearing denied Jan 26, cert. filed March 4, 1946.

Petits. were convicted of conspiracy to defraud the US by concealing their connection with the Nazi party and continuing to do so till the date of the indictment. The concealment was in connection with their registration under the Alien Registration Act. The petits. were indicted on Sept. 13, 1944. The evidence indicated that the German consul in NY had been in charge of the Nazi Party overseas and was aided by Vogel, his secretary. As part of the conspiracy the consul and German Ambassador directed the petits. and others who were indicted at the same time to conceal their membership in the Nazi party; the registrations which were made by petits. in 1940, stated that petits. were not members. The last overt act charged occurred in 1940; the indictment charged that the conspiracy continued until the date of the indictment, in view of the fact that affirmative concealment occurred after that date with the cooperation of the petits.

Each petit. made certain oral and written statements to the FBI in 1943 which were received in evidence against all the petits, after the trial judge ruled that the conspiracy was a continuing one Petit. Mayer on the first day of the interview with the FBI denied he was a member of the party; the next day he admitted his membership, explaining that Vomgel had told him to deny it; Fiswick in 1944 at first denied membership but then admitted it, stating that Vogel in 1940 had told him to deny membership. Petit. Rudolph in 1943 said he had been told in 1940 to deny membership, but in 1944 in a sigged statement he said he had not acted on anyone's instructions in concealing membership.

The CCA affirmed the conviction, Waller dissenting.

The only question presented by the petitioni is whether the statements made by each petit. to the FBI can be admitted a s against all of them or whether they can be used only against the person making it. The CCA held that the conspiracy was a continuing one; that cooperation was necessary after registration to continue to conceal party membership from the gov't. Thus a statement made during a conspiracy and in furtherance of it is admissible against co-conspirators. Thus the statements denying membership as late as 1943 and 1944 was properly usable against all of the petits. Brown v. Elliot 225 US 392 indicates that where the plot contemplates bringing about a continuous result which will not continue without

the cooperation of the conspirators, the conspiracy may be treated as continuing. The mere fact that the last overt act chargdd was in 1940 does not prevent the conpsiracy from continuing beyond that time. The gov't if it wanted ~~to~~ could select only one overt act at the beginning of the conspiracy. It is not bound by its choice. More is proved here than ~~thm~~ a conspiracy which merely brought about a result. Continuous affirmative action was necessary.

The gov't however concedes that the statements by petits. that they were members of the party in 1940 is not admissable against all of them since they were only narrative declarations of past fact. But as the gov't points out petits. were not prejudiced by admitting such statements against all of them since each in his own statement admitted substantially what the others said. The case is not of sufficient importante or interest to justify review here.

DENY EGW Op. R. 353

No. 911 1945 Term
Everson v. Board of Education
Appeal Ct Errors & Appeals, NJ
Juris. SJ 2-3; Appeal timely: SJ 2.

NJ has a statute permitting the board of education of a district to make rules and contracts for the transportation of children to and from school, including the transportation of school children to and from school other than a public school except such school as is operated for profit. It is mandatory as to non public schools where public school children are transported.

The Township of Ewing acting under the statute by resolution provided for the transportation of the pupils of Ewing to the Trenton Catholic Schools. Those schools are under the supervision of a priest and religion is taought thereunder. No provision is made for the transportation of pupils going to schools of other denominations.

Petit. a taxpayer in the school district brought this suit contending that the statute and resulution adopted thereunder was invalid both under the state constitution and the 14th amendment.

The lower ct held the statute invalid and the ct below reversed, one judge dissenting

I think this case involves a substantial federal question. Here taxpayers funds are used to support a religious institution of which he is not a member. It seems well astablished by decisions in NY and elsewhere that the transporation benefits the schools and not merely the pupils.

1. Petit. argues that the taxation to benefit private schools takes his property without due process. This argument in itself has weaknesses since a state may properly aid with its funds certain private institutions deemed to have an important and necessary social function, such as private colleges etc. However, I think that to tax x to provide funds to support a religious institution of which the taxpayer is not a member, especially where no provision is made for other denominations, interferes with ~~xxxxxx~~ appellant's freedom of religion. He would not donate money voluntarily to support a church in which he does not believe, yet here ~~xxx~~ he is required to do so by compulsion of the state. That is tantamount to establishing a church which violates one of the basic theories upon which this nation is built.

2. A so-called child benefit theory has been worked out, which says the money is not really used to aid the church but is for the benefit of the children who go to the church school. But that is sheer sophistry. But even accepting it it would seem that to use money to benefit the children is a diversion of property to a private purpose in violation of the 14th amendment. The state

provides public schools which are open and available to all. If a particular religion feels that the children will become contaminated by mingling with children of other denominations it is free to have its own shhool s under ~~x~~ Pierce v Society, but it should have to pay its way without state help. To ask a taxpayer to support the private denominational schools also seems in violation of the due process clause. It would also seem as appellant suggests a violation of the freedom of religion to pick out one church and in effect establish it as the state supported church. That is done here by the resolution. Only Catholic schools and public schools are benefitted. In Chochran v. State, 281 US 370 where this ct upheld a La. statute providing free textbooks for school children where the benefit went to catholic schools, it would pointed out that the legislation does not segregate private schools or their pupils for benefits. Here the resolution does that very thing.

Note Prob. Juris. EGW Op. SJ 18

No. 914 1945 Term
US v. Sheridan
Cert. 6 Cir.
Juris. R. 2. Cert. timely: Rehearing denied Jan. 28, cert filed March 5, 1946.

Petit~~x~~ Resp. was indicted and convicted under a statute providing whoever shall transport or caouse to be transported in interstate commerce securities, or shall cause to be transported in interstate commerce any falsely made, forged, altered or counterfeited securities knowing the same to have been so made is guilty of a crime.

Petit. cashed on several occassions a check which was forged. The check cashed in one state was drawn on a bank in another state. Petit. would write the check, signing a false name as drawer, cash it at a hotel, or jewelry store. The bank then sent the check for collection to the other state and it was returned marked no account.

Petit. contended that ~~xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~ the transportation in interstate commerce was not for the purpose of executing a fraddulent scheme and the causing the chekks to be so transported was not in furtherance of the fraud.

The CCA reversed the conviction on this ground.

Resp. relies on Kann v. US 323 US 88. The Kann case involved violation of the mail fraud statute. There as here the check was cashed by the bank, the defendant receives the fruits, before there was any use of the means of interstate commerce or the mails. The ct there said the mailings in question were not for the purpose of executing the scheme. Here too the scheme so far as respl is concerned ended when he cashed the forged check. That the check was subsequently transported in interstate comerce was not essential to his scheme and was no concern of his. In fact if the check were not so transported the scheme would be even more foolproof. It can thus handly be said consistent with the Kann case that where the fruits are sought and obtained prior to any transportation that the fraudulent intent persists through the later transportation and that it is neccessary to the execution of the scheme. The gov't urges that in the Kann case the statute was to protect on y the mails, whereas here wider protection is intended. There too the statute required the mails to be used for the "purpose of executing such scheme or artifice" whereas here there is no such express requirement. While in a literal sense resp. did set in motion a transaction which ultimately cuased the chekk to be transported, I don't think the acts here come within it. The ~~xxxx~~ crime is essentially local in character, the intent and purpose of it ending when the cash is received.

DENY EGW Op. R. 21

No. 920 1945 Term
US v. Ruzicka
Cert. 7 Cir.
Juris. R. 3. Cert. timely: Rehearing denied Jann 5. cert. filed March 7, 1946.

This case involves the right to challenge action taken under a Milk Marketing order in a court in the first instance.

Under the Aggiculure Marketing Agreement Act of 1937 milk distribution in Chicago operates under a pricing order. Certain handlers of milk are required to pay certain sums into an equalization fund depending on the use to which the handler puts the milk he distributes.

The market administrator in the area brought suit under §8a(6) to collect payment of certain sums allegedly due and billed to resp. and for an order compelling compliance with the marketing agreement. In response resp. denied that any indebtedness existed and contended that the audit made by the Adminstrator of resp's books was inaccurate; the validity of the ma rketing order itself was attacked. [R. 92-3].

§8a(6) of the statute vests DCs with jurisidction to enforce the order and restrain violations; §8a(7) gives the Secretary of Agric. the power to but does not require that he conduct an investigation with respect to violations. §8a(8) provides that the remddies in the section are in addition to and not exclusive of others existing at law or equity. §8a(15(A) provides that any handler subject to an order may file a written petition with the Secretary 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 request a modification. §8a(15(B) gives the DCs jurisdiction to review the action of the Sec't under §8a(15)(A) provided that the pendency of proceedings under this subsection are not to impede proceedings under §8a(6); it is also provided that proceedings under §8a(6) are to abate when a final decree is issued under §8a(15)(B).

The DC gave judgment on the pleadings without permitting resp. to defend on the ground the debt was not owed, or that the order was invalid. Meanwhile pesp. had filed a petition under §8a(15)(A) which was continued pending the DC action and ultimately dismissed without prejudice.

The CCA reversed on the ground that the statute did not require resp. to object to the order or the obligation before the sec't in order to raise the issues in the DC.

The question here is whether the statute requires pesp's administrative remedies be exhausted before he can defend against an action seeking to enforce an admin-

istrative order on the ground that it is invalid, or that he has complied with it. Usually the doctrine of exhaustion of remedies is applied in a situation where the person subject to the order has himself brought suit in court. That was the case in Meyers V. Bethlehem Steel. Here petit. argues under §8a(15(A) resp. was bound to first petition the sec't and unless and untill he did so he could not defend against a suit bro ght by petit. under §8a(6) on the ground that the order was invalid, erroneous or otherwise defective. Here ~~xxxix~~ resp. only sought to show that the Administrator's verification of the account was incorrect.

It seems to me that the right to defend in a civil or criminal action should not be lightly taken away. The provision §8a(15)(A) is not mandatory. It says that the resp. "may" petition; Yet petit. asserts that the exclusive way to defend against the action of the administrator is by petition to the Sec't. It is true that Congress may constitutionally require such a procedure. Cf. Yakus v. Bowles. But when Congress seeks to preclude a defense except if made in a particular administrative or judicial tribunal it says so expressly, as in the Emergency Price Control Act. Otherwise, it should not be implied. Cf. Estep v. US. In the Estep situation of course theere were administrative preliminaries wh ch the petit. had to first deal with before defending in ct. Special considerations of speed and national policy were there involved which required that he pursue the administrative remedy. But here the action is commenced by the petit. No registration etc. is necessary. ~~xRxxix~~. * Resp. by statute is merely given a right to go to the SEC't. He is not required to do so. Under such circumstances I would think that he may properly defend against the action of the Administrator in the suit brought against him. There appears to be a substantial conflict with LaVerne Coop v. US 143 F2 415.

GRANT EGW Op. R. 135

Nos. 941 & 1048 1945 Term
Bethlehem Steel Co v. NY Labor Relations Brd.
Allegheny Ludlum Steel Corpl v Kelley & Lewis
~~&xxx~~
A ppeal Ct App. Ny & Sup Ct. NY.
Juris. SJ 2. Appeals timely

Both of these cases involve the same issue, although one arises on a declaratory judgment action and the other in resistence to a subpena issued by the state Labor Relations Board which is like the NLRB. Both appellants are large steel producers engaged mainly in interstate commerce. In each plant located in NY the foremen are members of the Foremen's association of America and sought a collective bargaining unit of their own under the state law. In 941 appellant was asked to testify with respect to the proceedings initiated by the foreman and a subpena duces tecum was issued and enforced by the state cts, over appellants objection that the state act as applied to the company was invalid because of a conflict with the Wagner Act. In 1048 the same issue was sought be be raised by a declaratory judgment action. At the time the state proceedings were undertaken, the NLRB's policy was not to act on requests of foremen's unions for certification as collective bargaining agents. Since that time, however, the NLRB has permitted foremen to organize in units independent of the main unions and has treated them as employees under the NLRA, although this change of policy was not before the cts below.

It seems clear that if the foremen are employees within the meaning of the NLRA and have rights under that Act, the state act would be invalid to the extent it sought to cover the same ground.

The cts below in the several cases sustained the validity of the state act as applied and the remittur and opinions show that the federal question was necessarily passed on.

The case involves one very important issue, namely whether foremen are employees within the meaning of the federal act. If they are, the federal act exclusively applies to employers engaged in industries affecting commerce; ~~xhix~~ this is admittedly true of these appellants, who main activities are in interstate commerce. Of course when the decisions below were made the NLRB had not clarified its position on foremen's unions, so that while there was power in the NLRB it was not exercised. ~~But~~ This alone ~~xhouldxnotxbaxheld~~ might be held to permit the state act to apply until the NLRB acted. This has been the general view as to power in the ICC where unexercised and state regulation. But now that power has been exercised and

the conflict seems reasonably clear. Allen Bradley Local v. Wis. Brd. 315 US 740; Hill v. Fla. 325 US 538; AFL v. Watson has similar implicati ns.

If probable jurisdiction is noted the Solicitor Gneral should be asked to file briefs amicus.

Note Prob. Juris. EGW No Ops in Ct. App.

No. 942 1945 Term
US v. Powell, Jr. et al.
Cert. 4 Cir.
Juris. R. 1. Cert. timely: Judgment entered Dec. 13, cert. filed March 12, 1946.

In Aug. 1941 the US shipped a number of carloads of phosphate rock and superphosate over the Seaboard Ry. consigned to the British Ministry of War Transport. They were shipped under Lend-Lease and were to be used in Britain as farm fertilizer. The US was billed at the commercial rate, but the Gen. Acc'ting Office claimed the shipments were ~~xxxxx~~ subject to land grant deductions and withheld a considerable portion of the charge for which the resp. ~~xxx~~ sued in the DC. The Transportation Act of 1940 provides that the US shall pay commercial rates, provided that those rates shall "not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use." The Lend lease Act was an act to promote the defense of the US and its provisions follow that purpose.

The sole question is whether the shipment of fertilizer for the use of farms in Britain which was hard pressed for food at that time moved for military or naval use.

The DC gave judgment for resp. and the CCA affirmed.

Apparaatly this is a test case. The actual amount involved here is less than $1,000, but the principle it establishes will be of great value to the parties. The Lend Lease Act as is well known was passed to provide Britain with the assistance necessary for her to carry on~~xx~~ the war alone while we prepared ourselves for eventualities. The shipment was made under the lend-lease act. In a very real sense the fertilizer was for military and naval use, since it would make possible the growth of more food in Britain thereby releasing ships etc. for other purposes. It aided Britain in its continuance of the war, and thus aided our defense preparations. Technically of course fertilizer is not thought of as military or naval property, nor does it usually move for military or naval use. But in view of the fact the goods moved under lend lease which was enacted solely for defense purposes it ~~xx~~ would seem that the result below is probably incorrect. Certainly this ct should pass on the issue.

GRANT EGW Op. R. 2

No. 959 1945 Term
US & ICC v. Seatrain Linnes, Incm.
Appeal DC Del.
Juris. SJ 1. Appeal timely: SJ 3.

This time the ICC is picking on Seatrain. By applications in 1941 Seatrain sought a certificate fmr of public convenience etc. under Part III of the ICA; the application was largely based on the graddfather clmase. The applications sought routes between NY and New Orleans via Havana Cuba and also between NY and Texas City Texas. Little evidence apparantly was introduced in view of the ICC's familiarity with Seatrain and its operations. The applications were passed on by Division 4 which granted a certificate in Aug. 1942 for commodities generally.

18 months later the Commission on its own motion reopened the case for reconsideration, raising the question as to whether the certificate should be modified so as to limit Seatrain to its peculiar type of operation, i. e. transporting railorad cars, loaded and empty, and liquid cargoes, nm or whether it should continue to have the authority granted in the certificate to transport commodities generally. Certain other lines were permitted to intervene. Seatrain refused to introduce further evidence pointing out that the certificates had been in effect for a year and half and that they were supported by accompanying evidence. Seatrain also argued that once a certificate is issued under Part III, in the absence of fraud or lack of full disclosure the ICC has no power to alter or modify it, so long as service in not abandoned. Seatrain did not present evidence as to its reliance on the certificate before the ICC. It apparantly treated the case as though reliance should be presumed.

Thus 2 and a half years after the certificate was issued, it was modified to limit Seatrain to its peculiar type of operations; authority to carry commodities gnerally was withdrawn. The ICC relies on §315(c) of Pt III of the Act. This provides that the ICC may suspend, modify or set aside its orders. The original certificate (pet. 42) provided that the carrier is authorized to perform the service subject to such terms, conditions and limitations as are now or may hereafter be attached to the exercise of such authority by the ICC.

In the proceeding before the DC to set aside this modified certificate Seatrain introduced evidence showing extensive financial relia nce on the original certificate. (Motion to affirm 6).

The DC held that the action of the ICC was improper on the ground that it had no authority to enter its order modifying the certificate.

The US seems to argue that Division 4 made something in the nature of a clerical error in giving authority to the appellee to transport commodities generally, and that the later action of the ICC (3 commissioners dissenting) was merely to correct the mistake. But that is a pretty weak argument. The original certificate gave broad authority to the appellee after a full presentation of evidence and argument. The division was quite aware of what it was doing. A year and a half went by and then suddenly the ICC seeks to withdrawm much of the authority granted even though there was no fraud, or nondisclosure. There is nothing in the Water Carriers Act expressly giving the ICC authority to revoke or modify certificates once granted. §315 refers only to orders, not certificates. It would require more express language than this to confer on the ICC the right to withdraw on its own motion authorizations on which reliance may have been put and rights vested. A certificate is a franchise and should not lightly be set aside. It seems to me that the burden is on the commission to show the necessity of the a ction if statutory authority does exist. Here no showing is made or suggested as to the necessity of the action.

There is legislative history to indicate that power was expressly not given the commission to revoke or suspend certificates of water carriers. Motion to affirm 3. While not conclusive on the power to modify it is helpful. §309(d) which permits the ICC to attach reasonable terms, conditions and limitations to the exercise of the privilege given hardly permits the action here taken, nor does similar phraseology in the original certificate.

It would seem that under the circumstances the DC did not err in permitting evidence of financial reliance to be introduced since appellee was merely seeking to preserve a right already given by the ICC. In any event reliance on a franchise should be assumed, in the absence of a showing to the contrary. Arbitary action by the ICC is not conducive to faith in the administrative process. Furthermore the principles of res judicata might well apply here, since the ICC modified the certificate on the basis of factw in the orginal record.

Note Prob. Juris. EGW OP. SJ 34

No. 961
Morris v. Jones, Dir. of Ins., Ill.
Appeal from Ill. Sup. Ct.

Juris.S.J. 3
Appeal Timely S.J.

This is an appeal arising under a claim that an Ill. statute and the action taken thereunder violates the full faith and credit. Chicago Lloyds is an unincorporated voluntary association dealing in the insurance business. It was organized under the Ill. statutes. It also did business in Mo.

In 1934 appellant through an employee of Lloyds was subjected to false arrest and malicious prosecution. Suit was commenced thereon in Mo. and service was obtained on Lloyds in that state. In 1938 before judgment was entered in the Mo. proceedings, Chicago Lloyds became subject to liquidation proceedings under Ill. law. The statutory provisions dealing with liquidation vests the property of the company in the statutory liquidator. The court entertaining the liquidation proceedings entered an order enjoining suits against Lloyds and directed the liquidator to proceed to liquidate the business and gave notice of all creditors having claims. The statute further provides that the rights and liabilities of the company and its creditors shall be fixed as of the date of the order directing liquidation. Within the time provided in the order appellant filed a claim with the liquidator setting forth the fact of his action in the Mo. court and claiming $100,000 because of the tort. The Mo. court proceeded to judgment in 1941 awarding appellant $50,000. The action was not defended by Lloyds after the liquidation order was entered. In 1941 appellant amended his claim in the liquidation proceedings in Ill. in order to prove the valid judgment which had been awarded in Mo. The claim was disallowed.

The court below affirmed this action.

In the present case we have a valid judgment obtained in another state after a judgment had been entered in a liquidation proceeding in Ill. pursuant to a special statute. Appellant contends that the Ill. court was bound to give full faith and credit to the Mo. judgment thereby permitting appellant to participate in the Ill. assets of Lloyds. It would appear, however, that the Ill. judgment, since it was prior to the Mo judgment properly under the Ill. statute established the rights of the then existing creditors in the assets. Appellant had an opportunity within the time permitted by the Ill. judgment directing liquidation to prove his claim. He did file a contingent claim but it was not pressed. Thereafter, in 1941, when that claim was amended to include the Mo. judgment, it was too late to obtain a share in the assets under the Ill. proceeding. Thus, even though the Mo. judgment is good, it would seem that appellant under the circumstances is not entitled under the full faith and credit clause to share in the assets of Chicago Lloyds.

In a sense, however, the Ill. court and statute seeks to reach out and control extra-state liabilities of Lloyds. It is clear of course that a federal court can so act under the bankruptcy power but a state court may not do so. In any event, however, the Ill. court had plenary power over the assets of Lloyds situated within that state. It properly ordered those assets distributed to creditors who had perfected their claims as of a given time. The claim accruing thereafter on the Mo. judgment thus is not a good basis for appellant's participation in the Ill. assets.

DISMISS; DENY EGW Op. S.J. 27

No. 963 1945 Term
Agwilines, Inc. v. Motorship San Veronico
Cert. 2 Cir.
Juris. R. 2. Cert. timely: Judgment entered Jan. 10, cert. filed March 22, 1946.

Petit. libeled resp's ship for damages sustained in a collision. At the time petit's ship was under time charter to the War Shipping Administration; because of the damages sustained by petit's ship it was detained 9 days; under the terms of the charter the owner was paid only half charter hire during the period of collision repairs. Resp.s agreed to pay petit. the difference between what petit. received under the charter during that period and what would have been received But for the collision. Petit. however sought full recovery for the loss of use of the ship undiminished by the amount paid it by the gov't.

The DC held for resp. and the CCA affirmed, Clark dissenting.

The only issue in this case is the measure of damages. Petit. argues that a tortfeasor cannot reduce the amount of his liability by the fact that the injured party is reembursed for part of the loss by a third person. But the point is that the charter covered the entire time during which the vessel was being repaired. The use of the vessel had been surrendered by petit. under the charter. The loss it sustained thus is thus loss of profits of which it was deprived by the collision. That loss is measured by the terms of the charter. Here under the charter the gov't paid half hire. Full hire is all petit. is entitled to and this resp. agreed to pay. This situation is unlike the case where an injured party is covered by insurance. There to be sure the tortfeasor may not reduce his liability by the amount the insurance company pays the injured party. Here however the charter was not a policy of indemnity but rather payment for the use of the vessel. The situation is quite different.

Nor can the owner recover on behalf of the charterer. This ct has held that in this situation the charterer has no cause of action for loss of use against the tortfeasor. Robbins Drydock Co. v. Flint, 275 US 303. The owner suing on the charterer's behalf is in no better position. Thus no loss having been shown over what resp. has agreed to pay, petit. may not recover more.

DENY EGW Op. R. 66

No. 968-69 1945 Term
Order of Ry Conductors et al. v. Swan et al.
Williams et al v. Swan
Cert. 7 Cir.
Juris. R. 2. Cert. timely: Judgment entered Dec. 21, cert. filed March 18, 1946.

This case involves a fight between a large and a small railroad union. The only question is which of the 2 divisions of the Railroad Adjustment Board has jurisdiction over disputes involving yardmasters. The suit was commenced by a declaratory judgment action by the ORC and members of the Adjustment Board were defendants. The Rail:Yardmasters of America intervened. It appears that jurisdiction over yardmasters, who are supervisory employees having charge of work in railroad yards is in either the first or forth division of the Board. The first division have jurisidction over disputes involving "yard service employees of carriers", the fourth has jurisdiction over employees of water carriers and over all other employees of carriers over which jurisdiction is not given to the other 3 divisiions. The labor members of the 1st division vote for jurisdiction and the carrier members against creating a deadlock. Since th deadlock is over jurisdiction no referee is appointed. On the other hand the carrier members want jurisdiction in the 4th division and the labor members deadlock. The Yardmasters is a comparatively small union with 6000 members, containing about 60% of all the yard masters. They have no representation in either division. Other yardmasters are members of the ORC and the BRT. It appears that the 1st division has entertained about 3 cases involving yardmasters but no jurisdictional issue was then raised; when it was raised a deadlock resulted. Deadlocks have resulted when the yardmasters sought to have 3 cases brought before the 4th division. Apparantly the ORC through its large voice on the 1st division is seeking to use its power to hamper the growth of the smaller Yardmasters union.

The DC at the hearing heard testimony from several experienced railroad executives and other employees to determine what was the precise meaning in the trade of yard service employees. The DC found it was a technical term and the evidence supported a finding that yardmasters were not yard service employees, although their status is somewhat ambiguous. There is some vague and inconclusive administrative construction in reports etc. where no real thought was given the problem lumping yardmasters with yard service employees such as switch tenders, hostlers etc. Petit. 14 n 2. But the Board has never agreed on the problem and it was open. Because the Yardmasters found

that division 4 deadlocked on jurisdiction every time a case was submitted involving yardmasters the union brought a suit for mandamus in the DC in 1938 in order to force the division to take jurisdiction. Division 4 was named as defendants. The carrier members admitted jurisdiction but the labor members did not file an answer. The DC entered judgment holding division 4 had jurisdiction. But since there was no real contest, resps. do not insist that it is res judicata although it would seem to be in the absence of collusion.

In any event the DC found after hearing in the present case that yardmasters were not yard service employees and hence that division 4 had jurisdiction. The CCA affirmed on the ground that the finding was supported by substantial evidence.

The result below pleases the yardmasters, the carriers, but not the ORC. While it is somewhat unusual to interpret a statute by holding a hearing on the technical meaning of a phrase, it seems proper in the present case where the words used do not have a general meaning, but do convey precise meaning to those who work in the industry. Yardmasters are something of a hybrid. They do not perform any physical work in the yards, but they apparantly supervise and control the work that is done there. They do not consider themselves yard service employees; there is no legislative history dealing with the meaning of yard service employees and while there is some ambiguous language in general reports made certain administrative agencies, their attention was clearly not drawn to the issue here involved. The Adjustment Board has never decided the question. There is no way that it can since the issue produces a deadlock in both divisions. The action of the ct seems proper and the result below seems correct. There is no necessity for review here since the decision below is binding on all the parties interested and a decision by this ct could add nothing but emphasis. There is nothing to indicate clear error in the action taken below, and the decision prevents a small union from being swallowed up by the larger.

DENY EGW Op. R. 271

No. 970 1945 Term
Fishgold v. Sullivan Drydock & Repair Co.
Cert. 2 Cir.
Juris. R. 3. Cert. timely: Judgment entered March 4, cert. filed March 19, 1946.

This question concerns the interpretion of the provision of the Slective Service Act dealing with the rights of veterans to reemployment.

Petit. entered the employ of resp. as a welder on Dec. 21, 1942 and was there employed till May 22, 1943 when he was inducted into the army. He was honorably discharged and was restored to his former position by the resp. on Aug. 21, 1944 and was never dismissed. However on three separate occassions during 1945 it refused to give him any work because there was not enough for all. In so refusing it preferred other non veteran welders who had higher shop seniority than the petit. This was in accordance with the union agreement. Petit. contends that the act gives him priority over all his fellows except other veterans. The union (which intervened and is prosecuting this appeal) takes the position that the act merely restored him to the same place in seniority which he would have had had he been on leave of absence during the period of his service. Thus during that period on this view seniority did not accrue.

§8(b)(B) provides that if the veterman makes application for reemployment "..such employer shall restore such person to such position or to a position of like seniority status and pay.." (c)"Any person who is restored to a position.. shall be considered as having been on furlough or leave of absence during the period of his training and service...shall be so restored without loss of senirotiy" and entitled to other benefits offered by employers to those on furlough, and "shall not be discharged from such position without cause within one year after such restoration.

Petit. in this case sued for the pay he would have had had he not been layed off.

The DC held for petit.

The CC A reversed, C ase dissenting.

The matter is one purely of statutory construction. The majority emphasized the fact that the statute merely required that petit. be restored to "such position", namely the position he had before entering service, or one of like seniority. There is no interference that the statute

meant the petit's seniority to be increased while he was in the service so that he would have the same status as if he had never left. Congress sought to have him regain his old position or one as nearly like it as possible. §8(c) says he shall be treated as though on leave of absence and that he shall be restored without loss of seniority. Thus he was not to lose such seniority as he had, but he was not to gain any.

The major difficulty with this view is the last sentence which says he shall not be discharged from such position within one year after restoration. Literally interpreted that puts him at the head of the class. It gives a veteran "superseniority". The ct read discharge to mean a final dismissal, not a mere layoff for a temporary period. It also held that "restored" means the new job was subject to the same conditions as the old one except imporved to the extent that a leave of absence would improve it. Here apparantly under the union contract petit. did not accrue senior rights while in the servide.

The administrative interpretations and legislative history are of little help here. Selective service [R 186] issued a regulation which interpreted the section to give veterans superseniority. This was never accepped widely either by cts or groups in the public, including some veterans organizations. The Attorney General takes the same position. But the NAT. War Labor Board took the opposite view in a decision as has the Solicitor of the Labor Dept. in issing an instruction to guide federal conciliators. All are charged in some measure with adminstering the act. While Congress did extend the Act in 1944 and slightly amend §8 there is nothing to show enactment of the Selective Service Regulations. The conflicting interpretations were known to it and it took no action. To hold otherwise than what the ct has done would be to construe the act so as to give veterans who are junior to non veterans in seniority a right to deprive the latter of their jobs. It would set them at war with labor unions all of which are avoided by the result below.

This case should be heard this term.

GRANT EGW Op. R. 181

No. 972 1945 Term
FCC v. WOKO, Inc.
Cert. App. DC

Juris. R. I. Cert. timely: Judgment entered Jan. 21, cert. filed March. 19, 1946.

In 1942 radio station WOKO filed an application for renewal of its license, which has been renewed periodically since 1930. The FCC held a hearing with respect to the application to determine whether the representation and statements made to the FCC and before that the FRC by the station, its officers and stockholders with respect to the ownership of its stock were true and whether the station is qualified to continue the operation of the station, and would serve the public interest, convenience etc. It was revealed that the station mx and its officer and 25% stockholder Smith had consistently misrepresented the fact that 24% of the stock was beneficially owned by one Pickard, a former member of the FCC then vice president of the Columbia Baroadcasting Co. He was given this stock in return for procuring for WOKO an affiliation with CBS. The other stockholders which are a newspaper in Albany where the state is located and one Curtis were not shown to have had knowledge or participated in the concellment. They own 50 1/2% of the stock. The stock owned by Pickard was kept in xxxxxxxxx Smith's name for a time and then put into a straw name.

§307(d) of the statute provides that the same considerations that govern granting of applications for licenses shall apply to renewals. §308(b) requires certain statements in the application as to citizenship, character, ownership etc. of the station. §309 provides in effect that no property right in the license is granted by its issuance. §312 provides that a license may be revoked for false statements in the application for the license or in the statements of fact required by §308. Licenses are granted only on a showing that the public convenience etc. will be served thereby.

The FCC without considering the service provided by the station to the public revoked the license on the ground that because of the facts revealed at the hearing it could not be entrusted withthe responsibilities of a station licensee and that a grant would not serve the public interest.

The CCA reversed, holding that the action was arbitrary; that it could not revoke without considering the facts of its service and whether the misstatements are so compelling as to outweight all other considerations, such as the loss of value of the property in the station etc.

Since the complexion of the Appl DC has changed in recent months its administrative law decisions have been rather suspect. This I think is a typical instance. Here the facts clearly show that the station and owners of half its stock have been playing fast and loose with the statute and regulations. Certainly the fact that Pickard, a vice president of CBS owns a substantial interest in a local station is a fact of some importance for the consideration of the FCC when its grants the renewal. Yet that fact was withheld. The FCC determined that this circumstance revealed a lack of sufficient character on the part of the station and its owners to justify a finding that a renewal was in the public interest. A licensee operates in the express knowledge that the right is subject to revocation for cause; it takes the risk that a considerable investment may be lost if it does not live up to the requirements. That is the scheme of the statute. Yet here the CCA takes into consideration the fact of that loss in reversing the FCC. It sets up a standard on the part of the FCC very much like a finding beyond a reasonable doubt in a criminal case. But the radio station is meant to serve the public not its own interests exclusively. Upon a showing that it has misrepresented material facts before the FCC, it seems to me that the agency in its discretion may properly refuse to renew the license because the public interest would not be served in doing so. This quite apart from the nature of the stations programs etc. There is a requirement of character and responsiblity which is not revealed merely by the program content of the station. This is quite apart from §312 which expressly gives the FCC authority to revoke a license for false statmmetns of the kind here involved. It seems to me that section gives the FCC power to refuse to renew for the same reasons. Otherwise it would renew and then use its power to revoke, which would be a round-a-bout way of doing the same thing.

In order to fulfill its reponsibilites in issuing licenses the FCC has a right to insist on full and fair disclosure of material facts. It is this which the CCA refuses to permit. The fact that there are criminal penalties involved does not prevent the FCC from exerting its power also. The FCC should not be requeired to make findings as to the adequacy of the station's services, when the facts now in the record alone justify a failure to renew.

No. 973 1945 Term
Board of Governors of the Fed. Reserve System v. Agnew et al.
Cert. App. DC
Juris. R. 2. Cert. timely: Judgment entered Feb. 13, cert. filed March 19, 1946.

Section 30 of the Banking Act provides that if any director of a state member bank of the Fed. Reserve violates any law relating to such bank the facts may be certified to petit. which shall give due notice and a hearing to the director and if the continging violations are found the Board may order that the director be removed from office. The order and its findings are to be kept secret except in connection with proceedings for violation of the section. Violation is punished by fine and imprisonment. Section 32 provides that no director "primarily engaged" in underwriting stocks, bonds and securities shall serve as a director of a member bank. No judical review of petit's order is provided for.

Resp.s are directors in a NJ bank. They are employees of Eastman, Dillon & Co., the 9th largest underwriter in the country; it is also a very large broker. Its underwriting transactions over a long period amount to 15% of the securities bought and sold by the firm; in 1943 26% of the gross income came from underwriting; in 1944, 32%. In 1943 its participation in underwriting was $14,657,000. More of its business comes from brokerage transactions than from underwriting.

To obtain review of the removal order resp.s brought an action for injunction or certiorari in the DC which held it had power to review the order and that Dillon Co. was not primarily engaged in underwriting.

The CCA affirmed.

1. Petit. urges that its order of removal is not reviewable by cts directly. It points to the fact that the requirement of secrecy in the statute would be negatived to hold otherwise. While it has been held that some administrative orders are not judicially reviewable, as in the Switchmen's case, the tendcency has been particularly where private rights are directly affected to hold that the administrative orders are reviewable by proceeding in equity. The Estep case points up the problem as to the situation where congress has not given a means of review expressly. I think perhaps that the

interest in protecting private rights from arbitrary action outweighxs the interest in secrecy, although the qu stion is not free from doubt.

2. Assuming that the order is reviewable I think the CCA erred. They made the interpretation of "primarily engaged" turn wholly on a w quantatative test; thus if 51% of the business is underwriting the Co. is within the statute as are its employees; otherwise not. But this is both too mechanical and unrealistic. Dillon Co. is one fm of the 9 largest underwriting firms in the US. The fact that its brokerage business is bigger does not prevent it from being primarily engaged in underwriting if primarily be defined to mean substantially or essentially. Otherwise a very small firm, which has a minute part of the underwriting business may be primarily engaged because that little underwriting is 51% of its whole business, while a large firm like Dillon Co. whose underwriting business is much larger but does not make up 51% of its total business escapes. Such a holding seems contary to the intention of congress which sought to avoid close tie-ups between underwriting companies and banks by forbidding common officers. The case is one of novel imppession and should be passed upon here.

GRANT EGW Op. R. 29

No. 988 1945 Term
US v. Bruno
Cert. 3 Cir.
Juris. R. 2. Cert. timely: Judgment entered Feb. 15, cert. filed March 23, 1946.

Resp.

Petit. was indicted for selling waste paper at over ceiling prices. 5 separate sales were charged in 5 counts. Resp. Petit. dealt through Carrano, a dealer who bought the paper from him and resold it to the mills, although it was shipped by Resp. for Carrano directly to the mills.

In each transaction Carrono order #1 Assorted Kraft paper having a ceiling of $1.75 per cwt. Two carloads were shipped to one mill and 3 to another. Carrano paid the invoice price. Inspection by the mills revealed that Petit. resp. had upgraded, that it delivered an inferior quality of waste paper not corresponding to the grade ordered. The actual ceiling of the grade shipped was $1.15 per cwt. With respect to 2 shipments the mill made no complaint. In 3 cases after the OPA had started to investigate the mills paid Carrano only the correct ceiling for the grade delivered and debits were then charged by Carrano to Bruno.

There was testimony that the mills customarily inspected their receipts of paper as to grade and if below grade they would notify Carrano.

The CCA reversed on the ground that an upgraded sale does not violate a price regulati n where there is an industry practice whereby the buyer reserves the right to regarde the shipment and where it may be customary to ship and bill without regard for the lower guality of the goods.

Petit. argues that the CCA decision makes difficult the prevention of a very common device in the black market, namely upgrading--charging a ceiling price that is not justified by the actual goods sold which are inferior in quality. It points out that to permit a seller to defend on the ground that the goods shipped are regularly inspected by the buyer and may be regraded by him takes the heart out of the act. It points out that in most ordinary sales under the sales act or otherwise a buyer has a right to inspect the goods and to refuse to pay for goods which do not meet the requirements of the order. There is nothing unusual about this, yet the CCA holds it is a good defence. The point is that the buyer which must have scarce goods is willing to pay a preium for inferior commodities, and is therefore uninterested in relying on the right of inspection. The sale is consummated for the purposes of the regulation on shipment and arrival. Thereafter the fact that the buyer protects himself should not aid the seller in escaping conviction. There is a conflict with US ex rel. Bowles v. Seidmon.

It was also contended by resp. that there was a custom

in the industry that cars were filled with whatever paper the seller had and billed at a higher grade. But as the gov't points out that even if such a custom exists it is clearly prohibited by the regulation, which requires correct invoicing.

Here it is true that resp. may not have received more than the ceiling on 3 out of the 5 shipments, since the upgrading was discovered and he was debited this amount. But at least 2 sales were wholly bad, and as to the others the sale was made and based on the invoice. The fact he received less cash because because of the OPA investigation did not prevent the consumation of the sale.

GRANT EGW Op. R. 115

No. 994 1945 Term
Crane v. Comm.
Cert. 2 Cir.
Juris. R. 22. Cert. timely: Judgment entered Dec. 28, cert. filed March 25, 1946.

Petit. received on her husband's death an apartment house worth $262,000 subject to a mortgage of $255,000 for which she was not personally liable, and accrued interest of $7,000. Thus her equity was zero. Between the date of acquisition, 1932 and 1938, she was allowed depreciation deductions on the full value of the building, without reduction because of the mortgage. The mortgage was in default at all times and she agreed to operate the property collect the rents and pay the net after taxes and expenses to the mortgageee. In 1938 to avoid foreclosure she sold the property subject to the mortgage for $3,000 cash. The expenses of the sale were $500 so that she netted $2,500. In the returns filed by petit. while she held the property she reported the rentals as gross income and deducted interest on the mortgage and depreciation totaling $25,500. In the 1938 return she reported $2,500 as capital gain from the sale of the building. The comm'r determined a capital loss of $500 on the land and a gain of $24,000 from the sale of the building.

§111(a) provides the gain from sale of property shall be the excess of the amount realized therefrom over the adjusted basis in §113(b). Amount realized is defined as the sum of any money received plus the market value of the property received. §113(A)(5) makes the basis of property transmitted at death its value at that time; 111(b) provides the adjusted basis shall be the basis under (a) adjusted for depreciation alloowed but not less than that allowable. The basis for depreciation under §114 is the same as that for determinating capital gain.

The Tax Ct held that the amount of the mortgage should not be included in the amount realized since she was not liable under it; thus the only gain was the $2,500 cash. The tax ct held further that on acquisition the basis of the property was zero since she had no equity. It held that since the basis was zero it could not be adjusted downward for depreciation allowed or allowable.

The CCA reversed, holding that petit's equity could not be treated as the basis for depreciation since it would only represent a small part of the wear and tear on the building and if not allowed in installments it would be taken in the year of sale contrary to the intents of the statute and uniform treasury practice. It was also held that even though not liable on the mortgage petit.

should have included it in the amount realized, since she was in control, reeeived the income from the property and by the sale is relieved of the creditors right to seize one of her assets. Thus the sale releases this right and the vendor receives property other than money.

This case involves a very difficult problem of statutory construction. Here petit. had a losing property. Her equity on its acquisition was zero. The only gain received on the sale was $2,500 yet she is taxed on $25,500 because the amount of the mortgage is treated as part of the amo nt realized even though she was not personally liable thereon. From that amount is subtracted the adjusted basis of the property, including the depreciation she had taken. While the st tute says that the basis for depreciation is the same as that for determining gain, it is difficult to see how petit. can be said to have realized gain in the amount of a mortgage on the property for which she was not liable. She is freed of no real burden by the sale, so far as the mortgage was concerned. Her other property was not menaned, and no personal judgment could have been obtained against her through that mortgage. It is true that here petit. included the amount of the mortgage as part of the value of the property in deducting depreciation. To be consistent she should have used her equity as the basis; this would hage reduced the amount of depreciation taken and would have been hard to compute. But that does not answer the question of the amount realized on the sale. Her total realization was $2,500. The amount of the mortgage should not be included. The fact that the taxpayer has taken a somewhat inconsistent position with regard to her depreciation basis does not answer the question of statutory construction involved. Since the Tax Ct's decision was at least a reasonable conclusion on the law it should have been affirmed. There is a conflict at least in principle with Hilpert v Comm. 151 F2 929. It would seem that the mortgage should be excluded from the amount realized.

GRANT EGW Op. R. 33

No. 996 1945 Term
American Stevedores v. Porello & US
Cert. 2 Cir.
Juris. R. 3. Cert. timely: Rehearing denied Jan 31, cert. filed March 25, 1946.

Petit. was loading a Navy transport under a stevedoring contract; the ship was to carry troops and supplies. While loading resp. an employee was injured on the ship. Resp. bcought an action in admiralty against the US which impleaded petit. Under the standard contract,"Warshipsteve" petit. agreed to be responsible for injury to persons through the negligence or fault of the Stevedore, his employees and servants."

For 10 months after the accident petit. received compensation which was retained.

Suit was brought against the US under the Public Vessels Act which permits such suits for "damages caused by a public vessel of the United States. "

The DC held that both the US and the petit. were negligent, and permitted contribution between the US and petit. of one half, allowing credit to petit. for the amount of compensation it had already paid.

The CCA affirmed, with modifications. (1) It held a suit for personal injuries was permitted under the Public Vessels Act; (2) that petit. was solely responsible to pay the damages awarded ag inst the US and petit. under the above stevedore contract; (3) that there was no basis of contribution between the joint tortfeasors in admiralty since there was no common liability; (4) that by accepting compensation payments resp. had not elected to pursue his remedy under the Longshoreman's and Habor Workers Act.

1. The Canadian Aviator case last term said that the statute was intended to impose on the US the same liability imposed by admiralty law on the private ship owner. Clearly the private owner would have been liable here, with or without negligence. But that case involved a collision between the libellant and a wreck while under tow by a public vessel. No personal injury question was invovled. It should be settled here, although I think the language of the Canadian case is broad enough to cover it.

2. The indeminty provision in the contract is apparantly standard and the US is a party, so that this ct is final authority on the meaning of it. Petit. argues that the indemnity provision applies only where it is solely responsible for the injury. This seems fair , otherwise the US avoids the fair share of its liability. It is also argued that an admiralty ct lacked jurisdiction to construe the contract which is claimed to involve a non maritime question. But the ct points out that jurisdictio

could rest on the fact the US is the indemnitee. The contract at best is ambiguous and to make the stevedoring co. wholly responsible for injuries sustained in part through the fault of the US seems to go beyond the reasonable requirements of protecting the US.

3. The CCA suggested although it did not pass on the point that there can be no contribution here under admiralty law, since there is no common theory of liability, because petit. could not recover against his employer; i. e. the US can claim no contribution on the theory of a common liability by which it has been compelled topay. That of course cuts both ways as petit. points out. The Chattahoochee, 173 US 540 may call for a different result on this point! The fact is that a single state of facts created liability in both US & petit. though for one liability was in admiralty and for the other ex contractu.

4. As to election of remedies the CCA is probably correct. Under the Longshoremen's Act election is to be made by giving notice to the deputy commissioner. Here notice of election to sue was filed. Also under the statute accpetanne of an award to bar suit must be under an award in a compensation order. Here no such order was entered. The payment was voluntary and was accepted apparantly as an installment on liability to be established in the suit.

The US does not oppose cert.

GRAnt EGW Op. R. 119

Nos. 997-998 1945 Term
Edward Katzinger Co v. Chicago Metallic Mgf Co.
Cert 7 Cir.
Jutis. R. 2. Cert. timely: Judgment entered Jan 22, cert. filed March 26, 1946.

This case raises the same issue as Magregor v. Westinghouse, No. 410 and is in conflict.

Petit. is the owner of a patnat relating to a baking pan. Under it the baking surfaces contain a number of little depressions unlike the usual flat type. This is supposed to improve baking. Petit. licensed resp. in their manufacture. The contract provided that the licensee can terminate the contract only on ceasing to manufacture of sell the patented article. Should it terminate without ceasing to manufacture the licensee agreed that it was estopped from denying the validity of the patent and be deemed an infringer. There was a clause in the contract requiring the licensee to sell the products at the same price as petit. Reso. paid the royalties for a while, and then became the manufacture of slightly different pans which it is claimed infringed the patent involved here. Petit. demanded royalties. Resp. brought a declaratory judgment action; the CCA held that the license was terminated. Petit. then on remand set up the estoppel clause in the contract. The DC held the patent was infringed that resp. was estopped to deny its validity.

The CCA reversed holding that under the Sola v. Jefferson El. Co. case resp. was not estopped to deny validity. On remand the DC held the patent invalid, but made no finding as to the issue of infringement. It had previous held that there was infringement.

The CCA affirmed the finding of invalidity, but did not pass on the invringement issue.

It appears that resp. did comply with the price fixing provision for a time, altho gh petit. gave evidence that it would not have enforced the provision had it been violated. Here unlike the Sola case, and like the Magregor case the suit is not bro ght to compel compliance with the price fixing provision, but rather is brought by the licensee for a declaratory judgment that the patent is invalid. The estoppel provision of the contract if good would be a complete bar to the suit. Thus the question becomes one of determining whether the mere inclusion in a license contract of a price fixing provision, even where not sought to be enforced, permits the licensee to attack the validity of the patent, where it has expressly agreed not to do so. The ct treated the contract as not severable, unlike the Penna. ct in the Magregor case. It seems to me that it goes fairly far to say that a price fixing clause tho gh not sued on so taints the whole contract that

an agreement not to attack the patent is void; it may be that the public interest in price competition requires that price ~~price~~ fixing powers be incident only to valid patents and that noone should surrender the right to attack them. O* this issue the ct is split 4-4. Cert. should be granted, since the question will not be decided this year. It shouldn't merely be held.

GRANT EGW Op. R. 31

No. 1011 1945 Term
Hudock v. Freeman
Sup. C . Pa.
Juris. R. 30. Cert. timely: Judgment entered Jan 7, cert filed March 28, 1946.

Penna. Bank & Trust Co. before 1930 was a solvent bank with a $200,000 capitalization under a Penna. statute imposing a liability on shareholders to the par value of their shares. Liberty State Bk & Trust Co., a title insurance Co. with $250,000 capitalization, but without shareholders liability merged under a Penna. statute with the Penna. Bank in 1930. The statute provided that on merger the corps. shall become one, but that the creditors of each shall continue to have their former rights and all debts and duties of the old corps. shall attach to the new one.

Petit. is the owner of 125 shares of the new company received in exchange for shares in the title company. The new bank failed and resp., the state secretary of banking brought this suit on an assessment against the shareholders of the new corp.

The ct below held that the shareholders liability attached pro rata to all the shares of the new corp. regardless of whether the shareholder of the merged corp. had been subject to double liability.

The only federal question raised is that to so interpret the Penna. statute is to deny due process to petit. But such a contention converts a mere matter of construction of an ambiguuous state statute into a denial of due process. One of the two merged corporations had shareholders who were subject to double liability. Petit. entered the merger with this fact before him. The merger statute itself is somewhat ambiguous but seems to indicate that the new corp. takes over all the debts, duties and liabilities of both of the older corps. The ct below expressly read this provision to impose double liability on all the holders of stock in the new corp. whether they were subject to it or not on the shares given in exchange therefore. This seems correct. No real federal question is presented.

DENY EGW Op. R. 51

No. 1018 1945 Term
Walling v. Halliburton Oil Well Cementing Co.
Cert 9 Cir.
Juris. R. 2. Cert. timely: Judgment entered Dec. 29, cert. filed March 29, 1946.

This is a good case in which to overrule Walling v. Belo Corp. The Facts are practically identical. Resp.s performs services for persons drilling and operating oil wells. The case involves its field employees, cementers, mechanics and the like. Prior to the FLSA they were on a monthly salary. After the act the present pay plan was adopted. The employment contract specified a basic hourly rate for the first 40 hours each week and provided for payment of not less than 1 1/2 times that rate for hours over forty. The contract also guaranteed each employee for regular and overtime a sum equivilent to 106 times the basic hourly rate (40+1 1/2 x 44). The basic ho rly rate was so fixed that the employee had to work a total of 84 hours per week before receiving compensation in excess of the quaranty. In effect the employees continued to be paid after the act what they got before. Thus where an employee was ill his pay reduction was computed not onx his hourly rate but the proportionate part of his monthly salary which had been reduced to weeks for the purpose of computation under the plan.

The guarantee was paid when fewer than 40 hours were worked as well as whhn more were worked so long as the total was not over 84. The facts show that 80% of the weeks were weeks in which less than 84 hours were worked. The average was around 60.

The DC held the plan good under the BELO case and the CCA affirmed, one judge dissenting.

Petit. contends the hourly rate specified in the plan in not the regular rate of pay upon which overtime should be computed. Aside from the fact that the pay scheme here is even more unrelated to the actual rate as determined by dividing the hours actually worked into the guaranteed wage inx view of the fact that an employee has to work 84 hours rather than 60 to get overtime the case is just like Belo. A more arbitrary scheme for avoiding the effect of FLSA to spread the work and make it expensive for employes to work employees extra hours is difficult to imagine. Everything you wrote in your dissent in the Belo case is applicable here. In view of the cases since that case the Belo case has very little vitality in it. However, so long as it stands I think this scheme must be upheld. It follows the Belo case quite carefully on the facts. The regular rate here of course is not based on hours actually worked or wages

wages actually received, but an arbitrary figure set out in the "contract" which has the effect of permitting, even inducing the employer to work its men more hours rather than less since hourly costs drop the more the hours worked, under 84. The Youngerman-Reynolds case and the Harnishfeger case should control here.

No. 1019 1945 Term
International Harvester Co. v. Evatt
A ppeal Sup. Ct. Ohio
Juris. SJ 2. Appeal timely: SJ 3.

Ohio levies a tax on foreign corporations "for the privilege of doing business in this State". The tax base is in part determined as follows: The total value of outstanding shares of a foreign corporation is obtained; that value is divided into two parts. One part is multiplied by a fraction whose nominator is the business done by the corp. in the state in the preceding year, and the denominator is the total value of business done everywhere. In interpreting the meaning of business done in the state the State Baord of Tax appeals includes all sales solicited and secured by appellant's Ohio branches for products made by appellant where the goods are shipped directly to the customer from outside the state, the shipment being made at the direction of the Phio branches. To this appellant has no objection.

However, the Board also included as busines s done in the state where the situation was revessed. Appellant has a factory in Ohio where it makes motor trucks and it ships directly to customers outside the st te in response to a direction by appellant's branches outside the state to do so. As to these, the order is obtained outside the state and shipment is made in response thereto, directly to the out of state customer. The Board acted under a rule of the Tax Commissioner which requires the inclusion of such items in business done. These items are substantial.

Appellant argues that the inclusion of such business is a tax on property and business outside the state, hence invalid under the 14th amendment; it is also contended that the tax as construed unlawfully burdens interstate commerce.

1. As to the due process point, it seems reasonably clear that the tax does not reach wholly extra state business. The contract with Ohio is that the goods are manufactured there. It is true that the tax is not one on manufacture but one on business done within the state. But looking through to the substance of the tax, it would seem to be valid under Amer. Mgf Co. v St. Louis, 250 US 459, where a tax on manufacture was sustained though measured by goods shipped outside the state.

2. As to burden on commerce the case is more doubtful. Appellant points out that the state is here inconsistent. It includes both shipments from out the state to Ohio customers, and shipments from Ohio to out of state customers. It points not only to the probability, but actuality of double taxation since many of the sales Ohio taxes are also taxed by the states to which the trucks are shipped.

Thus in Harvester Co v. Dept. of Treasury, 322 US 340 some of the sales which were there taxed by Indiana and which taxes were upheld here, involved shipments from Ohio to Indiana customers; the sales were there made by Indana branckes of appellant. Now Ohio taxes those same sales, by including them among the business done in Ohio. The basic rationale currently employed by this ct in these commerce cases to is preclude double taxation of the sale interstate sale. Yet that is precisely what is involved here. A proper rule would be that the state of destination may tax the sale, but not the state of origin. It is no answer to say that if the tax were on the incident of manufacture the state could reach it by basing the tax on the value of the manufacture under the St. Louis case, supra. Here the tax is on the privilege of doing business, and the appellant should not have to pay for the privilege of selling goods in other states where the only transaction in Ohio is that the goods are manufactured there.

Note Prob. Juris. EGW Op. SJ 30

Nos. 1052 & 1053 1945 Term
US v Dickinson
US v. Withrow
Cert 4 Cir.
Juris. R. 1. Cert. timely: Judgment entered Jan. 4, cert. filed april 3, 1946.

These are two suits under the Tucker act to recover compensation for flooding and damage to resp's lands. Both resps. own property along the Kanawha River in W. Va. Certain locks and dams raising the water level of the river were completed in 1937. Dickinson bought his land on Aug. 16, 1937. The dam was officially accepted by the petit. in Aug. 20, 1937.

Dickinson bought his land which borders on the pool created by the dam and construcded a large residence thereon. Withrow's land consists of residence property fronting on the river for 180 feet. Dickinson brought his action on April 1, 1943 and Withrow April 10. Dickinson claimed compensation for the permenent flooding of .22 acre, for intermintent flooding of .10 acre and other items. The last included the cost of protective work which would have prevented erosion and damage from saturation and erosion on the land not taken. Withrow's claims were similar. Awards were made for land permenently and interminttently flooded, and and a considerably larger amount for the cost of protective work.

The DC awarded damages as stated above on the theory the taking occurred on Sept. 22, 1938 when the elevation of 566 feet was attained; it rejected the petit's claim that the ca use accrued in May, 1937 when the dams was completed and in operation.

The CCA affirmed.

1. The first issue involves when the cause accrued. If it accrued in May 1937 Dickinson may not recover, since he did not then own the property. Valuation, the gov't claims should also be as of May, 1937, rather than on Sept. 1938 the date the water reached its new normal level. But the DC found that the taking was not complete until Sept. 1938, in that the height to which the pool would go was not clear until that time in view of the possible change in gov't plans; moreover the flooding was not fully accomplished until that time. There is no reason why the gov't should insist that the cause accrued at a time when the extent of damage was still speculative. If an implied contract arises on the taking, its terms were not complete at the earlier date. Thus Dickinson was the proper party to sue and the claims are not barred by the statute of limitations.

2. Dickinson was awarded compensation for the permenent

f

flooding of certain land. However, this land was reclaimed at his own expense prior to the time the suit was brought. The gov't claims it is not liable for this portion of land. It is conceded that had Dickinson taken no action the gov't would be liable. On any theory of contract the claim accrued when the land was flooded. Thereafter Dickinson raised the level of the land sufficient to reclaim it. I fail to see how such action on Dickinson's part can avoid the liability. The land was reclaimed with the permission of petit. It appears however that there is a conflict on this point with Kelley's Creek etc R. v US 100 Ct. Claims 396, 412.

2. 3. The gov't complains of the award to resp.s of the cost of riprapping (i. e. a sustaining wall of stones) and other works which could have prevented erosion to the part of the land retained by resps. The value of the land was shown to have been quite high. There was testimony that it would have been good economy to take these measures to prevent erosion. The award amounted to $10.33 per lineal foot of river bank. It is claimed that such damages are consequntial. The CCA relied on the principal that when part of land is taken compensation not only includes tha market value of that part taken but the damage to the remainder resulting from the taking, embracing injury due to the useto which the part taken is to be devoted. US v. Grizzard, 219 US 180. This seems to be a proper approach to the problem;;however there have been some divergencies with respect to the gov't,s responsibility for the cost of measures protecting that part of the land not taken. Petit. 13.

4. Last the gov't contends it is not liable for the alleged taking of land where that land is expected to be flooded intermittently at the new level of the river. It argues that there is no showing the overflows have been increased or are more likely because of the dam. The DC however, found that by operation of the dam the US could raise the water above the new normal level and that the dam had equipment to do so. There was evidence that the gov't had actually bought easements to 574 feet, rather than 566 feet, the normal height. There was also evidence, resp. 13, that the water might go so high because of the dam.

The case seems relatlively unimportant.

DENY(?) EGW Op. R. 252

No. 1056 1945 Term
Steele v. ~~Mann~~ General Mills, Inc.
Cert. 5 Cir.
Juris. R. 2. Cert. timely: Rehearing denied Feb. 15, cert. filed April 5, 1946.

This is a diversity case involving a suit by a contract motor carrier in Texas to recover for alleged deficiencies in payment under rates prescribed by the Texas Ry. Comm.

Petit. was an employee of resp. and it was decided that respl would set him up as a contract carrier so that it could haul its goods exclusively in Texas. This was done. A permit from the Texas Commission was needed and a copy of the contract between petit. and resp. was produced which stated that the rates would be as fixed by the Commission. Actually the arraggment which was contemplated involved a payment of expenses plus 10% to petit. which was below the applicable rate fixed by Texas statute. The arrangment continued for 3 years during which time petit. without protest was compensated under the above arrangment.

He later brought suit for the difference between the actual rate and the legal rate applicable to contract carriers in Texas.

The DC held for petit.

The CCA reversed, one judgxe dissenting, on the ground that though the contract arrangment in violation of Texas law was void petit. was in pari delicto and hence estopped from taking advantage of it. Treated as a suit on the statute, rather than on the contract, it found that the state statute permitted no such suit.

Petit. argues that the Texas statute fixing rates reveals an overriding policy and even though he cooperated in its breach to ought to be able to obtain financial advatgge from it. The case involves only the law of Texas. The law is not at all clear, but the CCA based its opinion on the law of Texas and there is no reason for this ct to review its conclusion. Admittedly for petit. to recover would engble him to take advantage of his own breach of that law.

The ct pointed out that the ~~xxxxxxxx~~ contract under which petit. was paid was the only operative contract and that was void. Hence there was no contractual remedy. The only suit permitted by the statute is one by the Ry. Comm. for a penalty. Moreover the statute was not passed for petit's protection but for the common carriers whose rates prescribed by the Comm. are made the basis of contract carrier rates.

DENY EGW Op. R. 408

No. 1075 1945 Term
Parker et al. v. Porter
Cert. Em. App.
Juris. R. 1 ??. Cert. timely: Judgment entered March 13, cert. filed April 8, 1946.

The question is whether a tenant has standing to obtain review under a rent regulation.

Petits. are tenants in an apartment house in NYC. The owner of the apartment house sought to sell some of the apartments so that the house would be cooperatively owned. Just as arrangements were being made the rent regulations was amended imposing certain requirements with respect to evictions by purchasers of such apartments, namel that they pay 20% of the purchase price in cash and that 80% of the tenants at the time of the issuance of the certificates of eviction under the regulation become purchas There was however a special hardship provision maixing with respect to cooperatives being organized at the time of the amendment. The applications for eviction were served on the tenants, and they contended before the Chief Branch attorney and the Regional Administrator that the requirement of the regulation had not been met. These officials denied the petitions for eviction, under the hardship oro-vision. The price administrator, however, issued an order granting the certificates.

Petits. then filed a protest against this order with the Administrator which was dismissed on they ground that tehant have no standing to protest the order.

The statute [§2(d)] gives the Administrator power by regulation or order to regulate speculative or manipulative practices including practices relating to the recovery of possession which in his judgment are likely to result in rent increases. §4 makes it unlawful to demand or receive more than the ceiling rent. The administrator under his rent regulation for housing requires, except for certain causes not here relevant, a certificate of eviction before a landlord may recover possession under local law. Permissio to evict is given a purchaser of housing accomodations who has complied with the reguirements of the regulation.

§203 provides that any person subject to a regulation may file a protest with the administrator and if the protest is denied file a complaint with the emergency ct.

A procedural regulation demfines subject to as reguiring or forbidding action on the part of someone.

The Emergency Ct held that a tenant is not subject to the rent regulation and hence the Emergency ct has no jurisdiction to hear a complaint filed by a tenant.

The argument of petits. proceeds on the theory that the regulations gives each tenant as vested right to housin accomodations except for certain exceptions and that they have standing to appeal an order depriving them of this ri

right.

I think the ct below is correct. The term "subject to" has been defined by the administrator in a way approved by the Emergency ct. as limiting the right to protest to one whose action is required or forbidden by a regulation. In other words such a one as is subject to criminal and civil penalties for violation. There is nothing in the actxxx or regulation which so involves any tenant. Atenant is given a right to sue for damages if overcharges are made but he is not liable for paying higher than the ceiling price. It is true that "subject" to has been somewhat boroadened by the Emr. Ct in 2 situations, one where agricultural producers are permitted to protest a regulation on processed agricultural commodities, but this right is given only to protect the special protestion given them by #3 which guarantees them certain prices; the other is that ane who receives a subsidy payment pay protest discriminatory treatment; but there economic interests are directly affected.

It seems clear from the terms of §2 that the preventior of eviction is used merely to prevent higher rents. It was not intended to give a tenant who has no such right under local law an indefeasible interest in the accomodations The administrator uses the reguation to protect the public interest in stable rents, not to protect the tenant in his house as such. This is also indicated by the legis. history. It is true that tenants participate inx the proceedings but only at the loweds administrative level, and then only to provide evidence upon which the administrato as guardian of the public intesest can make an informed judgment as to circumvention or evasion of the regulation.

If a tenant could obtain review here, it would follow that every non business consumer of food, clothes etc could obtain review of any price regulation which affects the cost of anything he buys, even though that regulation imposed no legal obligation on him. The administrative burden as resp. points out would be impossible. It would seem then that the Administrator alone is the guardian of the public interest in stable rents. Each tenant or buyer cannot be given the same status. The term "subject to" was used in the regulation to give a relatively narrow scope to review before the administrator and the Em. App. Resp. 11-12. Since no vested right in the tenant is given by the act to permit review of each and every order would put an intolerable burden not only on the Administrator But on the landlord who owns the property, and who but for the regulation may obtain possession. It would mean endless delay and hardship on returning veteran and others who own property. Since there can be no conflict and the result below is correct review is unneces

No. 1088 1945 Term
Oklahoma v. US Civil Service Comm.
Cert. 10 Cir.
Juris. R. 3. Cert. timely: Judgment entered Jan. 18, cert. filed April 11, 1946.

This case raises the question of the validity of the Hatch Act as applied to states. The Resp. filed a charge against one Paris and the petit. in that Paris had violated the act in that while serving as a member of the state highway Commision he also held the position of Chairman of the State Democratic Central Committee and took an a ctive part in the management of the party by assisting in the sale of tickets for the Okla. Victory Dinner, the funds from which were used for the party. The dinner was on June 14, 1943 and the charge was filed in Oct. 1943. Paris resigned as chairman on Oct. 18, 1943.

The statute provides that no officer or employee of a state or local agency whose principal employment is in connection with any activity which is financed in whole or part by loans or grants of the US shall take any active part in political management or campaigns. This act does not apply ganerally to elective officials. The act provides that if there is a violation resp. shall invegtigate and notify the state agency that removal is required. If this is not done, as it was not done here, the appropriate federal agency is to withhold double the amount of the salary of the offending officials from the funds paid to the state. The employee may not be reappointed to any state job within 18 months without like/incurring the wrath of Congress and resp.

The removal orders are reviewable in the DC, CCA are in this ct, ~~an~~

The CCA sustained the constitutionality of the Hatch Act and thus sustained the order.

1. The first arguement of petit. is that the Act applies only to "pernicious" political activity. That term is used only in the title of the statute; the words of the statute refer only to "any active part in political management". I don't think the statute can be limited to political activity which is pernicious, whatever that is. The Hatch Act is devoted to the rather naive and unfortunate theory that a nation of politicians can rid itself of politics, not merely "bad" politics.

2. The most important argument of petit., one on which the resp. does not oppose cert. is that the US cannot validity condition its grants-in-aid on compliance by the state with conditions which interfere with the internal administration of the state and the selection of its officials. This argment is based on the 10th amen

I think there is real merit in this argument. Just because Congress has the right to grant or withhold sums of money to the state, it does not follow that Congress may attach to grants any conditions it sees fit, no matter whether unconstitutional or not. Certainly Congress could not directly by law govern the appointment and qualifications of state officials. Yet here it does so on the theory that it is merely a condition of obtaining federal aid. While certain conditions, which are relevant to the purpose for which the money was given, may certainly be attahhed to grants, I don't this Congress may properly attach a condition dealing with the freedom of political activity of its officials. The economic coercion of granting or withholding funds is very real. Ordinarily a state is in no position to refuse to compl y with any conditions Congress may impose. BY this means if Congress so desires it could completely destroy the independent fabrick of state gov't. The theory of the 10th amendment was to prevent this.

3. It is urged that the power granted to respl is an unlawful delegation of powers. There is nothing in this. The policy is set out by Congress and the procedure of the resp. carefully circumscribed.

4. The other questions raised relate to whether the order is supported by the evidence and whether the st tute was properly interpreted to include this kind of activity. These are relatively minor questions and perhaps review should be limited to just No. 2, supra.

There is a possible question of the standing of the state. Here however it sues in its own right since the order of the resp. operates against it by reducing the grants of US money otherwise ava ilable to it. The state followed the statutory procedure in seeking review as a "party aggrieved.

GRANT EGW Op. R. 55

No. 1088-89 1945 Term
SEC v. Chenery Corp.
SEC v. Feb. Water & Gas Corp.
Cert. App. DC
June 3. April 2. Cert. timely: Judgment entered Feb. 4, cert. filed April 8, 1946.

This is the second chapter in Chenery Corp. v. SEC. After this ct remanded the case ot the SEC it held further argument but took no new evidence. It then held on the basis of its experience in administering the holding co. act and in view of the objectives of that act that it could and should require that reorganization managers who buy stock of the corporation on the market should be limited to the cost of that stock plus interest in exchanging it for stock in the new corporation.

The SEC pointed to the dominant position which management has in reorgainzation and their interest in formulating plans which would tend to reduce to the market price of the securities ~~xxxxxx~~ so that they could buy them up at low cost. It points out that the situation creates an inevitable conflict of interest among the management group which is contrary to the purposes of the act. It points out that a management group under these circumstances is buying against a reorganization which they themselves are planning and over which at the time of buying they exercise a dominant influence over most of the factors that affect the progess and outcom e of the reorganization.

No finding was made one way or the other as to an actual conflict of interests among the purchasers in this case, or that there was concealment or wrongdoing. The SEC seemed to concede in the previous case that there was no such wrong doing.

The CCA reversed on the ground that the opinion of this ct limited the SEC to ~~xxxx~~ the use of its rule making power is establishing a course of conduct in reorganization proceedings and that it was not open to it to proceed in the way it did in this case.

The opinion in the Chenery case is to say the least ambiguous. It points out that the SEC is wrong on the law it purported to decide and indicates too that while the SEC has broad power to establish standards of conduct it had not purported to do so by regulation. But there is a lot of language in the opinion pointing to the fact that the SEC has not purported to exercise it s judgment based on the act itself in the case before it. In other words the opinion does not make clear whether the SEC may formulate policy by a case to case approach, or whether it is limited to its rule making power. To deprive the SEC of the power which all cts, and numerous other agencies

such as the FTC and the NLRB have--the power to develop policy by case rather than by regulation seems completely unjustified. I don't think this ct meant to do so in this case. It merely pointed out that the SEC hadn't purported to do so, and it was wrong on the theory on which it had proceeded. The dissent in the Chenery case assumed that the majority did not preclude the adoption by the SEC of a new theory on which to proceed in this very case.

Furtheremore, the actual disposition of the case by this ct is revealing. The case was not reversed but merely remanded for further proceedings. This assumes that the SEC could adopt a new position based on its experience and the policy of the statute. It is not inconsistent with Justice Frankfurtmer's view that an administrative agency has to exercise the discretion vested in it and give the right reasons for action taken to uphold the SEC now.

Resps. insist that for the SEC now to be permitted to adoptmx a new theory is to indulge in retroactivity. But any time a new rule of law is announced by a ct as to acts already completed there is in a sense retroactive law making. This is the very essence of the judical procedure, and often with respect to taxes and otherm matters it causes hardship. But the SEC should be permitted in particular cases to do what cts always do. Every new rule of law started in some decision. That is how the case system works. The SEC should be given the freedom allowed other administrative agencies to adopt its case to case approach to difficult problems ihhernent in the statutes it is enforcing.

GRANT EGW Op. R. 173

No. 1096 1945 Term
Independent Warehouses, Inc et al v Scheele
Appeal Ct Errors & Appeals NJ
Juri . S. 3. Appeal timely: SJ 5

Appellants are the Erie Ry, a coal company and a warehouse company. The Coal company maintains certain tracks and equipment on land owned by it in the Township of Saddle River, NJ. Its equipment is used for the storage and reloading of coal stored in transit under a railroad tariff. As contract agent at the sole expense of Erie it operated the tracks and equipment for the unloading, reloading and servicing of coal owned by shippers enroute in interestete commerce, under through shipping contracts and tariffs moving under through routes and joint rates from mines in Pa. to ultimate destinations in other states. Independent is a corporation acting solely as Erie's agent at a tariff railroad station at Coalberg in the Township and hhndles for Erie coal for storage in transit.

The Twonship had first attempted to tax the coal stored in the yards as part of the realty. But this was held improper under NJ law. Seeking to obtain the same revenue it by ordinance adopted a requirement that the storage business be licensed in order to continue and that the fee therefor be 3/4 cents per square foot of storage space. For Appt. this amounts to over $20,000 and is the same amount that the realty taxes sought to raise. Fines were provided for disobediance to the ordinance.

Independent was convicted of violating the ordinace and fined. Numerous challenges to the validity of the ordinance were raised--that it was an burden on interstate commerce, violating equal protection and due process .

It should be mentioned that the tariffs permit storage in transit for two years. When the owner orders the coal shipped from the yard the tariff is based on the through rate from Pa, but there is a new billing for shipment to the ultimate point of destination plus reloading charges.

The CT below held the ordinance valid as a tax on intrastate business.

The only really important point in this case is the commerce point. It would seem that the Ct below is correct. When the coal is shipped from Pa. to the storage yard its ultimate destination is unknown. The coal has not yet been sold. It may be stored there free up to two years. While goods actually in transit in interstate commerce may not be taxed, it would seem that the continuity of the movement is broken by the storage at the yards. The coal comes to rest and acquires a situs in the state. A license tax measured by the amount of storage capcity on this kind of storage even though operated by an interstate

carrier seems proper. The coal itself is not taxed. The p rivilege of engaging in a local warehouse business is the thing that is taxed. The financial if there actually be one is not on the coal but on the business. On the facts it is not improbable that the coal itself could be taxed as personal property by the state in view of the fact that to all intents and purposes it is stored indefinitely in the state awaiting a purchaser either in that state or elsewhere. The fact that the coal shipemtn are billed as from Pa. under the circumstances does not create a continuous interstate movement.

DEsmiss
DENY EGW Op. SJ 34

No. 1103, 1945 Term
Dodez v. U.S.
Cert to C.C.A. 6th.

Petr was a Jehovah's witness. He claimed exemption from the draft because he was a minister. He was first classified I-A and later was classified as a conscientious objector. He took his physical examination and was accepted for service for work of national importance. He was ordered to report and refused to do so.

On indictment for failure to obey an order of the Selective Service Board, he attempted to introduce evidence of arbitrary action by the local board which resulted in his classification for work instead of granting him the exemption of a minister. The court refused his tendered testimony and instructed the jury (U.S. br. 11) that the decisions of the local boards were final except where an appeal is taken and that petr should be found guilty if he registered and knowingly failed to report for work in accordance with the order.

The CCA affirmed; first, because under Falbo petr had not exhausted his administrative remedy, and second, even though he had exhausted it, the evidence which he offered was not sufficient to justify a ruling on the local board's violation of his constitutional rights.

Petr here seeks to set aside the sentence because (1) the court below erred in saying that his administrative remedy had not been exhausted under Falbo; (2) [R. 194-200] by holding that none of the evidence which he offered showed a denial of constitutional rights by either the local board or the board of review to which he took his claim .

A. So far as the right to present evidence is concerned the Govt admits that the amendment of the regulation since the Falbo decision makes it possible to permit evidence at a trial of unconstitutional acts of the local board. This was so decided in Estep.

B. The Govt, however, contends that the barring of eviden by the trial court and the instructions given by the trial court was not material error. It was not material because the evidence offered would not show a violation of petr's rights by the board.

The Govt contends:

1. That evidence as to prejudice by the local boar is immaterial since he took an appeal. Furthermore, ~~any~~ de no evidence presented on the trial would be immaterial since the question is whether the local board acted unconstitutionally. (U.S.br. 16).

2. The evidence was largely directed at a classification given by the local board and not to that given by th appeal board (U.S. br. 18). Nothing shows that his evidence was not heard by the local board and the appeal board.

3. The Selective Service files show that the evidence which he offered was passed upon by the local board.

So far as the Govt's response under B is concerned, it would seem to be good. Petr's answer is that a similar defense in the Smith case (148 F. 2d at 292) did not avail. It is true that failure to present substantial evidence of arbitrary action appeared in the Smith case and that we reversed the Smith case along with the Estep case. The statement in the petition for review, however, in the Smith case did not raise this question. Neither did the response for the Govt. It turned on a question of whether evidence of arbitrary action could be presented at all. Therefore the Smith case did not decide that because the DC did not hear the evidence, the affirmance by the CCA should be reversed. The Smith case decided only that the trial court must hear material evidence of arbitrary action by the local board. Since the position of the CCA in this case as to the lack of materiality seems sound, we should deny the cert. There is no conflict with the Smith case.

SR

No. 1104 1945 Term
Anderson v. Yungkau et al
Cert. 6 Cir.
Juris. R. 1. Cert. timely: Judgment entered Jan 28, cert. filed April 12, 1946.

This case is an outgrowth of Anderson v. Abbott.

Petit. had originally commenced action against 7 stockholders. The proceedings were held up pending Anderson v. Abbott. A large number of persons are potential liable under that case. Petit. had brought these suits and meanwhile the 7 defendants died. More than 2 years after the deaths petit. sought to substitute their executors or administrators as parties.

FRCP 25(a) provides, "If a party dies and the claim is not thereby extinguished, the Court within two years after the death may order the substitution of the proper parties. If substitution is not so made, the , the action shall be dmissed as to the deceased party." FRCP 6(b) provides that when by these rules or by notice given thereunder or by order of ct an act is required or allowed to be done at or within a specified time the ct for cause shown in its discretion may 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 action under Rule 59 or period for taking an appeal.

The DC dmissed the actions.

The CCA affirmed on the ground that a dismissal for failure to substitute within the two year period was mandatory and not within the discretion of the ct after that period under Rule 6(b).

Petit. argues that Rule 6(b) applies ~~all~~ to all other provisions establishing a time except the ones specifically there mentioned, which are not involved here. He points out it was impossible to check the whereabouts or death of the 5,000 defendants involved all over the country. He urges that 6(b) was intended to relieve against hardship or injustice such as is involved here. Certainly it would seem that the terms of 6(b) cover just this case. The CA dmisors seemed to so treat it. Petit. 8. He argues that the word "shall" in 25 should not be construed as mandatory in the light of 6(b)

But the ct below points out that if the two years are a statute of limitation ~~xxx~~ a ct could hardly extend the statute. The estates of decedents need to be wound up at some time, and should not be kept subject to a pending case for an indefinite period. Two years being a reasonable time for substitution, at the end of that time, it is argued that right ceases. The CCA says also that 6b was intended merely to relieve a party who was to take certain

action within a given time, but was not intended to apply to affirmative action demanded of the ct in plain words.

There is no conflict in the CCAs on this point but since it involves an important question in the administrati of the rules I think it should be settled here. The answer is far from clear.

GRANT EGW Op. R. 26

Nos. 1116-18 1945 Term
Porter v. Lee
Porter v. Dicken et al.
Cert. 6 Cir.
Juris. 1. Cert. timely: Orders entered April 9 & 5, cert. filed April 15, 1946.

In 1116-17 the facts are these: Beever rented an apartment from Lee for 43 dollars monthly, payable in advance on the 18th of the month. The rent was not paid on Oct. 18, 1944 because the tenant's child was ill --the wife couldn't pay and the tehant was employed and couldn't pay in person. On the 19th Mrs. Beever wented to Lee's office to pay; he wasn't in but the janitor who previously had accepted payment refused because he had no receipt book. On Oct. 20 notice to vacate was given; on the dame day Beever mailed a money order with the rent. The tender was refused and the order returned, although previously he accepted slightly late payments. Lee told Beever the real reason was not non-payment but the fact he didn't want children in the aparxtment any more. Lee then sued in the state ct to recover possession on Oct. 20; the case was continued to Dec. 4, 1944 at which time petit., price administrator, brought the first action to enjoin Lee from prosecuting the eviction. The DC issuing a temporary restraining oder. After hearing the order was dissolved and injunction denied, on the ground that the DC had no power to enjoin action in a state ct. In July 1945 Lee brought another action to recover possession on the ground of non-payment; actually rent had been paid each moth by Beever to his att'y who kept it in escrow under agreement with Lee's att'y. Eviction was directed in the state ct. On July 9, 1945 Porter brought another action in the DC to restrain enforcement of this judgment. Again the DC dismissed for want of jurisdiction tox restrain state action. Appeal was taken in each case, and an application for injunction pending appeal in the first case was denied.

Meanwile the tenant was served with a writ of possession under the state ct order and he vacated, unwillingly, having no other choice.

On an affadavit showing the tenant had moved the CCA dismissed the appeals as moot, on the ground the tenant had moved.

In No. 1118 the Facts were these: the tenant is in possession of a house which was sold by the owner's executor to resp. who without OPA approval obtained a writ of possession in a state ct. While the writ was in the hands of the sheriff for execution petit. brought this action in the DC to restrain the evicition.. The DC issued

a temporary restraining order and then dismissed it on the ground the §265 of the Jud. Code barred the relief. Appeal was taken and is now pending in the CCA, which refused to issue an order to maintain the status quo pending disposition of the case.

The EPCA gives the administrator power to regulate or prohibit speculative or manipplative practices or rent or leasing practices, including practices relating to the recovery of possession. His rent regulations provide that so long as the tenant continues to pay the rent he cannot be removed unless the administrator issues a certificate of eviction after application to the rent control office, and after certain notices to tenant and OPA. In neither case was this regulation complied with. §265 of the Jud. Code provides that injunctions shall not be granted to stay state proceedings except in bankruptcy proceedings. §205 of the EPCA provides that the administrator may obtain an injuncti n of acts or practices in violation of the act or regulations.

In the second case relief is sought prior to final judgment.

In Nos. 1116-17 the additional question to the main issue is whether the case is moot. The ct below has overlooked its broad powers both under equity jurisdiction and the EPCA. The tenant has been removed against his will; but the apartment is still vacant and even if rerented the tenant takes subject to the present proceedings. Thus the ct is in a position to order resp. Lee to restore the status quo ante by reinstating the removed tenant. This holding is in direct conflict with Henderson v. Fleckinger 136 F2 381 and should be resolved here. It seems to me that since the ct still has power to act to restore the tenant to his rightful occupancy the case is not moot.

The other issues involve 2 questions: power to enjoin state proceedings and the abuse of discretion in failing to issue a temporany order in No. 1118

1. On the first point the ct below is just plain wrong. Bowles v. Willingham 321 US 503, 510 recognized that §265 was was subject to a further exception, namely an injunctive suit by the administrator under §205(a) of the Act. The DC has power clearly to enjoin action in contravention of the price regulations in a state ct.

2. There is clear abuse of discretion here in not granting a temporary stay. The effect of the 2 decisions in the 6th CCA is to practically end control of rents in that circuit as petit. points out. Thus all a landlord has to do is to obtain in violation of the regulations an eviction in the state ct. The federal ct will not grant a restraining order. Thus the tenant is removed. On appeal to the CCA the case is dismissed

as moot and the regulations are thus thwarted. It is clear that without protection of occupancy rent control is futile, since if the tenant may be dispossessed at the will of the landlord he will be willing to pay any rent or meet any other condition in order to retain his apartment or home in a time of pressing demand for housing accommodations.

This ct has jurisdiction to review the action of the CCA in 1118 in failing to give temporary relief. The cases should be set down for hearing at once.

GRANT EGW No ops.

Nos. 1130-32 1945 Term
US v. Nation Lead & Du Pont Co.
Du Pont v. US
Nat. Lead v. US
Appeal DC NM
Juris. SJ 1-2. Appeals timely.

This is an appeal and cross appeals in am suit brought by the US to enjoin a conspiracy to restrain interstate and foreign trade in the titanium pigment industry. The industry did not exist before 1920 and was created by agreement in that year between the holders of the 3 basic patents in France, , Sweden and the US. Under that agreement by which Nat. Lead became bound by purchase of a company with ~~them~~ certain of the basic patents . The agreement and its subsequent renewals were the equivilent of a cartel dividing the entire world among the several foreign and domestic members of the cartel. The agreement set out the territory each member could exploit, and dealt with production. The industry was founded on basic patents, since expired. The agreement provided for royalty free crossx licensing of existing patents, exchange of technical information and for the royalty free licensing of new patents among the members. The evvdence indicated that the cartel was clearly intended to exclude competitors. Ittanium oxide is a basic constituent of white paint and other products.

Du Pont came into the picure in 1931. The DC found that it adhered to the cartel agreement at that time, though with some reluctance for it seemed more aware of the antitrust laws than Nat. Lead. Du Pont obtained the benefit of royalty free use of forign patents of members as well as those of national Lead. All technical know-how was exchanged between members. Nw There were no imports of titanium from foreign sources into the US and none was exported to the territories of the foreign members. The two concerns manufacture 100% of all the composite titanium pigments and 90% of the pure pigment, the rest being made by smaller licensed compies. The licenses restrict production and the restrictions were lifted only after suit was brought.

We have then a picture of world wide control and monopolistic explointation of an important commodity. The DC found that the arraggement went well beyond rights incident to valid patents. There is a veritable maize of patents, hundreds of them, which restrict entry into the field, even though the basic patents have expired.

The DC cancelled the agreement and enjoins similar ones. Both defendants are to present plans for divesting themselves of their interests in foreign manufacturers and

and each defendant is required to grant any applicant a license under all titanium pigment patents presently owned or issued within 5 years at a uniform, reasonable royalty, provided the applicant give reciprocal rights. The decree also provides that at the option of either party the licensor shall furnish the licensee for a reasonable charge tecnical information relating to methods and processes used by the licensor in the commercial practice of the licensed patents.

The US objects to failure to require royalty free licensi until the effect of the illegal combination is dissipated; to the failure to require the defendants to submit a plan providing for the divestiture of half the plant and assets used in the titanium business; and to require them to furnish for a reasonable charge technical information relating to the manufacture of titanium pigments without confining this to methods and processes used in a licensed patent and without requiring reciprocity.

Nat. Lead contends the DC erred in finding the agreements illegal under §1 and Du Pont contends that it was not a member of the conspiracy.

It is obvious that the case is of great importance in the administration of the antitrust laws and jurisdiction should be noted. The royalty free licensing which the gov't seeks is novel, since such a provision was stricken in the Hartford-Empire case, but here it is probably justified in view of the findings that the patents were licensed on conditions beyond the scope of the patent monopoly. The exchange of full information is essential to the creation of competition in the field. The decree limits this exchange unduly. Technical information with respect to processes not patented is essential to new entrants in the field. The question of requiring any partial dissolution in a duopoly situation is novel. Usually dissolution is required only where on firm or combination under single control substantially controls the field.

Note Prob. Juris. EGW Op. SJ 2 Appen.

No. 1143 1945 Term
Gardner v. NJ
Cert. 3 Cir.
Juris. R. 12. Cert. timely: Rehearing denied March 28, cert filed April 20, 1946.

This case arises from the long continued effort of the Central Ry of NJ to avoid certain ad valorem taxes imposed by NJ. Through a series of litigation in the state ct in which the petit. objected to the amount of the assessment and the constitutionality of the tax on due process, equal protection and other grounds it was determined that the taxes were good. Suits a lso were brought in the fed. ct to enjoin collection but the constituionality and validyt of the taxes were held to be res judicata because of the state ct decisions. The petit. because of the large amount of back taxes went into §77. The state legislature passed a bill reducing the petit's indebtness to the state. By the settlements act in order to take advan tage of it petit. had to waive all rights to contest the legality of prior assessments. At that time it had appeals pending before the state brd of tax appeals.

Meanwhile the attorney general contending that the settlements actx was invalid under NJ law had brought suit to set it aside. The Highest NJ ct held it invalid, thereby reinsta ting the old assessments. But petit. had complied with the offer contained in the settlements act, it contends, by dismissing the appeals.

The present suit commenced through a proceeding brought by petit. in the bankruptcy ct to adjudicate the relative rights, claims, liens and priorities in the assets of the debyor. The resp. moved to dismiss insofar as state taxes or liens were concerned for want of jurisidction.

The DC determined it had jurisdiction. Then the state filed a writ of prohibition in the CCA in order to prevent ~~in~~ adjudication with respect to tax liens. NJ also appealed the order of the DC sta ting it had jurisdiction.

The CCA after carefully examining state tax procedure and ~~xhxx~~ §64 of the Bankruptcy act determined that the DC had no power in view of the manner of assessment to permit relitigation of the amount of the tax; it held that it could deal with any legal error in its assessment but that numerous constitutional issues previously litigated were res judicata. The order of the DC was reversed and prohbition denied.

The CCA in its decision relies largely on Ark. Corp. Comm. v. Thompson, 313 US 132 which held that a bankruptcy ct could not reexamine the amount of state taxes where the state through its own officials had determined the amounts through quasi judical proceedings. The CCA

carefully examined state tax procedure and found it like that of Arkansas discussed in the Tompson case. It would seem unseemly for the DC to reexamine in the Fed. cts what has been so bitterly litigated and decided in the state proceedings.

The other argument of petit. is that the settlements act which was held invalid constituted a contract upon acceptance by dismissal of the pending state tax appeals, and hence petit. need only pay the reduced taxes there provided. The CCA did not pass on this issue since it is not strictly before it since the appeal was from an order of the DC holding it had jurisdiction and also involved a petition by resp. for a writ of prohibition. However, the CCA left open on remand questions as to legal errors in assessing the tax. Presumably the issue petit. sought to raise will be open on remand for the judgment is not final. In any event it is not at all clear that the statute created a contract on acceptance or that petit. did more than a voluntary act in dismissing its appeal.

DENY EGW Op. R. 2.

No. 1148 1945 Term
Gulf Oil Co. v. Gilbert.
Cert. 2 Cir.
Juris. R. 3. Cert. timely: Judgment entered Feb. 4, cert. filed April 23, 1946.

This case raises the question of whether the doctrine of forum non conveniens applies to a tort action based on diversity.

Petit. is a Penna. Corp. and resp. a citizenx of Va. Resp. was the owner of a warehouse at Lynchburg, Va. The action brought in the Southern District of NY by resp. is for damages caused by fire to the warehouse and the goods therein when a gasoline truck which was delivering gas to resp. caught fire and spread to the building. The estimated damages are $350,000. Jennings-Watt Oil Co., an apparant subidiary of petit. operates its business in Lynchburg under a contract with petit. to indemnify the latter from damage growing out of the negligence of Jennings. It will not be possible to implead this corp. if the suit is brought in NY. The principal witness is the truck driver, but there are many other ones. Numerous customers of resp. have brought suit, in Va. Generally, most of the witnesses and litigants are residents of Lynchburg, and beyond the reach of process of the DC. NY is ~~x~~ crowded and hotel and travel facilities are difficult. Many witnesses for petit. will be unwilling to come and much evidence will be by deposition.

Petit. does business in NY and has ~~fixed~~ appointed an agent in that state upon whom process may be served.

~~Xxxxxxxxxxxx~~x Contending that the suit in NY, rather than in Va. would impose great hardship on it and make it difficult to defend petit. moved to dismiss the NY action both on the basis of want of venue and forum non conveniens.

The DC held that there was venue, but dismissed for want of a convenient forum.

The CCA reversed, A Hand dissenting.

It seems reasonably clear that a state ct in NY would dismiss this suit since it involves a tort action between 2 non residents. Of course a federal ct is not bound under any rule to do the same, but the NY rule furnishes a guide for action. There is no question but that the suit in the present forum imposes a great hardship on petit. and makes it difficult or impossible to properly defend it. Admittedly depositions are a mild substitute for testimony, and the petit. has no way of compelling witnesses, or impleading the company which is primarily liable under the contract. A separate suit must later be brought against it if petit. loses here.

~~It is true~~

It is true however that the doctrine of furum non conveniens has been narrowly limited inx the federal cts to suits involving the internal affairs of corporations. Even there the discretionary exercise of jurisdiction is limited. Williams v. Green Bay & W~stern Ry. But in that case the ct indicated if the suit was vexatious or oppressive the doctrine might properly be applied. It is not clear whether that st tement was meant to be limited to stockholders suits or to apply generally. Under the FELA cases the doctine clearly does not apply, but that is because of the special venue provisions of the statute. Under the ordinary diversity case suit may be brought at the residence of the plaintiff, or defendant, or any place the latter, if a corporation does business and has filed a consent to be sued. To bring the suit in Pittsburg would be even more cxxxx inconvenient, yet that is the home office of petit. It is a Penna. Corp. Pittsburgh is farther from the place the cause arose than NY. It would seem that to apply the rule petit. seeks consistently in many ordinary transitory causes of adtion, the plaintiff's forum would be limited to the place the cause arose. This would seem to be contrary to the policy of the venue statute and the freedom to select the forum which is given those who have transitory claims. It might permit possible abuse in that defendants would seek to avoid otherwise proper forums because they were favorable to the plainfiff's interest, such as a tendency to give large verdicts. Balancing the various interests involved, while this is a somewhat extreme case, I think the CCA is correct. In Meredith v. Winter Haven this ct pointed out that a federal ct must decide questions of local law, even if complicated. Of course that does not take care of petit's objection that he cannot properly defend because of his inability to procure witnesses.

While the result is correct, the problem is an interesting one which this ct should probably pass on.

GRANT(?) EGW Op. R. 59

No. 1183 1945 Term
Aircraft & Diesel Equipment Co v. Hirsch et al;
Appeal DC Dist. Col.
Juris. SJ 1. Appeal timely: SJ 4.

The question is whether there is equitable jurisdicti to enjoin certain action threatened under the Renegotiation

Appellant filed suit to enjoin the Price Adjustment Board and the Sec't of War from issuing an order under the Second Renegoiation Act requiring appellant's customer to pay to the US certain money owed appellant which the resp. found to be excessive profits.

Part of the money owed was due under contracts made prior to the Renegotiation Act. Part of it was pursuant to orders placed thereafter. Appellant makes diesel equipment for aircraft and it sold such equipment to private contractors or subcontractors who sold the complete aircraft to the US. The Resp. determined unilaterally that appellant had realized a large sum in excess profits in 1942. Appellant did not agree and sought review in the Tax Ct. The petition there is pending, but still the resp. threatens to require that the customers to pay the excess into the Treasury, since the Tax Ct proceedings do not operate as a stay. Appellant apparantly has a large number of customers in different cities, but the actual number is not set out.

The petition in the three judge district ct alleged the threatened action of the resp. with respect to payment of its customers, the fact that the remedy at law was inadequate because of the multiplicity of suits necessary to sue each of its customers; the fact that the Tax Ct proceedings did not stay the order and that it was not clear that it could pass on the constitutionality of the statute; numerous violations of constitutional provisions by the statute were alleged, due process, delegation of powers; retroactivity etc.

The DC dismissed on the ground that if the Tax Ct determines there are no excess profits appellant may not attack the constitutionality of the statute; that appellant may sue its customers who are not numerous at law; that in any event it has an adequate remedy against the US in the Ct of Claims.

This case is somewhat different from Mine Safety Appliances since here the US is threatening to require appellant's customers to pay sums due it to the US. Appellant seeks no money by means of this suit from the US. It seeks to enjoin unlawful and possibly unconstituional action. Certainly the questions of law raised are far from settled. The act would be applied retroactively in this case raising many difficult issues of due process. See my memorandum on this aspect of the statute.

Multiplicity of suits is a good ground for equitable jurisdiction as is a threatened unlawful taking of property. Here the DC says the customers are not numerous but it id not clear how many there afe. Appellant's remedy at law is far from clear. Even assuming th t the Tax Ct. decides that there are no excess profits, the US will already have collected the money. A determinatio by the Tax Ct under the sta ute does not require the US to repay the excess. See Steadman's various articles in Mich. L. Rev. especially 43 Mich. 235. There is no assurance that the US would appropriate the money. The remedy in the ct of claims also is far from clear. May appellant sue there after obtaining a judgment in the Tax Ct, or must he? Appellant has exhausted his administrative remedies; his Tax Ct proceeding does not assure him of protection.

GRANT EGW Op SJ 61

Nos. 1192 93 1945 Term
Krug v. Santa Fe Ry
Cert. App. DC
Juris. R. 1. Cert. timely: Judgment entered Feb. 4, cert. filed May 3, 1946.

In the 1940 Transportation Act it was provided that land grant railroads were entitled to obtain full commercial rates on certain products providing that if any carrier by railroad shall have received a grant of lands for the US to aid in the construction of any part of the railroad operated by it, the lower land grant rates shall continue to apply unless the carrier files with the Secretary of the Interior 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, or which it is claimed should have been granted to such carrier..."

Resp. filed such a release, but then brought a petition for a writ of injunction or mandamus to obtain the lands here in questionx. In 1866 under statute pesp's predeckessor obtained a vested right in certain land. By the Act of 1874 it was provided if lands granted to a ry were in the possession of a settler whose entry had been allowed, the railroad on relinguishing those lands would be entitled to select an equal quantity in lieu thereof. In 1904 a similar act was passed for the relinguishment and the selection of "in lieu" lands in New Mexico. In 1911 and 1916 resp. relinguished and conveyed to the US certain lands pursuant to the 1874 and 1904 Acts.

In 1943 the Land Office rejected resp's application for the selection of "in lieu"lands under the 1874 and 1904 Acts on the ground these claims had been relea sed under the 1940 Act. Resp. sued to compel petit. to determine its rights in the lands without regard to the release.

The DC dismissed and the CCA reversed, holding that the release required by the statute and the statute itself was not intended to cover the lands here claimed since they were not granted to aid in the construction of a ry.

The only issue in the case is the construction of the 1940 statute set out above. Here literally the Act applies. ~~Rxtitx~~ Resp. did receive land grants. The release required is not in terms limited to grants given for the construction of the ry. Only such rys. are required to give the release, but the release ~~it~~ is required to apply to "any claim ..to lands or interests in land.."

The CCA read the statute as applying only to claims for land granted in aid of construction. The claims here are only indirectly related to the original lands which were granted as an aid to construction. The claims relate directly to lands which resp. sought in place of lands it had relinguished beca use there were prior settlers, under the 1874 and 1904 Acts. But the release under the statute, I think, was meant to cover these as well as direct construction land claims. The terms of the statute are not limited in the way resp. urged and the CCA found. It may be that it was unfair for Congress to include the present claims, but the resp. need not have filed its release at all. If it had not done so it would be entitled to the land but could only obtain land grant rates from the gov't.

GRANT EGW Op. R. 53

and quite properly all interest on railroad bonds is in fact contingent. If they can't pay it you can't collect it. It spooperly can't be sold and to go into §77 requires infinite delays and large losses for junior interests. Here the interest is cumulative. Petit. will get all they are entitled to before the stockholders obtain any dividend: Any interest which is passed is added to the claims of petit. The main sinking fund by calling for the retirement of debt senior to the convertibles improves their position a nd value. Petit. by the fact of convertibility participa in any increments in the value of the stock. In effect the Convertibles were and continue to be under the plan preferred stock. The plan merely recognizes the obvious. By the limitation on dividends the convertibles are safequarded and their value is enhanced. To the extent tha this is so the present holders of the bonds can sell them on the market in 1960 for what they would receive for them from resp. on that maturity date. It is hard to see how they are hurt by the extention of the maturity date under these arrangements. It should be pointed out that the Convertibles are given the right ~~to~~ obtain representation on the Board of Directors, by election of one member nominated by its trustee. Of course petit. would not be under the plan, entitled to interest out of the cash reverves built up during the war if there are no current earnings. But before the plan to get interest they would have to force resp. into §77 and as the most junior security with some 430 million dollars ahead of them in senior claims their chances would be equally as slight. It would seem that realistically viewed the plan is fair and equitable, even assuming that the absolute priority rule is still the law.

2. In 1221 the my objection is to the removal on restrictions on extending or refunding existing senior securites. The idea behind the clause was to transform the Refunding bonds into first instead of second liens by depositing the senior securites as collateral behind them. The plan was accepted here too by a vast majority. The refunding bonds continue to be secured both as to interest and principal although 60% of the interest is made contingent but cumulative. The answer is that the shareholders gave up very considerable dividend rights for the express benefit of petit. and other senior securit The most dividends that can be paid on the 300 million dollars worth of shares is 3 million. All the rest goes to the Refunding and other bonds as compensation for the relinghishment of their rights. The refunding bonds are also convertible and obtain the benefit of increase in value if any of the stock.

The ct I think should not take the time and effort necessary to review this case since it is the only out-

standing one on a statute which is no longer in effect.

DENY EGW Op. 63 F Supp. 542

No. 1227 1945 Term
Us ex rel. Goodman v. Hearn
Cert. 5 Cir.
Juris. R. 2. Cert. timely: Time to file extended to May 15, cert. filed May 15, 1945.

This case raises the indentical issue and is in conflict with two cases in which cert. already has been granted, Nos. 947 948 this term. The issue relates to the use of non statutory Theological panels in classifying persons in IV D as x ministry students under the Selective Service Act. The fifth circuit holds this was proper and the 2nd and third circuits hold it improper. This case like the others arises on habeas corpus.

GRANT EGW Op. R. 216

No. 1238 1945 Term
Fish v. US
Cert. 2 Cir.
Juris. R 2. Rehearing ~~denied~~ granted and judgment affirmed April 26, cert. filed May 16, 1946.

Petit. was convicted of evading a price regulation by selling lettuce on condition that the purchaser also buy celery, broccoli or honeydew melons none of which had a ceiling price. Lettuce did have a ceiling price. The regulation specifically probhibited evasion by the use of "tying agreements".

The CCA affirmed the conviction holding that the decision of this ct in the Kraus case did not apply since the regulation specifically prohibited tying agreemebts.

In the Kraus case the difficulty was that the regulation was general interms and did not expressly prohibit tying agreements as this ct pointed out. It was thus held that the regulation was too vague to justify the conviction on the basis of the charge given and the evidence. But here the situation is differant. The regulation by the use of the words "tying agreements" forbids the sale of any commodity covered by it on condition that the buyer purchase any other commodity. Here petit. insisted that purchasers taken celery etc. if they wanted the lettuce. This was a violation of a specific regulation.

DENY EGW Op. R 214