IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 804

KENNETH W. COLEGROVE, PETER J. CHAMALES and KENNETH C. SEARS,

Petitioners,

vs.

DWIGHT H. GREEN, as a Member Ex-Officio of the Primary Certifying Board of the State of Illinois, EDWARD J. BARRETT, as a Member Ex-Officio of the Primary Certifying Board of the State of Illinois and ARTHUR C. LUEDER, as a Member Ex-Officio of the Primary Certifying Board of the State of Illinois,

Respondents.

MOTION FOR REARGUMENT BEFORE THE FULL BENCH OF THIS HONORABLE COURT.

URBAN A. LAVERY,
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CHAMPLIN-SHEALY COMPANY, CHICAGO 365

[August, 1946]

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MOTION FOR REARGUMENT BEFORE THE FULL BENCH OF THIS HONORABLE COURT.*

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Come now the above named Petitioners by their Counsel (and in addition to their **Petition for Rehearing** concurrently filed herein) and humbly present to this Honorable Court this their Motion for Reargument of this

**The italics in the following text are those of the writer, unless otherwise indicated.*

cause before the full Bench of this Court and in that behalf these Petitioners respectfully show:[1]

1. For reasons which are well known to this Court, this cause has been considered and decided by only seven Members of this Court and thus the Judgment of this Court, in this cause, and the opinions handed down in the case, represent the views of these seven Members only; one Member of this Court having been unavoidedly absent at the time of oral Argument and during all of the consideration of the cause by this Court, and one Member—the late Chief Justice—having tragically departed this life after hearing the oral Argument, but before the decision of this cause.

2. At the time of the filing of this Motion (August, 1946) this Court will have, for the first time in this case, a full Bench of nine Members present or available; and it is hoped and assumed that

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[1] **A motion for Reargument,** as distinguished from a **Petition for Rehearing,** seems clearly authorized by the practice of this Court, going back more than 100 years See for example on this point the case *Green* v *Biddle* (1821-1823) 8 Wheat 1, 5 L. Ed 547, U S Supreme Court "Condensed Reports" (Campbell & Co , Philadelphia 1854) Vol 5, p 369 That case is discussed in some detail in the attached **"Suggestions."** It appears in the Report of that case that after the case had first been decided, at the February 1821 Term, and an opinion of the Court filed, a Motion was made—

*"That the certificate * * * (and) the opinion of this Court * * * should be withheld and the cause continued to the next Term for Argument."*

The Record of this Court at the same place contains a notation *"Motion Granted"* The Report of that case shows further that no **Petition for Rehearing** had been filed, or was ever filed, in that cause The Report shows that that case was later reargued at the February 1823 Term of this Court, and that two new and separate opinions were filed by Justices of this Court, neither of whom was the Justice who prepared the original opinion in 1821.

Moreover a **Petition for Rehearing** at the present time is subject (and properly subject) to the rather rigid provisions of Rule 33 of this Court entitled *"Rehearing"* One of the necessary results of the language of Rule 33, as applied to this particular case, is to give a practical veto to a **Petition for Rehearing** to a minority of four Members of this Court This statement is not made in any sense of criticism but as a plain statement of fact

This Court, as is well known, has a separate Rule 7 concerning **"Motions."** It is under that Rule that the Petitioners think and contend that they are here proceeding, and it is under that Rule that they pray that this Motion be considered by the full Bench of this Court

this Motion will therefore be passed upon by the full Bench of this Honorable Court.

3 The three opinions handed down in this cause show that only three Members of this Court *are in accord in opinion,* as to the reasons for the decision and judgment of this Court in this cause; one Member of this Court having filed a separate and individual opinion concurring in the result and the decision in this cause, but differing on the grounds and reasons therefor; while three Members of this Court have dissented in an opinion prepared by one of such dissenting Members.

4. Under our view of the precedents and decisions, it has been the unchanged and unbending rule of this Court since the year 1834 (and until the decision of this cause) that this Court would not deliver any judgment in a case where grave constitutional questions are involved, *unless a majority of the full Bench concur in opinion thus making the decision that of a majority of the whole Court.* This rule was established by this Court in the two cases of *Briscoe* v. *Commonwealth Bank of Kentucky* and *City of New York* v. *Miln,* those two cases being reported together, in 8 Peters. 118, 8 L. Ed. 887, decided at the January Term of this Court 1834.[2]

5. This Court in 1871 in the "Legal Tender Cases" 79 U. S. 457 in an "opinion of the Court,"

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[2] The full and entire opinion of Chief Justice Marshall in those cases appearing at the place cited is as follows:

> "Mr Chief Justice Marshall delivered *the Opinion of the Court* in this and the preceding case.
>
> 'The practice of this Court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, *unless four Judges concur in Opinion, thus making the decision that of a majority of the whole Court* In the present cases four Judges did not concur in Opinion as to the Constitutional questions which have been argued *The Court, therefore, direct these cases to be reargued at the next term* under the expectation that a larger number of the Judges may be present' "

A footnote in the report of this case to Chief Justice Marshall's opinion says

> "Mr Johnson and Mr. Justice Duvall were absent when these cases were argued"

in which a full majority of the nine Members of the Court were in accord, sustained and reasserted the doctrine laid down in 1834 by Chief Justice Marshall.[3]

The comment of this Court in that case, quoted in the following footnote, we respectfully suggest, is clearly pertinent to this **Motion for Reargument** before the full Bench of this Court.

6. Your Petitioners respectfully show that many of the major points and matters discussed in both of the prevailing opinions in this cause, are concerned with questions of Law, and with questions of high Judicial Policy; and that these particular matters involve contentions and issues of crucial importance in this case. The Petitioners further show that these particular matters of high Judicial Policy are concerned with points and issues that lie largely outside the Briefs and the oral Argument of this cause; and that therefore these Petitioners in a substantial measure have not had their "day in Court" with respect to these matters. This particular point is made without any sense or purpose of criticism whatever; but on the contrary this situation is due solely and inevitably to the complexity and variety of the matters which had to be

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[3] It will be recalled that this Court in the "Legal Tender Cases" above cited expressly overruled the case of *Hepburn* v *Griswold,* 75 U S 603, decided in 1869 This Court in that case by a divided Court, with one vacancy on the Court, had held the Legal Tender Statute of the United States unconstitutional and void by a vote of 5 to 3 In the "Legal Tender Cases" two years later the Court swung the other way, overruling its earlier decision and sustaining the constitutionality of that important fiscal Statute The opinion of the Court in the "Legal Tender Cases" is written by Justice Strong and he says in his opinion at p 554 of the Official Reports

> "That case *(Hepburn* v. *Griswold)* was decided by a divided Court and by a Court having a less number of Judges than the law then in existence provided this Court should have These cases (the 'Legal Tender Cases') were argued before a full Court, and they have received a most careful consideration *The questions involved are constitutional questions of the most vital importance to the Government and to the people at large We have been in the habit of treating cases involving consideration of constitutional powers differently from those which concern merely private right. Briscoe* v *Bank of Kentucky, 8 Pet. 118 We are not accustomed to hear them in the absence of a full Court, if it can be avoided"*

discussed on the oral Argument of this cause, and in the short time of one hour allowed to the Petitioners' Counsel.

7. In view of the Rule and the Practice of this Court as above set forth, and particularly in view of the special circumstances and special situation existing upon the oral Argument of this cause, as above set out, the Petitioners respectfully pray that this cause be reargued before the full Bench of this Court.

In support of the foregoing Motion, the Petitioners prayerfully ask the attention and consideration of this Court with respect to the Appendix entitled "**Suggestions**" to this Motion, hereto attached.

Respectfully submitted,

URBAN A. LAVERY,
Attorney for Petitioners,
Chicago, Illinois.

Of Counsel:

EDWIN BORCHARD,
New Haven, Connecticut.

KENNETH C. SEARS,
Chicago, Illinois.

I hereby certify that the foregoing Motion is presented in good faith and not for delay.

URBAN A. LAVERY,
Attorney for Petitioners.

August 16, 1946.

APPENDIX

SUGGESTIONS
in Support of
THE FOREGOING MOTION.

IN THE

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SUGGESTIONS

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I.

THE "QUORUM" STATUTE FOR THIS COURT.

Congress by the Act of April 10, 1869, 16 Stat 44, established the present law with respect to the "quorum" required for the business of the Supreme Court of the United States The text is now found in Sec 215 of the Jud Code of 1911 (U. S C A Title 28, Sec 321) which in turn was a reenactment without

* The Italics used hereafter in the text of these **"Suggestions"** have been added by the writer, unless specifically indicated otherwise

change of Sec 673 of the Rev. Stat. The present Act reads as follows·

> "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight Associate Justices, any six of whom shall constitute a quorum "[1]

ANNOTATIONS TO "QUORUM" STATUTE

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[1] There are few cases in the Books discussing or referring to this "Quorum" Statute. The principal cases are cited in this Note The two outstanding cases to be considered in these "'Suggestions" are the Briscoe and Miln cases (1834) cited below, and also "The Legal Tender Cases" (1872) 79 U.S 457. Each of them will be taken up and discussed at length.

The sole annotations to this Statute shown in U S C. A at the place above cited mention and discuss only three cases The principal citation is that for the two cases of *Briscoe* v. *Commonwealth Bank of Kentucky* (1834) 8 Pet. 118, 8 L. Ed. 887, and the case of *City of New York* v *Miln,* which is reported jointly with the last mentioned case at the same citation

The next case cited in the annotations to the Code is a case decided by the Supreme Court of South Carolina in 1891, *Williams* v *Benet,* 35 So Car 150, S E 311, 14 L R A 825. The third case cited is another state case *Snider* v. *Rinehart* (Colo 1892) 18 Colo 18, 31 p 716. These two cases merely recite the fact that the Supreme Court of the United States may proceed, and indeed has proceeded, to do business although vacancies may exist on that Court, including a vacancy in the office of the Chief Justice of the United States.

COMMENT OF A STANDARD LAY AUTHORITY

It is interesting to note, however, that this particular statutory provision is discussed in Ency. Brit. 13th Ed (1926) in its Article on "COURTS," Vol 7, p 523, where the following suggestive statement is made·

> "A rule" (it is the Statute cited above rather than a rule of Court) "requiring the presence of six Judges to pronounce a decision, *prevents the division of the Court into two or more Benches* * * * "

This particular Authority then continues with the following comment, which is pertinent to this discussion:

> "Every case is discussed twice by the whole body, to ascertain *the view of the majority,* which is then directed to be set forth in a written opinion, then again when the written opinion prepared by one of the Judges, is submitted for criticism and adoption by the Court as its judgment "

So far as we know there is no similar comment in any of the Law Books suggesting this idea.

II.

CHIEF JUSTICE MARSHALL'S DOCTRINE, 1834.

By far the most important decision in the Books, we respectfully state, requiring discussion and comment in these "Suggestions" is Chief Justice Marshall's Opinion in 1834, in the Briscoe and Miln cases cited above. Marshall's Opinion, and the Doctrine it lays down in the premises, seem to us to be largely controlling on this Motion for Reargument. Accordingly Marshall's Doctrine and those early cases will be discussed here at some length.

By far the most significant decision of this Honorable Court concerning the basic questions raised by the foregoing **Motion for Reargument** in this cause is that in the *Briscoe* and *Miln* cases cited above The "Opinion of the Court" in that case handed down at the January 1834 term, by Chief Justice Marshall is as follows

"Mr Chief Justice Marshall delivered the Opinion of the Court in this and the preceding case·"

> "The practice of this Court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four Judges concur in opinion, thus making the decision that of a majority of the whole Court In the present cases four Judges did not concur in opinion as to the constitutional questions which have been argued The Court, therefore, direct these cases to be reargued at the next Term under the expectation that a larger number of the Judges may be present "[2]

[2] A footnote to the Report of Chief Justice Marshall's opinion says "'Mr Justice Johnson and Mr Justice Duvall were absent when these cases were argued."

Procedural Facts About These Cases.

It is always important and significant in close legal research about any important and controlling case, to have the facts of the case carefully summarized and analyzed so that the real holding of the Court and the reasons for it may be fully understood and appreciated For that reason the main procedural facts as to these two cases are set forth in the footnote below [3]

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[3] The *Briscoe* case came to the Supreme Court of the United States on Writ of Error from the State courts in Kentucky The Kentucky State Legislature by an Act of November 29, 1820, had incorporated the "Bank of the Commonwealth" with a capital of $2,000,000 00 of "capital stock" all of which belonged exclusively to the State The powers of the Bank were generally set forth in a statute incorporating the Bank By a later Act of December 25, 1820, the Legislature further amended the powers and authority of the Bank In 1831 the Bank brought suit in the State courts of Kentucky against Briscoe and others on a promissory note given by the defendants to the Bank The defendants pleaded want of consideration in that the only consideration given by the Bank for the note consisted of certain "Bills of Credit" issued by the State of Kentucky, which the defendants charged were in violation of the Constitution of the United States, and were therefore void The State courts sustained a demurrer to that defense, and gave judgment against Briscoe and his associates The case then came before the Supreme Court where as the Report of the case shows there was oral Argument by Counsel on both sides, some time prior to the opinion above quoted of Chief Justice Marshall, rendered at the January 1834 Term

The *City of New York* v. *Miln* case came to the Supreme Court of the United States on a certificate of division in the Circuit Court of the United States in the State of New York The City of New York had sued Miln in that Court for certain statutory penalties for violating an Act of the State Legislature of New York of February 11, 1834 "concerning passengers in vessels coming into the Port of New York" In the Miln case the defendant had demurred to the plaintiff's declaration The Federal Judges having been divided on the legal issues raised, certified to the Supreme Court of the United States the question whether the New York Act "assumes to regulate trade and commerce," coming into the City of New York from Foreign Ports, in violation of the Commerce Clause of the Federal Constitution In the *Miln* case the Report also indicates that at the time the case was first submitted, sometime prior to Chief Justice Marshall's opinion at the January 1834 Term, Counsel on both sides of that case had appeared before the bar of the Supreme Court and had argued the case orally

It was this procedural background, and particularly the fact that after the prior oral arguments in these cases (as stated by Chief Justice Marshall) that "in the present cases four Judges did not concur in opinion as to the constitutional questions which have been argued" which led this Honorable Court in 1834 to lay down the rule announced by Chief Justice Marshall and set forth above.

Comment on Marshall's Opinion.

It is a commonly known historical fact and indeed it is shown by the Frontispiece of Vol 8 of the Peters Report cited above, that in 1834 this Honorable Court consisted of the Chief Justice and six Associate Justices—that is a full Bench of seven Members.

Chief Justice Marshall's opinion as above set forth deserves careful comment and analysis at this place. Particular notice should be taken of three points in the language of Chief Justice Marshall's opinion.

The *first* point to be emphasized is that Marshall says that "*The practice of this Court is not to deliver any judgment in cases where constitutional questions are involved, unless four Judges concur in opinion,*" * * * "(except in cases of absolute necessity)" Chief Justice Marshall stresses this point by further stating the effect of this rule to be· "*thus making the decision that of a majority of the whole Court*" Marshall then points out specifically that in the two cases in question "which have been argued, four Judges did not concur in opinion as to the constitutional questions. . ."

It does not need any argument by us to show that under the present applicable Statute, fixing the full Bench of this Court at nine Members, the words "*four Judges*" as used by Chief Justice Marshall must now be read as "*five Judges*"

The *second* significant point in Chief Justice Marshall's opinion is that the Supreme Court in the two cases pending before it in 1834, *by its own Motion,* ordered "these cases to be reargued at the next Term," when, as Marshall indicated, it was anticipated that a "larger number of Judges might be present" This point about the Court itself enforcing Marshall's doctrine, *on its own Motion,* and requiring a Reargument before the full Bench (or as Marshall says "a larger number of Judges") need not be further commented upon, by Counsel, in this discussion

The *third* significant point in Chief Justice Marshall's doctrine is his announcement that in grave constitutional cases no decision will be handed down "*unless four Judges concur in opinion*" This rule, as translated into the present membership of this Honorable Court, means that *five Judges* of this Court should "concur in Opinion", *as well as in the Judgment,* before a grave constitutional question will be decided In other words his opinion implicitly points out the distinction to be made between the "judgment" of the Court, and the require-

ment that a majority of the full Bench must also "concur in opinion," in constitutional cases This particular point is made crystal clear by the fact that Chief Justice Marshall uses the phrase "concur in opinion" twice in his doctrine as above laid down.

These three points in Marshall's doctrine which we have discussed have been commented upon here because they indicate the meticulous care with which Chief Justice Marshall was accustomed to use his language, but principally because these points indicate the solemness and the sureness with which this doctrine was announced and adopted by this Honorable Court in that early day

The Later "Story" of the Briscoe and Miln Cases.

It is necessary, in order to understand the full force and effect of Chief Justice Marshall's doctrine, to carry forward to conclusion the full "story" of these two cases In 9 Pet 85, 9 L Ed 60, it appears that these two cases were again on the Court's calendar "for the January Term 1835 " At that time the Counsel for the City of New York and the Counsel for Briscoe from Kentucky appeared before the bar of the Court and it there appears that the Counsel.

> "Inquired if the Court had come to a final decision as to the argument of the case involving constitutional questions at the present term "

The Report at that place then indicates that Chief Justice Marshall in effect repeated his prior doctrine because the Report shows his reply was as follows:

> "*Mr. Chief Justice Marchall*: The Court can not know whether there will be a full Court during the term, but as the Court is now composed the constitutional questions will not be taken up. *12 February 1835* "

There is a footnote to the Report in 9 Pet. at this place which recites that:

> "The Court was at the time this Motion was made and during the whole term composed of six Justices, the vacancy occasioned by the resignation of Mr Justice Duvall not having been filled "

This point about the number of judges present is particularly pertinent upon this discussion It shows that whereas the case had been before the Court in 1834, and *had been orally argued although two Justices had been absent, yet the Court in 1835* would not take up the cases again even though there were six

Judges present and ready to hear the cases, with only one vacancy on the Bench.[4]

The Briscoe and Miln Cases on Reargument.

The next chapter in the "story" of these two cases takes us down to the January Term of the Court 1837, where we find that the case of the *City of New York* v. *Miln* is again reported in 11 Pet 102, 36 U S 102 The Frontispiece of 11 Pet shows that Chief Justice Marshall had died since the 1835 Term of the Court and that Chief Justice Taney had succeeded him The Frontispiece also shows that Justice Johnson had died and had been succeeded by Justice Wayne, and that Justice Duvall had resigned and had been succeeded by Justice Barbour Accordingly at the January 1937 Term of the Court there were three new Members on the Bench and the Report indicates that all seven Members of the Court were in attendance making a full Bench present when the case was reargued The Report of the *City of New York* v *Miln* case in 11 Pet contains the following memorandum·

> "The case was argued at a former Term of this Court and the Justices of the Court being divided in opinion a reargument was directed "

It further appears at the same place that the same Counsel, who had argued the case originally before Chief Justice Marshall and the Court in 1835, reargued the case on oral Argument in 1837. The Report then shows that Justice Barbour delivered the "opinion of the court" while Mr Justice Johnson delivered a "concurring opinion," and Mr. Justice Story delivered a "dissenting opinion "

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[4] A leading authority on Constitutional history in this country has recently commented (1944) on the *Briscoe* and *Miln* cases, and on Chief Justice Marshall's doctrine of 1834 After quoting Marshall's opinion, and citing the two cases in 8 Peters 118, and 9 Peters 85, this commentator says·

"These cases were again continued when the Court was unable to reach an agreement during the 1835 term By this time the vacancy caused by the death of Justice Johnson had been filled by the appointment of James M. Wayne of Georgia, but Justice Duvall had resigned, leaving one vacancy on the Court Against the decided opposition of Justice Story and himself, Marshall was unwilling to announce a decision in which only three Justices concurred When the cases were finally decided, after Marshall's death, Justice Story, dissenting, expressed the views in which he and the Chief Justice concurred (11 Pet. 420)" Charles Grove Haines, in his recent work, *"the Role of The Supreme Court in American Government and Politics, 1789-1835"*, p. 611

While it does not affirmatively so appear in the Reports of the *Miln* case, the truth seems to be that after the Court had heard the Argument the second time, the case was decided contrary to the view of Chief Justice Marshall, as well as to the view of Justice Story (See Comment of Professor Charles Grove Haines in Note 4 above)

It is unnecessary here to discuss the reargument in 1837 of the *Briscoe* v. *Commonwealth Bank* case, other than to say that that case followed generally the same pattern as the *City of New York* v *Miln* case It was reargued at the January 1837 Term and the Supreme Court proceeded to answer the questions which had been certified to the Court by the Federal Circuit Court in the State of New York The report of the case in 1837 appears in 11 Pet 257. On the second hearing this case was likewise heard by the full Bench of the Court

THE PREVIOUS BACKGROUND OF MARSHALL'S DOCTRINE—GREEN V. BIDDLE.

It seems desirable here to give some of the background and the significant circumstances which led Chief Justice Marshall and the Court to take the important stand which they announced in the Briscoe and Miln case.

The historical fact is that Marshall's doctrine, as laid down in 8 Pet 118 in 1834, had a significant and important previous background, which has been the subject of considerable comment by law writers and writers on Political Science Thus we find the point about this "background" commented on in a standard work (after quoting from and referring to Marshall's doctrine) as follows: [5]

> "The case of *Green* v *Biddle*, 8 Wheat. 1, 5 L Ed 547, first decided in 1821 and again determined on rehearing in 1823, greatly affected land titles in Kentucky and brought about a remonstrance from the Legislature of Kentucky * * * Allegations that the decision in this case was arrived at by a minority of the Court (several Members being absent) may have had an influence (11 years later) in bringing about an announcement of the Supreme Court in *Briscoe* v *Bank of Kentucky* and *City of New York* v *Miln*, 8 Pet 118, 8 L Ed 888 in 1834 by Mr Chief Justice Marshall "

[5] Professor Walter F Dodd (past Professor of Law, Yale Law School) in his Work entitled *"CASES ON CONSTITUTIONAL LAW"* (1932), and in the Chapter concerned with *"The Judicial Function"*

Another leading Commentator[6] likewise traces Marshall's doctrine to the case of *Green* v *Biddle*, 8 Wheat 1, which had been decided on reargument (as above indicated) at the February Term 1823 This author states with respect to the last named case:

> "In December 1823 the Legislature of Kentucky in a blaze of resentment against the decision of the Supreme Court of the United States (*Green* v *Biddle*) invalidating a Kentucky Statute, petitioned Congress * * * so to organize the Supreme Court of the United States that no constitutional question * * * involving the validity of State laws shall be decided by said Court unless two-thirds of all of the Members belonging to said Court shall concur in such decision ' ''

This author further says at another place in his text, with respect to the *Green* v *Biddle* case

> "The decision, intrinsically unpopular, was rendered more so by the wide-spread believe that the decision was rendered by only three Judges, a minority of the Court of seven This belief seems to have been erroneous ''[7]

Professor Cushman in his Article further points out the significant fact that between 1823-1830

> "At least six proposals" [like that in Kentucky] "were made to Congress * * * On January 21, 1829, Representative Barbour (later a Member of the Supreme Court) as Chairman of the Judiciary Committee reported such a Bill ''[8]

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[6] Robert Eugene Cushman (then, June 1921, Associate Professor of Political Science at the University of Minnesota and now for many years Professor of Government at Cornell University) in an article which has been generally commended, in 19 Mich Law Rev 771, entitled *"Constitutional Decision By a Bare Majority of the Court"*

[7] On this particular point of the assumed "minority" decision in the *Green* v *Biddle* case Professor Cushman further says·

> "In deciding the case of *Green* v *Biddle in 1823* Mr Justice Washington sought to allay the storm of protest, which it has already been seen greeted that decision, by solemnly declaring that the Court had attached every possible weight to the proposition that the State Statute in question was constitutional * * *
>
> "For discussion of this situation see Beveridge, *Life of John Marshall,"* Vol IV, 375 to 382, Corwin *"John Marshall and the Constitution"* 184 to 185, Charles Warren *"Legislative and Judicial Attacks on the Supreme Court"* 47 Am Law Rev I at pp 20 to 27 "

[8] Professor Cushman points out that two other similar efforts were made in 1867-1869 (citing them) and also cites a Bill by Senator Bourne in 1911 requiring "unanimous decisions" in such cases.

The author then says as to these proposals:

> "These various proposals and discussions have borne some fruit. Even Marshall felt the need of making some concessions to those who were accusing the Supreme Court of invalidating State laws by a bare majority of a quorum, and in 1834 laid down" (the doctrine stated by him in 8 Pet. 118).

Professor Cushman then concludes with respect to Marshall's doctrine, with a comment that seems to be true down to the present case:

> *"This rule has prevailed ever since in the United States Courts and has been adopted also in the Courts of several States."*

SUMMARY OF A LEADING AUTHORITY.

We conclude this Comment about the previous background of Marshall's doctrine, and the *Green* v *Riddle case*, with the following conclusion from a leading historian of this Honorable Court, who has often been honored by being cited by this Court [9]

> "It is interesting to note that if the Court had followed the precedent which (it was charged) had been set in 1823 in *Green* v. *Biddle* and had delivered its opinion by a mere majority of the Judges present, the whole course of American Legal history would have been changed" (Citing several leading cases.)

[9] Charles Warren, in the Article cited in Note 7, *ante*

THIS COURT IN 1872 REAFFIRMS THE MARSHALL DOCTRINE.

It is a legal and historical fact of first importance, on the consideration of the present MOTION, to know that this Court in the "Legal Tender Cases" in 1872, after full review of this particular question, reaffirmed and reannounced, in all respects, Chief Justice Marshall's doctrine as quoted above in these "Suggestions". An analysis and discussion of the "Legal Tender Cases" with respect to this particular point should, therefore, be helpful and informative to this Court on the consideration of this Motion for Reargument.

The First "Legal Tender Case."

It will be recalled that in the first so-called "Legal Tender Case", namely, the case of *Hepburn* v *Griswold,* 75 U S 603, 8 Wall 603, 19 L. Ed 513, decided at the December Term 1869, it was held, by a divided Court, that the Acts of Congress known as the "Legal Tender Statutes" were unconstitutional and void, so far as they applied to the facts of that particular case [10]

THE SECOND "LEGAL TENDER CASES."

It is a matter of common knowledge of both the Bench and the Bar, that the holding of this Court in *Hepburn* v *Griswold* was reversed by this Court in 1872, and the validity of the "Legal Tender Statutes" sustained, in the so-called "*Legal Ten-*

[10] It is worth while noting that the *Hepburn* v *Griswold* case was argued December 10, 1869, and decided February 7, 1870 The majority opinion, which is of course the "Opinion of the Court" in that case, was written by Chief Justice Chase At the conclusion of Chase's opinion he states that Mr Justice Greer had taken part in the hearing of the case and its consideration and his views are summarized in the Chase opinion The fact, however, is that Justice Greer had resigned January 31, 1870, seven days before the decision in the *Hepburn* v *Griswold* case The Report of that case shows that Justice Miller wrote a dissenting opinion, in which Justices Swain and Davis concurred.

The division in the Supreme Court in the *Hepburn* v *Griswold* case was therefore by a majority of five and a minority of three.

der Cases," 79 U. S. 457, 12 Wall. 457, 20 L Ed 287 In the two cases which were heard together, this Honorable Court, by a majority of five to four, took exactly the opposite stand which the court had taken 2 years earlier, and officially overruled the doctrine which it had laid down in the *Hepburn* v *Griswold* case In the second *"Legal Tender Cases"*, the Report shows that "Mr Justice Strong delivered the opinion of the Court", and that four other Justices (making a full majority of five) concurred [11] The Report of the second "Legal Tender Cases" (as found in the so-called Lawyer's Edition, above cited) in its *"Statement of Facts"* contains much interesting information that is pertinent to the present discussion in these **"Suggestions."** There is accordingly set out in the following footnote certain data and information, pertinent to the present discussion, which is found in that Report [12]

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[11] In the second "Legal Tender Cases" a dissenting opinion was rendered by Chief Justice Chase in which Justices Clifford and Field concurred Mr Justice Clifford also wrote a separate dissenting opinion, as did Mr Justice Field Mr Justice Nelson dissented from the holding and judgment of the Court, but without rendering an opinion

See for extended and authoritative discussion of the so-called *"Legal Tender Cases,"* and particular comment about the "first Reargument" and the "second Reargument" of those cases, *Warren, "Supreme Court in United States History"* Vol. 3 Ch. 31

[12] The Report of these two cases as found in 20 L Ed. 287 shows that the two so-called "Legal Tender Cases" were actually the cases of *Knox, Plaintiff in Error* v. *Lee* et al, case No 10 on the docket of the Court at the December Term 1870, and the case of *Parker, Plaintiff in Error* v *Davis*, that case being No. 17 on the docket of the Court at the same Term.

At the head of the *"Statement of Facts"* given in that Report, the following Memorandum appears.

"No. 10 argued Nov. 17, 1869 Reargued Feb 23, 1871, and further, Apr. 1871.
No 17 argued Apr. 18-19
Both decided May 1, 1871."

The report then sets out a summary of the Argument of Counsel before the Supreme Court and then (p. 290 of the L Ed Report) there comes the following Memorandum

""These cases having been submitted to the Court April 10, 1871, Mr. Justice Clifford announced that the majority of the Court would make the following Order of these cases.

"Ordered that Mr Potter" (opposing Counsel) "and the Attorney General be heard in these cases on the 12th inst. upon the following questions:

(These two specific questions the Court wished reargued was set forth) "Mr. Potter will open, the Attorney General will reply and Mr. Potter will close"

It further appears at the same place that Mr. Justice Clifford, although making the announcement, further announced.

"I dissent from the Order of the Court in these cases Especially from that part of it which opens up for Reargument the question whether the Act of Congress, known as the 'Legal

It appears in the original Report (12 Wall at pages 528 and 529) that the decision of the Court in these second "Legal Tender Cases" was handed down May 1, 1871 (See also 11 Wall 682.) The original Report at page 529 contains the following interesting suggestive statement, which appears immediately

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*Tender Act' is constitutional * * * And I am requested to say that Mr Justice Nelson and Mr. Justice Field concur in this dissent"*

The proceedings last mentioned occurred as indicated on April 10, 1871 The Report of this case at this place then contains the further Memorandum

*Apr 12, 1871—Mr Justice Clifford informed the Bar that Mr Justice Nelson was too ill to attend Court today, that in consequence of his absence the hearing of these cases assigned for Argument this morning would be further postponed * * *"*

The Report of this case at the same place then shows the following after the April 12th announcement of Mr Justice Clifford

"After the announcement of the above Order Mr Justice Swain made the following remarks

*"'Further Argument of this case having been again postponed on account of the indisposition and absence of Mr Justice Nelson, it is deemed proper by the Court that a few remarks by it should be submitted * * *"*

The "remarks" of Mr Justice Swain are rather extended and are therefore summarized here in this Note The first point to be considered is that Mr Justice Swain makes clear that he is speaking for "the Court" He points out that there are two separate cases involved The names of the parties having been given above in Note No 10 Mr Justice Swain further points out that the **Knox** v **Lee** case "was brought into this Court (by Writ of Error) Oct 1, 1869'" He states that on April 30, 1870, this particular case "was continued and ordered to be Reargued on the first Tuesday of the ensuing December Term 1870" He then states

*"Nov 17, 1870, during the Fall session of this Court, it having been ascertained that neither the Chief Justice nor Mr Justice Nelson could be present at the time designated, the hearing was postponed On the 23rd of that month the case was Argued by the Counsel of the parties All the Judges were present but the Chief Justice * * * At the close of the Argument, Honorable Clarkson N Potter (opposing Counsel) asked to be heard upon the constitutional question involved in the cases The Attorney General expressed a desire to be heard also if Mr Potter were heard These requests were taken into conference and both promptly acceded to"*

After further "remarks" by Mr Justice Swain, not essential to this discussion, the Statement of the Case concludes with the following

"In accord with the foregoing the cases were argued"

ahead of the "Opinion of the Court," delivered by Mr. Justice Strong:

> *"On the 15th of January 1872—till which time, in order to promote the convenience of some of the dissentient members of the Court, the matter had been deferred—the Opinion of the Court, with concurring or dissenting opinions from the Chief Justice and different Associate Justices, was delivered."*

We respectfully ask the Court's indulgence for setting out in some detail, in the foregoing comment, the facts and circumstances with respect to the division of this Court in the *Hepburn* v *Griswold* case *ante* and in the so-called *"Legal Tender Cases," ante* We have done so because we believe the information therein contained is not readily available in any one convenient place in the Books.

MARSHALL'S DOCTRINE REAFFIRMED, 1872.

We now come to the important and controlling announcement of this Court in the second *"Legal Tender Cases"* where this Honorable Court in January 1872 expressly reaffirmed and reannounced Marshall's doctrine of 1834 The "opinion of the Court" in the second "Legal Tender Cases" was written by Mr Justice Strong After expressly stating that the basic doctrine of *Hepburn* v *Griswold* was overruled, this Court in its opinion goes on to discuss that particular case as follows·

> "That case was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have These cases have been heard before a full court, and they have received our most careful consideration The questions involved are constitutional questions of the most vital importance to the government and to the public at large We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right (Citing *Briscoe* v *Bank of Kentucky,* 8 Pet 118) We are not accustomed to hear them in the absence of a full court, if it can be avoided. Even in cases involving only private rights, if convinced we had made a

mistake, we would hear another argument and correct our error." [13]

Here we have the rule stated by this Court in fairly modern times which we respectfully urge should be applied in the case at bar.

No Later Comment by This Court.

So far as we have been able to discover there seems to be no other comment in the Reports of the decisions of this Honorable Court since the "Legal Tender Cases" in 1872 directly concerned with what we have called "Marshall's Doctrine" And yet we think it still remains true today, as stated by a leading authority on Political Science, that:

> "This rule has prevailed ever since" [that is since Marshall's announcement in 1834] "in the United States Courts, and has been adopted also in the courts of the several States" [14]

Indeed we respectfully say that point made in that quotation has stood unchallenged since the doctrine was first announced in 1834, and down to the decision in this case, in June 1946

CASES IN OTHER COURTS.

While it is of course true that the holdings and statements found in lower Federal courts, and even in State courts, are not controlling with this Honorable Court, yet we think it may be helpful to make some reference to pertinent cases and decisions in such other courts

The first case to which we refer is *Frischer & Co* v. *Bakelite Corp* decided by the United States Court of Customs and Patent Appeals (1930), 39 Fed (2d) 247 It appears from that Report that there are five Judges on that Court but that one of the

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[13] It should be noted in this connection that the same point about the division of the Court in *Hepburn* v *Griswold* case and in the *"Legal Tender Cases,"* is likewise commented upon in the dissenting opinion of Chief Justice Chase, 8 Wall at p 572 It there appears that the *Hepburn* v *Griswold* case "had been decided Nov 27, 1869"; that the opinion in that case "had been read and agreed to in conference Jan. 29, 1870, and that the opinion would have been delivered in Court January 31, 1870, had not the delivery been postponed for a week to give time for the preparation of the dissenting opinion" Chief Justice Chase then refers to "the Act increasing the number of Judges to nine," which took effect the first day of December 1869. These statements of fact are merely given here to complete the record

[14] Already quoted in these "Suggestions" from the Article by Professor Robert E. Cushman in 19 Mich Law Rev. 771 (1921).

five Judges "did not participate" in the decision or the opinion The question before the Court came up on appeal from a decision of the United States Tariff Commission, and involved the precise question whether certain "findings" of the Tariff Commission, which had been rendered by three members of that Commission, out of a full membership of seven, could be sustained as valid and lawful The Court of Customs and Patent Appeals determined that the "findings" of an Administrative Body were valid and proper, even if made by a quorum of a mere majority of such a Board The Court points out, however, that an opposite rule applies in judicial proceedings and in Courts of Justice, as distinguished from administrative proceedings before Administrative Boards In discussing this latter point (which of course may be said to be dictum) the Court of Customs and Patent Appeals said

> "Where courts are concerned it has been uniformly held, so far as we can ascertain, that a clear majority of all of the legally constituted members thereof shall concur, or no valid judgment may be entered, except as may follow no decision, citing *Mugge* v *Tate* (Fla), 41 So 603, *Deglow* v *Kruse* (Ohio), 49 N E 477, *Denver etc R R* v *Burchard* (Colo), 86 Pac 747, 9 Ann Cas 994, *Madlem's Appeal,* 103 Pa 584, *Putnam* v *Rees,* 12 Ohio 21, *Northern R R* v *Concord R R,* 50 N H 166; *Johnson* v *State,* 1 Ga 271; *Ayres* v *Bensley,* 32 Calif 631; *Ill Cent R R* v *Frazier,* 47 Ill 505."

We will not extend this comment about decisions and rulings in other cases further than to say that we understand the doctrine above laid down, by the Court of Customs and Patent Appeals, is a sound statement of law generally accepted in State Courts in the United States

AN INCIDENTAL CASE IN THIS COURT DISTINGUISHED.

These **"Suggestions"** would not be frank and complete unless some specific reference was made to the leading case of *United States* v *South-Eastern Underwriters Assn*, 322 U S 533, decided by this Honorable Court in June 1944 That case has an incidental interest here, because Marshall's Opinion was specifically raised on the Petition for Rehearing filed in that case But on this point the case is clearly distinguishable from the case at bar, as we will now try to prove.

In that case the principal question before the Court was whether the business of insurance was "Commerce" within the purview of the Sherman Anti-Trust Act The Report of that case shows that two Justices of this Court disqualified themselves from considering the case, presumably after listening to

oral Argument. Such disqualification of course resulted in the further fact that there were only seven Members of this Court available to consider and pass upon the case. In that case, as is well known, the seven Members of that Court divided 4 to 3 Four Members of the Court concurred in "the opinion of the Court", which sustained the contention that the business of insurance was "Commerce", within the meaning of the Sherman Anti-Trust Act, while three Members of this Court dissented, one of them "dissenting in part."

In the later proceedings in that case, the Attorneys for the South-Eastern Underwriters Assn. filed a Petition for Rehearing The records of the Clerk of this Court show that several other Petitions for Rehearing were filed in support of that Main Petition, such supporting Petitions having been submitted by the State of New York, the State of North Carolina, the Commonwealth of Massachusetts, the State of Washington, the Commonwealth of Virginia, and a joint Petition on behalf of 38 other States

We have had the privilege of examining the Main Petition for Rehearing, together with the Petitions in support thereof, filed by the various States and Commonwealths above referred to All of those Petitions cite and refer to the doctrine of Chief Justice Marshall as laid down in 8 Pet. 118, in the *Briscoe* v *Bank of Kentucky* and *City of New York* v *Miln* cases None of those Petitions for Rehearing, however, cite or in any way refer to the equally important reassertion of that doctrine (as discussed and commented upon in these **"Suggestions"**), in the "Legal Tender Cases", *ante*, in 1872

The Reports of this Court in 323 U S 811, in the list of "Rehearings denied", contains the following Memorandum

> "The *United States* v *South-Eastern Underwriters Assn*, No. 353, October Term, 1943. Rehearing Denied October 1944 Mr Justice Roberts and Mr Justice Reed took no part in the consideration of this application."

The presentation of the Petitions for Rehearing in the *South-Eastern Underwriters* case constitutes, so far as we know, the only occasion (certainly within modern times) on which Chief Justice Marshall's Doctrine has been raised and urged upon this Court as a ground for Rehearing.

We point out that there is, however, an essential, and we think controlling, difference between the realistic situation existing in the *South-Eastern Underwriters* case and existing in the case at bar. In the former case the oral Argument had taken place *before the full Bench of this Court* No one of the nine Justices of this Court was absent during either the oral

Argument, or the consideration of the case, or the announcement of the opinion and judgment in the case The problem and difficulty in the *South-Eastern Underwriters* case, in this precise particular we are now discussing, arose solely because two Members of the Court felt themselves called upon to disqualify themselves from considering the case.

In the case at bar the opinions and decision are the result of a totally different situation Upon the oral Argument of this case there was not a full Bench, one Justice being unavoidably absent during the whole time that this case was pending before the Court and down until some time after the decision of the Court, June 10, 1946 After the case had been argued there occurred the tragic and lamented death of the late Chief Justice, a substantial time before the decision and opinions in this case were handed down

In the *South-Eastern Underwriters* case we respectfully say, the Doctrine of Chief Justice Marshall was not applicable for two major reasons·

1. Because the full Bench of the Court was present and there was no way in which the case could be reargued except before the same seven identical Justices who had previously decided it; since of course the two Justices who had disqualified themselves would have been compelled presumably to take the same action upon a Reargument

2 Marshall's Doctrine is based upon the existence of some grave constitutional question being presented to the Court Such was not the fact in the *South-Eastern Underwriters* case. *The essential question there was one of statutory construction rather of constitutional law* Indeed the Main Petition for Rehearing in that case (as well as the supporting Petitions for Rehearing) did not contend that any major question of constitutional construction was involved

Accordingly it seems obvious to say that there is no precedent growing out of the four to three decision in the South-Eastern Underwriters case, which in any way adversely affects the right of the Petitioners in this case to present and urge upon the Court this **"Motion for Reargument"** *before the full Bench*

CONCLUSION.

A Question of Practice.

The Counsel for the Petitioners, who is personally responsible for these **"Suggestions"**, realizes fully that a rare and unusual question of Practice and of Advocacy has been raised by the foregoing **Motion for Reargument Before the Full Bench.** The major points of law here raised, and discussed are obviously related to the Petition for Rehearing concurrently filed in this case by the Petitioners We believe however, that the major points and issues here raised and discussed are separate and distinct in themselves, and raise issues of Law and high Policy, which we have felt deserve and require special treatment and consideration Accordingly we have concluded it to be the better Practice to present these particular issues and points in this separate book, rather than to incorporate them into the **Petition for Rehearing** itself These **"Suggestions"** we respectfully submit are essentially concerned with a special and unusual set of legal questions that have (so far as we know) never been required to be as fully and exhaustively presented to this Court as we have felt is necessary to preent them in this case.

The Juristic Shock of Minority Decisions.

Finally, we respectfully submit, that every thoughtful and seasoned Jurist, as well as every experienced and contemplative Advocate, and indeed every qualified student of Political Science as well, feels a sense of juristic shock whenever a minority of the members of a high Judicial Court is called upon, for any reason, to announce and decide some dominant legal doctrine, and to do so with less than the approval of a full majority of the full Bench We recognize, however. as implied in the doctrine of Chief Justice Marshall, laid down in the *Briscoe* and *Miln* cases in 1834, that such holdings or rulings sometimes may be required "in cases of absolute necessity" This rule requiring a full majority of this Court in cases announcing a major doctrine of Constitutional Law is, for reasons beyond the control of this Honorable Court, spelled out in dramatic fashion by the decision and the opinions in the case at bar Here we say is a situation against which the deepest instinct and the finest sensibility of every jurist and every lawyer repugns It is only the ultimate factor of "abso-

lute necessity'' of which the Chief Justice speaks, we respectfully say, that can justify a refusal to apply that doctrine in such a case as that at bar.

We have made out our case for either a Reargument or a Rehearing in the case at bar with the best efforts which our modest talents will permit. We are sure of the sense of justice of this Honorable Court and of its high desire always to decide constitutional cases in the best interest of all of the people

Respectfully submitted,

URBAN A LAVERY,
Attorney for Petitioners,
Chicago, Illinois

August 16, 1946.

[To follow page 26 of "SUGGESTIONS" heretofore filed]

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

No. 804

COLEGROVE ET AL V GREEN ET AL.

ADDENDUM
to
FOREGOING SUGGESTIONS.[1]

In the foregoing "*Suggestions*" it is stated that there seems to be no later comment or discussion in the opinions, *per se,* of this Court (after the "Legal Tender Cases", in 1872) concerning Chief Justice Marshall's Doctrine, that grave questions of constitutional law will not be decided by the Court, unless and until "a majority of the whole Court * * * concur in opinion"—to use Marshall's historic language Further research tends to confirm that statement.

However, certain further pertinent and significant legal data and material have since been located, which it is deemed proper and desirable to submit herewith for the information and assistance of the Court in the premises

I.

THE "INCOME TAX CASES" OF 1895.

First in importance in that behalf is the story of the "Income Tax Cases"[2] of 1895, particularly so far as the Rehearing and Reargument of those cases are concerned

Now the usual reading and study of the various opinions, *per se,* found in the Reports of those cases, will disclose little information or light, even indirectly, on the important point involved in the present "Motion". But a careful reading of the preliminary "Statement of the Case," for the second decision in those cases, is illuminating and informative; because it shows that these cases implicitly constitute a strong argument in favor of a Reargument or Rehearing, of the case at bar, and before the full bench of this Honorable Court

[1] Through the kind consideration of the Clerk of this Court this Addendum has been physically added to the foot of the foregoing "Suggestions"

[2] *Pollack* v. *Farmers' Loan and Trust Company* and *Hyde* v. *Continental Trust Company,* 157 U S 429, 39 L Ed 759, 15 St. Ct. 673, argued March 7, 8, 11, 12 and 13, 1895 and decided April 8, 1895.
Same cases 158 U S 601, 39 L Ed. 1108, 15 S. Ct. 912, reargued May 6, 7 and 8, 1895 and decided May 30, 1895

Accordingly the story of what occurred in those cases, both on the first Argument and Hearing, and likewise on the Petition and Rehearing, and the Reargument, will be here set out.[3]

THE FIRST HEARING.

The first hearing of these cases was not before a full bench, only eight judges being present This fact is not disclosed either by the opinions of the Court, or in the "Statement" by the Reporter, on the first hearing But the frontal page of the Official Reports of this Court, in 157 U S, shows that Mr. Justice Jackson, "by reason of illness", took no part in these cases on the first hearing.

Nevertheless the Court, on the first hearing, *by a full majority of the entire bench,* held invalid certain provisions of the Federal Income Tax Law of 1894. At the same time the Court split 4 to 4 as to the validity of certain other provisions of that Act.[4]

It is obvious therefore that on the overall situation, the decision of the Court on the first hearing of these cases left the grave Constitutional questions which were raised in a rather unsatisfactory and unsettled condition.

THE SECOND HEARING.

When the first decision came down, showing the Court badly split over the case, the loosing parties promptly filed a Petition for Rehearing As might be expected that Petition vigorously seized upon the fact that the case had not been heard before a full bench. For our present purposes the significant matter is the content of that Petition for Rehearing, and the unusual treatment and attention which is given to it by the Official Reports of this Court, as will shortly be pointed out and discussed

The first hearing of the case had occupied a full week of oral argument, March 7, 8, 11, 12, and 13, 1895. Nevertheless the decision came down fairly promptly and on April 8, following. The Petition for Rehearing was filed, April 15, and one week later, April 23, the Court made the following official announcement:

> "The consideration of the two Petitions for Rehearing of the Income Tax Cases is reserved until Monday, May 6, 1895, *when a full Bench is expected,* and in that event two counsel on a side will be heard at that time." [Italics added]

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[3] The searching lawyer will find no reference to that story, or to the important legal and historical facts involved (so far as we know) in any of the customary "Headnotes" or comments found in the Digests or the Encyclopedias or other Commentaries, discussing the so-called "Income Tax Cases"

[4] The various Reports of the first decision found in the three Reporter Systems do not indicate the precise way in which the Court was divided; the Reports merely give the dissenting opinions of Mr. Justice White and Mr. Justice Harlan.

The wording of that order of the Court, and particularly the part which we put in italics, is important for the present discussion. It constitutes a clear recognition of Marshall's Doctrine (which had been set out in the Petition for Rehearing, as we shall see) and is an implicit reaffirmation of that Doctrine, and its restatement in the "Legal Tender Cases" of 1872, cited and discussed, *ante.*

On the second hearing of these cases (which were again argued for three separate days, May 6, 7, and 8, 1895) all 9 Justices were present and took part in the decision, which again came down fairly promptly, on May 20, 1895.

AN UNUSUAL CIRCUMSTANCE.

We have already mentioned the special attention which the Official Reports of this Court gave to the text of the Petition for Rehearing in these cases Indeed it is an unusual and suggestive circumstance that the complete text of that Petition (including the address to this Court, and the names of the six learned and famous Counsel who signed it) is set forth in the Reports (158 U S 601, 39 L Ed 1108), at length and *in haec verba* The Reports of this Court through the long years before and since will be searched in vain, we believe, for a similar precedent. Whatever may have been the stimulus which suggested this unusual step by the Official Reporter of this Court, the plain fact is that the full effect of the Court's action in granting the Rehearing cannot be fully appraised and understood without a reading of the Petition for Rehearing itself, and in conjunction with a reading of the "Opinion of the Court," on the second hearing

THE PETITION, PER SE.

The Petition itself is illuminating, and is a pattern for good Advocacy, as might be expected from the distinguished array of Counsel who prepared it It lays particular stress on Chief Justice Marshall's Doctrine as he announced it in the *Briscoe* case in 1834. The Petition also cites *Home Ins. Co* v. *New York,* 119 U. S. 129, 30 L Ed 350 (See also 122 U S. 636, and 134 U S 594), as authority for its statement that—

> "The rule laid down by Chief Justice Marshall has been frequently followed "

In addition the Petition relies on *"Phillips' Practice"*, p. 380 [5]

But for some unexplained reason the Petition does not cite or refer to the far more significant precedent found and set forth in the "Legal Tender Cases", discussed at length in the foregoing *"Suggestions"*

[5] The Home Insurance case and the *Phillips* text are both discussed hereafter.

For the convenience of the Court, and in line with the methods already used, the cogent and pertinent part of the text of that Petition for Rehearing is set forth in the following footnote [6]

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[6] **"PETITION FOR REHEARING.**

* * * * * * *

II.

"The Court, early in its history, adopted the practice of requiring, if practicable, constitutional questions to be heard by a full Court, in order that the judgment in such case might, if possible, be the decision of the majority of the whole Court

"In *Briscoe* v *Commonwealth Bank of Kentucky*, 33 U S 8 Pet 120, 122 (8 L Ed 888) this rule was announced by *Chief Justice* Marshall in the following language·

'The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court. In the present case, four judges do not concur in opinion as to the constitutional questions which have been argued The court therefore direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present'

"The same cases were again called at the next term of the court and the *Chief Justice* said the court could not know whether there would be a full court during the term, but as the court was then composed, the constitutional cases would not be taken up 34 U S 9 Pet 85 (9 L Ed 60) In a note to the cases upon that page, it is stated that during that term the court was composed of six judges, the full court at the time being seven, there was then a vacancy occasioned by the resignation of *Mr Justice* Duval, which had not yet been filled

"The rule laid down by *Chief Justice* Marshall has been frequently followed Reference may be made to the case of *Home Ins Co of New York* v *New York*, 119 U S 129, 148 (30 L Ed 350-354) *Mr Chief Justice* Waite there announced that the judgment of the supreme court of the state of New York was affirmed by a divided court At the same time, *Mr Justice* Woods was ill and absent during the whole of the term, and took no part in any of the cases argued at that term There were, therefore, only eight members of the court present A petition for reargument was presented upon the ground that the principle announced by *Mr Chief Justice* Marshall should be followed, and that the constitutional question involved was sufficiently important to demand a decision concurred in by a majority of the whole court The petition was granted (122 U S 626) and the case was not reargued until the bench was full 134 U S 594, 597 (33 L Ed 1025, 1029) This practice is recognized as established in Phillips' Practice, at page 380.

III.

"It is respectfully submitted that no case could arise more imperatively requiring the application of the rule than the present. — — In addition, it is manifest that, until some decision is reached, the courts will be overwhelmed with litigation upon these questions — —

"Your petitioners, therefore, respectfully pray that these cases be restored to the docket and a reargument be ordered — —.

Washington, April 15, 1896.

Joseph H Choate, William D Guthrie,
Clarence A. Seward, David Willcox,
Benjamin A Bristow, Charles Steele,
Of Counsel for Appellants"

ANNOUNCEMENT BY THE COURT.

The Official Report of the second hearing of the "Income Tax Cases" in the Reporter's "Statement" also sets forth, *in haec verba,* an unusual document or instrument, being the so-called "Statement" of the Attorney General "In response to Petition for Rehearing" The Attorney General, as the responsible Law Officer of the Government, in his Response, for all practical purposes, joined in a request for a Rehearing. Indeed the opinion of the Court states that the Court so considers the Attorney General's Statement.

The Official Report of the case (158 U. S. 601) on the second hearing of these cases contains the following interesting and illuminating announcement by the Court:

> "*Mr. Chief Justice* Fuller: In cases Nos 893 and 894 the appellants made application for rehearing as to those propositions upon which the court was equally divided, whereupon the Attorney General made the suggestion that if any rehearing was granted, it should embrace the whole case We treat this suggestion as amounting in itself to an application for a rehearing, and not desiring to restrict the scope of the argument, we set down both applications to be heard to-day *before a full bench, which the anticipated presence of our brother Jackson, happily realized, enables us to do* * * *" [Italics added.]

This reiteration about the necessity of "a full bench", upon the Rehearing which the Court granted, can hardly be overemphasized or too much stressed, on the present discussion

SILENCE OF THE OPINIONS.

We have already adverted to the fact that the opinions themselves in the "Income Tax Cases" are entirely silent with respect not only to the reasons for the Rehearing, but more particularly with respect to the fact that the first hearing was not before the full bench. But on the other hand, as we have already impliedly suggested, it seems implicit in the full story of these important cases, that the Court itself may have intended to make up for that silence, indirectly, by seeing to it that the full facts and circumstances, in these particulars, would be set out and be reported, either in the "Statement" of the Official Reporter, or in the text of the Petition for Rehearing, which itself is printed in that "Statement".

The outstanding and significant facts, from these cases, for our present purposes, are: a) that the first hearing of the "Income Tax Cases" took place before eight Justices instead of nine; b) that the Court was evenly divided as to certain issues in the case—just as the Court is evenly divided in some respects in the case at bar; and c) that in recognition of Marshall's Doctrine, a Rehearing of the case was ordered

The conclusion on this point is, we respectfully suggest, that even though the Court, in its opinions, was silent in the premises, the thing the Court did in granting a Rehearing and in specifying that such Rehearing must be before a full bench, is a strong argument in favor of the granting of the Motion for Reargument, in the case at bar.

II.

HOME INSURANCE CO. V. NEW YORK—1890.

The next decision of this Honorable Court in importance, for the purposes of this *Addendum* (after the "Income Tax Cases") is the case of *Home Insurance Co.* v. *The State of New York,* which likewise was twice argued before this Court and was finally decided in 1890.[7] As we have seen this case was strongly relied on (as a precedent for a Reargument) in the Petition for Rehearing, filed in the "Income Tax Cases" Here again it will be helpful, we believe, to give, in summarized fashion, the "story" of the Home Insurance Co. case, so far as the actual facts of the procedure of this Court concerning the Reargument are concerned.

FIRST HEARING.

The Home Insurance Co case was argued before this Court the first time, October 25 and 26, 1886 Although the point does not appear anywhere in the Report of the Case, the argument was not before the full bench of this Court. The frontal-page of Volume 119 of the Official Report of this Court shows that Justice William B Woods "was absent during the whole term covered by these decisions" In its first decision in that case the Court was split 4 to 4, and no opinions whatever are given. Instead, at the end of the rather extended "Statement of the Case," in the Reports there is set forth the following very short *per curiam* order.

> "Mr. Chief Justice Waite announced that the judgment of the Supreme Court of the State of New York was affirmed by a divided Court."

PETITION FOR REHEARING.

As might be expected, a Petition for Rehearing was promptly filed, which relied strongly on the fact that the cause had not been heard by a full bench It was argued in that Petition that—

> "The principle announced by Mr Chief Justice Marshall should be followed and that the Constitutional question "involved was sufficiently important to demand a decision, *concurred in by a majority of the whole court.*"[8]

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[7] For the first decision of that case, see 119 U. S. 129, 30 L. Ed. 350. For allowance of Rehearing, see 122 U. S. 636. For Rehearing and final decision, see 134 U. S. 594, 33 L. Ed. 1025.

[8] See paraphrase of the Petition for Rehearing in the Home Insurance Co. case as set forth in the Petition for Rehearing in the "Income Tax Cases", 134 U. S. at page 603. It is particularly to be noted that a leading member of the New York Bar, at that period, Mr. Benjamin H. Bristow, signed the Petition for Rehearing in the Home Insurance Co. case, and also was one of the Counsel signing the Petition for Rehearing in the "Income Tax Cases," only five years later.

REARGUMENT GRANTED BEFORE THE FULL BENCH.

That Petition for Rehearing was granted by the Court February 7, 1887, in a Memorandum Order appearing in 122 U S. at page 636 On the Reargument (134 U S 594) there appears the following statement at the outset of the Official Report of the case:

> "This case was first heard October Term, 1886 On the 15th of November, 1886, it was affirmed by a divided court. * * * On the 7th day of February, 1887, on Motion of the Counsel for the Plaintiff in Error [Mr Benjamin H Bristow] that judgment was rescinded and annulled, and the cause restored to its place on the Docket, *to be heard by a full Court.*"

Here, in the language of this Court's order, granting a Rehearing in the Home Insurance Co case, in 1887, we have the second important instance in point of time (following the "Legal Tender Cases" in 1872, discussed, *ante*) when this Court again reaffirmed Chief Justice Marshall's Doctrine, and granted a Reargument before the full bench, where (in both cases) there was only one judge absent on the first hearing The "Income Tax Cases" in 1895, are, of course, the third important instance in that particular, in point of time, when this Honorable Court has followed Marshall's Doctrine, where only a single Judge was absent from the bench on the hearing of the cause.

Here, in the case at bar, it must be remembered, two judges were absent when this case was decided, and the opinions handed down.

SECOND HEARING.

To complete the story of the Home Insurance Co case certain further incidental facts should be given In the intervening four years between the first argument and decision (October and November, 1886) and the second argument and decision (March and April, 1890) the Court had been largely reconstituted Chief Justice Waite had been succeeded by Chief Justice Fuller; Justice Woods had been succeeded by Justice Lamar, and Justice Blatchford had been succeeded by Justice Brewer

On the second argument and decision the Court had consisted of the full bench of nine The Court divided seven to two, the "Opinion of the Court" being written by Justice Field; while a short Dissenting Opinion was written by Justice Miller and concurred in by Justice Brewer.

There is no reference in Justice Fields' Opinion, on the second hearing, either to the fact that the first hearing had not been held before a full bench, or to the reasons why a Reargument was ordered.

III.

A SIGNIFICANT AUTHORITY.

We next refer to a significant Text Authority strongly sustaining the foregoing Motion for Reargument of the case at bar, before the full bench.

In the Petition for Rehearing in the "Income Tax Cases" (see 158 U S 601) Counsel say with reference to the practice of this Honorable Court requiring that a decision in a case involving Constitutional questions be *"concurred in by a majority of the whole Court"*.

> "This practice is recognized as established in *'Phillips' Practice,'* at page 380."

The text cited is a work entitled *"United States Supreme Court Practice,"* by P Phillips, who is described on the frontispiece of the book as *"Counsellor of the Supreme Court of the United States"* The work was first published in 1872, and a "Revised Edition" published in 1875 The comment of this Author, as is shown by the quotation given below, strongly supports the above quotation, and furthermore is helpful and informative on the present argument For purposes of convenience the full text of that Author's Comment is here set forth:

"Rehearing and Reinstating a Cause"

* * * * * *

"As germane to this subject we may say that, in cases involving Constitutional questions, the practice is not to give judgment *without a majority of all the Judges who constitute the Court concur in opinion* When this concurrence is wanting, a reargument will be ordered at a time when a full Court is anticipated. *New York* v *Miln,* 8 Pet 118.

"In 1835 the Court consisted of but six judges, the vacancy occasioned by the death of Judge Duval not having been filled

"The case of *New York* v *Miln, supra,* and other cases involving Constitutional questions, being reached, the Chief Justice said. 'The Court cannot know whether there will be a full Court during the term, but as the Court is now composed the Constitutional cases will not be taken up' 9 Pet. 85."

A Modern Statement of the Rule.

This rule, laid down by Phillips in his Book in 1872, has recently been confirmed, in almost identical words, by a standard and accepted modern authority In 15 *Corpus Juris,* under the general topic *"Courts"*, we read in a note at page 966

> *"Where Constitutional questions are involved, a majority of all the Judges of the Supreme Court should concur, according to the practice of that Court in such cases. Briscoe* v. *Bank of Kentucky,* 8 Pet. 118, 8 L. Ed. 187." [Italics added.]

IV.

GRAVE DEFECTS OF DECISIONS BY MINORITY.

Finally we ask the Court's indulgence for discussing an imponderable, but nonetheless grave and serious defect, of what may fairly be called Decisions by a Minority, like that in the case at bar.

In the Article on *"Courts"* found in 15 *Corpus Juris,* we read at page 398:

> "Sec 324—*Concurrence of Judges.*
>
> "Where a majority of the Court concur merely in the result, the principles enunciated in the opinions cannot be considered as within the rule of *stare decisis,* although they are entitled to consideration as the views of the Judge writing the opinion" Citing (among several State cases) *Woodruff* v *Parnham,* 8 Wall 123, 19 L Ed 382

A "RESULT" DECISION, ONLY.

Here of course is the reason why the Law Publishers cannot and will not give any "Head notes," in the ordinary sense, for the three several Opinions handed down by this Honorable Court in the case at bar.[9] With all due respect, it must be bluntly stated that there is no "Law" whatever established by the decision in the case at bar The decision in this case constitutes what the Law Publishers call a "Result Decision", only.

This particular and unusual point is discussed by this Honorable Court in the case of *Woodruff* v *Parnham* cited above That case is a clear authority for the rule about *"stare decisis"*, quoted above from *Corpus Juris.* In the Woodruff case, Mr. Justice Miller, speaking for this Court in 1869, refers at some length to "The License Cases", 5 How 504, decided in 1846 In those cases an unusual practice was followed, since there was no "Opinion of the Court" handed down, although all seven Justices were present and took part in the decision, each judge (but one) writing a separate opinion

In commenting on that situation Justice Miller said in the Woodruff case:

> *"The separate and divisive opinions delivered by the Judges on that occasion leave it very doubtful if any material proposition was decided* * * *" [Italics added]

That language, we most respectfully say, should be emphasized as being clearly pertinent and applicable to both of the "majority" opinions in the case at bar.

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[9] See specific comment on this point in the separate "Petition for Rehearing" [August 1946] filed by these Petitioning Citizens in the case at bar, at page 4 thereof.

For the meagre "Headnotes" of the three opinions in this case which will go into the "Digests", etc., see the Reports of those opinions in 66 S. Ct. 1198, and also in L. Ed. Advance Sheets, July 1946, p. 1242.

THE "INFALLIBILITY" OF THE COURT AFFECTED

Now ordinarily it is of no lasting or serious consequence, from the point of view of our Jurisprudence, if there be diverse and even dissenting opinions of this Court in any given case—*provided a majority of the full bench be "in accord in opinion,"* to use Marshall's classic phrase Indeed differing and dissenting opinions may actually prove beneficial to our Law, as the history of our Jurisprudence and of this Court has sometimes shown to be the fact. But where there is added to a deep division in views between the members of the Court, in any grave case, the further element of there being *no majority opinion whatever in the case,* then the situation passes, juristically, into a different and more unfortunate category. Then the status of the Court itself suffers and is adversely affected. As a very great authority on the Court has clearly pointed out,[10] the divisive rulings of the Court in the "Legal Tender Cases," and in the "Income Tax Cases" (discussed above) tended, unguardedly and unconsciously, to bring what he calls "self-wounds" upon the Court

For it must always be remembered that this Court alone, under the Constitution, speaks *ex catedra.* This Court alone possesses what may properly be called the power of Legal Infallibility. Its chief function under our system of Government, and likewise under the affectionate will of the whole people and nation, is to be the Supreme Law Giver. Its specific purpose under several statutes, but even more surely under its great tradition, is to be the source and harmonizer of our Judge-made Law. It is at once the duty and the high privilege of the Court to bring order out of chaos, in the confused and conflicting views and contentions about the Law. It must never itself bring confusion and disorder through its own decisions. For it that should ever happen, both the Court and the Law would suffer.

A GOOD OMEN.

It is for these reasons that we most respectfully suggest that it may turn out to be a good omen, that on the present hearing of this Motion for Reargument, there is now, happily, and for the first time in this important case, a full bench present and available to consider and review the grave Constitutional questions here involved.

It is perhaps not a matter of the highest importance that either side should win this particular case in the final event. But it is of the utmost importance that an opinion of this Court, *representing the views of a majority of the full bench,* should finally go into the Books, determining these grave Constitutional issues.

The above "Addendum" is accordingly most respectfully and prayerfully submitted.

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September 12, 1946.

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[10] Former Chief Justice Charles Evans Hughes in his Book on the Supreme Court.