ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S174 of 2011

BETWEEN

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Appellant

AND

PETER JAMES SHAFRON
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the Internet.

Part II: Issues

2. Mr Shafron agrees with ASIC's statement of the issues on the appeal, save that issue (b) should be stated in the following terms:

   a. whether the New South Wales Court of Appeal erred in concluding that the failure by ASIC to call certain witnesses negatively impacted on the cogency of ASIC's contention that the board of James Hardie Industries Ltd ("**JHIL**") passed the Draft ASX Announcement Resolution.

Part III: Notice under section 78B of the *Judiciary Act 1903*

3. The respondent considers that notice under section 78B of the *Judiciary Act 1903* (Cth) is not required.

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Part IV: Facts

4. Mr Shafron adopts the matters set out in Part IV of the submissions of Ms Hellicar and Messrs Brown, Gilfillan and Koffel. He relies on the following additional matters by way of addition or emphasis.

5. The critical factual issue on this appeal is whether the 7.24am draft news release (the "**Draft ASX Announcement**") was tabled at a meeting of the JHIL board on 15 February 2001 (the "**February Meeting**"), and the subject of a unanimous board resolution (the "**Draft ASX Announcement Resolution**").

6. Insofar as the subject matter of the Draft ASX Announcement Resolution is concerned, ASIC was required to prove that it was in the following terms (see FFASC [57]; ABRed1/194M):

   a. that JHIL approve the Draft ASX Announcement; and

   b. that JHIL authorise the execution of the Draft ASX Announcement and send it to the ASX.

7. From the perspective of ASIC's case, the testimonial evidence adduced at trial, or given before the Special Commission of Inquiry and tendered at trial, disclosed, at best, a lack of recollection of the tabling of the Draft ASX Announcement, or the making of the Draft ASX Announcement Resolution (see CA [232]; ABWhi/52.16, [236]; ABWhi/53.25, [362]; ABWhi/74.14, [384]; ABWhi/78.29). Other testimonial and tendered evidence either did not deal with the topic (see CA [237]; ABWhi/53.37), or directly contradicted ASIC's case (see CA [236]; ABWhi/53.24).

8. In particular, the two witnesses called by ASIC who were present at the February Meeting (Messrs Baxter and Harman) gave evidence as follows:

   a. Mr Baxter had a limited recollection of the events of the February Meeting (LJ[130]-[132] and [140]); ABRed2/443O-444T and 446S-447C; CA[232]; ABWhi/52.16). Mr Baxter had no actual recollection of taking a draft news release to the February meeting (CA[360];ABWhi/73.49) or of tabling a draft news release or of discussion at the meeting concerning a draft news release (CA[362]; ABWhi/74.14). He could not recall distributing a copy of the draft announcement to those present at the meeting (ABlu10/4615P). He had no

recollection of saying anything about the media release, or about anything at all, at the board meeting (ABBla1/352K-L and ABBla1/397M-T).

b. Mr Harman was unable to say that the draft ASX announcement was tabled or discussed at the meeting (LJ[141]; ABRed2/447D). Mr Harman said in his evidence that it was *"not my understanding that the press release was set in stone at the board meeting"* (CA[337]; ABWhi/70.6).

9. The matters upon which ASIC continues to rely in support of the tabling of the Draft ASX Announcement, and the passing of the Draft ASX Announcement Resolution, either as direct evidence, or matters from which an inference could be drawn, are the following:

a. In relation to the tabling of the Draft ASX Announcement:

i. ASIC relies on the fact that the Draft ASX Announcement was taken to the February Meeting by Mr Baxter and given to Messrs Cameron and Robb (CA [383]; ABWhi/78.20). The Court of Appeal specifically observed, however, that this fact assisted ASIC's case only to a *"limited extent"*, in that it did not follow that the Draft ASX Announcement was generally distributed at the meeting by way of tabling (CA[382]; ABWhi/78.15). Furthermore, even if the document was generally distributed, it did not follow that the distribution was for the purposes of approval (as opposed to information or discussion) (CA [384]; ABWhi/78.33).

ii. ASIC relies on the fact that copies of the Draft ASX Announcement were located in files of BIL Australia Pty Ltd ("**BIL**"), a company associated with Mr O'Brien and Mr Terry (CA[372]-[374]; ABWhi/76.16-37). The Court of Appeal found that this fact did not significantly support a conclusion that the document was provided to Messrs O'Brien or Terry at the 15 February 2001 board meeting (CA[384]; ABWhi/78.31). The Court of Appeal noted the submissions against ASIC that there were numerous possible explanations for how the Draft ASX Announcement might have come to be in BIL's possession (CA [375]; ABWhi/76.38). As recorded above, even if the Draft ASX Announcement was generally distributed, the Court of Appeal observed that *"it may have been for information or*

discussion and not with a view to the definitive approval of the Draft ASX Announcement Resolution" (CA [384]; ABWhi/78.33).

b. In relation to the tabling and/or approval of the Draft ASX Announcement:

i. ASIC relies on the fact that the minutes of the February Meeting contained a minute of the Draft ASX Announcement Resolution (CA[468]-[470]; ABWhi/93.34-51). In relation to this matter, the Court of Appeal held that while *"some strength"* in ASIC's case was derived from the minutes, there were *"significant considerations telling against the weight to be given to the minutes as a correct record"* (CA[791]; ABWhi/146.42). The minutes contained numerous, and in some cases significant, inaccuracies (CA [489]-[495]; ABWhi/97.11-98.24) and, being drafted before the meeting, *"did not record the reality of what had occurred"* (CA [494]; ABWhi/98.9). Consequently, the accuracy of the minutes was required to be viewed with "*considerable reserve*" (CA [791]; ABWhi/146.42).

ii. ASIC relies on an alleged *"correlation"* between statements as to key messages that were likely to have been made at the February Meeting and the Draft ASX Announcement (CA [238]; ABWhi/53.41 and CA[385]-[419]; ABWhi/78.38-85.48). That correlation was, however, found to be *"weak"* (CA [420]; ABWhi/85.49). Moreover, the Court of Appeal observed that even if it could be inferred from the statements made at the meeting that management was discussing the draft release, *"there remained a significant further step to approval of the draft news release as an ASX announcement"* (CA [395]; ABWhi/81.45).

10. The Court of Appeal identified further matters as tending against a finding that the Draft ASX Announcement was approved. These included:

a. The fact that the usual process followed by JHIL before a press release was approved by the board was not followed in the case of the Draft ASX Announcement (CA [310]; ABWhi/66.48). In particular, the usual process involved the approval of the CEO, CFO, General Counsel, and the company's external legal advisors, prior to the announcement being taken to the board (CA [303]-[304]; ABWhi/65.45-66.7). In the present case, Mr Shafron was not

involved in the drafting of the ASX announcement in the lead up to the February 2001 board meeting; the trial judge found (and the Court of Appeal did not hold otherwise) that Mr Shafron had not seen the Draft ASX Announcement at any time prior to the JHIL board meeting on 15 February 2001 (LJ[135]; ABRed2/445). The usual process would also have involved the proposed announcement being vetted by UBS, Trowbridge, Access Economics and PwC (CA [311]; ABWhi/67.3). In the present case, none of these organisations were given any opportunity to consent to the Draft ASX Announcement's references to them, prior to the board meeting (CA[309] ABWhi/66.38). The failure to follow the usual process made it less probable that the Draft ASX Announcement was put to the board for approval (CA [314]-[316]; ABWhi/67.26-45). As the Court of Appeal found, the *"absence of prior vetting, advice and consents tends against the definitive approval alleged by ASIC"* (CA[315]; ABWhi/67.36).

b. Mr Baxter said of the Draft ASX Announcement, in his 7.24am email to Ms Rotsey on 15 February 2001, that *"no doubt we can refine later"* (CA [207]; ABWhi/45/45 and [308]; ABWhi/66/35)

c. The fact that the Draft ASX Announcement was *"treated as a work in progress, with subsequent changes of significance including upon consideration by Allens"* (CA [792]; ABWhi/147.5). That is to say, *"significant"* changes were made to the Draft ASX Announcement after the meeting by numerous parties, which suggested that *"whatever had occurred at the meeting was less than the Draft ASX Announcement Resolution"* (CA [336]; ABWhi/69.45).

d. In this context, the conduct of Mr Shafron following the February Meeting is particularly instructive. That conduct confirms that Mr Shafron did not have an understanding that the board had approved the Draft ASX Announcement. In particular (see CA [337]; ABWhi/70.1):

   i. Mr Shafron requested a soft copy of the ASX release late on 15 February 2001, and after the February Meeting (ABBlu5/2162). He did so for the purpose of providing the draft to Trowbridge, to obtain their approval to their mention in the document. It was plain that Mr Shafron was not merely requesting a *"final"* copy of the ASX release, because, upon being told that Mr Baxter was still working on it, he simply asked for "*[w]hatever you have*

now please" (ABBlu5/2162). It is also plain, as the Court of Appeal acknowledged, that Mr Shafron viewed the ASX release as a "*work in progress*" and did not suggest to Mr Baxter (or his secretary) that the version to be sent to Trowbridge had to be the 7.24am Draft ASX Announcement (which according to ASIC the board had signed off) (CA[337]; ABWhi/70.15).

ii. If, contrary to Mr Shafron's contention, the Draft ASX Announcement had been distributed to all present at the board meeting, Mr Shafron would have been given a copy of the Draft ASX Announcement at that meeting and if the board had approved it (as ASIC allege), it would be expected that Mr Shafron would have quoted directly from it to secure Trowbridge's consent to how Trowbridge was mentioned in it. The fact that he did not suggests that Mr Shafron did not have access to the document in any form.

iii. In seeking to obtain Trowbridge's consent to the reference to Trowbridge in the draft ASX Announcement (CA[337]; ABWhi/70.9), Mr Shafron explained in his email to them on the evening of 15 February 2001 that *"As of the moment the document is not available for me to attach"* (ABBlu5/1956);

iv. In any event, regardless of what inference might be made from Mr Shafron's request for the ASX announcement, it is clear that Mr Shafron understood that the board had not "finally" approved the terms of a release to the ASX.

v. On 16 February 2001, Mr Shafron asked Mr Morley "*Who approved the press release*?". Mr Morley replied that he assumed Mr Macdonald had (ABBlu12/5667T). Once again, it is clear that Mr Shafron did not understand the board to have approved the Draft ASX Announcement in terms of the pleaded Draft ASX Announcement Resolution at the February Meeting.

11. The state of the evidence described above led inevitably to a finding that ASIC had not proved that the Draft ASX Announcement was tabled at the meeting, or that the Draft ASX Announcement Resolution was passed. The ability of the Court of Appeal to draw those conclusions was fortified by the failure of ASIC to call certain other witnesses

present at the meeting (and, in particular, Mr Robb). The circumstances in which that failure arose were as follows:

a. On 7 March 2008, ASIC's solicitors served lists of topics of various witnesses, including Mr Robb (CA [649]; ABWhi/122.27). ASIC proposed to call every living witness to the events of the February Meeting, other than the defendants. ASIC had identified and listed Mr Robb (and others at Allens) as major witnesses (DOC.08DEF.001.0090).

b. Between June and August 2008, ASIC served subpoenas on witnesses that it proposed to call, including Mr Robb (CA [650]; ABWhi/122.30).

c. On 9 September 2008, ASIC's solicitors stated in correspondence that the reason it had served lists of topics for witnesses including Mr Robb was because JHIL and JHINV had asserted that those witnesses had an ongoing duty of confidentiality. The letter went on to say that JHIL and JHINV had *"relaxed"* that duty, and that as a result ASIC would attempt to obtain statements from those witnesses. It said that it would endeavour to serve those statements at the earliest opportunity (CA [651]; ABWhi/122.31).

d. On 16 September 2008, ASIC's solicitors informed the trial judge's associate by letter copied to the solicitors for the other parties that it intended to call, inter alia, Mr Robb, and that it intended to serve an affidavit as soon as practicable (CA [652]; ABWhi/122.45).

e. At a directions hearing on 22 September 2008, ASIC's counsel stated that ASIC had had *"exemplary co-operation"* from, inter alia, Mr Robb, and that a statement was expected in the week of 6 October 2008 (ABBla1/2O). The trial judge directed ASIC to use its best endeavours to serve Mr Robb's statement by 10.15am on 29 September 2008 (CA [653]; ABWhi/123.1).

f. The hearing commenced on 29 September 2008, without any statement from Mr Robb being served (CA [654]; ABWhi/123.11).

g. On 7 October 2008, Mr Robb's solicitors provided to ASIC's solicitors Part 1 of a draft of his statement. They indicated that Part 2 would likely be provided later

that week. They asked if ASIC's solicitors and counsel would like to meet with Mr Robb (CA [656]; ABWhi/123.22).

h. On 8 October 2008, counsel for ASIC indicated that it was considering whether it needed to call Mr Robb (CA [657]; ABWhi/123.27).

i. On 9 October 2008, ASIC wrote to the other parties indicating that it did not propose to call Mr Robb (CA [661]; ABWhi/124.20).

j. On 9 October 2008, ASIC was served with a notice to produce Mr Robb's draft statement. ASIC produced the draft statement but asserted a claim of legal privilege over Mr Robb's draft statement.

10 k. On 21 October 2008, some 12 days after being served with the notice to produce, ASIC consented to the other parties having access to Mr Robb's draft statement (CA [662]; ABWhi/124.35).

l. On 22 October 2008, Mr Robb's solicitors wrote to the solicitors for Mr O'Brien and Mr Terry, stating that Mr Robb was not prepared to meet with them or other parties (CA [665]; ABWhi/125.1).

12. As the Court of Appeal acknowledged, given the late stage in the proceedings that the respondents were informed of ASIC's decision not to call Mr Robb, the respondents *"had no practical ability to obtain statements or otherwise assess whether they wished to call him"* and therefore could not take the risk of calling Mr Robb blind (CA[776];
20 ABWhi/144.15). Additionally, Mr Robb had declined approaches by the Respondents, and the letter from Mr Robb's solicitors (dated 22 October 2008) "*made it sufficiently clear that Mr Robb was not willing to meet with the lawyers for any of the appellants*" (CA[669]; ABWhi1/125.25).

13. There is one final factual matter to which Mr Shafron draws attention. At CA [341]-[344]; ABWhi/70.41-71.34 the Court of Appeal refers to a telephone conversation involving Mr Shafron, Mr Macdonald, Mr Robb and Mr Cameron. In relation to the account of the Court of Appeal:

a. It must be observed that there is a real doubt that a conversation in those terms ever took place. The only evidence of it is Mr Peter Cameron's statement to the
30 Special Commission of Inquiry (ABBlu9/4248G). It was not possible for the

parties to test Mr Cameron's recollection because he had died. ASIC did not call Mr Robb, who was the other party to the conversation. Mr Robb's file note of the conversation is not consistent with Mr Cameron's recollection (ABBlu5/2189).

b. On the face of Mr Robb's file note there is raised the likelihood that Peter Cameron is remembering as one conversation comments made to him and Mr Robb over two or more conversations with Mr Shafron and Mr Macdonald individually. Mr Robb's file note has a clear demarcation between three separate telephone attendances on 15 February 2001 (ABBlu5/2189). Paragraph [55] of Peter Cameron's statement does not show any appreciation of that aspect of the file note, instead referring to the note as a record of "*the conversation*"(ABBlu9/4248R). In the middle note of telephone attendance, Mr Robb has struck through the name *'Macdonald'* and written the name *'Shafron'* above it. Mr Robb evidently was careful to record to whom he was talking – in that middle file note, the clear implication from the document is that he was talking to Mr Shafron and *not* Mr Macdonald, because he would not have struck through 'Macdonald' if they were both on the call. That context is important when looking at the distinct file note for the third call on the day, recorded as a "*T/A Peter Macdonald*" (but not Peter Shafron). It is that third conversation where the words "*fully funded*" are recorded as used by Peter Cameron and affirmed by Mr Macdonald (ABBlu5/2190P), but the firm implication from the file note is that Mr Shafron was not a participant in that telephone call.

c. It is thus submitted that the better view of the evidence is that Mr Shafron was not a participant in the telephone call with Mr Robb and Peter Cameron on 15 February 2001 in which the words "*fully funded*" were spoken. Such weight as might be attributed to Peter Cameron's assisted or reconstructed recollection is outweighed by the implication from the contemporaneous documentary record, namely Mr Robb's file note of three conversations with identified individuals.

Part V: Legislation

14. Mr Shafron accepts as correct ASIC's statement of the relevant legislative provisions.

Part VI: Argument

15. Mr Shafron adopts the submissions made in Part VI of the submissions of Ms Hellicar and Messrs Brown, Gilfillan and Koffel. He makes the following submissions by way of addition or emphasis.

16. It is important properly to identify the significance of the Court of Appeal's finding of the existence of a duty of fairness to its conclusion that ASIC had not proved that the Draft ASX Announcement Resolution was passed at the February Meeting. That significance needs to be assessed in two contexts:

    a. First, the significance of the fact that ASIC was found to have breached an obligation of fairness to the consequences of that failure. That is to say, did the failure to call relevant witnesses in breach of the duty of fairness, as opposed to the mere failure to call relevant witnesses, affect the way in which the cogency of ASIC's evidentiary case was assessed?

    b. Secondly, the significance of the consequence of the failure to call relevant witnesses (whether in breach of an obligation of fairness or not) to the overall result. That is to say, did the failure to call relevant witnesses make a difference to the result?

17. In relation to the first of those inquiries, the following matters should be observed:

    a. The consequence of the breach of the postulated obligation of fairness was to engage the principle in *Blatch v. Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970 (CA [730]). That is to say, assuming that that principle would have been engaged in the circumstances of this case in any event, no additional consequence or sanction flowed from the breach of the obligation of fairness, as opposed to the simple failure to call Mr Robb.

    b. The weighing of evidence in accordance with *Blatch v. Archer* is performed for the purpose of determining whether a party has discharged its onus of proof. In this case, it has always been common ground that ASIC was required to discharge its onus of proof to the civil standard, but to the degree of satisfaction needed to satisfy the requirements of s. 140 of the *Evidence Act* 1995 (NSW) or *Briginshaw v. Briginshaw* (1938) 60 CLR 336 (CA [747]).

c. The *Blatch v. Archer* principle would be engaged in the ordinary event by ASIC's failure to call a witness if (see *Payne v. Parker* [1976] 1 NSWLR 191 at 201):

i. the missing witness would be expected to be called by ASIC rather than Mr Shafron;

ii. that witness' evidence would elucidate a particular matter; and

iii. the failure to call the witness is not explained.

d. That principle was engaged in this case for the reasons set out in the Hellicar, Brown, Gilfillan and Koffel submissions at [135]-[146], in particular:

i. Mr Robb was the person best placed to give evidence of the crucial events before, during and after the February Meeting. His conduct and state of mind was of central importance to ASIC's case. In civil penalty proceedings, with serious consequences for proven breaches, it would be expected that ASIC would call direct evidence available to it, rather than relying on uncertain inferences.

ii. The evidence made clear that Mr Robb would not co-operate with the defendants to the same extent as he would with ASIC (CA[665]; ABWhi/125.1 and ABBlu12/5410-5411). The difficulties in obtaining useful access to Mr Robb were exacerbated by the history of ASIC's representations regarding its intentions in relation to calling Mr Robb, and the lateness of its change of position.

iii. Mr Robb's evidence would have clearly elucidated several critical matters, including the events of the February Meeting. The Court of Appeal concluded that Mr Robb "*would probably have knowledge on the issues*" (CA [766]; ABWhi/142.44).

iv. ASIC failed to give any explanation for why it did not call Mr Robb. The procedural history demanded such an explanation.

e. It follows that, in determining whether ASIC discharged its onus of proof to the relevant standard, regard will be had not only to the evidence that ASIC did call, but to its failure to call other evidence: *ASIC v. Rich* (2009) 75 ACSR 1 at [440];

Shalhoub v. Buchanan [2004] NSWSC 99 at [71]; *Cook's Construction Pty Ltd v. Brown* (2004) 49 ACSR 62 at [42]; *Whitlam v. Australian Securities and Investments Commission* (2003) 57 NSWLR 559 at [119].

f. The existence of a duty of fairness, breached by a failure to call Mr Robb (and possibly others), can thus be seen to be immaterial to the assessment of ASIC's evidentiary case. That is, it had no consequence beyond the ordinary application of the principle in *Blatch v. Archer*.

18. In relation to the second of those inquiries, it is clear that the Court of Appeal's finding that ASIC had not proved that the Draft ASX Announcement Resolution was passed did not depend upon any of the inferences capable of being drawn against ASIC by reason of its failure to call Mr Robb.

19. The only matters regarded by the Court of Appeal as weighing in favour of a finding that the Draft ASX Announcement Resolution was passed were the following:

a. The Draft ASX Announcement was taken to the February Meeting by Mr Baxter, and distributed at least to Messrs Robb and Cameron. But this fact assisted ASIC's case that the document was tabled, and the Draft ASX Announcement Resolution passed, only to a *"limited extent"* (CA [383]-[384]; ABWhi/78.20-36; [790] ABWhi/146.32).

b. The minutes of the February Meeting recorded the Draft ASX Announcement Resolution. But the Court of Appeal considered that there are *"significant considerations telling against the weight to be given to the minutes as a correct record"*, and that their accuracy was required to be viewed with "*considerable reserve*" (CA [791]; ABWhi/146.42).

c. The suggested *"correlation"* between statements as to key messages that were likely to have been made at the February Meeting and the Draft ASX Announcement was held to be *"weak"* (CA [238]; ABWhi/53.41, CA[385]-[419]; ABWhi/78.38-85.48, CA [420]; ABWhi/85.49, [792]; ABWhi/147.1). In any event, there remained a *"significant further step"* from a discussion of the Draft ASX Announcement, to the passing of the Draft ASX Announcement Resolution (CA [395]; ABWhi/81.45).

d. A desire of JHIL to quell stakeholder opposition by communicating full funding, and the usual practice of JHIL in having the board approve significant announcements was held to provide "some basis" for ASIC's case, but the Court of Appeal regarded those matters as not possessing *"great force"* and, in any event, *"the failure to follow the [usual] practice tends against"* ASIC's case of final approval (CA [792]; ABWhi/147.2).

e. The absence of subsequent protests again provided *"some basis"* for inferring consideration and approval, but, once more, not a basis of "*great force*" (CA [792]; ABWhi/147.7).

10 20. Those matters can hardly be regarded as a sufficient basis upon which the Court of Appeal might have regarded itself as satisfied to the level of *"actual persuasion"* of ASIC's case. That is all the more so when the various considerations identified by the Court of Appeal as undermining ASIC's case were taken into account (most significantly, the fact that the Draft ASX Announcement was treated as a "*work in progress*" (CA [792]; ABWhi/147.6), with significant changes being made following the February Meeting, and senior executives, including Mr Shafron, proceeding on the basis that no final approval had been given (CA [337]; ABWhi/70.9).

21. In conclusion, therefore, the finding of a breach of the obligation of fairness did not enable any inference to be drawn that would not, in any event, have been drawn
20 pursuant to *Blatch v. Archer*; and the inferences that were drawn could not possibly be regarded as necessary or sufficient to explain the finding of the Court of Appeal that the Draft ASX Announcement Resolution was not passed at the February Meeting.

22. In any event, the fact that the failure to call certain witnesses (most significantly, Mr Robb) was regarded as adversely affecting the cogency of ASIC's case is unsurprising. It reflects an orthodox understanding of the Australian law of evidence (for the reasons given above). It is also consistent with the approach in other jurisdictions. In particular, the United States doctrine of the "*missing witness*" (see *Graves v. United States* 150 US 118 at 121 (1893)[1]) recognises that the failure to call a witness will in appropriate circumstances (including where a government regulatory body fails to call a
30 witness previously served with a subpoena to give evidence in a civil trial) permit the

[1] See generally McCahey, "*The Missing Witness Rule: Its Application at Civil Trials*" Trial Evidence Journal, Summer/Fall 2005 at 12. See also *Creel v. Commissioner* 419 F3d 1135.

drawing of inferences adverse to the relevant party's case. As the 11th Circuit observed in *Raley Inc v. Kleppe* 867 F 2d 1326 at 1329 (1989):[2]

"*It is well settled that the production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.*"

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[2] See also *Mammoth Oil Co v. US* 275 US 13 at 52 (1927).