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BY CHARLES A. KEIGWIN

BOOKS


ARTICLES

The Origin of Equity, II (1929) 18 The Georgetown Law Journal 92.
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The Origin of Equity, VI (1930) 19 The Georgetown Law Journal 165.
REGULATIONS are not all birds of a feather. The genus contains several species and numerous varieties. The several species differ in origin, function, and performance. These differences in the case of the two dominant species, legislative regulations and interpretive regulations, give rise to legal problems of practical importance to administrative law. Unfortunately the problems are none too well recognized. Relatively few lawyers realize, when they see legislative regulations and interpretive regulations perched side by side, that they are not the same kind of bird.

I. INTRODUCTORY

The legal product resulting from the exercise by an administrative officer or agency of power to prescribe substantive regulations in connection with federal regulatory legislation, including revenue legislation, is variously denominated in the acts of Congress and in administrative practice thereunder. The product is commonly known as a "regulation". But it may also be called a "rule", or sometimes an "order" or "determination" although of general application. Under the federal food and drug legislation the product is frequently designated as a "definition" or "standard", particularly when it deals with the identity or quality of a food or the fill of its container.

*Ph.B., Hamilton College (1915), M. A. Columbia University (1917), LL.B. id. (1918); Assistant Legislative Counsel, U. S. House of Representatives (1919-1923); Legislative Counsel U. S. Senate (1923-1930); Special Counsel to the Secretary of Agriculture (1933); Member and General Counsel Federal Alcohol Control Board (1934-1935); Sometime Professor of Law, Georgetown University Law School; member of the Bars of New York, the District of Columbia, and Maryland; author: Enforcement Provisions of the Food, Drug and Cosmetic Act (1939) 6 Law and Contemp. Prob. 70; Content of a Course on Statutory Law (1936) 25 Georgetown Law Journal 67; The Office of the Legislative Counsel (1929) 29 Col. L. Rev. 381; Corporate Criminal Liability (1928) 28 Col. L. Rev. 1, 191; Air Commerce Act of 1926 (1926) 12 A. B. A. L. Rev. 371; and numerous articles in various legal periodicals.
Strictly procedural regulations and regulations governing solely the internal affairs of an administrative agency are not dealt with in this article. The discussion (with one exception, the "permissive standards" later mentioned) is confined to substantive regulations used to administer regulatory acts of Congress. These substantive regulations fall into the two main categories, legislative regulations and interpretive regulations. One difference between the two lies in their force and effect. A brief, and correspondingly inadequate, statement is that legislative regulations prescribe what the law shall be and have the force and effect of law, while interpretive regulations merely construe the terms of a statute and do not have the force and effect of law unless "ratified" subsequently by Congress.¹

¹Perhaps the earliest attempt in legal literature to distinguish between legislative and interpretive regulations was that in 1920 by Fred T. Field, formerly a member of the Advisory Tax Board of the Treas. Dept. Field classified regulations as "administrative regulations", "interpretive regulations", and "standards". By "interpretive regulations" Field meant regulations of the type herein described by the same name. His "administrative regulations" were in most instances procedural rather than substantive in character. "Standards" were legislative regulations of a substantive character. See Field, The Legal Force and Effect of Treasury Interpretations, The Federal Income Tax, (1921) 91.

In 1927 Professor J. P. Comer using the same terms developed the distinction fully and ably in his Legislative Functions of National Administrative Authorities. See particularly, chapters II and V. Comer's volume broke much valuable new ground compared with the preceding literature dealing with regulations. This literature had contented itself mainly with the constitutional aspects of delegations of power to make regulations.

Even earlier the Legislative Counsel's Office of the Senate and of the House of Representatives had employed similar distinctions. Perhaps the fullest but by no means the earliest statement by that office is to be found in, C. E. Turney, Memorandum on Constitutionality of Provisions of Air Commerce Act of 1926 Delegating Regulatory Powers to the Secretary of Commerce, manuscript, Office of the Legislative Counsel, United States Senate, July 1, 1929.

More recent are the statements by James Hart, The Exercise of Rule Making Power, Report by President's Committee on Administrative Management (1937), 309; by E. C. Alvord, Treasury Regulations and the Wilshire Oil Case (1940) 40 Col. L. Rev. 252; by Stanley S. Surrey, The Scope and Effect of Treasury Regulations under the Income, Estate, and Gift Taxes (1940) 88 U. of Pa. L. Rev. 556. The latter two confine their discussion to the abnormal complexities that have arisen around income, gift, and estate tax regulations. Hart uses the terminology "regulation" and "interpretive regulation" relegating "administrative regulation" to regulations of internal departmental administration. Alvord and Surrey use "legislative regulation" and "interpretive regulation."

Any choice of terminology is more or less arbitrary. The term "legislative" is not wholly apt as it carries with it the improper implication that the regulation is enacted by Congress itself when in fact the regulation is adopted by an administrative officer or agency pursuant to authority delegated by legislation that also gives to the regulation the force and effect of law.
Whether or not a substantive regulation is interpretive or legislative is to be determined from the statute. If the statute provides that non-conformance to the regulation is to result in the imposition of legal sanctions specified by Congress, then the regulation is legislative. Among such sanctions are denial of right to import or export, or forfeiture of goods, criminal penalties, penalty taxes, and suspension or revocation of permits. A few of the income tax regulations are legislative and in such instances the amount of tax payable will depend on these regulations.

In another class of situations the statute lays down a primary rule but allows or requires the administrative officer or agency to relax it by regulations. Such regulations have the force and effect of law and are legislative for failure to come within the permitted tolerance, variation, or exemption may result in the imposition of statutory sanctions.

On the other hand if power to prescribe a substantive regulation is delegated by statute, but no sanctions are imposed by statute for failure to conform to the regulation, then it is interpretive. It is also interpretive if it is prescribed pursuant to the inherent powers of the Executive to construe the statute and not pursuant to a specific delegation of authority by Congress. Despite the numerous grants of authority for legislative regulations made by recent acts of Congress interpretive regulations still are probably the more common type of regulations promulgated by federal administrative officers or agencies. Some if not the majority of the regulations issued under most regulatory acts are interpretive. Such regulations express the views of the administrative officer or agency as to the meaning or application of general requirements of a regulatory act, the construction that will be followed in administering the act. Interpretive regulations (except where they have been "ratified" by Congress) have validity in judicial proceedings only to the extent that they correctly construe the statute and then, strictly speaking, it is the statute and not the regulation to which the individual must conform.

Incidentally there has arisen, particularly in connection with the defining or standardizing of agricultural commodities, a third category.

In the Department of Agriculture "legislative standard" is usually confined to standards actually written by Congress into the act as, for example, the butter standard appearing in 42 STAT. 1500 (1923), 21 U. S. C. § 6 (1934). Also the Bureau of Agricultural Economics of the Department has for some years drawn a distinction between "mandatory" or "legal" standards, i.e., legislative regulations, and the "permissive standards" later described. The Food and Drug Administration has long distinguished between administrative standards that have the force and effect of law and those that are interpretive or advisory.
This embodies permissive definitions or standards. To call them "permissive regulations" would be a misnomer. They make no pretense of regulating, neither do they interpret the provisions of a regulatory act. They set forth standards that are made available for voluntary use and observance but there is no legal compulsion to use or observe them.²

II. A “Case History” of Interpretive and Legislative Regulations as Aids in Administering Federal Regulatory Legislation

To facilitate the administration of federal food and drug legislation both interpretive and legislative regulations, as well as certain permissive standards, have been used. The demand for authority to prescribe such regulations and the experience with them in connection with such legislation has extended over a comparatively long period. The "case history" of this bit of federal administrative law is both illustrative of the relative value of interpretive and legislative regulations as aids in administering regulatory acts of Congress and helpful in arriving at an understanding of the legal problems involved in the formulation and use of such regulations.

The general statutory prohibition in food and drug legislation is one against the adulteration or misbranding of foods and drugs. It is impossible to determine whether a food, for instance, is adulterated or misbranded unless there is first determined the normal composition of the food. This can be made known administratively by promulgation of a regulation called a standard of identity. It prescribes the required and optional ingredients, the proportions of each, tests to ascertain their presence and absence, methods of manufacture, and the like. Of course, in the absence of any such regulation the dictionary, trade practice, and consumer understanding are available datum points from which to

²These permissive standards are made in connection with a "service" or other non-regulatory act, as for instance, pursuant to provisions of law that authorize the Secretary of Agriculture to certify, if requested, the class, quality, condition, or grade of various agricultural commodities (see, e.g., 52 Stat. 740, 7 U. S. C. 414 (Supp. 1938); 52 Stat. 739, U. S. C. 415a (Supp. 1938); Perishable Agricultural Commodities Act of 1933, 46 Stat. 531, § 14 (1930), 7 U. S. C. 499a (1934), am. 48 Stat. 585, 7 U. S. C. 499b (1934)) or to make regulations "for the guidance of state officials". (See, e.g., 32 Stat. 296 (1902). This is done for the purpose of facilitating and definitizing, not of regulating, transactions in the commodities, or for the purpose of aiding and making uniform enforcement of laws regulating the commodities in various States. Standards set forth in permissive regulations are frequently specified or incorporated by reference in private sales contracts in order to definitize such contracts. See also for a "regulation" of somewhat similar character the "specification" or "instruction" considered in Standard Computing Scale Co. v. Farrell, 249 U. S. 571 (1919).
measure adulteration or misbranding, but they may well lack and usually do lack any high degree of precision. Tomato juice, for example, is a relatively new product. When the enthusiastic demand for it first arose there was no household practice that served to define the product. Trade practice quickly developed two types of product. One was the pure juice of the tomato, a thin amber liquid. The other was the familiar red liquid composed not only of the juice but also the pulp of red tomatoes. It would be difficult to say that tomato juice had at that time any precise meaning, or at least one sufficiently certain to warrant subjecting a manufacturer to fine or imprisonment for misbranding or adulteration. The trade asked the Secretary of Agriculture for a standard inasmuch as the more expensive pure juice could not compete in cost with the admixture of juice and pulp. However, the admixture, because of its greater vitamin value, was finally approved by regulation as being entitled to the name "tomato juice" and in consequence the amber liquid has practically disappeared from the market. The regulation completed the destruction of one branch of an industry and firmly entrenched another. Federal food and drug legislation has from time to time made use of various types of regulations to meet problems analogous to this.

A. PERMISSIVE STANDARDS FOR FOOD

During the few years immediately preceding the enactment of the Food and Drug Act of 1906 permissive standards for certain foods were promulgated by the Secretary of Agriculture in an attempt to bring about uniformity in state food laws and their administration and in court decisions. The secretary was authorized under an Agricultural Appropriation Act item first appearing in 1903 to establish "in collaboration with the Association of Official Agricultural Chemists . . . standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of officials of the various states and the courts of justice." Pursuant to this authority standards of

Canned tomato juice is the unconcentrated, pasteurized product, consisting of the liquid, with a substantial portion of the pulp, expressed from ripe tomatoes, with or without the application of heat; and with or without the addition of salt." S. R. A., F. D., No. 2, Rev. 2, 9, Sept. 1931.


Dept Agric. Appropriation Act for 1903, 32 STAT. 296 (1902). See also, 32 STAT. 1158 (1903) ; 33 STAT. 287 (1904) ; 33 STAT. 874 (1905) ; 34 STAT. 686 (1906) ; and (1907) AM. FOOD J. 16-17.
identity for food products were formulated by a Committee on Food Standards of the Association of Official Agricultural Chemists and promulgated by the secretary on recommendation of the committee. Members of the committee were not appointed by, nor was the committee an official establishment of, the Federal Government. The committee was composed of five members of a private scientific body, four of whom were state officials and the fifth a federal official.

From the federal standpoint the secretary's standards were permissive. They had no force and effect as law nor did they interpret the provisions of any regulatory act. Their use was voluntary. However, practically all the food and drug legislation at the time was state legislation. The standards were adopted by state authorities as a basis for administering and interpreting state legislation. In addition many of the state laws provided for the adoption of these federal permissive standards as state legislative standards giving to them the force and effect of law for state purposes.

There was from the federal standpoint one exception to the permissive character of these standards. They were also made use of by federal officials in connection with the administration of the Federal Act of August 30, 1890, prohibiting the importation of adulterated foods. They served as interpretive regulations for this act. In the main, however, the standards were educational and advisory and their use was permissive. So far as interstate shipments of food were concerned the manufacturer "could take 'em or leave 'em" without legal consequences.

For these permissive standards, see the following circulars of the Office of the Secretary Dept of Agric., No. 10, Nov. 20, 1903; No. 13, Dec. 20, 1904; No. 17, March 8, 1906; No. 19, June 26, 1906.

Thus California formerly adopted the standards of identity for foods that were published "in Circular number nineteen, the Food Inspection Decisions, and the Service and Regulatory Announcements of the Bureau of Chemistry of the Dep't Agric." Circular No. 19 embodied the permissive standards. California subsequently changed this situation by adopting the current interpretive regulations embodying standards of identity for food products. CAL. GEN. LAWS, (Deering, 1931) Act 57, § 1 et seq.

The provisions of the Vermont law are similar in that they adopt those standards "now in use by the United States department of agriculture as authorized by acts of Congress approved June 3, 1902, and March 3, 1903, as promulgated by such department by circular nineteen issued in pursuance of such acts, and such standards as may hereafter be adopted or promulgated by such department pursuant to such authority". The statute makes it an offense to sell food products not conforming to such standards after receiving notice from the State Board of Health forbidding the same. VT. PUB. LAWS (1933) § 5347.

26 STAT. 415 (1890).
B. INTERPRETIVE REGULATIONS FOR FOOD

Following the enactment of the Food and Drug Act of 1906 and up until its repeal by the Food, Drug and Cosmetic Act of 1938, all the regulations of the Secretary of Agriculture embodying standards for food (other than certain standards of quality for canned foods), were interpretive regulations.

During the course of the enactment of the 1906 act numerous attempts were made to include in it authority for the Secretary of Agriculture to adopt regulations embodying standards. These attempts were all unsuccessful. Also shortly after the enactment of the measure the authority to prescribe the permissive standards, theretofore carried from year to year as an item in the Agricultural Appropriation Act, was discontinued.

However, despite this lack of any delegated authority from Congress the necessities of the situation resulted in the Secretary of Agriculture's again undertaking, beginning in 1914, the adoption of regulations


\[\text{As reported by the Senate Committee the bill (Sen. Rep. No. 88, 59th Cong., 1st Sess. (1905)) contained no express provision authorizing the Secretary of Agriculture to establish standards. On the floor the Senate rejected the Piles amendment writing into the legislation standards for evaporated milk and cream; the Alger amendment (Cong. Globe, 40th Cong., 2d Sess. (1868) 2646) authorizing the Secretary of Agriculture to fix standards for food products when advisable for the guidance of officials charged with the administration of the food laws and for the information of the courts; and the Money substitute bill which authorized the administrative establishment of standards. Senator Heyburn stated that the only power under the bill to fix standards rested with the courts to which Senator Bailey replied: "This measure of justice is as variable as the judge's conscience. . . . the law ought to be certain." (Cong. Globe, 40th Cong., 2d Sess. (1868) 2757).}\]

The opposition to writing standards for specific commodities into the legislation or granting the Secretary authority to prescribe standards grew out of the fear of placing in the hands of the Secretary of Agriculture what were then felt to be broad powers, a fear stimulated perhaps by the "aggressive personality and advanced views" of Dr. Wiley, chief of the bureau that would administer the bill if passed. Possibilities of great difference in view as to proper standards were also in the minds of many members of the Senate as a result of the violent controversy then pending over the question of "What is whiskey?". See, Bowers, Memorandum on the "What is Whiskey" Controversy, mimeograph, Office of the General Counsel, F.A.A., Aug. 1, 1935.

In the House the Committee included in the bill authority for the Secretary to prescribe standards of an interpretive character (see Sen. Rep. No. 88, 59th Cong. 1st Sess. (1905) as reported to the House of Representatives by the Committee on Interstate and Foreign Commerce, § 9, and H. R. Rep. 2118, 4, 59th Cong., 1st Sess. (1905)) and this provision was passed by the House but finally rejected by the conference committee.
establishing food standards. The Secretary revived the system of promulgating standards recommended by a committee that was not an official establishment of the Federal Government.\textsuperscript{14}

From time to time the committee recommended to the Secretary of Agriculture standards for various foods. These standards he in turn embodied in regulations issued in his own name. In proposing a standard the committee relied on information supplied by its individual members as a result of their own observation and experience, on the technical literature, and on information presented by interested manufacturers either at private or informal hearings before the committee or in response to written questionnaires. A transcript was kept of the testimony offered at such hearings but was not made public. Thereafter the committee promulgated a proposed standard, usually designated a "tentative standard", and gave notice thereof through press releases. Usually no substantial protest was made against the proposed standard. If substantial protest was made an informal public hearing was held and notice thereof given through press releases. A transcript was kept of the public

\textsuperscript{14}In lieu of the Committee on Food Standards of the Association of Official Agricultural Chemists earlier availed of, there was established a Joint Committee on Definitions and Standards composed of nine members, three each from the Department of Agriculture, the American Association of Food, Dairy, and Drug Officials, and the Association of Official Agricultural Chemists. The members were appointed by and responsible to their respective parent bodies but acted jointly in formulating standards. For several years each of the two non-departmental groups on the committee reported directly to their parent organizations for approval and the Secretary of Agriculture adopted the standards for the purposes of the Food and Drugs legislation only after approval by those two organizations. See Food Inspection Decisions, Nos. 160, 161, 162, 165, 169, 170, 171, 172, 173, 174, 176, 177, 178, 181, 182, 185, 186, 187, 188, 189, 190, and 191, all issued between the years 1916 and 1922. Subsequently the non-departmental members were vested by their parent organizations with full power to act without reference of proposed standards to their organizations and to report directly to the Secretary of Agriculture.

Shortly after the creation of the Joint Committee its non-departmental members were given an official status by being designated by the Secretary of Agriculture as "collaborating officials" of the Department of Agriculture in order that the Government might pay their expenses. Memorandum of C. L. Alsberg, Chief Bureau of Chemistry, U. S. Department of Agriculture, to the Secretary of Agriculture, January 14, 1914; Opinion of the Solicitor, U. S. Department of Agriculture, Francis G. Caffey, to C. L. Alsberg, Chief Bureau of Chemistry, U. S. Department of Agriculture, January 13, 1914. Later the Secretary of Agriculture took over the appointment of the non-departmental members of the Joint Committee but exercised no true selective authority for he limited his appointments to three nominees submitted by each of the two organizations of state officials. Subsequently the name of the Joint Committee was changed to Committee on Food Standards.
hearing and made a public record. The proposed standard, with or without modification in the event of a public hearing, was submitted by the committee to the solicitor of the department and the director of regulatory work for report thereon before transmittal to the Secretary.

The Secretary's regulations embodying these standards were called "Definitions and Standards for Food Products" and were "adopted as a guide for officials of this department in enforcing the Food and Drug Act." That Act contained no specific authority for the promulgation of such regulations and *a fortiori* did not make their observance compulsory. Thus the regulations were purely interpretive serving merely as a guide to the administrative officials and also to manufacturers and other persons subject to the Act. That the regulations were without force and effect of law in judicial proceedings was fully recognized. The director of regulatory work of the department stated before the Committee on Agriculture of the House of Representatives that:

"In the enforcement of the Food and Drugs Act it has been found necessary to express, for the information of the public, standards upon which the department proposes to operate in the enforcement of that law. The terms of the Food and Drugs Act are general in their provisions. They define a product as adulterated, for instance, if it has some essential material, wholly or in part, abstracted. The department recognized at the very beginning, ... that there would be, in a great degree, a voluntary compliance with the requirements of that law if the industry only knew what the law required. The industries were not of themselves capable of making a specific interpretation of the provisions of that law, and, therefore, did not know what the requirements of the department might be. The department, therefore, promulgated definitions and standards for various classes of food products. Those definitions and standards did not have the force nor effect of law and the Department of Agriculture has never presumed for a moment that they do have. They merely serve as an indication of the administrative position taken by the Department in the enforcement of the law."

In court proceedings the department rarely offered the interpretive regulations in evidence. The evidence used was found in trade practices and consumer understanding as to the identity of the food. Indeed the courts have gone so far as to hold that an article of food conforming to the only published interpretive regulation for the commodity was nevertheless adulterated and misbranded on the ground that it did not conform to the statute.

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16*Hearings before Committee on Agriculture on H. R. 12053, 67 Cong., 4th Sess. (1923) 2.

17For the last publication thereof see S.R.A., F.D., No. 5, issued Nov., 1936.

18*United States v. One Hundred Barrels of Vinegar, 188 Fed. 471 (D. Minn. 1911); United
The standards in the interpretive regulations were based on reputable trade practices if substantially uniform and on the concensus of consumer understanding as to the identity of the particular food. The regulations nearly always represented the judgment of the better element in the trade for trade backing was necessary if the regulations were to be observed with a minimum of regulatory effort. In some instances, however, as for example, in the tomato juice situation heretofore discussed, there was no uniformity of trade practice and no concensus of consumer understanding. In such a situation proof of violation of the Act became impossible and enforcement impracticable, for evidence as to the identity of a particular product would be conflicting and insufficient to establish a violation, particularly in criminal proceedings. Thus in *United States v. Rinchint*¹⁸ the court in the absence both of evidence showing uniformity

⁰¹⁸ *United States v. Six Barrels of Ground Pepper*, 253 Fed. 199 (S. D. N. Y. 1917). Also the courts have held misbranded an article on the ground that it did not conform to the statute, the decision not being based on lack of conformity to the standard in the applicable interpretive regulation. *United States v. Ninety-five Barrels of Alleged Apple Cider Vinegar*, 265 U. S. 438 (1924). Prior to the adoption of any of the interpretive regulations under the Act two Federal courts were concerned with the question as to whether or nor the permissive standards that had been promulgated before the enactment of the Food and Drug Act, 34 STAT. 768 (1906) 21 U. S. C. §§ 1-5, 7, 15 (1934), were impliedly adopted by the Act or at least had mandatory effect to the extent that they set forth the law with respect to the proper composition of the commodities. In one case it was held that the particular standard had no force and effect of law. (United States v. St. Louis Coffee and Spice Mills, 189 Fed. 191 (E. D. Mo., 1909).) In the other case it was held that the standard was controlling and could be looked to as a “fact” for the purpose of ascertaining whether a violation had occurred. (United States v. Frank, 189 Fed. 195 (S. D. Ohio, 1911).) The court further held that it made no difference that the authority to establish the standard was found in an appropriation Act and not in the Food and Drugs Act of 1906 that created the offense. This decision seems subsequently to have been ignored by the courts.

(United States v. 717 Cans of Syrup, (D.C., Mo., 1933). Notice of Judgment, Food and Drugs, No. 1450. In its opinion the court said:

“It should not be left, it seems to me, for the decision of the Court, but that it should be determined by Congress or by authorization of the Secretary of Agriculture so that the trade may know—so that any man manufacturing it (ice cream) will not be at the mercy of what his brother merchants in a town fix upon as being the right proportions. Therefore, in this case I do not think the evidence before me is sufficient for the standard to be fixed either by the Court or the jury below which this defendant may be said to have fallen. I grant the motion to direct a verdict for the defendant.”

*United States v. 717 Cans of Syrup*, (D.C., Ariz. 1911) Notice of Judgment, Food and Drugs, No. 1450. In its opinion the court said: “It should not be left, it seems to me, for the decision of the Court, but that it should be determined by Congress or by authorization of the Secretary of Agriculture so that the trade may know—so that any man manufacturing it (ice cream) will not be at the mercy of what his brother merchants in a town fix upon as being the right proportions. Therefore, in this case I do not think the evidence before me is sufficient for the standard to be fixed either by the Court or the jury below which this defendant may be said to have fallen. I grant the motion to direct a verdict for the defendant.”

*United States v. 717 Cans of Syrup*, (D.C., Mo., 1933). Notice of Judgment, Food and Drugs, No. 21266, is also illustrative of the consequences flowing from the lack of even an interpretive regulation. The article involved was labeled “Maple Flavored Syrup” and in much smaller, less conspicuous type “Blend of Pure Corn Syrup and Granulated Sugar Syrup.
of trade practice or consumer understanding and of any applicable interpretive regulation refused to assume the burden of establishing a standard for the commodity.

In a few instances the Department attempted to overcome this sort of difficulty by promulgating interpretive regulations embodying standards that within the Department were informally and rather loosely called "arbitrary" standards. Such standards were established only where the trade generally agreed to accept and observe them and there thus would shortly arise a substantial uniformity of trade practice evidence of which would then become available for use in substantiating the Government's position in any court prosecutions. In some instances the agreement was placed in writing and signed by the trade and the Department.19

In the administration of the Food and Drug Act of 1906 the Department of Agriculture also made use of certain interpretive standards for mineral and other waters and for commercial feeds. These interpretive standards were not issued as regulations of the Secretary of Agriculture and were not formulated directly under Department of Agriculture auspices as were the food standards of the Food Standards Committee. The interpretive standards for mineral and other waters were promulgated by the Secretary of the Treasury,20 and those for commercial feeds by...
C. LEGISLATIVE REGULATIONS FOR FOOD UNDER THE 1906 ACT

The enforcement difficulties that arose in administering the Federal Food and Drug Act of 1906 under a system of interpretive regulations defining and standardizing food commodities resulted in repeated attempts by the Secretary of Agriculture to have Congress "legalize" food standards. By this it was meant that Congress should authorize the Secretary to adopt legislative regulations so that the standards embodied in them would have the force and effect of law and failure to conform to them would constitute an offense.

As early as 1913, even before the first interpretive regulations formulated by the Food Standards Committee were placed in effect, the Secretary of Agriculture recommended to Congress amendments to the Act permitting the establishment of "legal standards" for food but no action was taken by Congress. Three years later specific legislation on the subject was drafted and proposed by the Secretary but again Congress failed to act. Under the proposal a variation from the standard in the legislative regulation would have constituted misbranding unless the label for the product showed how it differed from the standard.

Butter Act of 1923. Failure of the Secretary of Agriculture to obtain authority to adopt legislative regulations resulted in his next attempt to

by the Surgeon General of the Public Health Service and composed of about forty members representing Federal organizations, national scientific associations, state and municipal health officer, and academic institutions. (Drinking Water Standards (1925) 40 PUB. HEALTH REP. No. 15, April 10, 693-721).

The Food and Drug Act of 1906 covers not only food for human beings but also food for animals such as commercial feeds. The standards for commercial feeds were set forth from time to time in the annual Official Publication of the Association of American Feed Control Officials, Inc., Announcements for (date). The Association was composed of one or more officials from each of the several States and from the Federal Government, engaged in the administration of laws covering commercial feeds. Drafts of the regulations were prepared in the first instance by appropriate committees of the Association and usually opportunity for informal hearing was given representatives of the American Feed Manufacturers Association and other trade interests. The standards were first promulgated in a preliminary form as standards "for discussion" or "tentative" standards and after a trial period of at least one year adopted by the Association as "official" standards. The Association recommended its official standards to State and Federal authorities as guides to them in the administration of laws relating to commercial feeds.
obtain standards with the force and effect of law taking the form of a request that the Congress itself actually enact the standard. This Congress did in the Butter Act of 1923, specifying a standard for butter.\textsuperscript{23} The situation that made this standard necessary well illustrates the defects of interpretive regulations from an enforcement standpoint and shows clearly their lack of any force and effect as law.

For the purposes of the Federal Food and Drug Act of 1906 the Secretary of Agriculture early adopted an interpretive regulation embodying the standard for butter that had been formulated as a permissive regulation prior to the enactment of that Act. Under this regulation butter was defined as containing, among other matters, not less than 82.5 per cent of milk fat.\textsuperscript{24} While this figure correctly represented the composition of butter as manufactured at the time of the adoption of the standard, the conditions in the trade changed until trade practice sanctioned the manufacture of butter having a milk fat content as low as 80 per cent. To meet this situation, the Department of Agriculture (in lieu of changing its interpretive regulation for butter) observed in its regulatory work a tolerance of 2.5 per cent of milk fat and no action under the law was instituted against butter containing at least 80 per cent of milk fat.\textsuperscript{26}

Many of the States, however, had enacted legislation adopting by reference the federal regulations for the purposes of their local food and drug laws.\textsuperscript{27} Massachusetts had such a system and that State threatened to enforce the Federal regulation providing 82.5 per cent of milk fat but without allowing, in conformity with trade practice, the tolerance of 2.5 per cent which, while not written into the Federal regulation, was nevertheless recognized by the Federal authorities in their administration of the Federal Act. To meet this situation, legislation was proposed in which Congress would itself enact a standard for butter of at least 80 per cent milk fat.\textsuperscript{28} Pending the enactment of the legislation the Department of Agriculture modified its regulation for butter by reducing the limit for milk fat to 80 per cent but limiting the water content to 16 per cent.

The Congressional standard adopted the 80\% milk fat minimum but

\textsuperscript{23}42 STAT. 1500 (1923) 21 U. S. C. § 6 (1934).
\textsuperscript{24}Circulars No. 19, 136, Sec'y Agric., June 26, 1906, May 14, 1919.
\textsuperscript{28}See remarks by Representative Voight, 64 Cong. Rec. 3231.
with no other limit on water content. This standard is the only instance in which Congress itself prescribed a standard for the purposes of the Federal Food andDrug Act of 1906. The immediate change in the legal enforcement and economic situation provided by a standard with the force and effect of law is well set forth in a statement made by the Assistant Chief of the Food and Drug Administration of the Department:

"One of the most serious problems we have encountered is the determination of what actually constitutes a violation. The act is most general in its language. With one exception—that of butter—there is no legislative standard for food products. After analysis, the general terms of the law must be applied to the commodity under consideration and a decision must be reached, first, by the Department and later confirmed by the courts as to whether a particular condition constitutes a violation within the general terms of the act. . . .

"Before the butter fat standard was definitely established there was considerable trade in a product which looked and tasted like butter, which, to the layman, was not distinguishable from butter, but which none the less showed a deficiency of butter fat and a corresponding excess of water. If traffic in such products was allowed to proceed unchecked the consumer paid the price of butter for this excess water, or, if a corresponding price reduction was made, honest competitors were placed at an unfair trade disadvantage. It was not especially difficult, even without a legislative standard, to bring successful legal action against a so-called butter containing materially less butter fat than was recognized as proper in good commercial usage. It was very much more difficult, however, to establish a violation when the deviation from accepted trade usage was comparatively small. Yet, in the aggregate, even small shortages in butter fat represent an enormous imposition upon consumers and honest manufacturers. Until a definite legal standard for butter was enacted there was always a question whether enforcement officials alleging butter with, let us say, 79% butter fat to be adulterated could establish to the satisfaction of the court that this product was actually in violation.

"So far as butter is concerned, that problem no longer exists. The mere establishment by proper evidence that a commodity contains less than 80% of butter fat and has been shipped within the jurisdiction of the law is sufficient to establish a violation.

291 That for the purposes of the Food and Drug Act of June 30, 1906 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter, and containing not less than 80 per centum by weight of milk fat, all tolerances having been allowed for." 42 STAT. 1500.

30Paul B. Dunbar, "The Trend in Food Legislation and Inspection," a paper delivered before the American Trade Association Executives (food industries group), September 24, 1930. See also W. G. Campbell, A New Food and Drugs Act, (1933) 17 FOOD AND DRUGS 122 issued by the United States Dep't Agric.
In the absence of similar definitely established legal standards this problem of enforcement in the intermediate zone still exists with respect to other food commodities. The Department continues to issue food standards which, as nearly as may be, represent consumer understanding. In general the Department can establish in contested court actions that products failing to meet these standards are violative of the general terms of the law. So far as the Federal government is concerned the standards are, however, advisory in character. To establish the illegality of products which fail to meet them it is necessary to prove in each case, not alone that the commodity fails to meet the announced standard, but that it does not conform with accepted trade usage and consumer understanding. Obviously the difficulty of establishing such proof increases as the product more nearly approaches the standard. Yet it is these very borderline products that are potentially most demoralizing to honest competition.

McNary-Mapes Amendment. It was not until 1930 that Congress authorized the Secretary of Agriculture to establish legislative regulations under the Food and Drug Act of 1906 for the standardization of foods. Even then the authority delegated was limited to the establishment of reasonable standards of quality, condition, and fill of container for each class of canned foods. The standards of quality, for instance, divided each class of canned food into two grades, a standard grade and an inferior or substandard grade. Sub-standard canned foods were required to be so labeled and the food was declared to be misbranded if it fell below the standard adopted by the Secretary and did not state on its label the fact that it was sub-standard. The standards authorized were standards of quality rather than of identity. No procedural requirements were laid down for the formulation of the standards other than that they should not take effect until after 90 days' public notice.

However, the care used by the Secretary of Agriculture in the formulation of the canned food standards indicates that he fully appreciated the difference in legal status between legislative regulations and interpretive regulations. For instance, the adoption of the first of these legislative regulations, namely, that covering the standard for canned peas, was preceded by an extensive field scientific investigation in all the principal canning sections of the country and the analyses of numerous samples collected; also by investigation to ascertain the factors taken account of by consumers in determining the quality or lack of quality of various canned peas. These factors were found to be flavor, color, absence of defects, and tenderness, of which the latter was the most important.

Permissive standards of quality for canned peas were already in effect under the Farm Products Inspection Law and reflected the factors and tests used in the commercial grading of canned peas. The factors there considered were clearness of liquor, absence of defects, uniformity of size, type, color, flavor, and tenderness. But the grading was done organoleptically by experienced graders on the basis of a scoring system in which scores were assigned for various factors, the total score constituting the grade. A low score in tenderness could be offset by a high score in other factors.

A legislative regulation adopting such a system would permit the proving of a violation only through expert opinion involving personal judgments of the grader based on his experience and the susceptibility of his senses to the influences of the various factors. Criminal prosecutions where guilt must be shown beyond reasonable doubt, require for their success that the proof must be produced in a clear and convincing manner and founded on fact rather than expert opinion. The problem was therefore one of obtaining a legislative regulation that eliminated in large measure factors of personal judgment and substituted factors having a substantial degree of definiteness demonstrable to a court and jury by laboratory or other precision methods. The factors finally determined on for inclusion in the regulation were limited to absence of defects, color and tenderness, all of which were after investigation found capable of precise definition and of being demonstrated by precise laboratory tests. However, one factor as yet lacking in precision, namely flavor, was added.

All this was arrived at only after extensive hearings. Proposed regulations were set for public hearing following the preliminary investigations. The evidence at the hearing was taken, transcribed and made a public record and briefs permitted to be filed. Following the hearing the Secretary did not immediately establish the final standards but awaited such further criticism as might be developed at the annual convention of the National Canners Association a month later. Thereafter the legislative

Grades for Canned Peas, Dep't Agric., August 13, 1930 (mimeograph).

The convention was in large part a continuation of the hearings. Tests there conducted demonstrated that the precision grading system proposed by the regulations produced results that corresponded closely to the organoleptic grading system of the trade so that the former, while far more effective from the standpoint of administrative enforcement and court procedure, would at the same time substantially accord with existing trade practices. See, 53 CANNING TRADE 29, March 2, 1931, and 53 CANNING TRADE 26, February 9, 1931.
regulations embodying the final standards were promulgated.\textsuperscript{32} They possessed a certainty and definiteness which general statutory prohibitions rarely possess and which are not obtainable in administering general statutory terms even if interpretive regulations are employed.

\textit{Preserves Bill and Copeland Amendment:} The list of major attempts to provide for the administration of the 1906 Act through food standards with the force and effect of law terminated with the Preserve Bill\textsuperscript{33} and the Copeland Amendment.\textsuperscript{34} Both attempts were unsuccessful.

\textsuperscript{32}Dep't Agric., Feb. 16, 1931, and S.R.A., F.D., No. 4, REV. 4, Sept., 1937.

\textsuperscript{33}There already existed an interpretive standard for preserve reading as follows: "Preserve, fruit preserve, jam, fruit jam, is the clean, sound product made by cooking to a suitable consistence properly prepared fresh fruit, cold-pack fruit, canned fruit, or a mixture of two or all of these with sugar (sucrose) or with sugar and water. In its preparation not less than 45 pounds of fruit are used to each 55 pounds of sugar (sucrose). The product in which the fruit is whole or in relatively large pieces is customarily designated as 'preserve' rather than a 'jam.'" S.R.A., F.D., No. 2, rev. 1, issued Dec., 1928. However, this standard, complicated by the ambiguous distinctive name exemption in the 1906 Act, had proved unsuccessful in preventing the marketing of wholesome but inferior products that looked like preserve and were accepted by the consumer as preserve but were sold under distinctive names such as "Bred Spred" and had substituted therein various ingredients, such as water, for the required quantity of fruit. United States \textit{v.} 10 Cases, More or Less, Bred Spred, 49 F. (2d) 87 (C.C.A., 8th, 1931); United States \textit{v.} 49½ Cases of Bred Spred, (D. C., Mich., 1931) Notice of Judgment, Food and Drugs, No. 17351; W. G. Campbell, \textit{25 Years of Food and Drug Enforcement}, mimeograph of address at the annual convention of the Association of Dairy, Food and Drug Officials of the United States at West Baden, Indiana, September 4, 1931. To remedy this situation the Preserve Bill of 1930 proposed standards of identity for preserve, jam, jelly, apple butter, honey preserve, and imitations. The bill followed the example of the Butter Act of 1923 by having Congress enact the standards in the legislation. See, SEN. REP. No. 3470, 71st Cong., 2d Sess. (1930); SEN. REP. No. 521, 71st Cong., 2d Sess. (1930); H. R. REP. No. 11514, 71st Cong., 2d Sess. (1930); H. R. REP. No. 1127, 71st Cong., 2d Sess. (1930); 72 CONG. REC. 6817, 6912, 8391 (1930). However, the bill failed of passage after being reported to both houses.

\textsuperscript{34}The Copeland Amendment, 72 CONG. REC. 10165 (1930), was offered in the Senate in 1930 as an amendment to the then pending House bill that later became the McNary-Mapes Amendment. It authorized the Secretary of Agriculture to establish definitions and standards of identity for all foods and made such definitions and standards "conclusive" in any proceeding under the 1906 Act. Thus regulations embodying such definitions and standards would have become legislative regulations with the force and effect of law. The Copeland Amendment passed the Senate but was eliminated by the conference committee of the two Houses and so did not appear as a part of the McNary-Mapes Amendment as finally enacted. 72 CONG. REC. 10166 (1930) and 72 CONG. REC. 10495 (1930). The Copeland Amendment was subsequently introduced as a separate bill, but with modifications urged by the manufacturers and approved by the Department of Agriculture. SEN. REP. No. 4659, 72nd Cong., 1st Sess. (1932) introduced by Mr. Copeland.
D. LEGISLATIVE REGULATIONS FOR FOOD UNDER THE 1938 ACT

The attempts to change over from a system of interpretive regulations to legislative regulations embodying definitions and standards of identity for all foods thereafter became a part of the program for new comprehensive food and drug legislation. That program after a five year legislative battle was finally enacted in the Food, Drug and Cosmetic Act of 1938. That Act authorizes the Secretary of Agriculture, whenever in his judgment such action will promote honesty and fair dealing in the interests of consumers, to “promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container.”

A food is declared to be misbranded unless it conforms to the applicable definition and standard of identity to the applicable standard of quality (or states on the label the fact of sub-standard quality), and to the applicable standard for fill of container. Criminal penalties

The prints of the bill listed below show the evolution of the standards provisions throughout the various stages of the legislative history of the measure. 52 Stat. 1040, 21 U. S. C. §§ 301-392 (Supp. 1938).

(a) Sen. Rep. No. 1944, 73d Cong., 1st Sess. (1933). This was popularly known as the Tugwell Bill. The subsequent proposals were known as the Copeland Bill.

For an excellent account of the legislative history, see Cavers, The Food, Drug and Cosmetic Act of 1938; Legislative History and Substantive Provisions (1939) 6 Law and Contemp. Prob. 2.

For a popular account of the necessity for legislative regulations embodying food products, see Lamb, American Chamber of Horrors (1936) c. 7.

are imposed for the introduction of any misbranded food into interstate commerce and the food may be seized and condemned. Misbranded imported foods may be either destroyed or excluded from entry. The regulations are thus given the status of legislative regulations with the force and effect of law. The 1938 Act, however, continues in force the McNary-Mapes Amendment with its legislative standards of quality for canned foods and also the standard for butter enacted by Congress in the Butter Act of 1923. All food standards of identity, quality, and fill of container used in the administration of the 1938 Act are consequently standards with the force and effect of law and the system of administration primarily through interpretive food standards is abandoned.

III. LEGAL PROBLEMS INVOLVING LEGISLATIVE AND INTERPRETIVE REGULATIONS

An examination of a departmental regulation frequently leaves one in doubt as to whether the administrative officer considers that he is interpreting what Congress meant by its statutory language or that he is prescribing what the law shall be pursuant to some statutory delegation of power which he construes as authorizing him so to do. Occasionally in his desire to shape the law in his own image the administrative officer regards any delegation of power to make regulations as one to prescribe what the law shall be although Congress may have evidenced no intention to grant power to make legislative regulations. However, the evidence of the Congressional intent is not always clear. The clear situations involving legislative regulations are those where non-conformity to the regulations results in criminal penalties or civil

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39 For a detailed account of these various sanctions see, Lee, The Enforcement Provisions of the Food, Drug and Cosmetic Act, (1939) 6 LAW AND CONTEMP. PROB. 70-90.

40 For example, the Naval Stores Act, 42 STAT. 1436 (1923), 7 U.S.C. § 96 (1934), imposes criminal penalties for selling naval stores in interstate commerce except in accordance with the official naval stores standards prescribed by regulations.

Similar measures are the Cotton Standards Act 1923 which imposes criminal penalties if cotton in interstate transactions is designated by a grade or class other than one within the official cotton standards prescribed by regulations, 42 STAT. 1436 (1923), 7 U.S.C. § 60 (1934), and the Grain Standards Act 1916 which imposes criminal penalties for interstate transactions in grain by grade unless the grades used are those fixed in the official grain standards as prescribed by regulations. 39 STAT. 485 (1916), 7 U.S.C. § 85 (1934). The standards prescribed by the regulations for naval stores and cotton, and likewise those for teas mentioned below, are actually "physical types", not mere printed word descriptions or definitions.
penalties or penalty taxes; or where non-compliance may result in exclusion of goods from importation or exportation, or in their forfeiture; or where non-compliance may result in denial, suspension or revocation of permits or other privileges or in denial of subsidy or benefit payments; where taxes are directed to be computed on the basis of such regulations; or where Congress authorizes regulations prescribing tolerances, variations, or exemptions relaxing a statutory rule. In addition Congress

41 For example, failure to comply with regulations prescribing minimum prices for coal subjects producers to a penalty tax imposed by the Bituminous Coal Act, 50 STAT. 72 (1937), 15 U. S. C. § 830 (Supp. 1938). Also regulations under the Sugar Act, 50 STAT. 903 (1937), 7 U. S. C. § 1176 (Supp. 1938), determine the amount of sugar that may be marketed in any year without incurring civil or criminal penalties or loss of subsidy payments, 50 STAT. 903 (1937) 7 U. S. C. § 1176 (Supp. 1938).

42 For example, the Tea Import Act, 27 STAT. 604 (1897), 21 U. S. C. § 41 (1934), excludes from importation tea that is inferior in quality to the official tea standards prescribed by regulations. The Export Apple and Pear Act, 48 STAT. 123 (1933), 7 U. S. C. § 581 (1934), bars apples and pears from exportation unless they conform to the minimum standards of quality prescribed by regulations.

43 For example, under the Federal Alcohol Administration Act, permits of members of the alcoholic beverage industries are subject to suspension or revocation for failure to comply with labeling or advertising regulations. Criminal penalties are also imposed, 49 STAT. 977 (1935), 27 U. S. C. § 201 (Supp. 1938). The Commodities Exchange Act provides that the designation of a commodities board of trade as a "contract market" may be withdrawn, or a cease and desist order issued, for violation of any regulation under the act, 49 STAT. 1491 (1936), 7 U. S. C. § 1 (Supp. 1938). Violations of regulations prescribed under the Federal Communications Act of 1934 subject the violator to revocation of his radio station license and to criminal penalties, 48 STAT. 1064, 47 U. S. C. § 151 (1934). Sanitary and other regulations for "official establishments" under the Federal Meat Inspection Act are enforceable by withdrawal from the establishment of Federal inspection, approval, and marking of its meats in the event of non-compliance with the regulations. Such marking is a condition precedent to the lawful interstate shipment of the meats, 34 STAT. 1260 (1907), 21 U. S. C. § 71 (1934).

44 See, for example, Sugar Act of 1937, 50 STAT. 903 (1937), 7 U. S. C. § 1101 (Supp. 1938).

45 The consolidated returns regulations about to be issued under the new excess profits tax law (Second Revenue Act of 1940) are an example of legislative regulations under the income tax laws. The same is true of the consolidated returns regulations under the Revenue Act. 49 STAT. 791 (1928), 26 U. S. C. (1934). Other examples of legislative regulations in the income tax field are the regulations covering depletion in certain cases, inventories, involuntary conversions of property, net operating loss deductions, wash sales, and certain basis determinations and allocations of income and deductions. INT. REV. CODE, §§ 22(c), 112(f), 170, 189, 208, 118(b) and (c), 113(a) (11) and (19), 113(b) (3), 117(b) (5), 372(c), 45, 119(e), 185, and 213(a) (1939). See Alvord, Treasury Regulations and the Wilshire Oil Case (1940) 40 COL. L. REV. 252, 260.

46 Thus variations from the stated net weight of packaged foods shipped in interstate commerce are permissible only to the extent of tolerances established by regulations pre-
may in the statute declare specifically that the regulations shall have the 
force and effect of law.\textsuperscript{47} More often a statute granting authority to 
make regulations attaches none of these sanctions to the regulations, is silent as 
to their force and effect, and is intended to cover only interpretive 
regulations or regulations affecting internal departmental functions. 
Particularly is this so of the usual broad grants that authorize “such regula-
tions as may be necessary to carry out the provisions of this Act” or which 
are similarly phrased, sometimes with the additional requirement that the 
regulations be “not inconsistent with law”.

Delegation of Power to Prescribe Legislative Regulations: Within the 
limits of the wide range of authority that Congress may constitutionally 
delegate to administrative officers and agencies lies a broad field of 
powers whose exercise is not ordinary administration of a purely executive 
character. Among these powers are those of prescribing legislative 
regulations. The constitutionality of certain delegations to administrative 
officers and agencies of such powers has been upheld by the Supreme 
Court. The powers so upheld fall into two classes:

First: The power of formulating regulations prescribing exemptions 
or permissive variations from a statutory rule of conduct or tolerances to 
be permitted in conforming to the statutory rule.\textsuperscript{48} Such regulations 
necessarily have the force and effect of law.\textsuperscript{49}

\textsuperscript{47}See Agricultural Adjustment Act, 48 Stat. 37 (1933), 10(c) 7 U. S. C. § 610 (1934).


\textsuperscript{49}Under the statute, in the event of variations in excess of those permitted by the regula-
Second: The power of formulating regulations prescribing what the applicable rule shall be within a limited field defined by the statute, the Congress by the statute giving to the regulations the force and effect of law by providing one or more of the sanctions previously mentioned. 50

The power of an administrative officer or agency to prescribe legislative regulations is to be found in an Act of Congress embodying a delegation of power falling within one of the above classes. 51 Further, it has been held that it is within the constitutional power of Congress to give to regulations a force and effect equivalent to that which they would have if Congress itself had written the regulations into the statute. 52

Legislative regulations, inasmuch as they may be prescribed only pursuant to a specific delegation of power by Congress, are invalid unless they fall within the metes and bounds of the power delegated. Supreme Court cases involving ultra vires legislative regulations are not common. However, the principle that legislative regulations falling without such metes and bounds are ultra vires and therefore invalid, is obviously sound.

Among the instances of ultra vires legislative regulations are regulations that would be beyond the constitutional power of Congress itself to


- An exception may exist in the case of regulations with the force and effect of law to carry out inherent executive powers that have certain regulatory aspects and that are delegated directly to the President by the Constitution, as for example his war powers.


The rate orders of the Interstate Commerce Commission are legislative “When . . . the Commission declares a specific rate to be the lawful and reasonable rate for the future it speaks as the legislature, and its pronouncement has the force of a statute.” Arizona Grocery Co. v. Atchison, Topeka and Santa Fe R.R., 284 U. S. 370, 386 (1932).
enact for the reason that they are so arbitrary or unreasonable as to be lacking in due process or are in a field beyond the regulatory power of Congress; also regulations that conflict with some express provision of statutory law or standard within the field in which the administrative officer or agency has been authorized to prescribe regulations or else go beyond the limits of that field.

Utah Power & Light Co. v. United States, 243 U. S. 389 (1917); Illinois Central R. R. v. McKendree, 203 U. S. 514 (1906); United States v. Davis, 132 U. S. 334 (1889). ("If any of the regulations go beyond what Congress can authorize . . . those regulations are void"); Manhattan General Equipment Co. v. Commissioner, 297 U. S. 129 (1936). ("And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable.")

Campbell v. Galeno Chemical Co., 281 U. S. 599 (1930); United States v. United Verde Copper Co., 196 U. S. 207 (1905); Morrill v. Jones, 106 U. S. 466 (1882); Merritt v. Welch, 104 U. S. 694 (1881); Titsworth v. Commissioner of Internal Revenue, 73 F. (2d) 385, (C. C. A., 3d, 1934). Cf., Boske v. Comingore, 177 U. S. 459 (1900) in which the statute specifically required the regulations to be "not inconsistent with law."

Nolan v. Morgan, 69 F. (2d) 471 (C. C. A., 7th, 1934), presents a recent example of an ultra vires legislative regulation. The McNary-Mapes Amendment to the Federal Food and Drug Act of 1906, 34 Stat. 768 (1906), 21 U. S. C. §§ 1-5, 7-15 (1934), authorizes the Secretary of Agriculture to establish "in the interest of the consumer" legislative regulations embodying standards of quality "for each class of canned food". The standards are required to be "reasonable", and a class is described as a "generic product".

The Secretary of Agriculture promulgated regulations for the standardizing and labeling of "canned peas". Immature peas were regarded as the high quality product and set the standard. The industry, however, produced another quality of canned peas, namely, the dry, ripe pea subsequently soaked in hot water and otherwise processed to restore them to the fullness and color of the immature pea and render them soft and edible. The soaked dry peas were regarded under the regulations as being an inferior quality of "canned peas", and were required to be labeled "Below U. S. Standard. Low Quality but not Illegal. Soaked Dry Peas."

In a suit to enjoin the enforcement of the regulation in its application to soaked dry peas, the Circuit Court of Appeals was of the view that soaked dry peas and immature peas constituted different classes. Each was a generic product and the former was not a subdivision of the latter. Therefore two different sets of standards were required, one for the canned immature pea and one for the canned soaked dry pea, each set of standards differentiating between the high quality and the substandard quality products of the respective classes. The court was further of the view that the regulations were driving canned soaked dry peas from the market, and that being a cheaper but still useful product this was not "in the interest of the consumer" and the standards were not "reasonable." In consequence the court held that the regulations were outside the authority conferred on the Secretary of Agriculture.

As a result of the decision the original regulations for canned peas were modified and new regulations issued for the canned soaked dry peas. See S. R. A., F. D., No. 4, Rev. 2, mimeograph, Food and Drug Administration, May, 1935, 16 and 17.
Frequently cases cited in legal articles or court opinions as deciding that particular regulations are *ultra vires* do not involve legislative regulations. On the contrary they involve interpretive regulations that erroneously construe the law or that take on the guise of legislative regulations and attempt to prescribe what the law shall be when no authority has been delegated to adopt legislative regulations in the particular field.55

**Inherent Executive Power to Prescribe Interpretive Regulations.** On the other hand the power of an administrative officer or agency to prescribe interpretive regulations is not necessarily a delegated power. The authority to exercise such power need not be found in an Act of Congress. Congress is not invoking the aid of the executive officer or agency to prescribe what the applicable rule shall be or to establish variations from the rule prescribed by the statute. Congress has expressed that rule of conduct as fully as it deems necessary. It merely asks the administrative officer or agency to administer it, not to create it.

To administer a statutory rule, the administrative officer or agency must first interpret it and determine the facts to which it applies. This is especially so where the statutory rule is expressed by Congress in general terms as is usual. The administrative interpretation need not necessarily be reduced to writing in advance of its application. It may be arrived at by a process analogous to the judicial process, i.e., decisions in individual instances from time to time. The interpretation is thus pricked out by a long course of administrative decisions. Again the administrative interpretation may be generalized and reduced to writing in advance of its application. It then takes the form of an interpretive regulation. Such a regulation adds naught to the statutory rule or to the statute construed, but it does serve to guide subordinate enforcement officials in their ad-

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*Cf., contra:* United States *v.* Antikamnia Chemical Co., 231 U. S. 654 (1914), in which a regulation, seemingly not merely interpretive but on the contrary an attempt to supplement the law, was nevertheless found to be valid because it was "administrative of the law" and not "additive to it"; and United States *v.* Five 1-Pint Bottles of Elixir Terpene Hydrate and Codeine, Notice of Judgment, Food and Drugs, No. 24030 (D. C., N. Y. 1934), in which the regulation was found to be valid and was described as being "interpretive and explanatory of the statute, not an attempted addition."
ministration of the statute and to apprise those subject to the statute of what they may expect in the way of administrative enforcement in the absence of an overriding judicial decision. However, the administrative officer or agency's interpretation of the statute has no more legal effect than that of the individual unless or until it has been approved by the courts or "ratified" by Congress.

The question of whether the power to prescribe interpretive regulations is an inherent power of administrative officers or agencies incidental to their duties to administer the regulatory Act or flows only from a statutory delegation of authority by Congress to prescribe such regulations is usually academic. This is so because in most of its regulatory Acts Congress includes an authorization to "make such regulations as are necessary to carry out the provisions of this Act," or similar language, even though no criminal or other sanctions are attached to non-observance of the regulations. Congress may even include such an authorization in an Act in which it has also delegated power to prescribe legislative regulations in certain particulars. The Federal Food, Drug and Cosmetic Act of 1938, and the various Revenue Acts are typical examples of statutes embodying authorizations for both types of regulations.

On the other hand the fact that the making of interpretive regulations need not necessarily be founded on a specific statutory authorization is apparently exemplified by the Federal Food and Drug Act of 1906. That Act contained no grant of authority to the Secretary of Agriculture to prescribe interpretive regulations embodying standards of identity for food, nevertheless he did prescribe such regulations under the Act for almost a quarter century. While the Act did contain a grant of authority to "make uniform rules and regulations carrying out the provisions of this Act" that authority was vested in the Secretaries of the Treasury, Agriculture, and Commerce jointly and not in the Secretary of Agriculture alone.

**Force and Effect of Interpretive Regulations.** To say that interpretive regulations do not have the force and effect of law and may only interpret the statute and not supplement it and prescribe what the rule shall be, is not to be taken as denying interpretive regulations all legal effect in the

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courts. A very real weight is given to them by the courts under certain circumstances.

In interpreting a statute the court frequently turns to extrinsic aids. One such aid is the administrative interpretation of the statute through interpretive regulations. In consequence, the principle has been enunciated by the courts that administrative interpretation, especially when it has long prevailed and has been uniform, is entitled to great weight and should be adopted by the court unless it is clear that the interpretation is erroneous. This principle is the well known rule of administrative interpretation of a statute. It deals with the weight to be given by the courts to administrative interpretation, especially administrative interpretation in the form of an interpretive regulation.

Without here attempting to analyze the principle in detail or the unreality of some of the various assumptions on which it is founded, the principle may be briefly summarized as follows: Conditions precedent to its application are that the statute be "ambiguous"; also that the interpretive regulation be not plainly erroneous and contrary to all reasonable interpretations of the statute. These conditions being present, then the interpretive regulation will be availed of by the courts to construe the statute if the administrative interpretation is of long standing and uniform. This last limitation avoids hardship to those who have justifiably acted in reliance on a generally accepted administrative interpretation. Particularly will the administrative interpretation be followed if the interpretive regulation is known to Congress and has been "ratified" or "adopted" by it. Congressional re-enactment of the statutory provision


60Walker v. United States, 83 F. (2d) 103 (C. C. A., 8th, 1936).


62Morgan v. Commissioner, 309 U. S. —, 60 Sup. Ct. 424 (1940); Lang, Executor v. Commissioner, 304 U. S. 264 (1938); Morrissy v. Commissioner of Internal Revenue, 296 U. S. 344 (1935); Helvering v. Bliss, 293 U. S. 144 (1934); Massachusetts Mutual Life Ins.
without change subsequent to the promulgation of the interpretive regulation is the usual foundation on which the courts rest their conclusion of ratification. Congress' knowledge of the prior interpretive regulation is usually assumed, an assumption that, more often than not, is contrary to fact. In some recent cases the courts have used language indicating that such subsequent reenactment of the statute gives to the interpretive regulation the force of law just as though the regulation itself had been enacted by Congress or had by specific reference to it been incorporated into the statute.\textsuperscript*} Also in ratification situations the limitations that the statute must be ambiguous and the administrative interpretation of long standing and uniform tend to disappear or be ignored.

In \textit{Helvering v. R. J. Reynolds Tobacco Co.}\textsuperscript{64} there was raised, but not decided, the question whether an interpretive regulation once embedded in the statute through subsequent reenactment of the statute repeatedly without change some half dozen or so times could thereafter be altered \textit{prospectively} by a new and different interpretive regulation. Or was the old interpretive regulation so frozen into the statute through ratification that any alteration would require either legislative amendment of the statute or possibly its further reenactment without change subsequent to

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\textsuperscript{63} See \textit{Armstrong Paint and Varnish Works v. Nu-Enamel Corp.}, 305 U. S. 315 (1938).

\textsuperscript{64} Cf. the following cases in which the interpretation embodied in the regulation was not of long standing and uniform, or for other reasons was not followed despite subsequent reenactment of the statute: \textit{Helvering v. Hallock}, 309 U. S. --, 60 Sup. Ct. 444 (1940); \textit{Helvering v. Wilshire Oil Co.}, 308 U. S. 90 (1939); \textit{Sanford's Estate v. Commissioner}, 308 U. S. 39 (1939); \textit{Iselin v. United States}, 270 U. S. 245 (1926). A frequent method of arriving at the same result is to hold that the statute is not ambiguous. See cases in footnote 1.

Unfortunately the courts have in a few cases applied the principles without recognizing that the regulations involved were legislative rather than interpretive. United States \textit{v. Dakota-Montana Oil Co.}, 288 U. S. 459 (1933); \textit{Murphey Oil Co. v. Burnet}, 287 U. S. 299; \textit{Burnet v. Thompson Oil & Gas Co.}, 283 U. S. 301 (1931). See E. C. Alvord, \textit{Treasury Regulations and the Wilshire Oil Case}, 40 Col. L. Rev. 252 (1940). This has resulted in unnecessary difficulties in applying the ratification doctrine.


\textsuperscript{64} 306 U. S. 110, 116-117 (1939).
the promulgation of the new and different regulation. The new and different regulation in the case had itself been "ratified" three times through further reenactment of the statute. The court considered this bit of bigamy by Congress in "ratifying" both the old and also the new and different regulation and decided that at least the new and different regulation could not operate retroactively.

Assuming that the ratification doctrine is to go forward with all its logical implications the answer to the question left undecided is more obvious if the distinction between legislative and interpretive regulations is kept in mind. Prior to ratification an interpretive regulation may be changed and the new regulation even applied retroactively by the administrative officer or agency. But once an interpretive regulation is ratified then the regulation becomes part of the law and should be the only permissible interpretation of the law. Such interpretation of the law having been adopted by Act of Congress should be capable of change only by further Act of Congress. The difficulty in going forward to this extent flows from the dubious assumptions on which the doctrine is based, namely, the silence of Congress implies its assent to a regulation of whose existence Congress is in most instances unaware.

However, in the case of legislative regulations Congress has given to the administrative officer or agency power to make law through prescribing legislative regulations. This is a continuing power until repealed by Congress. Such a power is not repealed in whole or in part merely by reenactment of the statute which grants it even though a legislative regulation is outstanding at the time. The doctrine of ratification should not be applied to outstanding legislative regulations to the extent of thereafter depriving the administrative officer or agency of the power, specifically

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65 But cf. Higgins v. Smith (U. S. Sup. Ct.) decided January 8, 1940, involving administrative practice not an administrative regulation; and Helvering v. Wilshire Oil Company (U. S. Sup. Ct.) decided December 6, 1939, involving an interpretive and not a legislative regulation, although the court's opinion confused the point. Both these decisions give prospective effect to the change and to that extent fail to pursue the ratification doctrine to its logical outcome. In Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110 (1939), the court refused to give retroactive effect to a new interpretive regulation following ratification of the old interpretive regulation. To that extent the ratification doctrine was followed to its logical outcome. In Helvering v. Hallock (U. S. Sup. Ct.) decided January 29, 1940, the Court refused to apply the ratification doctrine to a new interpretive regulation that had changed the old interpretive regulation in order to conform to an intervening decision of the Supreme Court itself. Both the old and the new regulation had been ratified. The new regulation was given neither prospective nor retroactive effect.
vested by the statute, to adopt further legislative regulations. The administrative officer or agency should be able to amend its prior legislative regulation just as Congress may amend its prior legislation. As a matter of law it should even be possible to do this with retroactive effect subject to the limitations of the Fifth Amendment due process clause on retroactive legislation and to the limitations, if any, expressed or implied in the particular statutory grant of the power to prescribe legislative regulations. The problem of whether Congress should as a matter of policy deny retroactive effect to legislative regulations is developed later.

Legislative regulations have the force of law and if *intra vires* must be applied by the courts. However, the interpretive regulation need not be followed by the courts. It is in origin only an extrinsic aid in deciphering the meaning of an ambiguous statute. This is shown among other things by the fact that the courts tend to give interpretive regulations little effect save where they have been “ratified” by Congress through subsequent reenactment of the statute without change. Then the force given them flows from the view that Congress has in effect enacted the interpretive regulation as a part of the reenacted statute.

**Statutory Limitations on Effect of Invalid and Retroactive Regulations.** Interpretive regulations, particularly in the absence of ratification, give no firm protection to the individual who relies on them. Although they are the Government’s own interpretation of the statute, nevertheless if the individual relies on such interpretation he does so at the peril of its not being followed by the courts. Their refusal to apply the regulation may arise because the court regards the administrative interpretation as not being of sufficiently long standing or of sufficient uniformity. Again the court may refuse to apply the regulation on the ground that it is a plainly

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66 Helvering v. Wilshire Oil Co., 308 U. S. 90 (1939). In this case the court erroneously regarded an interpretive regulation applied to § 114 (b) (3) of the Revenue Act of 1928 as a legislative regulation issued under section 23 (1) of the same statute. It then held that the regulation could be amended prospectively even though it might have been ratified by previous reenactments of the Revenue Act. The holding if not the logic, is proper for legislative regulations but not for interpretive regulations. Cf., Helvering v. Hallock, 60 Sup. Ct. 444 (1940). See also Alvord, *Treasury Regulations and the Wilshire Oil Case* (1940) 40 Col. L. Rev. 252; Surrey, *The Scope and Effect of Treasury Regulations and the Income, Gift, and Estate Taxes* (1940) 88 U. of Pa. L. Rev. 556, 571-575.

67 Cf., Arizona Grocery Co. v. Atchison, Topeka, and Santa Fe R. R., 284 U. S. 370, 386, 389 (1932), holding that legislative orders prescribing rates may be amended only prospectively by an administrative agency and that this would be the limit of the power of the legislature itself.
erroneous interpretation of the law or that the statute is unambiguous and does not require interpretation. These results may follow even though Congress has subsequently reenacted the statute following the promulgation of the regulation and therefore given reason to believe that the ratification doctrine might serve to validate the regulation.68

Similarly in the case of a legislative regulation individuals may rely on it only later to have it held ultra vires.

Of course, the individual has the choice of ignoring the interpretive regulation and relying on his own interpretation of the statute if he deems the regulation to be erroneous or, in the case of a legislative regulation, of ignoring it as being beyond the authority delegated and ultra vires. Such a course of action, however, carries with it grave risks of litigation, expense, delays and other indirect but powerful pressures resulting from a contest with the administrative officer or agency promulgating the regulation. After all it is the Government's own regulation and the individual who chooses to conform to it rather than ignore it should not suffer from his law abiding attitude even though he founds his actions on an invalid regulation.

Again the administrative officer or agency may itself change its interpretation of the statute and then go even further and apply to past events the new interpretive regulation rather than the regulation in force at the time of the event and even urge before the courts the invalidity of its own prior regulation.69 Also the administrative officer or agency may adopt a new legislative regulation contrary to a prior legislative regulation and attempt to give the new regulation retroactive effect. In other than exceptional circumstances the individual should not have to run the risk that a change of mind by the administrative officer or agency may result in a retroactive change in regulations to his disadvantage. Retroactive legislative powers in the hands of Congress have much less likelihood of abuse than in the hands of administrative officers or agencies not content with remedying their mistakes for the future only.

In a few instances Congress has imposed statutory limitations remedying

68Sanford's Estate v. Commissioner, 308 U. S. 39, rehearing denied 637; Helvering v. Wilshire Oil Co., 308 U. S. 90 (1939); Helvering v. Hallock, 60 Sup. Ct. 444 (1940). Apparently the only protection the individual has is that if the interpretive regulation is otherwise valid and has been ratified by Congress then he need not fear that a new and different interpretive regulation can be thereafter adopted and retroactively applied to him. Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110 (1939).

69Lang v. Commissioner of Internal Revenue, 304 U. S. 264, 270 (1938).
these difficulties. Thus it has provided in the Securities and Exchange Act of 1934\(^7\) that:

“No provision of this Act imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the [Securities and Exchange Commission or the Board of Governors of the Federal Reserve System], notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.”

Such a provision accomplishes two results. It necessarily leaves the statutory rule unchanged and thereby protects the individual who chooses to rely on the statute rather than on the regulation. However, if the individual chooses to rely not on the statute but on the Government’s own regulation (whether it is an interpretive regulation that erroneously construes the law or for other reasons is not followed by the courts, or is a legislative regulation that is \textit{ultra vires}), such a provision also protects the individual up to the time that the invalidity of the regulation is determined either by decision of the court or by amendment or rescission by the administrative officer or agency, and further protects the individual against retroactive amendment or rescission of the regulation.\(^7\)

The policy of protecting the individual who relies on an invalid provision of law has also been adopted by Congress in other circumstances. Thus it has on occasion enacted remedial legislation to reinstate the legal position of those who in good faith relied on a statute held unconstitutional\(^7\) or on an interpretive regulation held erroneous.\(^7\)

\(^7\)\textit{For many years the Secretary of the Treasury has had \textit{discretionary} authority to apply without retroactive effect any change in regulations even though, for instance, induced by a court decision holding a former interpretive regulation to be erroneous. INT. REV. CODE, § 3791 (b). H. R. REPT. 704, 73d Cong., 2d Sess. (1938), 38.}

\(^7\)\textit{For instance the sugar bounties provided by the Tariff Act of October 1, 1890 (26 Stat. 567) were repealed by the Tariff Act of August 27, 1894 (28 Stat. 509). Those manufacturers who had relied on the sugar bounty legislation and altered their business operations so as to become entitled to the bounty prior to repeal of the legislation were held without remedy in United States \textit{ex rel} Miles Planting & Manufacturing Co. v. Carlisle, 5 App. D. C. 138 (1895), both because the repealing act reserved no accrued rights and because the sugar bounty legislation was unconstitutional. Congress thereupon protected those manufacturers and refiners who had relied on the legislation while in force by providing in the Sundry Civil Expenses Appropriation Act of 1895 (28 Stat. 910, 933) appropriations to cover the bounties to which they would have been entitled had the act not been declared unconsti-
Legislative Regulations and the Constitutional Requirement of Certainty. Legislation may be so uncertain in its terms as to be lacking in due process of law and therefore unconstitutional. *Ubi jus incertum, ibi jus nullum.* As Justice Cardozo has pointed out, a provision of law so indefinite or uncertain as to be unintelligible in its application is not a provision by which conduct can be governed. It is not a rule of law, it is mere exhortation and entreaty. Before disobedience can occur there must be something to be obeyed. Before a statute can be applied by an administrative officer or agency or by the courts, there must be a statutory rule to apply.

In judicial theory, if the legislature requires obedience to statutory requirements, the language in which the legislature expresses those requirements should not be so general or vague as to make their application wholly uncertain and unpredictable as regards the individual falling within the scope of the statute. Nor should the language be so general or vague as to compel the administrative officer or agency and the courts to exercise an unrestrained and undirected authority in applying the statute in the performance of their respective administrative and judicial duties. A statute so lacking in certainty is, from the individual’s standpoint, a statute that may arbitrarily deprive him of property rights. It therefore lacks due process. From the executive or judicial standpoint, such a statute, if void for indefiniteness, would impose upon the Executive and the constitutional and repealed. *Cf. In re Sugar Bounty, 2 Comp. Treas. Dec. (1895) 98,* and United States v. Realty Co., 163 U. S. 427 (1896).

The processing taxes imposed by the Agricultural Adjustment Act of 1933 (48 Stat. 31) were held unconstitutional by the Supreme Court in United States v. Butler, 297 U. S. 1 (1936) thereby making unavailable funds for benefit payments to farmers who had conducted their farming operations in reliance on the act. Congress subsequently protected these farmers by providing in the Supplemental Appropriation Act of 1936 (49 Stat. 1109, 1116, 44 U. S. C. 310a) funds from other sources to meet obligations and commitments under the provisions of the unconstitutional act and regulations pursuant thereto.

An interpretive income tax regulation treated a dividend of common stock on preferred stock as a non-taxable stock dividend rather than income. The regulation also allocated the original cost between the preferred stock purchased and the common stock received as a dividend. The regulation had been repeatedly ratified but was nevertheless held invalid as being contrary to unambiguous statutory provisions. Koshland v. Helvering, 298 U. S. 441 (1936); *cf. Helvering v. Gowran, 302 U. S. 238 (1937).* The decision produced gross inequities for both taxpayers and the Government. H. R. Rep. No. 885, 76th Cong., 1st Sess. July 21 (1939). These inequities were eliminated retroactively by enacting the interpretive regulation into law and giving it retroactive application. Revenue Act of 1939, sec. 214 (e), Pub. No. 155, 76 Cong., 1st Sess. (1939) (53 Stat. 862, 874).
courts legislative functions in violation of the doctrine of separation of
powers, were they under a duty to administer or apply it. A regulatory
act involving such a degree of uncertainty is open to successful con-
stitutional attack.\textsuperscript{73}

On the whole there are sound reasons why Congressional regulatory
policies should be express in general terms and certainly that is customary
in most federal regulatory legislation. The generality may, however,
become so great as to endanger the statute on the grounds of uncertainty.
Legislative regulations are one means of avoiding this constitutional
difficulty. If the duty of the individual under the act is not a duty to
observe the vague general requirements of the act but a duty to observe
the legislative regulations promulgated thereunder, then there is no un-
certainty as to the individual's duty if the regulations are themselves
definite. A comparison of two Supreme Court cases illustrates the point.

\textit{United States v. L. Cohen Grocery Company}\textsuperscript{74} involved the Wartime
Food Control or Lever Act. That act made it a criminal offense to make
any unjust or unreasonable rate or charge in handling or dealing with
certain commodities, mostly agricultural in character, denominated

\textsuperscript{73}Corporation Commissioner of Oklahoma \textit{v.} Champlin Refining Co., 286 U. S. 210 (1932); Lanzetta \textit{v.} New Jersey, 306 U. S. 451 (1939); Cline \textit{v.} Frink Dairy Co., 274 U. S. 445 (1927); Connally, Commissioner of Labor of Oklahoma \textit{v.} General Construction Co., 269 U. S. 385 (1926); United States \textit{v.} L. Cohen Grocery Co., 255 U. S. 81 (1921); \textit{cf.} the following
cases under the Federal Food and Drugs Act of 1906; United States \textit{v.} Sweet Valley Wine Co.,
208 F. 85 (N. D. Ohio, 1913); United States \textit{v.} 420 Sacks of Flour, 180 F. 518 (E. D. La.,

The doctrine has application in civil as well as criminal proceedings. For example,
contracts in violation of regulatory acts are not enforceable but this defense is not available
if the act itself is unconstitutional by reason of uncertainty. A. B. Small Co. \textit{v.} American
Sugar Refining Co., 267 U. S. 233 (1925); Standard Chemicals and Metals Corporation \textit{v.}
Waugh Chemical Corporation, 231 N. Y. 51, 131 N. E. 566 (C. A. 1921).

In general, a term, even though its precise meaning is unfamiliar to the layman, has the
requisite degree of certainty for constitutional purposes if the term by reason of the tech-
nical understanding thereof is precise and definite to the commercial, industrial, or other
interests concerned (Bandini Petroleum Co. \textit{v.} Superior Court of California, 284 U. S. 8
(1931); Hygrade Provision Co., Inc. \textit{v.} Sherman, 266 U. S. 497 (1925); Omaechevarria \textit{v.}
Idaho, 246 U. S. 343 (1918); or by reason of a settled common law meaning, well enough
known to enable those concerned to apply it. International Harvester Co. \textit{v.} Kentucky, 234
U. S. 223 (1914); Nash \textit{v.} United States, 229 U. S. 373 (1913); \textit{see} Sproles \textit{v.} Binford, 286
U. S. 426 (1932); United States \textit{v.} Wurzbach, 280 U. S. 396 (1930); Whitney \textit{v.} California,
274 U. S. 357 (1927); Miller \textit{v.} Oregon, 273 U. S. 657 (1927); Miller \textit{v.} Strahl, 239 U. S. 426
(1915); Waters Pierce Oil Co. \textit{v.} Texas, 212 U. S. 86 (1909).

\textsuperscript{74}255 U. S. 81 (1921).
"necessaries." It was urged by counsel for the defendant that the act was so indefinite that it did not enable the defendant to know what was forbidden; that therefore the act amounted to a delegation by Congress of legislative power to court and jury to determine what actions should be held to be criminal and punishable. The court agreed with counsel as to the invalidity of the act but on a somewhat different constitutional ground. It held that the lack of a standard of some sort for determining whether a charge was unjust or unreasonable resulted in such uncertainty that the act was in violation of the due process clause of the Fifth Amendment.

_United States v. Shreveport Grain & Elevator Co._75 involved section 8 of the Federal Food and Drugs Act of 1906. This section required that packaged goods be marked with their net weight subject to a proviso that "reasonable variations shall be permitted". The majority of the court were of the view that this language standing alone would by reason of the vagueness of the term "reasonable variations" render the statute in this particular aspect void for indefiniteness and lacking in due process. The majority, however, found that the language quoted (the section being properly construed) was modified by a subsequent phrase "by rules and regulations made in accordance with section 3 of this Act." Section 3 provided for joint uniform regulations by the Secretaries of Agriculture, Commerce, and Treasury "for carrying out the provisions of this Act." In other words the requirement as to stating net weight, properly construed, was subject only to such reasonable variations as were permitted by regulations of the three Secretaries. So construed the statute was constitutional and not void for indefiniteness.

In the _Cohen case_ the prohibition against unjust and unreasonable rates or charges in handling or dealing with necessaries rested directly on the individual. In the _Shreveport case_ the statute required that reasonable variations shall be permitted by regulations and before the vague statutory duty to mark the net weight within reasonable variations rested on the individual, the regulations had to be established. The individual's duty then was to observe the regulations rather than the vague statutory duty in the absence of regulations. These regulations were legislative regulations with the force and effect of law, enforceable by criminal penalties and other sanctions in case the individual marked the net weight otherwise than within the range of variations permitted by the regulations. _The Shreveport case_ exemplifies the point that legislative regulations may give the

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75 U.S. 77 (1932).
requisite definiteness to vague statutory provisions which if they bore
down directly on the individual would be void for uncertainty.\textsuperscript{76}

Interpretive regulations, unless ratified by Congress, can have no such
effect for regulations interpreting a vague provision of law do not alter or
make definite that provision but merely make definite the executive officer
or agency's interpretation of that provision. It remains the duty of the
individual to observe the vague provision of law unless it is declared void
for uncertainty. One implication to be drawn from a decision such as
that in the \textit{Shreveport case} is that a statutory rule of conduct may be so
indefinite as to be void for uncertainty and yet be sufficiently definite to
constitute a valid delegation of legislative power to establish legislative
regulations.\textsuperscript{77}

Enough has been said to emphasize the differences in the legal origin
and administrative functions of legislative and interpretive regulations.
Some of their legal problems have been discussed. Among these are the
differences in their force and effect, the application of the "ratification"
doctrine, \textit{ultra vires} and erroneous regulations, the situation of him who
relies on \textit{ultra vires} or erroneous regulations, and the relation of legis­
tative regulations to the constitutional requirement of certainty in legis­
tation. This does not exhaust the legal problems inherent in the differences
between the two types of regulations. The character of the administrative
proceedings from which legislative regulations emerge, the constitutional
and statutory requisites as to hearings in the course of such proceedings,
the due process limitations on hearing procedure, the necessity for ad­
ministrative findings and their legal effect, and statutory and non-statutory
judicial review of legislative regulations—all are examples of other prob­
lems. Their adequate consideration demands, however, a genuine under­
standing of the basic differences between legislative and interpretive
regulations.\textsuperscript{78}

\textsuperscript{76}\textit{Contra}: United States \textit{v.} Ballard, 12 F. Supp. 321 (W. D. Ky. 1935); but see Di Santo

\textsuperscript{77}\textit{Contra}: \textit{In re} Peppers, 189 Cal. 682, 209 Pac. 896 (1922). This decision was not followed
where after referring to the Cohen Grocery Company case Chief Justice Taft states that
"The rule as to a definite standard of action is not so strict in cases of delegation of legislative
power to executive boards and officers."

\textsuperscript{78}52 STAT. 1040, sec. 701 (e), 21 U. S. C. 301 (Supp. 1938).
WHEN the Supreme Court struck down the plan for the reorganization of the Los Angeles Lumber Products Company, it gave new life and renewed vigor to that veritable "demon incarnate,"\(^1\) the Boyd doctrine,\(^2\) which had been to equity reorganizers a "perpetual specter,"\(^3\) threw into consternation those of the reorganization bar who had looked upon Sections 77, 77B and Chapter X\(^4\) as life preservers thrown by a solicitous Congress "in the name of debtor relief and sweet charity"\(^5\) to harassed stockholders in distressed corporations; and apparently disposed definitely of the so-called "composition theory"\(^6\) so far as Section 77 and Chapter X are concerned.

With the inception of corporate and railroad reorganization under the Bankruptcy Act,\(^7\) management and equity security-holders had taken
the position that Sections 77 and 77B (and Chapter X) were "composition" statutes designed to afford a debtor corporation an opportunity to effect a compromise of its debts with its creditors and to continue in business, with the old stockholders retaining an interest in the reorganized corporation, regardless of whether the debtor might be solvent or insolvent. The proponents of this theory (with an ingenuity which had long characterized attackers of the Boyd rule) seized upon the provision for submission of a plan to creditors and stockholders for acceptance as supporting the view that Sections 77 and 77B were "composition" statutes. To be sure, the technique of submission was and is an element of bankruptcy compositions. But the "compositionists" wholly ignored the fact that in order to sustain the constitutionality of the provisions for corporate reorganization under the bankruptcy power of Congress, it was deemed necessary to invoke this procedure for effectuating compositions. A composition of a debtor with his creditors was confirmed by the court if (1) a majority of the creditors had agreed to it and (2) if the court found the proposed composition to be "in the best interests of creditors." While courts seldom upset a composition which was approved by a majority of creditors, the second element was at least theoretically satisfied before a composition

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8The "composition theory" (as applied to § 77) has been most earnestly defended by Ernest S. Ballard and Minier Sargent of the Chicago Bar in briefs filed before the Interstate Commerce Commission in Chicago and E. I. R. R. Reorg., Finance Docket No. 5592; Missouri Pacific R. R. Reorg., Finance Docket No. 9918, and Spokane Int. R. R. Reorg., Finance Docket No. 10131.

9Describing the methods used by its proponents to arrive at the conclusion that § 77 was a "composition statute," Mr. Leslie Craven of the New York Bar is quoted as follows: "(He) goes through the records, that is, the debates in Congress, and wherever he sees the word 'composition', he hops on it like a duck on a junebug, and then, the first thing you know—this is a composition statute." "Field Day" hearings before the I. C. C. on the construction of § 77, Nov. 16-17, 1937, Western Pacific R. R. Reorg., Finance Docket No. 10913.


was approved, and the test applied was whether the creditor would, by the composition, receive approximately as much as he would in a liquidation of his debtor.\(^{13}\)

But while the drafters of 77 and 77B (and Chapter X) employed the technique of compositions by adopting the procedural device of submission to creditors (and to stockholders if the debtor was not found to be insolvent), they substituted an entirely different test to determine the court's approval of a plan after it had received the requisite votes of security-holders. Under Section 77\(^{14}\) the court must find the plan "fair and equitable," and under 77B and Chapter X the same finding was and is required, with the added requirement of "feasibility."\(^{15}\) Thus, while the *procedural* device of submission was adopted from composition practice, the judicial *standard* by which the court was to be guided in upholding or in rejecting the plan accepted by two-thirds of the security holders was not the composition standard at all, but the standard developed by the equity courts in reorganization cases.\(^{16}\) The words "fair and equitable" import the "fixed principle" of the *Boyd case* and the Supreme Court so held in the *Los Angeles Lumber Company case*.\(^{17}\) It would have been easy for Congress to have used the words "in the best interest of creditors" (words of art for a composition),\(^{18}\) instead of the words "fair and equitable," which had acquired a fixed meaning in equity reorganization. The familiar rule is therefore applicable "that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary."\(^{19}\)

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\(^{14}\)47 STAT. 1474 (1933), 11 U. S. C. § 205 (e) (1934).


\(^{17}\)Cf. note †.


\(^{19}\)308 U. S. 106, 115 (1939).
The Boyd rule stems from the law of fraudulent conveyances\(^{19}\) and the court there held that an interest in the new company could not be given to the stockholders if a fair offer of participation had not been made to an unsecured creditor. But this applies with as great force to a non-acceptor in a 77, 77B or Chapter X proceeding as it did to Boyd. Although the non-accepting minority bondholder may be bound by a plan approved by a majority of his fellow bondholders, the plan must be a plan which is fair and equitable to him. He cannot under the statute be bound by a plan merely because (as the district and circuit judges apparently believed in the Los Angeles Lumber case)\(^{20}\) an overwhelming majority of his colleagues accepted the plan. The property of the debtor could no more be conveyed to stockholders in (constructive) fraud of the rights of the non-accepting creditors in a 77B proceeding than could Boyd’s rights be cut off in an equity receivership. In the Boyd case the court struck down a “constructively fraudulent” conveyance despite the fact that it took the form of a judicial decree and sale. In the Los Angeles Lumber case the court struck down a conveyance which was equally “constructively fraudulent” despite the fact that overwhelming majorities of bondholders and stockholders had approved the plan and the district court had affirmed it. As an equitable decree did not help the Northern Pacific in Boyd’s suit, the judge’s decree did not obscure or cure the “unfairness” of the plan by which Case would have been forced (because of the action of a majority of his fellow bondholders, acting in conjunction with stockholders) to see assets of the debtor, to which he had a claim, diverted to stockholders of the old corporation.

I

The principal asset of the Los Angeles Lumber Products Company, a holding company, was the stock of the Los Angeles Shipbuilding & Drydock Corporation engaged in ship building and ship repair work.\(^{21}\) The district court found that the company was insolvent; that the debtor’s assets were worth less than $10,000, and its holdings in the ship building subsidiary were worth approximately $830,000. Its liabilities consisted of $3,807,071.88 first lien mortgage bonds, issued in 1924,

\(^{19}\)Cf. 1 Glenn, op. cit. supra note 1 222-225.

\(^{20}\)24 F. Supp. 501 (S. D. Cal. 1938), and 100 F. (2d) 963 (C. C. A. 9th, 1939).

\(^{21}\)The Company had, in all, six subsidiaries. Three had no assets and two had assets of little value.
maturing in 1944, on which no interest had been paid since 1929. The bonds were secured by a lien on fixed assets of the ship building company and the capital stock of all the subsidiaries.

In 1930 in consummation of a management plan, by a vote of 97% of the bondholders, the trust indenture was amended so as to reduce the interest rate from 7½% to 6% and interest was made payable only if earned. The old stock was wiped out and by assessment a new Class A and Class B stock issued. Some of the old stockholders contributed $400,000 new money which was turned over to the ship building company for working capital. In consideration of this contribution the bondholders also consented to the modification so that the stockholders’ liability was released. There were outstanding at the time of the 1937 reorganization 57,788 shares of Class A stock and 5,112 shares of Class B stock.

In 1937 the Company was again in financial difficulties and, following the customary pattern, the management again proposed a plan for scaling down debt, but by which it would retain a substantial interest in the new company.

The plan proposed by the management, which was assented to by 80% of the bondholders and over 90% of the stock, prior to filing of 77B proceedings, provided that it might be consummated by contract or in 77B. The latter procedure was chosen. The plan provided for the organization of a new corporation to acquire the assets of the ship building company. The new company was to have a capitalization of 1,000,000 shares of authorized $1 par value voting stock, which was to be divided into 811,375 shares of preferred and 188,625 shares of common. The preferred stock was to be entitled to a 5% non-cumulative dividend, after which the common stock was to be entitled to a similar dividend. Thereafter shares were to participate equally. In liquidation the preferred was to receive a preference to the amount of its par value.

The bondholders were to receive under the plan 641,375 shares of preferred at the rate of 250 shares per $1,000 bond. Class A stockholders were to receive 188,625 shares of common without paying any subscription or assessment. No provision was made for the Class B stock. A total of 170,000 shares were reserved for sale to raise money.

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23 Thus, by the 1937 plan, the cycle from a 7½% secured first mortgage lien, which a bondholder bought in 1924, to an equity security was completed. While the bondholders would have obtained technical control of the new corporation, 23% of the common stock
for rehabilitation. The par value of the stock to be issued aggregated the going-concern value of the assets of the enterprise. In all, 92.81% of the bonds, 99.75% of the Class A stock and 90% of the B stock assented to the plan.

This plan, which gave 23% of the assets and voting power of the new company, to stockholders who had no equity in the old corporation, was upheld by the district court and affirmed by the circuit court as fair and equitable. It was stricken down by the Supreme Court unanimously. No dissenting voice was raised to defend the so-called composition theory which had received the support of many reorganization lawyers, several district courts and at least one circuit court since 1933.

In a clear-cut opinion, Justice Douglas cuts through many of the arguments which had grown up in the five years or more since the enactment of the amendments.

First, there are two elements involved in the approval of a plan, (1) that the requisite percentage of each class of creditors have approved it, and (2) that it is "fair and equitable." "The former is not a substitute for the latter." On this point the holding was foreshadowed in Taylor v. Standard Gas & Electric Co., where the Court reversed an order approving a 77B plan, despite the fact that the required number of the various classes of security holders had approved it.

Second, the words "fair and equitable" are words of art which acquired a fixed meaning prior to the enactment of 77B and will be held to have that meaning as used in 77B. "Fair and equitable" included the rules of law enunciated in the Howard, Monon, Boyd and Kansas was to go to the old stockholders who could, no doubt, have retained actual control because the bondholders were so widely scattered. A more perfect example of management perpetuation of control can scarcely be imagined. Thus it was "the usual squeeze play between mortgage and debtor interest." See 2 Glenn, op. cit. supra note 1064-1065.

"See note 20 supra.
"See note 20 supra.
"See note 1 supra. Justice Butler did not participate in the decision.
Railroad Company v. Howard, 7 Wall. 392 (U. S. 1868).
"See note 2 supra.
City Terminal cases.\textsuperscript{33}

In the Los Angeles Lumber case, if all the assets had been turned over to bondholders, they could have received only 25\% of their claims, and yet under the plan approved, 23\% of the value of the enterprise was given to stockholders.

Third,\textsuperscript{34} where the debtor is insolvent the stockholders’ participation must be based upon a contribution in money or money’s worth. If the stockholders’ contribution is inadequate, it is obvious that the bondholders’ rights could be easily diluted.

Fourth,\textsuperscript{35} a plan approved by the requisite number of creditors prior to filing under Section 77B will not be binding upon the reorganization court. The plan must, to be approved, be a fair and equitable plan, and the bargain made by the parties before the filing of a petition may be set aside if the plan does not meet this test. The courts are not required “to place their imprimatur on plans . . . not in accord with the standards of ‘fair and equitable’” merely because of agreements by the required percentages previously made.\textsuperscript{36}

II

THE RÔLE OF COURTS IN REORGANIZATION

The Federal District Courts have until recently shown a reluctance to take an active rôle in formulating reorganization plans.\textsuperscript{37} Under the equity practice it was long before the district courts would even consider a plan. But gradually the practice developed of submitting the plan to the court for approval before the foreclosure sale.\textsuperscript{38}

One of the purposes of the reorganization amendments to the Bankruptcy Act was to impose upon the courts an active part in formulating a plan.\textsuperscript{39} But many courts were content to adopt the supine rôle of merely registering the consent of the requisite two-thirds and binding it

\textsuperscript{33}Kansas City Terminal Ry. v. Central Union Trust Co., 271 U. S. 445 (1926).

\textsuperscript{34}308 U. S. 106, 122 (1939).

\textsuperscript{35}Id. at 114.

\textsuperscript{36}Id. at 128; cf. H. R. REP. No. 1409, 75th Cong., 1st Sess. (1937) 47, commenting on the Chandler Bill: “The Court will not be asked to put its imprimatur on a plan which comes to it only after it has already been approved by creditors and stockholders.” See Chandler Act provision apropos this subject. 52 STAT. 576 (1938), 11 U. S. C. A. § 576 (Supp. 1940).

\textsuperscript{37}Cf. Frank, supra note 13, at 541, 565-566.

\textsuperscript{38}Ibid.

\textsuperscript{39}Cf. H. R. REP. No. 1409, 75th Cong., 1st Sess. (1937), 37-38, 47.
by a decree\textsuperscript{40} and in \textit{Downtown Investment Ass’n v. Boston Metropolitan Bldg.}\textsuperscript{41} the First Circuit Court stated:

\begin{quote}
"The acceptance of a proposed plan by the parties interested is strong evidence that it is fair and feasible. . . . On such matters business men may be trusted to know where their interest lies."
\end{quote}

While the Court cautioned that this rule should be applied with "careful scrutiny", not all district courts heeded even this warning. As in the equity reorganizations, these courts were impressed by the "practical ideal," as Foster\textsuperscript{42} has termed it, a desire to get the corporation out of the court as soon as possible. In 1933 Frank,\textsuperscript{43} with shrewd foresight, predicted that the acceptance by the required two-thirds would have a tendency to impress the judge; and while there was nothing in the statute to suggest it, plans were treated by certain courts as presumptively fair although they had little to commend them except that they had been approved by the requisite number of security holders.\textsuperscript{44}

This heresy the Supreme Court happily rejected. "The court is not merely a ministerial register of the vote of the several classes of security holders"; and "all those interested in the estate are entitled to the court’s protection."\textsuperscript{45}

It is difficult to see how any one can quarrel with this branch of the case. To any one familiar with reorganizations, it must be apparent that the security holders of a corporation in reorganization are in a mood where "sales resistance" is low; their interest or dividends have stopped; they are resigned to accept anything that seems to hold out the hope of early resumption of income.\textsuperscript{46} Consequently they are fair

\textsuperscript{40}\textit{In re Syndicate Oil Co.}, C. C. H. Bankr. Serv. (2d ed.) \textsuperscript{ff} 4155, aff’d, 89 F. (2d) 1019 (4) (C. C. A. 2d, 1937); Dubois \textit{v. Consolidated Rock Products Co.}, C. C. H. Bankr. Serv. \textsuperscript{ff} 52, 118 (1939). This opinion was subsequently withdrawn after the Supreme Court’s decision in the Los Angeles case, see \textit{ibid.}, \textsuperscript{ff} 52, 553; \textit{cf. Downtown Investment Ass’n v. Boston Metropolitan Bldgs.}, 81 F. (2d) 314 (C. C. A. 1st, 1936); Jameson \textit{v. Guaranty Trust Co.}, 20 F. (2d) 808 (C. C. A. 7th, 1927). Where no issue of solvency was raised the stockholders were allowed to participate over objection. \textit{In re Atlas Brewing Co.}, C. C. H. Bankr. Serv. \textsuperscript{ff} 51, 564 (1939). In such cases the courts have shown a reluctance to leave stockholders out. \textit{In re Hopkins Lake Realty Corp.}, C. C. H. Bankr. Serv. (Decisions 1934-36) \textsuperscript{ff} 3276 (1934).

\textsuperscript{41}See note 40 \textit{supra}.

\textsuperscript{42}\textit{Foster, Conflicting Ideals for Reorganization} (1935) 44 \textit{YALE L. J.} 923, 928-929.


\textsuperscript{44}\textit{Cf. supra} note 40 and the district court decision in \textit{Los Angeles Lumber Products Co. supra} note 20.

\textsuperscript{45}308 U. S. 106, 114 (1939).

\textsuperscript{46}\textit{Cf. Foster, op. cit. note 42, Frank, supra} note 13, at 711; see Sophian \textit{v. Congress Realty Co.}, 98 F. (2d) 499, 502 (C. C. A. 8th, 1938).
game for the management which desires to continue its control. Two-thirds consent is of little significance so far as the fairness of the plan is concerned. And this is particularly so where there may be a few large holders whose claims, together with the few who may always be depended upon to "go along," approximate the required two-thirds. One result of the decision may be a greater readiness on the part of the courts to share their responsibilities by inviting the cooperation of the Securities and Exchange Commission in reporting upon the plan in those cases where such reports are discretionary. The Commission, at a time when some district courts were supinely approving plans which did not meet the "fair and equitable" standard out of deference to the overwhelming votes of security holders, was disapproving them in its advisory reports under the Chandler Act.

III

THE DEATH-KNELL OF THE "COMPOSITION THEORY"

Mr. Swanstrom's pessimism for the future of reorganizations because of the Los Angeles decision is only slightly less deep than that which pervaded certain members of the reorganization bar after the Boyd decision. "Some of the implications of the opinion," wrote Mr. Swanstrom, "may result in restricting the statute in many cases to serving as mere mechanics for liquidation." This view I do not share. In those cases where the rule laid down by Justice Douglas results in liquidation, it will very likely achieve a good economic result, for Congress certainly did not intend that "corporate cripples should be given crutches to limp about" as a constant menace to investors.

But in the great majority of cases, the opposite result will be achieved.


49See note 40, supra.


52Ibid.

If stockholders know in advance that the *Boyd* rule is the "law of the land" and applicable to reorganizations under the new amendments, much delay in reorganization will be avoided. It will be to the advantage of creditors to insist upon a valuation of the debtor based upon earnings and if this shows that the enterprise is insolvent, a finding should be made that creditors and stockholders whose claims have no value may not participate under the plan. If the finding is supported by substantial evidence it should be sustained on appeal. This should not increase delay but lessen it because lengthy negotiations with the stockholders as to the basis of their participation will be avoided.

Mr. Swanstrom (apparently) believes that the Court failed to give sufficient weight to the statutory provision that the plan must not only be "fair and equitable" but also "feasible" and he would construe "feasible" so as to relax the meaning of the "fair and equitable" standard of the *Boyd case*. With this argument I cannot agree. While "fair and equitable" refers to the standard to be approximated as between security-holders, "feasibility" relates to the capital structure of the new corporate enterprise. Will the proposed capital structure enable the reorganized enterprise to operate profitably? Does evidence of estimated future earnings indicate that they will be sufficient to cover fixed charges? Can new money be obtained on reasonable terms? Are the provisions of the plan adequate to insure good management? This is the view of "feasibility" taken by Finletter and applied consistently by the Securities and Exchange Commission in its advisory reports under the Chandler Act.

"Feasibility" does not relate directly to participation except in the very rare cases where the stock is held by a distinct personality and the old enterprise was developed by him and he is needed in the new one. Adequate management to satisfy the feasibility requirement can be obtained without necessarily giving management participation.

In the exceptional cases, the reorganization court, under the *Los Angeles Lumber* rule, has ample discretion to find a true "money's worth" contribution. But in the average run of cases, the claims of stock-

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57 FINLETTER, LAW OF BANKRUPTCY REORGANIZATION (1939) 589.
holders to expert knowledge indispensable to the new enterprise may (it is believed) be considerably discounted and should be critically examined.60 Granted a sound structure, the corporation can obtain talent—in many cases the old management itself—on a salary basis; if indeed the old management should be re-employed, the corporation having arrived at the reorganization point under its guidance.

Mr. Swanstrom’s suggestion61 that “the several metropolitan centers produce their own peculiar problems and develop their own individual solutions to such problems,” if followed, I believe, would result in a bond being one thing in Boston and another in New York, as indeed was the situation when the first circuit62 adhered to the composition theory and the second63 to the Boyd doctrine. Such particularism is not in accord with principles of American jurisprudence in any other field of law, and such differences as exist between certain sections of the country can hardly justify such a result, particularly where a uniform rule of nation-wide application is a *sine qua non* to determining the legal rights of investors.34

A thoughtful pondering of the Supreme Court’s decision in *In re 620 Church Street Corporation*65 in 1936 might have led reorganization counsel to view it as “handwriting on the wall” blighting in advance the hopes of the composition school. In this short opinion Chief Justice Hughes dealt with a plan which gave no securities in the reorganized company to the stockholders or to the second and third mortgage bondholders. The district court had affirmed the plan and the circuit court denied the stockholders and second and third mortgage bondholders leave to appeal. Certiorari was granted. After pointing out that the district court had found the corporation hopelessly insolvent (assets $245,025.00 and $445,500.00 first mortgage bonds outstanding) and that the claims of the petitioners had no value, said:66

“Petitioners insist that this consent to the plan of reorganization was neces-

60Ibid.
63*In re* Day & Meyer, Murray & Young, 93 F. (2d) 657 (C. C. A. 2d, 1938).
64A New York investor should not have to guess at his rights in reorganization merely because his bond is of a Massachusetts company.
65299 U. S. 24 (1936).
66Id. at 27.
sary or that their claims should have been accorded 'adequate protection'. But adequate protection to which the statute refers is 'for the realization of the value of the interests, claims or liens' affected. Here the controlling finding is not only that there was no equity in the property above the first mortgage but that petitioner's claims were appraised by the court as having no value. There was no value to be protected."

It would seem that this was a holding that if a district court found that the assets of the debtor were insufficient to satisfy the first mortgage, junior creditors and stockholders were not entitled to participate in the plan. But the ingenuity of those seeking to whittle away the Boyd doctrine is limitless! Prominent "equity" counsel took the position that merely held that the plan need not be submitted to security holders whose claims were valueless; they still had a right to participate in a plan!⁶⁷

IV

WHEN MAY "NON-ENTITLED" CLASSES PARTICIPATE IN THE PLAN?

Finletter⁶⁸ uses the expression "non-entitled" classes to indicate junior creditors or stockholders whose claims, based upon a valuation of the debtor as a going concern, are valueless. In what circumstances may "non-entitled" classes retain an interest in the enterprise? For note that the Los Angeles case does not say that they may not participate;⁶⁹ it sets the limits within which they may participate and those limits are narrow. What are they?

"Stockholder's participation must be based on a contribution in money or money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder."⁷⁰

There can be little debate as to the meaning of a contribution of "money." If the stockholders pay an assessment, make a cash contribution, they may participate; provided, and this should not be overlooked, a plan which includes stockholders in this manner meets the test of feasibility—that the price paid for the stock approximates its book value; that working capital is needed for the new enterprise and that there is no dilution.⁷¹ The statutory requirement of feasibility

⁶⁷Loc. cit. supra note 10; cf. supra note 5, at 1357.
⁶⁸Finletter, Principles of Corporate Reorganization (1937) 418-420.
⁷⁰Ibid.
⁷¹Cf. notes 57 and 58 supra.
makes warrants for the stockholders to subscribe impracticable if their issuance tends to over-capitalization.\textsuperscript{72}

As to the meaning of "a contribution of money's worth," however, there is the possibility of disagreement. But the opinion in the Los Angeles case does not leave the meaning ambiguous. To make doubly clear what it meant, the Court condemned the "contributions" allegedly made by stockholders under the Los Angeles Lumber plan as "illustrative of a host of intangibles" which, if recognized, "would serve as easy evasions" of the Boyd rule.\textsuperscript{73} An additional test implied by the Court's opinion is: \textit{Do the alleged contributions of stockholders have a place in the asset column of the balance sheet of the new company, or are they merely vague hopes or possibilities?}\textsuperscript{74} The talent of an inventive genius, the formula of a secret process, owned by a stockholder of which the new company might be deprived without his participation, might conceivably constitute a "money's worth" contribution by this test; not, however, such vague generalities as "the financial standing and influence in the community" of the stockholders and "the desirability of continuity of management." Properly condemned also was the argument that the stockholders should be included in the plan because of the district court's finding that if the bondholders foreclosed now they would receive "substantially less than the present appraised value" of the debtor's assets. The answer\textsuperscript{75} of the Supreme Court was unequivocal:

"To hold that in a 77B reorganization creditors of a hopelessly insolvent debtor may be forced to share the already insufficient assets with stockholders because apart from rehabilitation under that section they would suffer a worse fate would disregard the standards of 'fair and equitable'.”

The surrender by the stockholders of the right to remain in control (which accrued from the amendment of the trust indenture precluding the right to foreclose until 1944) was no consideration, the court held,\textsuperscript{76} for the dilution of the bondholders' priorities. Neither was the avoidance of litigation a "consideration."\textsuperscript{77}

It probably is too much to hope that this decision will permanently

\textsuperscript{73}See note 69 supra.
\textsuperscript{74}Ibid.
\textsuperscript{75}308 U. S. 106, 124 (1939).
\textsuperscript{76}Id. at 124-129.
\textsuperscript{77}Id. at 129.
lay to rest attempted evasions of the *Boyd* doctrine. It should, however, result in uniformity of decision where conflict previously had been the rule. Compromises must invariably be worked out in special circumstances but they must be based upon substantial concessions, as illustrated by Justice Douglas in his opinion. Those who have contributed "risk" capital to an enterprise must be willing to take the risks inherent in a position which also holds forth the hope of profits. A lienor or creditor, on the other hand, is entitled to the assurance that his lien or claim will be satisfied in reorganization so far as possible under the *Boyd* doctrine. Otherwise the sale of a bond becomes a fraud and deception to investors who buy it in reliance upon its expressed terms and the debtor's promise, secured or unsecured, to pay. If the Supreme Court had not upheld the strict priority theory, it would have been pertinent to consider whether the principle of fair marketing of securities would not have required the putting of a "red-herring" across every bond, to wit, "In the event of reorganization, the within terms may, or may not, mean what they say."

Avoidance of litigation, doubtful claims of stockholders to "financial standing in the community" and the like are not "contributions of money's worth"; they have no place on the asset side of the balance sheet of the reorganized company and only such contributions can constitute consideration for the participation of "non-entitled" classes in the reorganization.

V

VALUATION TO DETERMINE PARTICIPATION

It has been suggested that one of the results of this decision will be to lay a greater emphasis on valuation in reorganization proceedings.78 But this seems only partly true. It has been essential from the outset to value the assets of the debtor to determine whether the plan need be submitted to certain classes of security-holders.79 Rather the decision goes far to clarify the entire problem of participation. If a valuation indicates that there are insufficient assets to satisfy senior lienors, the only basis upon which juniors may participate is by a cash or equivalent contribution. Thus is eliminated the factor which has plagued and prolonged many reorganization proceedings, namely, the necessity80 of deal-

78(1940) 53 Harv. L. Rev. 485.
ing with the "non-entitled" classes because of their nuisance value. The only recourse now of such classes is an appeal from a district court's finding of no value for their claims. The Boyd doctrine, as a rule of equity, is a rule of fairness. Historically it operated independently of value. "In its pristine freshness" it merely required that if any interest was preserved to stockholders the intermediate creditors must first be satisfied in full. The "value concept" is introduced by Section 77 and Chapter X. Valuation was an inevitable corollary of placing greater responsibility on the court in the consummation of a plan. In order to work out a plan, both "fair and equitable," and "feasible," a valuation of the debtor is unavoidable. It was also a logical concomitant of public realization that corporate cripples were a menace to the national economy; that a sound financial structure must be limited by a fair valuation of the assets; and that the place to achieve this aim most effectively was at the point where corporations start afresh—in the reorganization court. This was apparently one reason why in Chapter X greater duties were imposed on the reorganization court and advisory reports by the Securities and Exchange Commission were provided for. To that extent 77, 77B and Chapter X add to the Boyd doctrine (which traditionally disregarded value and emphasized fairness) the value concept. But it was inevitable that the concept of fairness and the concept of value should coalesce into a single standard of "fair and equitable"—a result apparently sensed by Justice Holmes only a few years after the Boyd decision in the Kansas City Southern case. The evolution of the Boyd doctrine to include a value element is completed (aided by statute to be sure) in the Los Angeles Lumber Co. decision of Justice Douglas. Perhaps this is its chief significance.

83See note 4 supra.
82Cf. Rostow and Cutler, supra note 5, at 1336 and 1346 where are quoted excerpts from addresses by Abe Fortas, former assistant director of the Public Utilities Division, S. E. C. (July 14, 1938) and of Samuel O. Clark, Jr., director of the Reorganization Division, S. E. C. (Jan. 5, 1939); see H. R. REP. No. 1409, 76th Cong., 1st Sess. (1937) 44-45.
84Cf. note 48, supra.
It may be observed that modern Anglo-American law tends to become statutory by piecemeal, and that, moreover, the increase in enacted law has not been solely nor mainly in response to a Benthamist urge to codify. A newly active state, with a broadening concept of the functions and aims of government, has promoted legislation reciting policies, creating agencies, conferring powers, inventing rights and duties, which read oddly to those bred in the common law tradition. So, not merely as a narrow legal problem, but also as a phase of this larger growth, it is of interest to inquire when and to what extent a failure to observe a standard of care imposed by statute will give rise to an action for damages at the instance of one aggrieved. What follows is an attempt to ascertain the nature of statutory duties of care in modern English law, and to consider the consequences which may be expected to flow in law from a breach thereof. It will be necessary also to canvass the propriety of the term "statutory negligence" which Lord Wright has recently used to describe such a breach, and to determine to what extent statutory negligence, if it be properly so-called, stands apart from negligence at common law.

The problem is, of course, one of interpretation, of discovering the sententia legis, the real meaning of the law in question. This way of stating the interpreter's function suggests that it is more nearly an art than a science, and indeed decided questions on this subject have provided convincing material for more than one legal realist. Certainly the complete meaning of a statute can rarely be discovered by an application of the now paramount literal canon of interpretation. The writer has elsewhere expressed an opinion favoring a close application by the courts of the literal canon within its proper sphere, on the footing that the litera

*A.B., the University of Toronto (1928); LL.B. University of Saskatchewan (1932); B.A. Oxford University (1934); Lecturer in Law at the University of Toronto (1935-1936); Professor of Law University of Saskatchewan; Author: Administrative Justice in Canada (1939) 17 Can. B. Rev. 619; The American Law Institute's Restatement of Restitution (1939) 3 U. of Toronto L. J. 140; Statutory Interpretation of Legal Terms (1937) 2 Sask. B. Rev. 53; The Literal Canon and the Golden Rule (1937) 15 Can. B. Rev. 689; and numerous other articles and reviews in various legal periodicals.

1 This is a treatment of the English authorities exclusively. For "statutory negligence" in the United States, the reader is referred to Restatement, Torts (1934) §§ 285-288.

legis, so far as they go, provide the best clue to the sententia legis. Yet no cloak of Latin can veil the fact that the sphere of literalness is of strictly limited circumference. Shortcomings of language, and of those who must employ language, render clarity and exhaustiveness in exposition uncommon, so that usually literal-grammatical construction can carry the expositor only a short distance.

That literalness is far from a universal solvent is evident in the case of statutes imposing duties of care, where it deserts the inquirer at the very threshold of the central problems. True, the scope of the duty is often set forth with sufficient nicety to allow the literal canon to determine the quantum of care to be taken and to discover upon whom and in favour of whom the duty is imposed. But statutory duties are not always imposed in terms; powers are often conferred upon statutory creatures without mention of duties and then these, if any, remain to be implied. Again, statutes often stop short with the bare record that a certain standard of care is to be taken, so that the initial question as to whether or not an action for damages will lie must depend upon considerations extrinsic to the statute. Nor are statutes normally eloquent as to the defences available in answer to a claim for damages, if such a claim is expressly or impliedly conferred. Typically, much is left to be read into the statute by the judge, and it is in this work of perfecting the statute that we are here primarily interested.

It was in the middle years of the nineteenth century that English judges, eager to confess a subordinate position among governmental agencies, finally asserted the supremacy of literal-grammatical construction; to Lord Halsbury, any tampering with the plain words of a statute was in derogation of Parliamentary sovereignty. This profession of humility was a far cry from the so called “free interpretation” of Plowden and Coke, and yet judicial sovereignty in interpretation was not seriously impaired. As remarked above, literalness assumes clarity—such limpid clarity, in one judge’s phrase, as one reading in bad faith could not becloud—and moreover so faint is the line between clarity and obscurity that often only the ipse dixit of a judge can stop forensic arguments on the point. This is merely to say with Maxwell that most problems lie within the ‘province of obscurity,’ where doubts must be resolved, gaps filled, and inconsis-

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4 Maxwell, On The Interpretation of Statutes (8th ed. 1937) 2.
tendencies removed, and that it is in this broad expanse that we must search for the nature of modern statutory duties of care as judicially conceived.

Modern writers are in complete agreement as to the proper judicial attitude in case of doubt; obscurities, it is said, should be resolved in the manner best calculated to promote the object of the legislation. This position has long received statutory recognition, and was moreover the early teaching of *Heydon's case*, in which Coke, C. J., asserted that all statutes should be interpreted *pro bono publico* so as to “suppress the mischief and advance the remedy” contemplated by the statute. It is apparent that this theory would have accorded with the protestations of judicial subordinacy heard throughout the last century, and yet, save in a limited class of statutes described as “remedial,” judges systematically resolved all doubts in favor of the rules of common law, and especially of those basic principles or ideals of government upon which as Dicey has demonstrated the superstructure of those rules was largely erected. Such an approach, despite lip-homage paid to literalness, resulted before the close of the century in an undeclared war of attitudes between court and legislature. Mr. Justice Holmes struck a clear note when he observed that if legislation reflects the policy of yesterday, adjudication reflects the policy of the day before yesterday. In any case Parliament from before the middle of the century had begun to pass statutes whose collectivist aims were unmistakable, and as that movement progressed—it is concisely outlined in Dicey’s *Law and Opinion in England During the Nineteenth Century* the clash of objectives referred to was accentuated. As Professor Jennings has shown, the common law assumed a police state dedicated to the preservation of social order, and whereas the state was becoming increasingly a service state moving in the direction of social duty and responsibility, the courts continued to interpret statutes with a pronounced common law bias in favor of private right and interest.

Whenever rights of property, contract, personal freedom from restraint, or of access to the courts appeared to be threatened directly or obliquely

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7 Jennings, *Law and The Constitution* (1933) 263: "The truth is that Dicey was again emphasizing the individualistic theories of the nineteenth century Whigs. Law for them consisted of rules limiting the freedom of action of individuals. . . . That theory has disappeared and the main function of administrative authorities is to provide social services."
(as they increasingly were) by the phraseology of the legislation, the individual adversely affected was regularly accorded the benefit of the first doubt which arose from literal-grammatical construction. Nor did this strong conceptualism stop short at the frontiers of literalness. To the consternation of lexicographers, it was held that "or" not only can but usually will mean "and" when used in penal or taxing statutes, and that "may," whose permissive connotation is clear to the ordinary reader, will be given an imperative sense if otherwise an apprehended right of the kind protected at common law would be adversely affected. Persons were freely permitted to contract out of statutory provisions inserted for their benefit; nor need the reader be reminded that the requirement of a mens rea was read into penal statutes save where its exclusion was clearly provided for. Moreover, it was held that if a statutory power could not be exercised without the commission of what would otherwise constitute a private nuisance it could not be exercised at all.

It is not surprising to find this general conflict of attitudes producing important effects in the special field of statutory duty which we started out to examine. In accordance with the collectivist trend, legislation such as that contained in the Factory and Public Health Acts imposed upon individuals for the better protection of certain groups in society duties of care the stringent character of which was evident not only from the broad language used but from the apparent object of the legislation. Yet the courts approached the problem of interpretation presented by the formulation of these duties with the strongest presumption that they were "intended by the legislature"—bemusing phrase—as similar in substance and effect to those duties of care which in an earlier and different atmosphere had been imposed by the common law. Statutory negligence, that is to say, was assimilated in its various phases to negligence at common

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9For a treatment of the problem of "contracting out" in relation to statutory duties, see Laskin, The Protection Of Interests By Statute And The Problem Of Contracting Out (1938) 16 CAN. B. REV. 669.
10It was only recently that Stallybrass was able to write of The Eclipse of Mens Rea (1936) 52 L. Q. REV. 60.
12Public Health Act, 1925, 15 & 16 GEO. V, c. 71.
13Factory and Workshop Act, 1907, 7 Edw. VII, c. 39.
law. The action for breach of statutory duty of care was, that is to say, treated as identical with modern "independent tort negligence," which, as Professor Winfield\textsuperscript{12} has demonstrated, was an outgrowth of the common law action on the case for negligence, the main constituents of which were settled during the first half of the last century. These constituents were (1) \textit{in limine}, a special duty of care owing from the defendant to the plaintiff, (2) a failure by the defendant to exercise the care of a reasonably prudent man in his relation to the plaintiff, and (3) perceptible damage to the plaintiff arising out of and attributable in law to a failure on the part of the defendant to exercise that degree of care. As Mr. Justice Holmes shows in his \textit{Common Law}, this particular tort rested upon an idea of individual moral culpability, though the moral fault required to be shown was necessarily objectivized and standardized to meet legalistic requirements.\textsuperscript{13} Accordingly, the defendant could escape liability by demonstrating that he had exercised due care under the circumstances, that the effective cause of the harm arose \textit{ab extra}, or that the plaintiff was the substantial author of his own hurt in that he (the plaintiff) had knowingly incurred the risk, or by his own inadvertence had contributed to the injury.

Three type cases of the latter half of the last century may serve to reveal the manner in which statutory negligence was identified with common law negligence as above described. Section twenty-two of the Regulation of Railways Act, 1868,\textsuperscript{13a} provides that,

\begin{quote}
"... every company shall provide and maintain in good working order a means of communication between passengers and servants."
\end{quote}

In \textit{Blamires v. Lancashire and Yorkshire Railway Company},\textsuperscript{14} the plaintiff brought an action for damages suffered, as he alleged, through a failure on the part of the defendant company to observe the above statutory duty. In the course of his judgment Brett J. said, \textit{inter alia},

\begin{quote}
"This is an action for negligence and the plaintiff is bound to prove that the railway company have been guilty of doing something which a railway company of ordinary care would not do, or omitting to do something which a railway company of ordinary care. ... It is right to use the Act as some evidence of what is due and ordinary care under the circumstances."\textsuperscript{15} (Italics supplied.)
\end{quote}

\textsuperscript{13}Holmes, \textit{Common Law} (1881) 108.
\textsuperscript{13a}31 & 32 Vict., c. 119 (1868).
\textsuperscript{14}L. R. 8 Ex. 283 (1873).
\textsuperscript{15}Id. at 288.
The language of the statute was absolute, but to the court, it merely afforded some material evidence as to what might constitute due care under the circumstances. In point of fact, in *Blamires case*, the court attached considerably more weight to the fact that it had been shown to be the custom for most railway companies actually to maintain a satisfactory means of communication than to the circumstance that the Company was required by statute to take that specific precaution.

In the next year, 1874, the legal effect of a corresponding statutory provision fell to be considered in *Hammond v. St. Pancras*. The Metropolis Act of 1855, section seventy-two provides that,

> "... every vestry and district board shall cause the sewers vested in them to be constructed, covered and kept so as not to be a nuisance or injurious to health and to be properly cleared, cleansed and emptied."

The plaintiff was an occupier within the defendant's district, and he brought an action for damages suffered through the flooding of his premises. The jury found that the flooding had been caused by a stopped sewer within the defendant's district, but also found that there was no lack of reasonable care on the part of the defendant in failing to keep the sewer cleansed, and that, indeed, the particular obstruction in question was not known to the defendant until after the injury complained of has occurred. The Court of Common Pleas was quite clear that no action lay in the circumstances. Brett J. said:

> "... the sewer may be obstructed though all care may be taken. It is contrary to what may be called our ideas of natural justice that the legislature should oblige the defendant to give compensation for damage which he has been unable to prevent. No doubt it is within the powers of Parliament to make the defendant responsible for the overflow of a sewer caused by an obstruction which he could not foresee; but I am entirely of the opinion that, in order to create a liability so extensive, clear language must be employed."

It is not easy to perceive how the language could be more explicit without an express statement to the effect that the statutory duty was absolute, yet the court imported a common law standard of reasonable care into the statute, citing as a parent reason the manifest justice of the rules surrounding negligence at common law.

The third case to be noted deals with an analogous though somewhat

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16 L. R. 9 C. P. 316, 43 L. J. C. P. 157 (1874).
16b 14 & 15 Vict., c. 28 (1855).
17 L. R. 9 C. P. 316, 318, 43 L. J. C. P. 157, 159 (1874).
different statutory situation. Suppose a statute creates a body and
endows it with substantial powers without special mention of duties of
care—is any obligation to take care to be implied? Here again is a
question of interpretation, albeit in which the wording of the statute can
be of small assistance, and even in such a case, as Blackburn J. said in
1866 (presenting the opinion of the judges to the House of Lords in
Mersey Docks Trustees v. Gibbs) the court will presume in the absence
of a contrary intention expressed in the statute, that such a body is subject
to the responsibilities attaching to ordinary persons at common law, in-
cluding *inter alia* the duty of reasonable care towards those who may be
adversely affected by the exercise of its statutory powers. The strong
conceptualism of the period, and the almost mystical attachment of judges
to the principles of the common law, is reflected in the language of
Blackburn, J.:

“[These enactments seem to us to show that the legislature did not intend
to take away any liability of the trustees which would otherwise have been cast
upon them by the ordinary law, though we should not willingly infer from them
that it was intended to impose any liability beyond that which would be imposed
by the common law.]”

Similarly, throughout this period the common law defences mentioned
earlier were available in answer to any claim for negligence arising out of
the breach of a statutory duty of care. Section twenty-one of the Factory
Act of 1844 provided that,

“... all parts of the mill gearing in a factory shall be securely fenced and the
fencing shall not be removed while the machinery is in motion.”

In *Caswell v. Worth,* decided under this statute in 1856, the defendant
had failed to observe his duty to provide fencing, but evidence was given
to the effect that the plaintiff had himself set the machinery in motion. The Court held that although the defendant was in breach of the statute,
the plaintiff was disentitled to recover on two ground s, first, that he had
been guilty of negligence contributing to the accident, and second, that
he had so voluntarily undertaken the risk as to render the defence of
*volenti non fit injuria* available. The language of Coleridge J. in that
case was unmistakable: “The action must be subject to the rules of

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20 Id. at 109.
19a 7 & 8 Vict., c. 15, § 21 (1844).
common law.” The reasoning of this case was approved in 1872, in *Britton v. Great West Cotton Company,*\(^{21}\) although Channel J. there expressed some doubt as to whether the plaintiff in *Caswell v. Worth*\(^{21a}\) had really been guilty of negligence contributing to the accident, or if he had knowingly incurred the risk. Similarly, in the next year, 1873, it was held that the common law defence of common employment as outlined in *Priestly v. Fowler,*\(^{21b}\) was available in answer to a claim for the breach of a statutory duty; per Blackburn J. in *Howells v. Landore Steel Company.*\(^{22}\)

This conceptual approach did not last out the century. It is true that *Mersey Docks v. Gibbs* remains today a leading case on the interpretation of statutes and in administrative law, and that, when a statute is silent as to the standard of care imposed it is presumed that the “reasonable care” of the common law was intended.\(^{23}\) But the attitude of the courts towards statutes which impose duties of care in absolute language—at any rate towards such of them as have not already been authoritatively interpreted—has undergone a substantial change in the last fifty years. In *Groves v. Lord Wimborne,*\(^{24}\) decided in 1898, the court of appeal had to consider the effect of section five of the Factory and Workshop Act of 1878\(^{24a}\) as amended by the Act of 1891,\(^{24b}\) which required all dangerous machinery to be adequately fenced, and the fencing to be constantly maintained in an effective state. The court was of opinion that an action lay for breach of such a statutory duty whether or not the defendant had exercised “reasonable care under the circumstances.” As Rigby, J., expressed it:

> “Where an absolute duty is imposed upon a person by statute it is not necessary in order to make him liable for the breach of that duty to show negligence. Whether there be negligence or not, he is responsible *quacunque via* for non-performance of the duty. . . . The cause of action relied on in the present case has nothing to do with negligence.”\(^{25}\)

Again, in 1905, in *Bett v. Dalmeny Oil Company,*\(^{26}\) the plaintiff succeeded

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\(^{21}\) L. R. 7 Ex. 130 (1872).


\(^{21b}\) 3 M. & W. 1, 150 Eng. Rep. R. 1030 (Ex. 1837).

\(^{22}\) L. R. 10 Q. B. 402 (1874).


\(^{24}\) [1891] 2 Q. B. 402 (C. A.).

\(^{24a}\) 41 & 42 Vict., c. 16, § 5 (4) (1878).

\(^{24b}\) Id. at 412.

\(^{25}\) [1905] 7 F. 787, 790.
for breach of a statutory duty of support, even though it had not been shown that the defendant had failed to exercise reasonable care in the matter, and Lord McLaren said:

"The duty is not merely to provide a competent underground manager and to supply him with material for supporting the roof of the mine where necessary. The statutory duty of the mine owner is to give necessary support to the roof, and in my opinion it is not an answer to a case of neglect of that duty to say that the employer had delegated the performance of the duty to a competent manager."

The above passage was quoted with approval by Lord Shaw in *Butler v. Fife Coal Company*,27 in 1912.

This newer position has since been consolidated in two cases before the House of Lords, both of which ruled against importing into statutory duties couched in absolute language any common law limitation of reasonableness. In *Watkins v. Naval Colliery Limited*,28 decided in 1912, the wording of the Coal Mines Act of 1887, section sixteen, came under review:

"Proper apparatus for raising and lowering persons at each shaft shall be kept on the works belonging to the mine and shall be constantly available for use."28a

The similarity of this language to that of early statutes which had been construed as imposing a common law duty of care is apparent, but Viscount Haldane said:

"It is not disputed that this is a provision for the benefit of the workman and that if it is broken he may therefore, if he can prove damage, succeed in an action. The real question is whether it imposes an absolute obligation to the allegation of breach of which it is no answer that the colliery company have not been personally negligent."28b

At the present time the governing case is that of *Lochgelly Iron and Coal Company Limited v. M'Mullan*,29 which came before the House in 1934 on a Scotch appeal. The pursuer there averred that in breach of the forty-ninth section of the Coal Mines Act of 191129a (which provides

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27[1912] A. C. 149, 150.
28a 50 & 51 Vict., c. 58, § 21 (1887).
29a 10 Edw. VII, c. 15, § 49 (1910); 1 & 2 Geo. V, c. 50 § 49 (1911).
that the roof of every working place ("shall be made secure") his son was ordered to work in a place with an insecure roof which fell upon him while at work. It was held by the law Lords that the facts disclosed actionable negligence on the part of the defendants.

In M'Mullan's case, Lord Atkin said, in what is now a famous passage:

"All that it is necessary to show is a duty to take care to avoid injuring, and if the particular care to be taken is prescribed by statute and the duty to the injured person to take care is likewise imposed by statute, and the breach is proved, all the essentials of negligence are present. I cannot think that the true position is, as appears to be suggested, that in such cases negligence only exists where the tribunal of fact agrees with the legislature that the precaution is one that ought to be taken. The very object of the legislation is to put that particular precaution beyond controversy." 30

Lord Wright added in the same case:

"In such a case as the present the liability is something which goes beyond and is on a different plane from the liability for breach of duty under the ordinary law apart from statute because not only is the duty one which cannot be delegated but whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute. But the duty is the same in kind in this respect, that it is a duty to take care which is owed to the workmen; . . . and which if broken constitutes negligent conduct for which if damage ensues to the workman affected, damages are recoverable. Hence the breach of such a duty as that in question has been, I think, correctly described as statutory negligence." 31

That the action for breach of a statutory duty of care "goes beyond and is on a different plane" from common negligence is illustrated inter alia by the defences available. All that is necessary to be shown, as Lord Atkin said, is damage flowing from the breach of the statutory duty, and so several of the common law defences are excluded. If the accident is unconnected with the breach of statute there is of course no liability—the breach by a motorist of a statutory duty to have a red light on the rear of his motor car would be no ground for an action for damages by a person who collided with the front of his car. 32 But it is now clear that the doctrine of common employment is no longer a defence to such an action, on the basis, as Talbot J., said in Wheeler v. New Merton Board Mills, 33 that,

30 Id. at 9.
31 Id. at 23.
33 [1933] 2 K. B. 669, 673.
"... there being an absolute duty on the employer, he cannot throw responsibility for failure to perform it on another."

Similarly, it was held as long ago as 1887, in Baddeley v. Granville,\(^{34}\) that the maxim "volenti non fit injuria" provides no defence, because the maxim only applies when there is an agreement between the parties, and it is not open today to an employer to contract out of a statutory duty he owes to his workman; thus, a fortiori, while a contract is an answer to a claim for common law negligence, it is no answer to a claim for statutory negligence. On a pure basis of causation, it had not been doubted until recently that contributory negligence was a defence to such an action, but the point is still open;\(^{35}\) moreover, it has been suggested by Lord Wright that mere failure to take reasonable care ought not to preclude a plaintiff from recovery unless it is coupled with such misconduct as disobedience to express orders; in other words, unless it amounted to gross negligence.\(^{36}\)

Then, is the term "statutory negligence" apt to describe a failure to observe a statutory duty of care? That this is the prevailing view of English law cannot be doubted, since under the peculiar provisions of the statute under review in *M’Mullan’s case* it was vital to the decision to decide whether or not the failure to observe the statutory duty was properly described as "personal negligence." Section twenty-nine of the Workmen’s Compensation Act provided that,  

"... the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment ... independently of this Act except in case of such personal negligence or wilful act as aforesaid."\(^{36*}\)

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\(^{34}\) 19 Q. B. D. 423 (1887).  
\(^{35}\) In Flower v. Ebb Vale Steel Co., [1934] 2 K. B. 132 (C. A.), the Court of Appeal held that contributory negligence was a defence in law to a claim for breach of a statutory duty, but on appeal to the House of Lords, [1936] A. C. 206, it was held that the only contributory negligence which had been alleged was a disobedience to orders, and that the evidence at the trial was insufficient to prove that the alleged orders were ever given. Thus it was not necessary for the House to decide on the legal question as to whether contributory negligence constituted a defence, Lord Wright saying, *supra* at 210, "It seems to me better to reserve its consideration for another occasion."  
\(^{36*}\) 15 & 16 GEO. V, c. 84, § 29 (1925).
Lord Wright and the other law Lords sitting in the case were of opinion that such a breach was properly described as personal negligence, and indeed it would seem that the failure to observe a statutory precaution is a species of the genus negligence. As has been said, it is not identical with common law negligence; the standard of care is more stringent than the standard of reasonable conduct required at common law, and the whole cause of action is less affected by notions of moral culpability. Yet the common law has not sufficient magic to define culpable negligence for all time to come. The essence of the statutory wrong for which damages are claimed is that the defendant by failing to take a specific precaution has occasioned harm to the plaintiff, and although subjective considerations are ruled out—moral blameworthiness being immaterial—and the objective standard of care required to be shown is more severe, the description "statutory negligence" seems accurate enough. Moreover, since a duty of care is involved, the description would separate "statutory negligence" from a statutory obligation to pay a sum of money in the nature of a penalty, and from a statutory liability (such as was discussed in *The Mostyn*), which is imposed independently of any duty of care whatever.

A few words may be permitted in conclusion. The new approach of the courts to statutes imposing duties of care, and the emergence of the nominate tort of statutory negligence is, it is submitted, sound interpretation, since legislatures by the employment of absolute language clearly contemplate a responsibility more stringent than that traditionally imposed by the ordinary law. But it is more than sound interpretation. On the one hand it evinces a willingness on the part of judges to co-operate with law-makers in the effectuating of statutes designed to achieve concrete social results. On the other, it harmonizes with the general movement of English law away from individual moral fault, with which much of the common law was associated, and towards social responsibility, as the basis for compensation. This movement has been reflected in the

[37]Lochgelly Iron & Coal Co., Ltd. v. M'Mullan, [1934] A. C. 1, 25. "In strict legal analysis, negligence means more that heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing: on all this the liability depends, and if this liability is attached by law formally to the employer, as happens in the case of a breach of the statutory duty, the whole position is I apprehend correctly described as 'personal negligence of the employer'."

[38] [1928] A. C. 57.
collectivist legislation constantly appearing on the statute-book, in the increasing projection of the law of torts along an amoral plane, in the extension of vicarious responsibilities, and in the law of interpretation itself. In the face of this development, the presumption favouring the *status quo ante* has lost much of its former force, and the courts are now happily less eager to stretch statutes upon the rack of the common law.
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Harold Gill Reuschlein, Faculty Advisor
A comprehensive opinion delivered by Mr. Justice Douglas, the Supreme Court, in *Sunshine Anthracite Coal Co. v. Adkins*,\(^1\) sustained the constitutionality of the Bituminous Coal Act of 1937,\(^2\) on all points challenged.

That Act provides for the regulation of the sale and distribution of bituminous coal in, or directly affecting, interstate commerce, through the medium of minimum price-fixing and elimination of unfair competition, by the National Bituminous Coal Commission.\(^3\) The Act is the successor to the Bituminous Coal Conservation Act of 1935,\(^4\) which was held unconstitutional by virtue of its labor provisions, in *Carter v. Carter Coal Co.*\(^5\) In many respects the present Act is an answer by Congress to the psychoanalysis indulged in by a majority of the Court in invalidating the regulatory provisions of the earlier Act in their entirety, in spite of the separability clause written into the Act by Congress.\(^6\)

The Court’s opinion in the present case represents a realistic approach in terms of present day needs, to the scope of the commerce clause and to the powers vested in the federal government to deal directly with forces which may dislocate an important segment of our national economy, and with which the states individually are powerless to cope. The Court recognizes that “... there are limits on the powers of the states to act as respects certain interstate industries,”\(^7\) and takes occasion to deny specifically the existence of a no man’s land between the state and federal domains. In sustaining the establishment of minimum prices as a proper exercise of the power to regulate interstate commerce, the Court

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\(^1\) 310 U. S. 381 (1940).
\(^3\) The functions of the Commission have been administered since July 1, 1939 by the Bituminous Coal Division of the Department of the Interior. Reorganization Plan No. 2, § 4 (a) and (b), submitted by the President to the Congress May 9, 1939, Pub. Res. No. 20, 76th Cong., 1st Sess. (1939) c. 193, approved June 7, 1939.
\(^5\) 298 U. S. 238 (1936).
\(^6\) Id. at 321, Hughes, C. J., dissenting, “I do not think that the question of separability should be determined by trying to imagine what Congress would have done if certain provisions found to be invalid were excised. That, if taken broadly, would lead us into a realm of pure speculation.”
\(^7\) Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 396 (1940).
quotes with approval the words of Mr. Justice Cardozo, dissenting, in *Carter v. Carter Coal Co.*, "To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences."8

Of special interest in this case is the use of the taxing power as a sanction to enforce a regulation of interstate commerce. Section 3 (a) of the Act imposes an excise tax of 1 cent per ton upon the sale or other distribution by the producer of bituminous coal produced in the United States. Section 3 (b) imposes an additional 19½% tax (based on sale price or in certain cases on fair market value), from which all producers accepting membership in the Bituminous Coal Code (provided for in Section 4) are to be exempt, thus providing a strong inducement for joining the Code.9 The Commission is empowered to fix minimum prices only for code members.

One of the points on which the constitutionality of the Act was challenged was that the 19½% tax is not a tax but a penalty. In meeting this challenge, there were two lines of decisions which the Court could have followed; the first, cases involving situations wherein Congress had both taxing and regulatory power;10 and second, cases involving situations wherein purported taxing measures have been sustained notwithstanding incidents of regulation attached to the tax which would be beyond the power of Congress to achieve directly.11 The Court met the

8*Id.* at 394.

9H. R. Rep. No. 294, 75th Cong., 1st Sess. (1937) 4, states concerning this tax: "Under subsection (b) a tax of 19½% is applied to coal which would be subject to the provisions in section 4 or the provisions of section 4-A. Producers who are code members are exempt from this tax. This tax is intended to be in aid of the regulation of interstate commerce in coal provided for in sections 4 and 4-A."

10United States v. Hudson, 294 U. S. 498 (1937) (tax of 50% on any profit realized from the transfer of silver bullion sustained as a special income tax); University of Illinois v. United States, 289 U. S. 48 (1933) (exaction of customs duties on laboratory apparatus imported from abroad against instrumentality of a state upheld as exercise of power to regulate foreign commerce); *Head Money cases* (Edye v. Robertson), 112 U. S. 580 (1884) ("duty" on aliens brought into this country sustained as valid exercise of power of Congress to regulate matters pertaining to immigration); *Veazie Bank v. Fenno*, 75 U. S. 533 (1869) (tax of 10% on state bank notes upheld as exercise of power to establish uniform currency).

11United States v. Doremus, 249 U. S. 86 (1919) (regulatory provisions of Harrison Narcotic Act (38 Stat. 785 (1914), 26 U. S. C. § 1040 (1934), giving federal government close powers of supervision and control of the drug traffic in interstate commerce, upheld as reasonably related to the protection and collection of the tax); Sonzinsky v. United States,
challenge squarely, again choosing the realistic approach. "Clearly this tax is not designed merely for revenue purposes. . . . The power of taxation, granted to Congress by the Constitution, may be utilized as a sanction for the exercise of another power which is granted it. . . . It is so utilized here."12

The constitutionality of the Act in other respects is likewise sustained. On the point of delegation of legislative power, the Court holds that the standards provided in this Act far exceed in specificity others which have been sustained, and "to require more would be to insist on a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process."13 On appellants' claim of discrimination under the Fifth Amendment, in that the statute classifies coal into code and non-code classes, applying the 19 ½% tax only to the latter, the Court holds that "there is no requirement of uniformity in connection with the commerce power," and that "discrimination constitutionally may be the price of non-compliance."14

The full significance of this decision may not now be determined. In itself, it represents a distinct step forward in recognizing the power of the federal government to supervise and regulate closely an industry not considered traditionally as one "affected with a public interest." Whether Congress may, at some future time, decide that other major

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12 Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 393 (1940).
13 Id. at 398.
14 Id. at 401.
industries require similar regulation, and whether the Supreme Court will at that time maintain its present attitude of realism, or whether it will draw a line of demarcation between the bituminous coal industry and other industries as to which "there are limits on the powers of the states to act" remains for another day to disclose.

WILLIAM H. EDMONDS

THE POTTSVILLE CASE APPLIED

THREE months after the Supreme Court handed down its decision in the Pottsville case,\(^1\) the United States Court of Appeals for the District of Columbia had occasion to apply the rule of that case in Evans v. Federal Communications Commission.\(^2\) The question was whether just because an appeal from a decision of the Commission was pending in the court of appeals, that court would issue an order directing the Commission to stay all further proceedings concerning the identical facilities involved in the appeal.

The appellant, Evans, owned and operated a radio station in Spartanburg, S. C. On January 9, 1940, the Commission granted an application of the Spartanburg Advertising Agency for a permit to construct a new station in the same city. Seventeen days later the advertising agency filed with the Commission an application for modification of the construction permit and three days after this Evans filed with the court of appeals an appeal from the Commission's decision. When Evans learned that the advertising agency had filed an application for modification of the construction permit with the Commission, he filed a motion in court for an order directing the Commission to stay all further proceedings on the application for modification of the construction permit

\(^1\) Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134 (1940); (1940) 28 GEORGETOWN LAW JOURNAL 929. This case held that where the court of appeals under its powers of judicial review of administrative determinations had reversed, on a point of law, the denial by the Federal Communications Commission of an application, it could not bind the Commission in its determination of "public convenience, interest or necessity" to the original record that had been made up almost two years before. The judicial function was solely to settle questions of law properly raised. "Public convenience, interest, or necessity" was for the administrative body to determine and the power could not be suspended merely because the court had once exercised jurisdiction over the case.

\(^2\) 113 F. (2d) 166 (App. D. C. 1940).
until the pending appeal had been disposed of. The court refused to issue the order.

The theory underlying Evans' motion was analyzed by the court as follows:

"In effect, appellant asks us to regard the order appealed from as if it were a final judgment or decree of a trial court, with the consequence that filing of the appeal divests the Commission of jurisdiction of the case, and therefore of power to change the order in any respect, during the pendency of the appeal."3

In dismissing this theory the court of appeals must have recalled the vigorous language directed at it by Mr. Justice Frankfurter when, speaking for the Supreme Court in the Pottsville case, he said:

"But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine."4

The reasoning of the court of appeals in the instant case involved two steps: (1) the court's decision on appeal bound the parties only on questions of law properly raised5 and did not preclude subsequent modification by the Commission of a license already granted; and (2), since the Commission could modify the license anyway, it would be futile, and would involve unnecessary delay to the administrative process, to force the Commission to await the court's decision on the appeal.

That the Commission could not be precluded from modifying a license already granted because of a judicial decision on appeal was an easy conclusion from the Pottsville case. That case settled that since it was the court's province only to settle questions of law properly raised, the

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5 "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision." Mr. Chief Justice Hughes, in Federal Radio Commission v. Nelson Brothers B. & M. Co., 289 U. S. 266, 276 (1933).
court had no further control over subsequent administrative proceedings instituted to determine how the "public convenience, interest, or necessity"—the touchstone for the exercise of the Commission's powers—could best be served. It was therefore clearly within the jurisdiction of the Commission to consider the application of the advertising agency for the modification of the construction permit already granted.

Since the Commission had power to modify the permit, the question remained whether the court should direct the Commission to stay all proceedings for modification pending the outcome of the appeal. This, as the court indicated, would be a futile gesture, for:

"Immediately upon rendition of our decision the Commission would be free, if indeed not required, to consider the application... We do not believe it is the purpose of the statutory provision for limited judicial review to require us to do a futile thing or one the only consequence of which would be to delay the final determination of the entire controversy. To hold otherwise would be in direct contradiction of the administrative purposes and procedure created by the statute with a view, among other things, to prompt and efficient disposition of the Commission's business and the conflicting claims presented to it."7

The decision undoubtedly is a sound one both in view of the Pottsville case pronouncement and the office of the administrative process. It is interesting to note, however, that the court did not decide whether it actually had the power to stay the Commission proceedings pending disposal of the appeal. The court merely said that:

"Even if it were clear that we have such power, exercising it would accomplish nothing other than delay for all concerned. [Italics supplied]."8

This raises an interesting question, and one not likely to be decided by the Supreme Court so long as the court of appeals applies the rule of

6"The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter." 48 Stat. 1083, 47 U. S. C. § 307 (a) (1934).
7"If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding..." 48 Stat. 1085, 47 U. S. C. § 309 (a) (1934).
9Id.
the instant case. On the basis of the fundamental limitations imposed on the judicial function with relation to review of administrative determinations as set forth in the *Pottsville case*, it would appear that the courts are without power to stay Federal Communication Commission proceedings instituted to carry out the functions vested in it by statute.

CARL SCHUCK

**INTERVENTION, BY THE SEC, IN CHAPTER XI PROCEEDINGS**

In *Securities and Exchange Commission v. United States Realty and Improvement Company*, the Supreme Court in a five-three decision decided (1) that a debtor's petition properly filed for an arrangement of its unsecured debts under Chapter XI should be dismissed because more adequate relief was obtainable in Chapter X, (2) that the Securities and Exchange Commission may intervene to contest the district court's jurisdiction under Chapter XI when it appears that relief thereunder is inadequate, and (3) that the Commission may appeal from an adverse ruling.

In the light of the facts developed in the instant case, it concededly appeared that the debtor's financial condition was so bad that an arrangement under Chapter XI would be a mere palliative. In order to provide

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1 At the time of writing, no petition for a writ of certiorari has been filed in the Supreme Court for review of the instant case.

2 Mr. Justice Douglas did not participate. Chapter X was largely the work of Mr. Justice Douglas who was then Chairman of the S.E.C.

3 The debtor, a New Jersey Corporation, doing business in New York, filed its petition for an arrangement under Chapter XI. By this proceeding the debtor sought to obtain an extension and modification of one class of its unsecured obligations, namely, its guaranty of the publicly held mortgage certificates in the amount of $3,710,500 issued by its wholly owned subsidiary, Trinity Building Corporation of New York. The certificates were in the hands of approximately nine hundred holders and had been in default as to interest, principal, and sinking fund for six months when the petition was filed.

4 § 701 et seq. (Supp. 1938).

5 In addition to the liabilities, see note 3 supra, the debtor had liabilities of $5,051,416, of which only $74,916 was current. This indebtedness included two series of publicly held debentures aggregating $2,339,000, maturing Jan. 1, 1944, which were secured by a pledge of corporate stock of little value and a $3,000,000 note, which was secured by a first mortgage owned by the debtor.
for more adequate relief and rehabilitation, the debtor should have filed under Chapter X where it could have been thoroughly overhauled, not only as to its unsecured creditors, but as to all other persons having an interest in the solvency of the debtor.

"[Debtor's] circumstances, as disclosed by its petition and proposed arrangement, are such as to raise a serious question whether any fair and equitable arrangement in the best interest of creditors can be effected without some re-arrangement of the capital structure . . . [debtor] seeks to stay the hand of its creditors and in the meantime to avoid that inquiry into its financial condition and practices and its business prospects, provided by chapter X without which there is at least danger that any adjustment of its indebtedness will not be just and equitable, and that its revived financial life will be too short to serve any public or private interest other than that of respondent."6

But although the debtor could have secured relief of a more permanent nature and of a fair and equitable type under Chapter X, in the instant case it chose to file for an arrangement under Chapter XI. Whether a debtor could choose his medicine as he saw fit was one of the most important questions presented by this case from the standpoint of the Bankruptcy Act and its administration. There is no language in the statute which determines under which chapter a debtor must file.7 It may be noted, however, that Chapter X provides that a petition shall be filed in good faith and that a petition is not deemed to be in good faith if the petitioner could obtain adequate relief under Chapter XI.8 The Court concluded that the proper exercise of the equitable powers of a bankruptcy court, based upon considerations of public policy, general statutory intent, and a certain interpretation of the legislative history,9 demanded that relief under Chapter XI should be withheld "when

684 L. ed. 966, 976 (U. S. 1940).
7"But the forty-odd experts who worked eight years revising the [Bankruptcy] Act omitted from it any formula for determining which corporate debtor should be rehabilitated under Chapter X and which under Chapter XI." Rostow and Cutler, Competing Systems of Reorganization, Chapters X and XI of the Bankruptcy Act (1939) 48 YALE L. J. 1334.
9The dissenting opinion, written by Mr. Justice Roberts and concurred in by Mr. Chief Justice Hughes and Mr. Justice McReynolds, vigorously attacks the opinion of the majority for finding it necessary to resort to legislative history, "where the words are as plain and unambiguous as they are in chapter XI." 84 L. ed. 966, 979 (U. S. 1940) (dissenting opinion). Reference was also made to the first section of both Chapter X and Chapter XI which states: "The provisions of this chapter shall apply exclusively to proceedings under this chapter." 52 STAT. 883, 905, 11 U. S. C. §§ 501, 701 (Supp. 1938).
relief is available under Chapter X which is adequate and more consonant with that policy".10

Of particular significance was the position of the Securities and Exchange Commission in these proceedings. The Commission obtained permission from the district court to present as amicus curiae the contention that the proceeding under Chapter XI be dismissed for lack of jurisdiction. This contention, not being sustained, the Commission then moved for leave to intervene. The district court entered three orders. The first order granted the Commission leave to intervene, for the purpose of enabling the Commission to appeal from any order in the proceeding; the second order denied the Commission's motion to dismiss proceeding for lack of jurisdiction, and a third order referred the proceeding to a referee in bankruptcy. The debtor appealed from the first order and the Commission appealed from the second and third. The Circuit Court of Appeals for the Second Circuit reversed11 the first order permitting the Commission's intervention for the reason that there was no such authority under Chapter XI and granted the debtor's motion to dismiss the Commission's appeal on the ground that the Commission had no special interest in protecting the holders of the mortgage certificates. Certiorari was granted11a because a question of public importance in the administration of the Bankruptcy Act was raised.

Chapter X provides for intervention in two instances: (1) the Commission may intervene where the debtor's petition is for less than three million dollars; and (2) where the debtor's petition is for more than three million dollars the judge shall submit to the Commission for examination any plan which is proposed.12 In either case the Commission's report shall be advisory only. The debtor pressed three contentions, (1) that the Commission was not permitted to contest the jurisdiction of the district court "as a matter of right," (2) that the Commission could not intervene under Rule 24 of the Rules of Civil Procedure, permitting intervention as a matter of right, for the reason that no statute conferred on the Commission an unconditional right to intervene and that the Commission had no interest which could be adversely affected by the district court's decision, and (3) that the Commission could not

10 84 L. ed. 966, 971 (U. S. 1940).
11a 84 L. ed. 651 (U. S. 1940).
intervene by permission under that part of the rule which provides for permissive intervention because no statute confers upon it a conditional right to intervene.

Mr. Justice Stone, speaking for the majority of the Court, acceded to the first two contentions. As to the third, it was said, "... here the question is not of the Commission's intervention 'as of right,' but whether the district court abused its discretion in permitting it to intervene." In sustaining the district court's exercise of its discretion, the Court held that in order to perform the public duties with which it is charged, the Commission should be permitted to intervene where a debtor seeks to defeat its function by filing a petition under Chapter XI, when, according to equitable principles, relief, if any, should be under Chapter X. There can be no doubt that this is a logical conclusion which follows from having decided that the district court, sitting as a court of equity, did not properly exercise its power in permitting the debtor to proceed under Chapter XI. But if the Bankruptcy Act be strictly construed the district court undoubtedly did abuse its discretion in permitting the intervention.

No statute confers upon the Commission the right to contest the jurisdiction of the district court. Neither is there any statute which confers upon the district court the right to permit the Commission to intervene in Chapter XI proceedings. Any authority which there may be must come from the Rules of Civil Procedure or the Bankruptcy Act. The latter, as already noted, only provides for intervention under Chapter X where the judge "shall" submit the plan for examination. If the judge permits an intervention where none was provided for, it seems that this

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1384 L. ed. 966, 977 (U. S. 1940).
146It may in the public interest even withhold relief altogether, and it would seem that it is bound to stay its hand in the public interest when it reasonably appears that private right will not suffer. . . . Before the provisions for alternative remedies were brought into the Bankruptcy Act by chapters X and XI the occasion was rare when a court could have felt free to deny a petition in order to serve some public or collateral interest at the expense of the petitioner's right to an adjudication." 84 L. ed. 966, 975, 976 (U. S. 1940). This statement assumes that the mentioned chapters are alternative remedies. This is not so. Under Chapter X reorganization affects not only secured and unsecured creditors and stockholders, but also affects the stock interest. Under Chapter XI the debtor files a petition for an extension and modification of its unsecured claims.
1584 L. ed. 966, 982 (U. S. 1940) (dissenting opinion).
16See note 12 supra.
is not only an abuse of a discretion but a deprivation of a right which a debtor has under Chapter XI.\(^{17}\)

Nor can the argument be pressed that the Rules of Civil Procedure\(^{19}\) permit, in the instant case, permissive intervention. In no uncertain terms Rule 24 provides that "in exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice . . . the rights of the original parties."\(^{19a}\) Chapter XI, not having any provision for intervention, it would seem that to permit the Commission to intervene in proceedings brought under it would be prejudicial to the debtor within the meaning of the Rule.

The Court further stated that the Commission may intervene "to object to an improper exercise of the [district] court's jurisdiction which, if permitted to continue, . . . would defeat the public interests which the Commission was designated to represent."\(^{20}\) But this is founded on a premise which assumes that the Commission has a present duty to perform for the public interest. This is not so. That the debtor’s petition may be dismissed in Chapter XI and proceedings started in Chapter X, would not necessarily follow.\(^{20a}\) The debtor could proceed in straight bankruptcy. Another answer is that Congress expressly provided for intervention in Chapter X. The exclusion of such a provision in Chapter XI, raises a strong implication against intervention. It would seem that this observation alone would be sufficient to hold that the district court abused its discretion by permitting intervention and also entering the right to appeal from any order in the proceeding.\(^{21}\)

Section 208\(^{22}\) of Chapter X gives to the Commission, "upon filing its

\(^{17}\) The legislature has specified who is entitled to the relief provided by the statute and in what circumstances. The court has no power to refuse that relief on the ground that some other relief would better serve the purpose." 84 L. ed. 966, 982 (U. S. 1940) (dissenting opinion).

\(^{18}\) "the court may [not], in its better judgment, refuse to award the relief which Congress has accorded the bankrupt." 84 L. ed. 966, 982 (U. S. 1940) (dissenting opinion).

\(^{19}\) "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. Rules Civ. Proc., Rule 24 (b).

\(^{20}\) 84 L. ed. 966, 977 (U. S. 1940).

\(^{21}\) Ibid.

\(^{22}\) See note 11 supra.

\(^{23}\) See note 11 supra.

notice of appearance, the right to be heard on all matters arising in such proceeding,” but provides that it “may not appeal or file any petition for appeal in any such proceeding.” 22a The majority opinion held that since this section applies only to proceedings under Chapter X it could not affect an appeal which is filed for Chapter XI proceedings. 23 The effect of the decision is to permit appeals whenever the Commission, after it has intervened, is denied its motion to dismiss proceedings under Chapter XI and to remit the debtor to Chapter X.

The conclusion to which the Court has arrived in order to bring about a desired end presents a paradoxical situation. The legislators made it possible for the Commission to intervene in Chapter X proceedings, but have denied it any right to appeal. However, in Chapter XI where there is no provision for intervention, the Commission is permitted to appeal. Where the legislators have thought it best to refuse a right, the judiciary has granted one.

JOSEPH B. CALANDRIELLO

22a Ibid.

23 Although Mr. Justice Stone offered no other reason, that offered by Circuit Judge Clark in his dissenting opinion probably best justifies the drastic conclusion saying, “The final question, whether the Commission may appeal, seems to me more difficult... Here, however, the intervention was for another purpose, the settling of a vital point of statutory construction, something which cannot be accomplished without appeal.” In re United States Realty & Imp. Co., 108 F. (2d) 794, 802 (C. C. A. 2d, 1939) (dissenting opinion).
FEDERAL LEGISLATION
CONSCRIPTION OF INDUSTRY

ON SEPTEMBER 8, 1939 the President of the United States declared a limited national emergency. On September 21, 1939 the Congress convened in special session and soon thereafter enacted the Neutrality Act of 1939. Then on January 3, 1940, while a great war raged abroad, the Congress returned to Washington to meet and adopt a program of legislation such as has not been seen since 1917. The products of its legislative labors clearly evidence the period of alarm which enkindled them.

Law after law has been passed in the interests of our common defense and preparedness. These include huge appropriations for defense, authorized increases in the personnel of our armed forces, registration of all aliens within the country, authorization for the mobilization of the National Guard and conscription of man power. While all of these measures play an important part in our national defense mechanism, there is probably no provision which creates more interesting legal discussion than the one empowering the executive to deal with the producers of the materials necessary to the success of our preparedness program.

1 Proclamation proclaiming a national emergency in connection with the observances, safeguarding and enforcement of neutrality, and the strengthening of the national defense. 4 Feb. Reg. 3851 (1939); Executive order setting up the Office of Emergency Management in the executive offices. 5 Fed. Reg. 2109 (1940); establishment of a National Defense Research Committee and of a Coordinator of National Defense Purchases, 5 Fed. Reg. 2446 (1940).

2 The Second Session of the Seventy-Sixth Congress began September 21, 1939 and adjourned November 3, 1939.

3 Pub. L. No. 54, 76th Cong., 2d Sess. (Nov. 4, 1939) § 1 et seq.

4 Great Britain and France declared war on Germany September 3, 1939.


7 Pub. L. No. 670, 76th Cong., 3d Sess. (June 28, 1940) § 1 et seq.


9 Pub. L. No. 783, 76th Cong., 3d Sess. (Sept. 16, 1940) § 1 et seq.

10 Id. at § 9.
It was long ago established that Congress, under its war power, had constitutional authority to draft men.\(^{11}\) The grant to Congress of power to raise and support armies, considered in conjunction with the grants of the powers to declare war, to make rules for the government and regulation of the land and naval forces, and to make laws necessary and proper for executing granted powers includes the power to conscript for military service. Compulsory military service is neither repugnant to a free government nor in conflict with the constitutional guaranties of individual liberty. Indeed, it may not be doubted that the very conception of a just government and its duty to the citizen includes the duty of the citizen to render military service in case of need and the right of the government to compel it. This conclusion, obvious upon the face of the Constitution, is confirmed by an historical examination of the subject.\(^{12}\)

The extent to which our national lawmakers can go in compelling industry to work for the government is not, however, clearly defined. Yet it is a fact that the concept of “total defense” is no longer restricted to the military and naval forces, but involves agriculture, industry, education, government and almost every other agency and institution of society.\(^{13}\) The war effort itself involves “working to the end of directing practically all our material resources to the single purpose of victory.”\(^{14}\)

The body of national legislators being cognizant of these facts adopted measures to insure the cooperation of manufacturers in the present defense plans. The first major step was startling and short-lived. The Act of June 28, 1940, entitled “An Act to expedite national defense,

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\(^{11}\)The draft law of 1917 was upheld against the following objections: (1) That by some of its administrative features it delegated federal power to state officials; (2) that it vests both legislative and judicial power in administrative officers; (3) that by exempting ministers of religion and by relieving members of certain religious sects from strictly military service, it is repugnant to the First Amendment; (4) that it creates involuntary servitude in violation of the Thirteenth Amendment. Arver v. United States, 245 U. S. 366 (1918); Jones v. Perkins, 245 U. S. 390 (1918) (Selective Draft Cases).

\(^{12}\)Kneedler v. Lane, 45 Pa. 238 (1863) (Civil War); Cox v. Wood, 247 U. S. 3 (1918) (World War I).

\(^{13}\)Cf. Hearings before the Committee on Military Affairs of the United States Senate on S. 4164, 76th Cong. 3d Sess. (1940); Hearings before the Committee on Military Affairs of the House of Representatives on S. 4164, 76th Cong., 3d Sess. (1940).

and for other purposes, contained a passage that broadened the discretionary powers of the Secretary of the Navy in administering the shipbuilding program. When the Secretary of Navy finds it impossible to make contracts or obtain facilities to effectuate the purposes of the Act, he has been authorized to provide for such from the funds available to the Navy Department and to operate them either by means of government personnel or otherwise. The Secretary of the Navy was further authorized under the general direction of the President, when he deemed an existing manufacturing plant or facility necessary for the national defense and was unable to arrive at an agreement with the owner for its use and operation, to take over and operate such plant or facility either by government personnel or by contract with private firms. The Secretary in such cases was authorized to fix the owner’s compensation. Curiously enough this clause had never been discussed either in the House or in the Senate, but had been quietly inserted in the conference report on the bill. It was specifically repealed less than three months later but it echoed a policy.

On August 26, 1940 Senator Russell, in behalf of himself and Senator Overton submitted the following proposed amendment to the Selective Service Bill then being considered by the Senate:

"The first and second provisos in section 8 (b) of the act approved June 28, 1940 (Public, No. 671) is amended to read as follows: "Provided, That whenever the Secretary of War or the Secretary of the Navy determines that any existing manufacturing plant or facility is necessary for the national defense and is unable to arrive at an agreement with the owner of such plant or facility for its use or operation by the War Department or the Navy Department, as the case may be, the Secretary, under the direction of the President, is authorized to institute condemnation proceedings with respect to such plant or facility and to acquire it under the provisions of the act of February 26, 1931 (46 Stat. 1421), except that, upon the filing of a declaration of taking in accordance with the provisions of such act, the Secretary may take immediate possession of such plant or facility and operate it either by Government personnel or by contract with private firms.""

The amendment proposed to extend the same power and privilege to the War Department as had been granted to the Navy Department by

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16Pub. L. No. 671, 76th Cong., 3d Sess. (June 28, 1940) § 1 et seq.
17Id. at § 8b.
18Ibid.
the Act of June 28th. The amendment also proposed to remove the proviso in the latter act which allowed the Secretary of the Navy to fix the compensation due to the owner of a plant or facility that has been taken over by the Government. That provision was at best of doubtful constitutionality. The Russell-Overton amendment sought to change the procedure so as to give the Secretary of Navy or the Secretary of War the right to enter into possession of such property upon the filing of condemnation proceedings. On August 28, 1940 the Senate passed the Selective Service Bill including this amendment and sent the measure to the House of Representatives.

The House Committee on Military Affairs evidently thought the Russell-Overton amendment too severe and substituted for it the amendment offered by Congressman Smith. This provision gave national defense orders priority, with heavy penalties for non-compliance, and enabled the Government to take control of plants on a rental basis when needed. The whole House adopted the Smith amendment, and the measure was sent to a committee of conference.

The conference agreed to the less stringent House amendment, except, that before the President would be authorized to exercise the power of taking over a plant or facility, the conference provided that the public necessity must be immediate, and the emergency in the public service imperative, and such as will not admit of resort to any other source of supply and the Secretary of War or the Secretary of the Navy must certify as to the circumstances. The conference report also provided that when the amount of compensation fixed by either Secretary was regarded as unsatisfactory by the owner, such person should be entitled to sue the United States to recover such additional sum as would amount to just compensation. This mollescence in regard to industry was not received kindly in the Senate, which sent the measure back to con-

20See note 15 supra.
21Ochoa v. Hernandez Y Morales, 203 U. S. 139 (1913) (Involving the taking of property without due process of law as guaranteed under the Fifth Amendment).
26Ibid.
27Senator Lee: "I think the conference report has greatly modified and reduced the effect of the Russell-Overton amendment, or the Smith amendment in the House. The teeth have been pulled out of the provision. We once had a toothless old dog, who could
ference with instructions that the language of the House amendment be inserted in lieu of the conference construction. The conferees followed their instructions and the original House amendment went back into the bill. In that form, the act was approved by both Houses of Congress on September 14, 1940. Two days later the President signed the bill and the "Selective Training and Service Act of 1940" became law.

Briefly Section 9 of this law provides that orders for defense materials in the usual line of a company's business are obligatory on such firm and shall take precedence over all other orders and contracts. Any manufacturer, who refuses such preference or who refuses to manufacture the quality or quantity of equipment desired, or who refuses to furnish the materials at a reasonable price as set by the Secretary of War or the Secretary of the Navy, shall be deemed guilty of a felony and punished. The Government is further authorized to take immediate possession of such plants. The compensation for its products or rental while used by the United States shall be fair and just.

Those who advocate more business in government and less government in business express little enthusiasm over this added power to exercise control over our industry. It is also doubtful if these measures will receive the support of those who suggest that such legislation is an insult to the patriotism of American industrialists. An examination of the experience of this nation in the last great war will aid in appraising the attitude of these men.

A review of the legislation by Congress during that war period and the proclamations of the President reveal an extensive resort to requisition. A Board on Mobilization of Industries essential for military preparedness was created and the president was given substantially the
same power to take possession of industry as that granted to him in
the present draft law. That power was exerciseable in time of war
or when war is imminent. Another similar provision was contained
in the Navy Appropriation Act of March 4, 1917. The validity of
these provisions was upheld in the case of Moore and Tierney, Inc. v.
Roxford Knitting Company, where the court went so far as to say that
in placing orders for material the act itself gave the preference and
nothing had to be said about it. In the words of Judge Ray, "Nor do
I think it was necessary for the government to say 'This is a command,
which must be obeyed, and given under the National Defense and Navy
Appropriation Act.'"

Referring to the power of the president under the same two acts, Jus­
those statutes he could have seized and operated plants for the manufac­
ture of yarn, and all the yarn in the country or that came into the
country, and since the greater includes the lesser, he could, through a
government agency duly created, as is here alleged, control its use." During the extraordinary conditions of World War I power was given
to the president to requisition foods, fuels, factories, packing houses,
oil pipe lines and mines. This power of requisition was made to apply
to coal, railroad transportation, lands, homes and furnishings for indus­
trial workers engaged in arsenals and navy yards and their families
in the District of Columbia. There was ample legislation to give the
President commandeering power over any type of commodity.

Thus the Government could, by the payment of just compensation,
require or commandeer the whole output of a plant and itself determine
the price to be paid for everything taken under the compulsory order.
The possibility of compulsory order gave a very formidable legal weapon
for compelling the acceptance of price determinations on the part of the
Government. "As a matter of fact, public opinion acceded to the

37. 250 Fed. 278, 286 (N. D. N. Y. 1918).
39. Id. at 161.
40. For a complete study of this extraordinary World War legislation see, The Power of
the United States in War Time, (1919) 53 Am. L. R. 87, 177.
president, in this emergency, power commensurate with the peril and left to his discretion the determination of the degree of peril and the power necessary to meet it."

The power to take property by direct seizure and not by indirection, as by taxation, has often been exercised in times of peace by congress and the states by utilizing the power of eminent domain. As seen in the case of Dupont de Nemours Powder Company v. Davis, the United States took possession of and operated the railroad system of this country during the last war in a sovereign capacity, as a war measure, "under a right in the nature of eminent domain." Prior to World War I we have but few and insignificant precedents defining the limitations of this power of the Government in the nature of eminent domain to conscript property and industry. For that reason we must look to comparatively recent decisions for the proper interpretations. In the case of International Paper Company v. United States decided on January 19, 1931, it was held that Section 120 of the National Defense Act of 1916 was sufficient authority for taking the right held by a lessee to make use of part of the water in a power canal, such taking being accomplished by requisitioning from the power company owning the canal all the electrical power capable of being produced by the use of all waters capable of being diverted through its intake for its plants and machinery connected therewith.

It has been remarked that the requisitioning power places the government in a position to address producers virtually as follows: "These are the prices to which the Government will agree; if you are willing to enter into a voluntary arrangement with us, you will be paid these prices for your goods, but if you refuse to do so, we will be compelled to ask the properly constituted authorities to commandeer your output or your plant and give you just compensation therefor, as provided by

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41 American Industry in the War, (1921) Report of the War Industries Board 74.
42 Searl v. School Dist. No. 2, 133 U. S. 553, 562 (1890) (Held that the right of eminent domain is an incident of sovereignty).
43 264 U. S. 456 (1924).
44 Id. at 462.
46 282 U. S. 399 (1931).
statute, and these very prices are the 'just compensation' for which the statute provides." It is necessary to recognize, however, that the matter does not end with the physical taking of the property. The statutes under which the power to requisition and commandeer was exercised provided for the payment of just compensation. If they had not done so these statutes would have been invalid under the Fifth Amendment to the Constitution. It has been well settled since the case of Ex parte Milligan that the emergency of war does not create new powers; the actions of the government are still subject to the limitations imposed by the Constitution.

The measure of compensation to be used when property has been requisitioned has been stated by the Supreme Court in the case of Phelps v. United States:

"The Government’s obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken."

In United States v. New River Collieries, the Supreme Court gave a company the highest prevailing market price as compensation for coal which had been requisitioned. The court in L. Vogelstein and Company, Inc. v. United States decided that the company's copper stock could be requisitioned at the liberal copper price fixed by the War Industries Board. In Parish v. United States, decided by the Court of Claims, it was held that where the Government takes over part of a plant in a private factory for public use, either under the act of March 4, 1917, 39 Stat. 1193, or under eminent domain, during a national emergency, the Government is liable for the reasonable value of the part taken...
over as of the time of the taking, and is not liable for the incidental
damage to the remainder of the plant.

These interpretations leave little of a coercive nature to the com­
mandeering power, and judicial application of the rule laid down in the
Phelps case has been sufficiently literal to alleviate whatever harshness
and arbitrariness there may be in commandeering. The practical diffi­
culties in the application of the power are enormous. In fact when the
War Industries Board was considering the commandeering of the copper
industry they were bluntly told by its representative, Mr. Ryan, that
"it would be impossible to commandeer all of the small, high cost mines
as there are such a great number." At another time the War Indus­
tries Board threatened to take over the steel industry which had been
extremely non-cooperative in the price negotiations but the threat was
never carried out.

The war effort involves "working to the end of directing practically
all our material resources to the single purpose of victory." Practi­
cally every important industry in the nation is necessary to the supply
of the armed forces. In times of national emergency such as these,
legislation must be designed to prevent any industrial delays in the
performance of contracts which are essential in providing materials of
war that would make our national defense more secure. Taxation is
hardly the answer. It is difficult to reach by taxation a concern that
absolutely refuses to make any of this material of war. Taxation does
not prevent the non-cooperator's entry into another line of business or
the closing of his plant altogether. In this connection the following is
a pertinent extract:

"It is recognized that the use of the taxing power to remove profits from war­
time production and commerce may not be permissible under the Federal Con­stitution without amendment. The attempt to make all profits uniform, at the
same time that the Government has power to commandeer products or plants
that are not freely made available for the prosecution of the war, is more
nearly analogous to the governmental authority exercised in the field of public
utilities than to the power to raise revenue. The use of any of the Federal
powers may be limited to the effecting of its direct purposes. Cf. the recent
United States Supreme Court case, Louisville Joint Stock Land Bank v. Radford,
decided May 27, 1935, dealing with the bankruptcy powers of the Federal
Government, and see Bailey v. Drexel Furniture Co. (259 U.S. 20). On the other hand it is, of course, impossible to forecast with any substantial certainty the extent to which the war powers of the Federal Government may be construed to permit the removal of war profits. Furthermore, it is well settled that the motives which prompt Congress to pass revenue measures will not be reviewed by the courts and that incidental effects of tax statutes will not invalidate such statutes. (See Bailey v. Drexel, supra.)

To those who feel that the Government can rely on the patriotism of industrialist there is this reply. During World War I the copper industry refused to produce at even the liberal prices first proposed by the Government. The steel industry refused to fill government orders until prices had been stabilized at levels satisfactory to the industry. Judge Gray, representing the steel industry, told the Price Fixing Committee that, "... manufacturers must have reasonable profits in order to do their duty." The Du Pont Company refused to build a great powder plant, which it alone was qualified to build, until it was assured of what it considered sufficient profits. Mr. Pierre du Pont wrote that "we cannot assent to allowing our own patriotism to interfere with our duties as trustees." Added to this difficulty the Government had to contend with the unscrupulous attitude of the shipbuilders in general. The case of U. S. Shipping Board Merchant Fleet Corporation v. Bethlehem Shipbuilding Corporation, Ltd. is an excellent illustration. It

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68Id. at 4.
69Id. at 5, 111.
70"The committee finds, under the head of Wartime Attitude of Shipbuilders, that the record of the present shipbuilding companies during the war, wherever examined, was close to being disgraceful.

"They made very considerable profits. On Treasury audits they showed up to 90 percent. They secured cost-plus contracts and added questionable charges to the costs. They took their profits on these ships after the wartime taxes had been repealed. They secured changes in contract dates to avoid war taxes. They bought from the Government, very cheaply, yards which had been built expensively at Government costs. In one case this was prearranged before the yard was built. One yard did not build necessary additions until it was threatened with being commandeered. Knowingly exorbitant claims were filed against the Government for cancelation. Huge bonuses were paid to officers. Profits were concealed as rentals." Sen. Rep. 944, Pt. 7, 74th Cong., 2d Sess. (1936) 13.
7123 F. Supp. 676 (E. D. Pa. 1938) and 26 F. Supp. 259 (E. D. Pa. 1938). The opinion of the United States Circuit Court of Appeals for the Third Circuit has not as yet been reported. The case is now No. 362 and No. 363 for the October Term of the United States Supreme Court.
was in 1917 when the Government needed ships badly and Bethlehem was the largest shipbuilding concern that the Fleet Corporation contracted with for ships. The contracts provided for payment of the cost of construction, a fixed profit and an item known as a "bonus for savings". The latter was equal to one-half the amount by which the actual cost of the ships might be less than a stated estimate of cost. The estimated cost of all the vessels was about $120,000,000; the actual cost was about $93,000,000; profits under the contracts would be over $25,000,000. These exorbitant profits were contested by the Government. The lower courts have decided against the Government on strict contract law, and the case is now pending for ultimate determination in the Supreme Court. In the view of the Circuit Court of Appeals, Bethlehem's insistence upon the extraordinary profit indicated "an attitude of commercial greed but little diluted with patriotic feeling." The court observed that "Bethlehem may be condemned for having taken advantage of the Nation's necessities to secure inordinate profits."

In the face of these considerations there is an obvious need on the part of the government for some influence over industry in the field of national preparedness and defense. The right to conscript industry when necessary is at least a good disciplinary measure. It is a high-powered gun, seldom used, but in an emergency.

GORDON F. HARRISON

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62From the brief of the Solicitor General in the Cases No. 362 and No. 363, of the October 1940 Term of the United States Supreme Court, p. 2.
63Id. at 14. (R. 2327).
64Id. at 14. (R. 2328).
65This point is developed at length in Industrial America in the World War by Grosvenor B. Clarkson, late Director of U. S. Council of National Defense. See pp. 97, 102.
NOTES

TRIAL BY JURY UNDER THE FEDERAL RULES

The Act of June 19, 1934,1 empowers the Supreme Court to unite cases in equity with actions in law so as to secure one form of civil action and procedure for both: "Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the Seventh Amendment to the Constitution shall be preserved to the parties inviolate." Significantly, this provision makes no attempt to enumerate the instances in which trial by jury shall be preserved. Congress has apparently left it to legal precedent to determine what shall be included. Therefore, some light may be thrown on this subject by an examination of the cases wherein the problem has arisen.

SCOPE

The keystone of our federal system of trial procedure is the Seventh Amendment which guarantees the right of trial by jury "In suits at common law, where the value in controversy shall exceed twenty dollars. . . ."1a Although this guarantee applies only in the federal courts,2 similar provisions have been adopted in almost all the states.3 The thing guaranteed is the preservation of jury trial as it existed in England at the time of the adoption of our Constitution. Since jury trial was not the accepted procedure in England in the administration of equitable relief, the constitutional provisions do not generally extend the right to cases in equity.4 There have been various attempts to augment this right, several states having adopted statutes which give to either

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1 48 STAT. 1064, 28 U. S. C. §§ 723 (b) and 724 (c) (1934).
2 Seventh Amendment to the United States Constitution. See Dimick v. Scheidt, 293 U. S. 474 (1934).
3 Ex parte Brown, 140 Fed. 461 (E. D. N. C. 1905).
4 The provisions of the state constitutions guaranteeing trial by jury are very similar. Colorado and Louisiana are the only states which have no such guarantee. Colo. Const. Art. III, § 23; La. Const. Art. 1, § 9.
5 The Seventh Amendment "... cannot be made to embrace the established, exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law; but should be understood as limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law." Shields v. Thomas, 18 How. 253, 263 (U. S. 1855).
party to a suit the right to have all cases, legal or equitable, submitted to a jury. In some instances these statutes have been held unconstitutional in so far as they attempted to give an absolute right to have certain issues of fact arising in an equity action passed on by a jury.¹

Because jury trial in civil actions is a constitutional right which must be preserved, the adoption of a form of civil procedure displacing the heretofore separate and coördinate systems of law and equity pleadings in the federal courts presented a difficult problem. No less a personage than former Chief Justice Taft declared that "... the most important limitation upon a federal union of the two kinds in one form of action is the requirement of the Constitution in the Seventh Amendment."² Other authorities have gone even further in insisting that the necessity of retaining trial by jury presented an insurmountable obstacle.³ But today, whatever may have been the difficulty or the impossibility encountered, the fact is that under the new Federal Rules of Civil Procedure⁴ the consolidation has taken place in the federal courts. The dual system of law and equity procedure has been abolished and replaced by "one form of action."⁵ All this has been accomplished without changing the distinction between legal and equitable issues and without abolishing trial by jury.⁶ Rule 38a of the new Rules provides that "the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States⁷ shall be preserved to the parties inviolate."

²"It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights." Brown v. Buck, Circuit Judge of Kalamazoo County, 75 Mich. 274, 283, 42 N. W. 827, 830 (1889); accord, Donahue v. Babbitt, 26 Ariz. 542, 227 Pac. 995 (1924), overruling Brown v. Greer, 16 Ariz. 215, 141 Pac. 841 (1914); Callanan v. Judd, 23 Wisc. 343 (1868). But see Taylor v. Person, 9 N. C. 161 (1822), wherein a statute of a similar nature guaranteeing trial by jury in equity cases was held constitutional.


⁷"The legislature has not the constitutional power to reduce all actions to one homogeneous form; because it could only be done by abolishing trial by jury... or, by abolishing trial by court." Reubens v. Joel, 13 N. Y. 488, 495 (1856).


⁹"Rule 2 provides that "there shall be one form of action to be known as a 'civil action'."

¹⁰Similar codes have been in effect in many of the states for years. The decisions are uniform in holding that the right of trial by jury is fully preserved. Bisnovich v. British American Assurance Co., 100 Conn. 240, 123 Atl. 339 (1924).

¹¹"The trial of issues of fact in the district courts, in all causes except in cases of equity
Under this new system of civil procedure, merely the distinction between law and equity procedure has been eliminated. Legal and equitable issues remain unchanged. "What was an action at law before the code is still an action founded on legal principles; and what was a bill in equity before the code, is still a civil action founded on the principles of equity." 12 A party desiring to have any legal issues in the action tried by jury has the right fully preserved. 13 There are provisions which allow the court, in its discretion or upon motion, to use an advisory jury where the action is not triable of right by a jury. 14 Advisory juries may also be used in actions essentially equitable, the verdict of the jury being given as much weight as the court wishes, or as the parties agree with the consent of the court. Issues on which jury trial is not demanded are triable by the court, unless the court in its own discretion orders a jury trial on any or all of the issues. 15 Where a jury is not demanded and legal issues are permitted to be tried by the court alone, a waiver of jury trial results; and when an equitable issue is permitted to be tried by a jury, the court is considered to have waived its right to have it tried by the court. 16

It is still necessary, however, in order to protect one's right of trial by jury or trial by court, to consult the precedents to determine what are legal and what are equitable issues. In various situations the problem has arisen many times in the state and federal courts. In applying the federal rules the courts will presumably look to the precedents to determine what have historically been legal or equitable issues, and their

and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury." Rev. Stat. § 566 (1875), 28 U. S. C. § 770 (1926).


13Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue." Fed. Rules Civ. Proc., Rule 38(b).

14In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury, or, except in actions against the United States when a statute of the United States provides for a trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." Fed. Rules Civ. Proc., Rule 39(c).


decisions will undoubtedly be influenced, if not bound, by them.\textsuperscript{17}

There is no doubt that a jury trial can be demanded in an action which presents issues which are entirely legal and that it cannot be demanded where the issues involved are entirely equitable. The difficulty arises in an action which presents both legal and equitable issues. In such cases there are many questions involved. Which is the main issue? Which should be tried first? Admitting the legal issue to be the principal one, will the findings of the jury also be conclusive as to the incidental equitable issue? And if the legal issue is merely incidental to the equitable issue, is there still a right to trial by jury on the legal issue?

For purposes of comparison, the cases have been considered in groups in an attempt to demonstrate the different ways in which the courts have answered the questions in cases of similar nature. Therefore, the cases decided in the non-code states\textsuperscript{18} have been treated together. Then follows an analysis of the decisions in the code states,\textsuperscript{19} and the discussion closes with a summary of the few cases in point that have been decided under the new Rules. For further convenience a purely arbitrary division of the cases into three categories has been made: (1) where the defendant (or plaintiff) interposes in a common-law action an equitable defense (or counterclaim); where the main issue is equitable but there are incidental legal issues involved; and, (3) where the specific equitable relief asked for is refused for equitable reasons, but the court still retains the case to give substitutional relief, commonly obtainable only in the law court.\textsuperscript{19a}

DECISIONS IN THE NON-CODE STATES

It was inevitable that the development of equity outside the common

\textsuperscript{17}Gordon \textit{v.} Washington, 295 U. S. 30 (1934); Low \textit{v.} United States, 169 Fed. 86 (C. C. A. 6th, 1909).

\textsuperscript{18}Only six states have separate courts of law and equity. They are: Ala., Ark., Del., Miss., N. J. and Tenn. There are eleven states where law and equity are administered distinct and apart from each other, but in the same court. These are: Fla., Ga., Me., Md., Mass., N. H., Penn., R. I., Vt., Va., W. Va. Two states, Louisiana and Texas, still retain strong influences of the civil law system of continental Europe where equity as a separate system is unknown.


\textsuperscript{19a}Extensive use has been made of the list of cases collected by Professor Zecharia Chaffee, Jr., in his text, \textit{Chaffee, Cases on Equitable Relief against Torts} (1924) 257.
law and under the exclusive jurisdiction of the chancellor would result in the separate existence of two systems of law, each with its own courts and methods of pleading and practice. Moreover each court jealously guarded its own jurisdiction and actively thwarted any effort on the part of the other court to intrude upon its authority. As a result, under this dual system, a party seeking relief in the wrong court would frequently have to start his cause anew in the proper one. His suit could not be transferred from equity to law or from law to equity. Equitable defenses could not be set up to law actions; nor could a legal defense be disposed of in an equitable action without a trial by jury.

Although the two courts did resent any invasion of their jurisdiction, they were not blind to the peculiar advantages of each other. As a result there were many successful attempts to increase their own jurisdiction and efficiency by borrowing from their neighbor across the hall.

This desire to coordinate the two systems was taken up by the legislatures, and statutes were passed permitting the easy transfer of cases from one court to the other and allowing equitable defenses in law actions.20

It is in the light of these circumstances, therefore, that an interpretation must be made of the cases in those states which still retain the dual procedure. The conflicting desires of the courts to increase their powers without changing their customary procedure has resulted in decisions which are anything but consistent. It seems impossible to determine categorically what issues are accorded jury trial and which are not, because many of the cases appear to be in direct conflict with one another. The trend of the cases, if any trend at all is discernible, is to allow the court in which the main issue arises to give incidental relief, although a strict adherence to dual procedure would require a transfer to the other court for such relief. This retention of jurisdiction by the equity court, however, is in accordance with the established maxim of equity to avoid a multiplicity of suits whenever possible, and to give complete relief once jurisdiction is obtained.

The first division in the outline presented above is that of the equitable defense. Simply stated, an equitable defense is one which, outside of statutory innovations, is cognizable only in a court of equity. Under the old common law such equitable defenses could not be pleaded in a court of law.21 Consequently, the older cases present no question of

jury trial. But the common law has been changed by statute, both in the state and federal courts. This change was accomplished in the federal courts by the Act of March 3, 1915, which provides that:

“In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same right in such case, as if he had filed a bill embodying the defense or seeking the relief prayed in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the records as law and justice shall require.”

Most, if not all, non-code states have adopted similar provisions. Two cases decided under the Act of 1915 are representative of the manner in which the courts have interpreted these statutes. One of these, Liberty Oil Company v. Condon National Bank, presented a situation wherein the defendant brought in additional parties to interplead them with the plaintiff. Chief Justice Taft, writing for the court, declared that this converted the action at law into an interpleader action in equity. In Plews v. Burrage the plaintiff was allowed to introduce by way of replication an equitable defense. Both courts held that the correct procedure was to dispose of the equitable issues before the trial of the action at law. If an issue at law remained it was triable by a jury. But this did not mean that the equitable issues could not be


23 ME. REV. STAT. (1930) c. 96, § 18. This statute is merely representative.


25 274 Fed. 881 (C. C. A. 1st, 1921). The court held that the plaintiff had the same right by replication to meet a legal defense by equitable reply as a defendant had to set up in his answer an equitable defense to a legal claim set up in the declaration. But see Keatley v. U. S. Trust Co., 249 Fed. 296 (C. C. A. 2nd, 1918), where the court construed a replication as asking for affirmative relief and held that the statute did not permit a replication interposing equitable relief.


submitted to the jury for an advisory verdict, which the court could accept in its discretion. Whether the equitable relief should be submitted to a jury or determined by the court is a matter of judicial discretion. 28 Where the issue is simple and eminently suitable for submission it can readily be left to the jury. 29 This is the preferred procedure for it gives the jury a more complete picture of the whole controversy, both legal and equitable, and enables it to arrive at a more accurate verdict.

Next to be considered is the problem where incidental legal relief is sought in an action in which the main issue is equitable. There are a number of courts in the non-code jurisdictions which hold that such incidental legal relief is wholly separate from the equitable relief asked, and will not be granted by the equity court because there is an adequate remedy at law. 30 In such jurisdictions, there is no doubt that jury trial of the legal issues will be given, for the equity court will send them to the law court for decision. 31 Whether this view is the majority one in the non-code states, it is difficult to ascertain; but a search of the reports has revealed that there are a number of courts which do not follow this doctrine. 32 These hold that wherever the jurisdiction of the court of

29Plews v. Burrage, 274 Fed. 881 (C. C. A. 1st, 1921). Cf. Union Pac. R. R. v. Syas, 246 Fed. 561 (C. C. A. 8th, 1917) wherein the court held that it was reversible error for the lower court to submit to the jury with the legal issues the equitable issue of fraud, for the verdict on the legal issue was contingent on the result of the equitable verdict. The equitable issue should have been first tried by the court and not submitted to the same jury. See also, Martin v. Smith, 102 Me. 27, 65 Atl. 257 (1906).
31"The relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived. The relief which equity affords must still be applied by the court itself, and all information presented to guide its action, whether obtained through master's reports or findings of a jury, is merely advisory." Basey v. Gallagher, 20 Wall. 670, 680 (U. S. 1874).
chancery is invoked to obtain equitable relief, the court "should proceed to accomplish complete justice and enforce all the plaintiff's rights, including the award and ascertainment of all damages . . . , the complainant having necessarily come into the court of chancery for the most important part of the relief to which it was entitled, viz., injunctive relief." 33

Although the cases in this latter group of states are uniform in holding that chancery may keep the case to award all relief, they are silent, for the most part, on whether the equity court will do it if a trial by jury of the legal issues is demanded. Consequently, they cannot be used as authority for the proposition that jury trial will not be granted if demanded. 34 Nevertheless, there is a strong line of authority which holds that jury trial will not be permitted because equity, having taken the legal matters as an incident to the general relief, it all becomes equity in that sense. 35 Perhaps this is not in strict conformity to our concept of jury trial as a matter of absolute right for all legal issues; yet, where the legal relief is purely incidental to the equitable relief asked, the departure is not serious enough to become a matter of concern. 36

33L. Martin Co. v. L. Martin & Wilkes Co., 75 N. J. Eq. 39, 55, 71 Atl. 409, 416 (Ch. 1908), overruled, 75 N. J. Eq. 257, 72 Atl. 294 (1909).
34Whaley v. Wilson, 112 Ala. 627, 20 So. 922 (1896); Winslow v. Nayson, 113 Mass. 411 (1873).
35It has recently been decided by the Supreme Court that the Seventh Amendment has no application to cases where the recovery of money damages is an incident to equitable relief, even though damages might have been recovered in an action at law. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 48 (1936); Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273 (1917); accord, Clark v. Wooster, 119 U. S. 322 (1886); Garden City Sand Co. v. Southern Brick and Clay Co., 260 Ill. 231, 103 N. E. 207 (1913). See Pomeroy, Equity Jurisprudence, (4th ed. 1918) §§ 236, 237.
36The opinion of the Florida Court in Brown v. Solary, 37 Fla. 102, 19 So. 161 (1896) is typical. In this case an injunction was sought to restrain a trespass. As an incident thereof damages were also asked. The court said: "It is a fundamental doctrine of the court of equity that when, by virtue of its original or concurrent jurisdiction, it has acquired cognizance of a case for one purpose, it will proceed to a complete adjudication, even to the settlement of purely legal rights, which otherwise would be beyond the scope of its authority. In speaking of the right to trial by jury guaranteed by the Constitution we saw . . . that in all those cases in which a court of equity, prior to the adoption of the Constitution guaranteeing a trial by jury, and by virtue of its general or concurrent jurisdiction for one purpose, had proceeded to a complete adjudication of the entire case, even to the settlement of legal rights which otherwise would be beyond its powers, it cannot be successfully claimed that the guarantee of trial by jury exists as to the legal right." Brown v. Solary, supra at 114, 19 So. at 164.

The later case of Cowan v. Skinner, 52 Fla. 486, 42 So. 730 (1907) further explains
To summarize, the non-code states are divided into three camps on the question of legal relief as an incident to equitable relief. One group insists that the legal relief must be had in a court of law, for the remedy at law is adequate. The second group will retain the entire issue and grant all relief in equity, but if a jury trial is demanded on the legal issues, it must be given. The last group holds that equity can give all relief and that by taking the legal matters as an incident to the equitable relief, it all becomes equitable and there is no right to a jury trial.

Thus, in certain states, whenever the court of equity assumes jurisdiction for some special purpose, it usually retains the case and awards all the relief possible. But suppose the equity court finds it inadvisable to give the particular equitable relief requested. Can it still retain the case to grant substitutional relief which is ordinarily not within the scope of its powers? Such a situation arises in cases where an injunction against a conceded nuisance is denied because the harm that would result to the public from the granting of the injunction would greatly outweigh the harm to the plaintiff caused by its denial. Where this doctrine obtains, the problem arises as to what relief can be given. If the complainant takes his action into the law court, he can recover damages. But the general practice in law is to limit the recovery to damages accruing up to the time of the trial. Consequently this would make the above decision. This case also involved an injunction and a demand for incidental damages, but the injunction sought was of statutory origin. The court held that where a right to an injunction existed on traditional principles of equity damages could be awarded, but it did not see fit to extend this to injunctions given by statute, for the defendant was entitled to a jury trial on the question of damages, where they could not be ascertained and awarded as incidents to equitable relief upon established equitable grounds independent of statute.

37The typical situation is this: A owns a small apple orchard. B runs a large smelting plant which employs half the village and is a $10,000,000 enterprise. The fumes from B's plant destroy A's apples. A asks for an injunction. The court considers the situation and refuses to grant the injunction, but says to A that it will estimate the damages to him and allow him a yearly recovery for this amount. A says that if this is the case, he demands a jury to determine the amount of damages. Will he get it? See F. Burkhart Mfg. Co. v. Case, 39 F. (2d) 5 (1930); United Cigar Stores v. United Confectioners, 92 N. J. Eq. 449, 113 Atl. 226 (1921); Daniels v. Keokuk Waterworks Co., 61 Iowa 549, 16 N. W. 705 (1883); Bliss v. Anaconda Copper Co., 157 Fed. 342 (C. C. D. Mont. 1909); Whalen v. Union Bag Co., 208 N. Y. 1, 101 N. E. 805 (1913).

38Simmons v. Patterson, 60 N. J. Eq. 385, 45 Atl. 995 (1900). In Illinois, and in some other states, statutes allow recovery of prospective damages by action at law; making relief in equity unnecessary. Such v. Chicago Sanitary Dist., 242 Ill. 496, 90 N. E. 197 (1909); Stetson v. Chicago & Evanston R. R., 75 Ill. 74 (1874). But these statutes are
repeated suits at law necessary, thereby resulting in a multiplicity of suits, an evil which equity always tries to overcome. Therefore, the preferable remedy is to give the entire relief in the equity suit, since the complainant has made out a case for equitable relief, denied only on special grounds. But here again we run into the bothersome requirement of jury trial. Suppose the defendant demands a jury for the determination of damages, will it be given to him?

In effect, this problem is similar to that of legal relief as an incident to equitable relief. Here, however, no equitable relief proper is given. Nevertheless, the equity court will, generally, instead of compelling the defendant to go into law, decide all the issues involved and decree the payment of compensatory damages. In fact, the cases are stronger than those involving incidental legal relief in holding that equity may give the damages asked, since they feel that equity can make a present award that will take care of all future damages arising from a continuance of the nuisance. This a court of law cannot do, and for that reason, equity believes the remedy at law to be inadequate. Consequently it retains the action and awards damages, not as incidental legal relief, but as true equitable relief, for which no demand can be made for jury trial. Although no cases have been found where a jury trial was demanded, the opinions of the courts tend to indicate that it would not be given.

Even New Jersey, perhaps the most ardent defender of the dual system, usually restricted to cases where the municipality or state are the ones causing the nuisance, and in such cases, the damages allowed resemble compensation granted in eminent domain proceedings.

Relief granted in substitution for other than an injunction in nuisance and trespass cases: Busch v. Jones, 184 U. S. 598 (1902) (patent injunction); Parks v. Booth, 102 U. S. 96 (1880) (same); Milkman v. Ordway, 106 Mass. 232 (1870) (specific performance).

believes that in such cases damages may be granted by the equity court in substitution for the established mode of equitable relief.\textsuperscript{41}

**DECISIONS IN THE CODE STATES**

The first code was adopted in 1848 when New York State created its old Code of Procedure.\textsuperscript{42} At the time of its adoption the majority of the judges and lawyers were opposed to it. This had its effect on the early decisions under the Code and the opinions are anything but consistent. After this antipathy to code procedure diminished, its true nature became universally understood. So far as jury trial is concerned, the important point is that, although there is but one form of action, the whole action is *not* to be treated as a unit in determining the problem of mode of trial. "The inherent, fundamental differences between actions at law and actions for equitable relief, such as determine whether a trial of the action by jury is a matter of right and otherwise affect the litigants, have not and cannot be abolished."\textsuperscript{43} In other words, in the code states, it is still "necessary to break down the causes of action into their component parts and see which of them will be disposed of by the chancellor, and which he would have relegated to the law court with its trial by jury."\textsuperscript{44}

Any division of the state codes into types must, of necessity, have an element of arbitrariness about it, although there are a number of earlier codes which served as models to states later adopting their own. Perhaps the best primary division of the codes is into (1) those codes which use the historical test to determine whether or not jury trial should be given—the historical test being whether the right to jury trial existed before the adoption of the state constitution, and (2) those codes which do not use any historical criteria for determining what kind of trial is to

\textsuperscript{41}This was pointed out in the case of Stevenson *v.* Morgan, 64 N. J. Eq. 219, 53 Atl. 677 (Ch. 1902). Therein the complainant sought unliquidated damages as an incident to an injunction. The court refused to allow the damages, but went on to distinguish this case from that where damages were allowed in substitution for some established mode of equitable relief.

\textsuperscript{42}N. Y. LAWS 1848, c. 379, § 62: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action."

\textsuperscript{43}Sadlier *v.* City of N. Y., 185 N. Y. 408, 414, 78 N. E. 272, 274 (1906).

be had, but attempt to enumerate actions triable by jury.\textsuperscript{45}

Although it is entirely possible (and even probable since the law
makers must have used an historical basis for their enumerations of
actions triable by jury) that a court in a given situation would arrive
at the same conclusion no matter which of the above tests is applied, it
is also possible that they would not. Therefore, it may be readily un­
derstood that the cases in the code states are not in entire agreement; and
the decisions have been further complicated by anomalous statutes in
different jurisdictions considering one or more of the special problems
involved.\textsuperscript{46}

Returning to the equitable defense, there is no doubt that one of the
principal reasons for adopting a single form of action was to do away
with the burdensome process of maintaining an additional suit in equity
in order to establish a defense to an action at law. Since the essence of
code pleading is consolidation of remedy the codes accomplished this

\textsuperscript{45}There are other points of distinction between the codes and a more detailed division

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can be found in the article, James, \textit{supra} note 44 \textit{passim}.

The New York Practice Act provides: "In each of the following actions an issue of fact

must be tried by a jury unless a jury trial is waived or a reference is directed: (N. Y. CIVIL PRAC. ACT, § 425)

1. An action in which the complaint demands judgment for a sum of money only.

2. An action of ejection; for dower; for waste; for a nuisance; or to recover a chattel.

The Connecticut Code provides: "All issues of fact in any such case shall be tried by

the jury, provided the issues agreed by the parties to be tried by the court may be so

tried. All cases not entered in the docket as jury cases under the foregoing provisions,

. . . and all other special statutory proceedings, which, prior to January 1, 1880, were

not triable by jury, shall be entered on the docket as court cases, and shall, with all issues

of law and issues of fact, other than those hereinafter specified, which may be joined

in actions entered on the docket as jury cases, be disposed of as court cases." CONN. GEN. STAT. (1930) § 5624.

The following codes are similar to that of New York: CAL. CODE CIV. PRAC. (Deering, 1931) § 592; COLO. CODE CIV. PRAC. ANN. (Mills, 1933) § 190; IDAHO CODE ANN. (1932) § 7-105; KAN. GEN. STAT. ANN. (Corrick, 1935) § 60-2903; MINN. STAT. (Mason, 1927) § 9288; MO. STAT. ANN. (1932) § 948.

The following codes are similar to that of Connecticut: ARK. DIG. STAT. (Pope, 1937) §§ 1032, 1033, 1035; IND. STAT. ANN. (Burns, 1933) § 437; IOWA CODE (1935) § 10940; KY. CODE ANN. (Carroll, 1932) Civil Prac. § 45.

\textsuperscript{46}A good example of this is the Connecticut Code which provides that "whenever an

action brought to recover damages and also to obtain equitable relief shall have been duly

placed upon the docket as a jury case, no determination of the equitable issues raised

by the pleadings shall prevent a jury trial of the claim for damages, unless both parties

shall agree in writing to waive a jury, or unless the determination of the equitable issues

had necessarily adjudicated all the facts upon which the claim for damages rest." § 5626.
result and in code states equitable defenses may be interposed in actions at law. 47

As to the question of jury trial, most of the courts have followed the rule in use before the adoption of the code. A right to trial by jury exists as to the legal issues. Issues of fact in connection with the equitable defense may be tried by the court without submitting such issues to the jury, although the court may do so when in its discretion that method would be most effective. 48 If it elects to send both legal and equitable issues to the jury, the jury verdict on the equitable issue is merely advisory and may be rejected by the court if it sees fit, unless, to do so, would also result in the rejection of the findings as to the legal issues. This is the general practice in most states, but in a few states the codes have been interpreted as requiring trial by jury of all the issues involved, unless equity is set up as a counterclaim. New York State is among this group; in this respect it is definitely in the minority. 49

What effect has code procedure on the right to trial by jury in a determination of legal issues when the legal relief is sought as an incident to equitable relief? The courts in the code states are in entire agreement in holding that damages may be obtained in the same action as an injunction. 50 They apply the historical test and hold that a jury trial is

47 Rogers v. Gwinn, 21 Iowa 58 (1866); Dobson v. Pearce, 12 N. Y. 156 (1854). These cases are merely representative. The New York Code was later amended to provide specifically for equitable defense to all actions. N. Y. CIVIL PRAC. ACT, § 262. Similar provisions are found in other code states, but most commentators consider them unnecessary additions to the codes.

48 Gunn v. Madigan, 28 Wis. 158 (1871).

49 Susquehanna S. S. Co. v. A. O. Andersen & Co., 239 N. Y. 285, 146 N. E. 381 (1925). "This decision of the Court of Appeals is unfortunate. It is not in accord with the well-settled law that provisions of the Code listing actions which must be tried by jury are declaratory of existing law, making no changes. It involves the idea that the actions so listed include issues arising in equitable defenses as part of such actions, though if the plaintiff asks for equitable as well as legal relief the Code provisions are construed as applying only to the legal issue, not the equitable one. It should be obvious that the equitable issue in both classes of cases is still equitable, and therefore triable to the court whether it be in form a defense or an affirmative action on a counterclaim." Walsh, EQUITY (1930) 118.

50 Courtwright v. Bear R. & A. W. & M. Co., 30 Cal. 573 (1866); Trowbridge v. True, 52 Conn. 190 (1884); Weston v. Pope, 155 Ind. 394, 57 N. E. 719 (1900); Gilbert v. Boak, 86 Minn. 365, 90 N. W. 767 (1902); Paddock v. Somes, 102 Mo. 226, 14 S. W. 746 (1890); Bly v. Edison, 172 N. Y. 1, 64 N. E. 275 (1902); Lynch v. Metropolitan, 129 N. Y. 247, 29 N. E. 315 (1891); Cogswell v. N. Y., N. H. & H. Ry., 105 N. Y. 319, 11 N. E. 518 (1887); Hunter v. Manhattan, 141 N. Y. 281, 36 N. E. 400 (1894); Fleischner v. Citizen's
not necessary if equity had jurisdiction to assess compensation at the time of the adoption of the state constitution. In most states, the result of applying the historical test has been that the constitutional requirement has no application to cases where the recovery of money damages is an incident to the equitable relief sought, even though the damages might have been recovered in a court of law.\textsuperscript{51} In such a case, it is the settled rule that if the claim for the equitable relief is well founded, the equity court may proceed to assess the damages sustained, and no absolute right exists to have them determined by a jury.\textsuperscript{52}

The New York courts have decided that Section 425 of the Civil Practice Act enumerating situations giving a right to trial by jury does not extend the right by use of the phrase "for a nuisance" to those cases where the action is in equity for an injunction and damages.\textsuperscript{53} This shows that the historical test is applied even in those code states which enumerate the actions in which a jury trial may be claimed.

There is no type of case which better illustrates that jury trial is preserved under code procedure than that where an injunction is denied for equitable reasons and damages awarded as a substitute thereof. We have seen that the tendency in the non-code states is to deny a trial by jury of the determination of the "legal" relief on the grounds that it has been turned into "equitable" relief by being retained by the court of equity. While it is true that there are in the code states a large number of cases which indicate that jury trial is not necessary,\textsuperscript{54} there is also a strong line of authority which holds that the joinder of the equitable and legal actions does not deprive the parties of their right to jury trial.\textsuperscript{55} These decisions, although in the minority, indicate that code procedure, instead of eliminating trial by jury, may actually extend it.\textsuperscript{56}

\textsuperscript{51}McCarthy v. Gaston, 144 Cal. 542, 78 Pac. 7 (1904); Fleischner v. Citizen's Investment, 25 Ore. 119, 35 Pac. 174 (1893); Hunter v. Manhattan, 141 N. Y. 281, 36 N. E. 400 (1894); Lynch v. Metropolitan, 129 N. Y. 247, 29 N. E. 315 (1891).

\textsuperscript{52}Hunter v. Manhattan, 141 N. Y. 281, 284, 36 N. E. 400, 401 (1894).


\textsuperscript{54}Sadlier v. City of N. Y., 185 N. Y. 408, 78 N. E. 272 (1906); Pealer v. Gray's Harbor Boom Co., 54 Wash. 415, 103 Pac. 451 (1909).

\textsuperscript{55}Matthews v. Delaware & H. Canal Co., 20 Hun 427 (N. Y. 1880).

In England there is as complete a merger of law and equity as exists in any of our states. The Common Law Procedure Act of 1854\(^\text{57}\) was the first step in their consolidation. It was followed by Lord Cairn's Act\(^\text{58}\) in 1858. These acts enabled the courts of law to grant equitable relief in actions arising at law, and courts of equity to grant legal relief in actions arising in equity.\(^\text{59}\) The final step in England's codification was brought about by the Judicature Act of 1873\(^\text{60}\) which united the courts of law and equity into a single court. Since there is no constitutional right to trial by jury in England, this practical difficulty is not encountered in English procedure.

**DECISIONS IN THE FEDERAL COURTS UNDER THE NEW RULES**

The Federal Rules of Civil Procedure do not assume to enumerate actions triable by a jury. Instead they simply state that jury trial shall be preserved inviolate and thus leave it to historical criteria to determine what this means.

If any one thing is noticeable in the decisions under the new Rules, it is the willingness of the courts to follow the simple formulae that have been suggested to them, namely: If an action presents legal issues, a jury trial is given. If the action presents equitable issues, a trial by court is given. If the issues are mixed, and one is not merely incidental to the other, trial by jury is given of the legal issues and trial by court of the equitable issues. If incidental equitable relief is asked in an action essentially legal, and the court would have referred everything to the jury for a determination before the adoption of the new Rules, it will continue to do so. And if it is an action formerly cognizable in a court of equity, where the court would have gone ahead to give damages, no jury trial can be demanded.

A brief review of the cases will best illustrate the results that have

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\(^{57}\) 17 & 18 Vict., c. 125, § 79 (1854).

\(^{58}\) 21 & 22 Vict., c. 27, § 2 (1858). "In all cases in which the Court of Chancery has jurisdiction to entertain an Application for an Injunction against a Breach of any Covenant, Contract, or Agreement, or against the Commission or Continuance of any wrongful Act, or for the Specific Performance of any Covenant, Contract or Agreement, it shall be lawful for the same Court, if it shall think fit, to award Damages to the Party injured, either in addition to or in substitution for such Injunction or Specific Performance, and such Damages may be assessed in such manner as the Court shall direct.

\(^{59}\) Pennington v. Brinshop, L. R. 5 Ch. D. 769 (1877); Hale v. Chard Union [1894] 1 Ch. 293 (C. A.).

\(^{60}\) 36 & 37 Vict., c. 66, § 3 (1873).
been accomplished. Perhaps the most important decision is that of *Bellevance v. Plastic Craft Novelty Company*. In this case the plaintiff alleged that the defendant had infringed his patent. He sought damages for the past infringements plus an injunction against future infringements. He also asked for a jury trial. In deciding that he had no right to jury trial, the court pointed out that there were two statutory remedies that may be taken in infringement cases: (1) an action on the case to recover damages for the infringement of the patent; and, (2) a suit for an injunction “according to the course and principles of courts of equity.” The first is an action of law, triable of right by a jury. But the second is primarily an equity action with incidental legal relief also demanded. The plaintiff proceeded under the second statute. Previous cases had decided that a demand for damages could be entertained in this type of suit without a trial by jury. But the plaintiff contended that since the new Rules abolished all the distinction between law and equity, the doctrine of the past cases no longer applied. But the court held that “... the distinction between Law and Equity, abolished by the new Rules is a distinction in procedure and not a distinction between remedies. The distinction still remains between jury actions and non-jury actions; whatever was, before the adoption of the new Rules, an action at law is a jury action, and whatever was a suit in equity falls in the category of a non-jury case.” In other words, the new Rules have not extended the right of trial by jury to cases formerly in equity.

A similar case is *Williams v. Collier* wherein the court was very specific in pointing out that the test of whether a jury trial will be given is whether the action is in its essence legal or equitable. This was a suit by a trustee in bankruptcy to recover the value of property transferred in fraud of creditors. The action was one for the recovery of a money judgment, a legal matter, plus a demand for additional remedies of an equitable nature. In deciding that the complaint stated a case formerly cognizable in equity and that the money judgment demanded was merely incidental to the equitable relief sought, the court pointed out that the answer could only be had “... by inquiring into the status of the case

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had it arisen when the formal distinction between an action at law and a suit in equity still existed." 66

Another decision has held that when a defendant pleads a legal counterclaim in an action essentially equitable, he is entitled to a jury trial of the counterclaim. This decision is in apparent contradiction to the predominant practice under old Equity Rule 30 to merge the incidental legal issue into the major equitable issue, thereby not necessitating a trial by jury. But the court justified its position by pointing out that under the old practice the defendant was not obliged to plead a legal counterclaim in the equity suit, but could sue on it in a separate action, thereby preserving his right to trial by jury. But Rule 13a of the new Rules makes it necessary to plead a counterclaim if it arises "out of the transaction or occurrence that is the subject of the opposing party's claim." The defendants, therefore, were obliged to plead the legal counterclaim in their answer or lose their right to do so. Therefore the court felt that jury trial must be given, since the alternative procedure was no longer open. 67

The recent case of Scoville Mfg. Co. v. U. S. Electric Mfg. Co. 68 presents another example where the court has relied on former practice to determine what its action would be under the new Rules. In this case the plaintiff sought to enjoin the infringement of a trade mark and also obtain an accounting. But since the infringement of the trade mark had long since been discontinued the court did not feel that it should grant an injunction. Having refused the equitable relief the question was resolved into whether the case could still be retained to grant legal relief without the necessity of a jury trial. We have seen that in the majority of the code states the courts usually retain the case under these circumstances. This court did likewise, pointing out that where it was "... jurisdictionally possible a court should not allow two causes to spring up where first there was one." 69 This is the true spirit of code pleading.

An interesting situation also arises where the plaintiff prays for equitable relief and in the alternative for legal relief if the equitable relief cannot be granted. Such a case is Fraser v. Geist,70 wherein the

66Ibid.
complainant sought specific performance of a contract or, this failing, damages for breach of the contract. The court held that since the complaint was in its essence an equitable one, no jury trial would be given.

There are many ancillary problems involved in cases where a jury is used for the legal issues without using it for the equitable issues. In cases of this nature the customary procedure is to dispose of the equity issue first and then determine the legal issue.\textsuperscript{71} Where an advisory jury is made use of, the advisory jury may hear all the evidence and decide on the legal issues, leaving the equitable issues to the court, which may accept or decline the findings of the advisory jury.\textsuperscript{72} The verdict returned by the advisory jury does not have a binding effect on appeal and should be given the same weight as a similar verdict had in equity on appeal.\textsuperscript{73}

In those jurisdictions which have adopted pre-trial procedure as provided for in the new Rules,\textsuperscript{74} there is a very convenient method of determining whether or not jury trial can be had on the various issues. Rule 16 provides that “the court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration . . . and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.” Consequently when the pre-trial judge determines what the issue to be decided is, the attorneys may inquire of him whether the trial is to be by jury or not. The judge who tries the case is bound by the determination of the pre-trial judge. In these jurisdictions in which pre-trial procedure has been adopted, therefore, a simplification of the problem of jury trial has been attained.

\textsc{James A. McKenna}


\textsuperscript{73}Lumbermen’s Mutual Casualty Co. of Illinois \textit{v.} Turins & Howard, Inc. (C. C. A. 2nd, 1939).

\textsuperscript{74}Rule 16.
The plaintiff seeks annulment in the District of Columbia on the ground that a Virginia decree divorcing the defendant from her first husband was void. The defendant married C. M. Hawk, and lived with him in the District of Columbia for five years. They separated, and the defendant wife moved to Virginia to procure a divorce from Hawk, because at that time desertion, her alleged ground, was not a ground for divorce in the District. The divorce action was begun at the instance of the plaintiff in the annulment action, and on the strength of a promise by him that he would pay for the divorce. The plaintiff contends that defendant had not established a domicile in Virginia and that therefore the Virginia decree was a nullity. Held, the public policy of the District does not require the voiding of all irregular foreign divorces, and that a participant in the foreign decree will be precluded by the doctrine of equitable estoppel from assailing the jurisdiction of the foreign court. Goodloe v. Goodloe, 113 F. (2d) 750 (App. D. C. 1940).

If the doctrine of estoppel and laches are to be recognized in any case, it seems that they should justly apply here. The lower court found that the present plaintiff, though not a party of record "caused the divorce action to be instituted and carried down there in Virginia." The rule of equity is to look to form and not to substance, so the plaintiff by furnishing the money to prosecute the suit was responsible for the divorce. Such a party should be estopped to deny the validity of the divorce. Kaufman v. Kaufman, 163 N. Y. S. 566 (1916). In the instant case, the court did not need to look at the validity of the Virginia decree since the plaintiff was estopped to attack it. "The validity of a divorce decree cannot be questioned in a proceeding concerning any right or other interest arising out of the marital relation, either by a spouse who has obtained such decree of divorce from a court which had no jurisdiction or by any spouse who takes advantage of such decree by remarrying." Restatement, Conflict of Laws (1934) § 112. This exempts a party not in privity to the action, as a prospective second husband of a wife obtaining a divorce. But in the Goodloe case, the court argued that a party who instigates the litigation in fact, and bears its expense, should stand in the shoes of the person actually obtaining the decree. The doctrine of estoppel as stated in the Restatement is considerably broadened by this new view.

In two previous cases with factual situations somewhat similar, Frey v. Frey, 59 F. (2d) 1046 (App. D. C. 1932), and Simmons v. Simmons, 19 F. (2d) 690 (App. D. C. 1927), the court declined to apply the doctrine of estoppel. In the Frey case, supra, it was held that marriage of one party after a fraudulently obtained divorce, was void and subject to annulment, regardless of whether the parties were in pari delicto or came into court with clean hands. The Simmons case held that a Virginia decree procured by fraud, both as to residence and as to the grounds, was invalid. In both these cases the court found that the divorce violated a public policy of this jurisdiction and would not be recognized. In the instant case the court did not even examine the validity of the decree. This demonstrates that the public policy of this District with regard to the recognition of foreign decrees is undergoing a radical change.
The estoppel doctrine is not followed by every state. It is significant, however, that in Virginia there is no general public policy against the application of equitable principles in determining the effect to be given irregular divorces, viz., the estoppel doctrine. The Virginia court refused on the ground of laches to allow a first husband to question the validity of his wife's Nevada divorce and remarriage, although the divorce was tainted with fraud. *Dry v. Rice*, 147 Va. 331, 137 S. E. 437 (1927); *accord, McNeil v. McNeil*, 170 Fed. 289 (C. C. A. 9th, 1909).

There are cases in a number of jurisdictions where a particular public policy requires the annulment of a marriage, without regard to the guilt or innocence of the parties. Where the doctrine of estoppel has been rejected in other jurisdictions, it has been for the purpose of preserving an established public policy. *Kraskin v. Kraskin*, 104 F. (2d) 218 (App. D. C. 1939) (Where fraud was practiced on the divorce forum); *Garman v. Garman*, 102 F. (2d) 272 (App. D. C. 1939); (Mail order divorces); *Lynch v. Lynch*, 34 R. I. 261, 83 Atl. 83 (1912) (Married woman remarried without the benefit of any judicial decree); *Szlauzis v. Szlauzis*, 255 Ill. 314, 99 N. E. 641 (1912) (Marriage in violation of a statute prohibiting marriage within a certain time); *Martin v. Martin*, 52 W. Va. 381, 46 S. E. 120 (1903) (Incestuous marriages). A party who has secured a divorce is not, therefore, estopped to deny its validity should he find it desirable to do so at a future time. (1940) 28 GEORGETOWN LAW JOURNAL 811.

What would have been the result if the first husband were before the court instead of the present plaintiff? Would the Virginia decree be *res judicata* against the first husband? Assuming that the first husband had not remarried, under the doctrine of the *Haddock case, Haddock v. Haddock*, 201 U. S. 562 (1906), the determination of his fault would not be binding upon him unless made by a court to whose processes he was under an obligation to respond. Since the jurisdiction of the Virginia court in this instance was predicated on his wrongdoing he, an absentee, non-domiciliary, who is served only by publication, was under no obligation to respond to this publication unless in fact he was guilty of the alleged desertion. BEALE, CONFLICT OF LAWS (1935) § 113.11.

The same may be said of the instant adjudication. In this case the first husband was not a party, was not served with process, and did not participate in the litigation. The finding that he was at fault in causing the separation, is not binding on him. It will thus appear that the fact that the first husband remarried and is thereby estopped to attack the decree is the only thing that is reasonably sure to save the Court of Appeals from embarrassment as a result of this decision.

WILLIAM J. GIBBONS

CONFLICT OF LAWS—Erie v. Tompkins Distinguished

Defendant telegraph company transmitted and delivered to addressee a telegraph message, submitted by an unknown addressee, which contained obviously defamatory statements concerning plaintiff. In an action for libel, held, for defendant on the grounds that the immunity of a telegraph company from liability to a defamed person, when it transmits a libellous message, must be broad enough to enable the
company to render its public service efficiently and with dispatch, such service precluding any requirement on the part of the company to first determine whether or not the sender was privileged to telegraph the defamatory message. _O'Brien v. Western Union Telegraph Co._, 113 F. (2d) 539 (C. C. A. 1st, 1940).

The message in question was interstate in character, originating in Massachusetts and delivered in Michigan, the transmission being accomplished by a common carrier engaged in interstate commerce, and, therefore, as the court held, the telegraph company was subject to the Federal Communications Act of 1934, 48 STAT. 1064 (1934), 47 U. S. C. (Supp. 1938) §§ 35, 151 et seq., and to regulations thereunder by the Federal Communications Commission. Basing its stand on this determination, the court said that it (the court) was not bound by the common law or statutes (whatever they may have been) either of Massachusetts or Michigan in deciding the limits of defendant's duty to accept and transmit defamatory messages. Instead, the court stated, "The extent of this duty will necessarily be marked out and made explicit in successive decisions of the federal courts interpreting and applying the language of the Act," and, the "liability of a telegraph company . . . for failure to transmit a message promptly will necessarily be determined by federal law, not by divergent rules of state law." _Supra_, at 541.

The court then continued, "Notwithstanding _Erie Railroad Co. v. Tompkins_, 304 U. S. 64 (1938) . . . there still exist certain fields—and this is one—where legal relations are governed by a 'federal common law', a body of decisional law developed by the federal courts untrammeled by state court decisions." _Ibid_. And so, here, is found a federal court unmistakably forecasting the innumerable cases, destined to arise in the future, to which will be applied the presently determined, and the rapidly growing, "federal common law," despite the cataclysmic and far-reaching decision in _Erie R. R. v. Tompkins_.

This proposition, however, was presaged by _Hinderlider, State Engineer, et al. v. La Plata River & Cherry Creek Ditch Co._, 304 U. S. 92 (1938), decided on the same day as _Erie R. R. v. Tompkins_, in which case was involved a compact entered into by the States of Colorado and New Mexico, with the consent of the United States, providing that each state should receive a definite share of the La Plata River's water under the varying conditions obtaining during the year. The Colorado Supreme Court granted the Ditch Company a mandatory injunction, the latter having charged the State Engineer with so administering the water of the river as to deprive the Company of water which it claimed the right to divert for irrigation purposes. In declaring the compact unconstitutional the state Supreme Court held that it was a " . . . mere compromise of presumably conflicting claims . . . in which the property of citizens is bartered, without notice or hearing and with no regard to vested rights." _Id_. at 99. But, while admitting that the assent of the Congress to the compact did not thereby make it a treaty or statute of the United States within the meaning of § 237 (a) of the Judicial Code, 45 STAT. 54 (1928), 28 U. S. C. § 344 (1934), the United State Supreme Court said, in reversing the decision of the State court, "For whether the water of an interstate stream must be apportioned between the two states is a question of 'federal common law' upon which neither the statutes nor the decisions of either state can be conclusive. . . . Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting fed-
eral questions." *Id.* at 110. These words were spoken, as was said above, on the same day as the identical court said, "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no general federal common law." *Erie R. R. v. Tompkins*, *supra*, at 78.

In *Board of County Commissioners of the County of Jackson, Kansas v. United States*, 308 U. S. 343 (1939), the county had in good faith collected taxes from an Indian on land exempt from such taxation by virtue of a federal treaty stipulation and the provisions of a trust patent. In a suit instigated on behalf of the Indian, the United States recovered from the county these taxes plus interest from the time of their payment. In the suit brought by the county for a refund of the interest, it being the settled doctrine of the State (Kansas) that a taxpayer may not recover from a county interest upon taxes wrongfully collected, the United States Supreme Court said that since the origin of the right to be enforced was the treaty, whatever rule the court fashioned was ultimately attributable to the Constitution, treaties or statutes of the United States, and did not owe its authority to the law-making agencies of the State. However, in a separate opinion by Mr. Justice Black (concurred in by Mr. Justice Douglas) it was said, "The failure of Congress to stipulate that a State—as here—must pay interest to an Indian when the State law permits interest to no one, is entirely consistent with the congressional policy of steadily extending the operation of the States' laws over their resident Indians." *Id.* at 354.

In *Illinois Central R.R. v. Moore*, 112 F. (2d) 959 (C. C. A. 5th, 1940), it was necessary to draw a still finer distinction between the doctrine laid down in *Erie R.R. v. Tompkins* and the cases applying the "federal common law" to the exclusion of local state law. Here the appellee brought an action in September 1936 to recover damages for an alleged wrongful discharge from appellant's employ in February 1933, basing the action on a collective agreement between the Brotherhood of Railroad Trainmen, of which the appellee was a member, and the appellant. On appeal the Supreme Court of Mississippi found that the contract was one to which was applicable the Mississippi six year statute of limitations and therefore entitled the appellee to recover. The case was then removed to the district court of the United States where the judge followed the decisions of the Supreme Court of Mississippi under the authority of *Erie R.R. v. Tompkins*. On further appeal, however, the United States Circuit Court of Appeals declared, "We are of opinion that the doctrine of *Erie v. Tompkins* applies only to local matters governed wholly by State law. A railroad union contract applying over a railroad system which operates in many States is not such. Its meaning and effect ought to be the same in each State. . . . Its subject matter, the relationship of an interstate railroad with its employees, is well within the commerce power of Congress and has for fifty years been a subject of federal legislation." *Illinois Central R. R. v. Moore*, *supra*, at 963.

The Court determined, accordingly, independently of the state court, that the Mississippi three year statute of limitations applied to the contract in question and, consequently, barred any action on the contract. In a dissenting opinion by Circuit Judge Holmes, however, after stating that the contract of employment between the appellee and the railroad company was made in Mississippi, was to be performed in Mississippi, and was therein performed until the date of the alleged wrongful discharge in Mississippi, it was said, "I cannot reconcile with *Erie Railroad Co. v. Tompkins* . . .
the majority opinion wherein it urges uniformity of construction of a contract, operating in many states, as a basis of federal courts exercising an independent judgment. . . . Upon the facts before us, the federal court is not authorized to exercise an independent judgment, either as to the construction of the contract sued on or as to the applicable statute of limitations. Both are questions of state law, and we should follow the state court.” *Id.* at 967.

If the foregoing cases are indicative of the development of a tendency, *Erie R.R. v. Tompkins* seems destined for some far-reaching qualifications.

**JACK W. DURANT**

**CONSTITUTIONAL LAW—Police Power—Regulation of Employment Agencies**

Mandamus to compel issuance of license to do business as a private employment agency. Respondent, Nebraska’s secretary of labor, would not issue a license to relator, Western Reference & Bond Association, because of its refusal to comply with a statute fixing the maximum compensation which an employment agency may collect as a $2 registration fee and ten per cent of client’s wages for the first month of the employment. Neb. Const. Art. XV, § 9, provides that the legislature may enact laws “for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare.” Peremptory writ granted. *Held,* that the statute is valid under the state constitution but contravenes the “due process” clause of the Fourteenth Amendment of the Federal Constitution. *State v. Kinney,* 293 N. W. 393 (Neb. 1940).

Despite recent trends in price fixing and extension of that category of businesses deemed to be “affected with a public interest”, the Supreme Court of Nebraska felt bound to follow *Ribnik v. McBride,* 277 U. S. 350 (1928), in which the Supreme Court held unconstitutional a New Jersey statute that predicated issuance of a license to a private employment agency on approval by a state official of a schedule of fees submitted by the applicant. There the Court said, “The business of an employment agent is not one ‘affected with a public interest’ so as to enable the state to regulate the service charge.” Respondent cited *Sunshine Anthracite Coal Co. v. Adkins,* 60 Sup. Ct. 907 (1940); *West Coast Hotel Co. v. Parrish,* 300 U. S. 379 (1937); *Nebbia v. New York,* 291 U. S. 502 (1934); and *Tagg Bros. & Moorhead v. United States,* 280 U. S. 420 (1930); but of these the Nebraska court said, “The industries affected are . . . distinctively different from the one affected by the *Ribnik* decision.” (P. 398).

The instant case gives the Supreme Court a clear-cut chance to reconsider the *Ribnik case,* in which Stone, J., wrote a strong dissent with Holmes and Brandeis, JJ., concurring. If it decides that under the facts of the case employment agencies are “affected with a public interest” to a degree sufficient to warrant price-fixing, it may create a great entering wedge for extension of this doctrine and the attendant regulatory powers to other fields.

This would not necessarily entail overruling the *Ribnik case,* for, as Mr. Justice Holmes, speaking for the majority, said in *Block v. Hirsh,* 256 U. S. 135, 155 (1921), “Plainly circumstances may so change in time or so differ in space as to clothe
with such an interest what at other times or in other places would be a matter of purely private concern." Earlier, Mr. Chief Justice Taft expressed the same view in Chas. Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U. S. 522, 535 (1923), where he classified as affected with a public interest "... businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them." Mr. Justice Roberts, in his majority opinion in the Nebbia case, supra at 536, said, "It is clear that there is no closed class or category of businesses affected with a public interest," and Mr. Justice Brandeis, writing the unanimous opinion of the Court in the Tagg Bros. case, supra, limited the Ribnik case by saying at p. 438, "This court did not hold in ... Ribnik v. McBride that charges for personal service cannot be regulated. The question upon which this Court divided ... was whether the services there sought to be regulated were then affected with a public interest." (Italics supplied.)

The question, then is: Have changing economic conditions in the past twelve years, particularly the growth of unemployment, imbued private employment agencies with a "public interest"? Or if this cannot be answered generally, the scope of the question might be narrowed to conditions in Nebraska, even as, in the Tagg Bros. case, it was decided that commission men in stockyards were engaged in a business affected with a public interest because of the indispensable nature of the service they were rendering and because they enjoyed a virtual monopoly in Omaha, Neb.

The test of virtual monopoly coupled with indispensability of service was evolved by the Court in a long line of cases beginning with Munn v. Illinois, 94 U. S. 113 (1876), which applied the monopoly test to Chicago grain elevators. Brass v. North Dakota, 153 U. S. 391 (1894), another grain elevator case, swung to what has been called the test of legislative declaration, but since German Alliance Insurance Co. v. Lewis, 233 U. S. 389 (1914), the monopoly-indispensability test has, after some deviations, become accepted. Willis, CONSTITUTIONAL LAW OF THE UNITED STATES (1936) 763, 764. In recent years cases have hinged on the problem of determining what constitutes an indispensable service or a virtual monopoly. In the Ribnik case and in Tyson v. Banton, 273 U. S. 418 (1927), for instance, indispensable service was found lacking in the employment agency and theatre businesses, and in Williams v. Standard Oil Co., 278 U. S. 235 (1929) no monopoly was found in gasoline selling. However, in the Nebbia case, the Court approved milk price regulation without finding a monopoly, thereby greatly broadening the concept of businesses that are affected with a public interest as to justify price-fixing.

This may be important if the Court reviews the instant case, for since the passage of the Social Security Act of 1935, 49 STAT. 620 (1935), 42 U. S. C. §§ 301-1305 (Supp. 1938), every state in the union has established a state employment office system, so no monopoly by private employment agencies could be established. As for indispensable service, however, Mr. Justice Stone in his dissenting opinion in the Ribnik case pointed out at p. 361, that employment agencies "deal with a necessary class, the members of which are often dependent on them for opportunity to earn a livelihood, are not free to move from place to place, and are often under exceptional economic compulsion to accept such terms as the agencies offer."
That employment agencies are subject to licensing and regulation in other respects was established in *Brazee v. Michigan*, 241 U. S. 340 (1916), and was conceded in the instant case. Neither was reasonableness of the statutory fee an issue. Stone in his *Ribnik case* dissent said at p. 373, "To me it seems equally obvious that the Constitution does not require us to hold that a business, subject to every other form of reasonable regulation, is immune from the requirements of reasonable prices," and it has been argued that any business is affected with a public interest if it is engaged in an anti-social competition. Hardman, *Public Utilities: The Quest for a Concept*, (1931) 37 W. VA. L. Q. 250, (1934) 40 W. VA. L. Q. 230.

Abolition of fee-charging employment agencies was voted by 33 out of 42 nations at the International Labor Conference at Geneva, 1933, and many of them in a reply to a questionnaire indicated that they had already done this. (See Report I, 17th Session, International Labor Conference, 1933). In this same report appears a memorandum prepared by the United States Bureau of Labor Statistics, dated September 29, 1932, stating that at that time approximately 40 states had enacted legislation governing or regulating such agencies. One, Idaho, abolished them entirely in 1915 and declared employment offices a function of government by a twice-reenacted statute which, though of doubtful constitutionality, has never been tested. *Idaho Code Ann.* (1932) § 43-201.

**CONSTITUTIONAL LAW—Religious Liberty—Saluting Flag**

The School Board of Minersville, Pennsylvania, acting under powers delegated to it by the state, adopted a resolution making compulsory the saluting of the flag and the pledge of allegiance at daily exercises. The Gobitis children, members of Jehovah's Witnesses and being within the compulsory school age, refused to salute because they believed so to do was contrary to the law of God. As a result they were expelled and suit was brought to compel the school board to reinstate them. *Held*, the requirement of participation by pupils in public schools in the ceremony of saluting the national flag, does not, in the case of a pupil who refuses participation upon sincere religious grounds, infringe, without due process of law, the liberty guaranteed by the Fourteenth Amendment. *Minersville School District v. Gobitis*, 60 S. Ct. 933 (U. S. 1940).

The religious guarantees of the Constitution have been considered by the Supreme Court in numerous cases. In *Reynolds v. United States*, 98 U. S. 145 (1878), the defendant was convicted of bigamy despite the fact that his religion allowed him to practice polygamy. Nor will a person's religious belief be held to justify his violation of a state statute. *Davis v. Beason*, 133 U. S. 333 (1890). In 1918 the Supreme Court held that Congress had the right to compel military service and that the provisions in the act exempting ministers and theological students and granting other relief to members of various religious sects did not make the law repugnant to the First Amendment. *Selective Draft Law Cases*, 245 U. S. 366 (1918). The restrictions by the National Prohibition Act on the amount of sacramental wine which might be used yearly was held to be constitutional and not in violation of the First Amendment. *Shapiro v. Lyle*, 30 F. (2d) 971 (W. D. Wash. 1929). In 1931
the Supreme Court held that naturalization was properly denied an applicant who, because of his religious beliefs and conscientious objections, was unwilling to take the oath of allegiance without qualifications. *United States v. MacIntosh*, 283 U. S. 605 (1931).

In 1933, the Supreme Court dismissed an appeal from a Maryland state decision which held that a university might suspend students refusing to take military training on sincere and conscientious religious objections. The ground of dismissal was want of a substantial federal question. *Coale v. Pearson*, 290 U. S. 597 (1933). In 1934, the Supreme Court decided that students suspended from the University of California because they refused, for religious reasons, to take a required course in military training could not compel the regents of the university to reinstate them without their taking the course. *Hamilton v. Regents*, 293 U. S. 245 (1934).

The precise question determined in the *Gobitis case* was presented to the Supreme Court on four occasions within the past three years and in each case a regulation or statute similar to that involved in the *Gobitis case* had been upheld in *per curiam* opinions. In *Gabrielli v. Knickerbocker*, 306 U. S. 650 (1939), *Hering v. State Board of Education*, 303 U. S. 624 (1938), *Leoles v. Landers*, 302 U. S. 656 (1937), appeals (from courts) of last resort in the states of California, New Jersey and Georgia, where requirements to salute the flag were held reasonable and constitutional, were dismissed by the Supreme Court for want of a substantial federal question. This amounted to implied affirmation of the state court decisions. Then, in *Johnson v. Deerfield*, 306 U. S. 621 (1939), the Supreme Court expressly affirmed a judgment of the United States District Court of Massachusetts, wherein a resolution requiring pupils to salute the flag was held to be constitutional. In all four cases, the courts of last resort of each state had previously considered whether the statute involved had violated any provision of the Constitution of the United States or any provision of their state constitutions. Each court was unanimous in holding the requirement to salute the flag constitutional. However, in the instant case, despite the fact that there was no decision by a state court of last resort as to the constitutionality of the school board regulation, the Supreme Court ignored this fact and decided the case on its merits.

As contrasted to the Supreme Court decisions in regard to the religious guarantees of the Constitution under the Fourteenth Amendment, there are the cases decided by the Supreme Court in regard to freedom of speech, press, and assembly under this Amendment. The Supreme Court allows the states to restrict religious freedom when it conflicts with national unity. But the Court does not allow the states to interfere with other inalienable rights, such as freedom of speech and press, unless such utterances and papers advocate the overthrow of the government by force and violence. Statutes, infringing freedom of speech and press, are not valid even though designed to secure the ends of national unity, or of public convenience.

A state may punish those teaching or advocating its citizens not to assist the United States in prosecuting or carrying on war. *Gilbert v. Minnesota*, 254 U. S. 325 (1920). It has been held that a state may punish persons for utterances advocating the overthrow of organized Government by violence or unlawful means. *Whitney v. California*, 274 U. S. 357 (1927); *Gitlow v. New York*, 268 U. S. 652 (1925). The first real departure from the restrictive speech doctrine was enunciated in 1931, when the Supreme Court, in a five to four decision, declared unconstitutional a

In 1931, the Supreme Court declared as unconstitutional a state statute which condemned as a felony the displaying of a red flag in a public place as a symbol of opposition to organized government on the ground that such opposition might have included peaceful and legal means. *Stromberg v. California*, 283 U. S. 359 (1931). Then followed *Herndon v. Lowery*, 301 U. S. 242 (1937), in which a statute punishing as a crime the solicitation of members for a political party (Communist) and the conducting of meetings, where one of the doctrines of the party was an ultimate resort to violence against organized government, was held to be an unjustifiable invasion of the right of free speech. In the same year, criminal punishment under a state statute for participation in the conduct of a public meeting, otherwise lawful, merely because the meeting was held under the auspices of an organization which teaches or advocates the use of violence, or other unlawful acts to effect an industrial or political change, though no such teaching or advocacy attended the meeting in question, was held to violate the constitutional principles of free speech and assembly. *De Jonge v. Oregon*, 299 U. S. 353 (1937).

The Supreme Court held unconstitutional, as an invasion of speech and press protected from state action by the Fourteenth Amendment, an ordinance which prohibited distribution of literature of any kind, at any time, place or manner in the city without a permit from the city manager. *Lovell v. Griffin*, 303 U. S. 444 (1938). In the Handbill cases, ordinances which prohibited distribution of handbills and other similar matters in the streets, were held to be void, on the ground that public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution. *Schneider v. State* (Town of Irvington), 308 U. S. 147 (1939). Also in 1939, an anti-leaflet ordinance of Jersey City was held void and its enforcement enjoined. *C.I.O. v. Hague*, 307 U. S. 496 (1939).

Thus it seems that although the recent Supreme Court decisions prevent state legislative interferences with the freedom of speech and press, the Court will allow state restrictions on religious freedom when "national unity" is bettered by such regulations. All this despite the fact that Communistic literature and meetings would probably be more harmful to national unity than the mere refusal of a few school children to salute the national flag.

THOMAS F. FLYNN

COURTS—Validity of New Rules—Substance and Procedure

In a suit for maintenance, the paternity of the appellant's child became an issue, and the court, acting under Rule 35 (a) of the Federal Rules of Civil Procedure, ordered the appellant and child to submit to a blood grouping test. Objection was made that the court did not have the power to order such an examination. Upon appeal the validity of Rule 35 (a) was challenged on the ground that the rule abridged a "substantive" right of privacy. The purpose of this argument was to take advantage of § 1 of the Act of June 19, 1934, which empowered the Supreme Court to promulgate the Rules and which provided, "Said rules shall neither abridge,
enlarge, nor modify the substantive rights of any litigant”.

 Held, since the Rules were prescribed by the Supreme Court and adopted by the acquiescence of Congress, they have been inferentially construed as not involving any “substantive” rights; hence, Rule 35 (a) is a valid legislative enactment giving the federal courts power to compel a physical examination of a litigant. 


 The court admitted that prior to the adoption of the Rules, the federal courts, in the absence of statutory authority, did not have the power to order a physical examination. Union Pacific Ry. v. Botsford, 141 U. S. 250 (1891). Only where the Conformity Acts allowed the courts to give effect to a state statute was such power available to the federal courts. Camden and Suburban Ry. v. Stetson, 177 U. S. 172 (1899). In the instant case, the court observed that the necessary statute was to be found in Rule 35 (a) which became law by the Act of June 19, 1934, supra.

 The debate concerning the validity of certain of the New Rules of Federal Procedure has developed along three lines. One group of cases apply a rigid rule of concepts, and, having determined that a Rule conflicts with a right which the state courts have regarded as “substantive”, strike down the rule on the authority of both § 1 of the enabling Act and the doctrine of Erie R. R. v. Tompkins, 304 U. S. 64 (1938), which requires the federal courts in cases involving the “general law” to apply only the substantive law of the state as defined by the state courts. Sampson v. Channel, 110 F. (2d) 754 (C. C. A. 1st, 1940), cert. denied, 60 Sup. Ct. 1099 (1940); Francis v. Humphrey, 25 F. Supp. 1 (E. D. Ill. 1938); (1939) 27 GEORGE-TOWN LAW JOURNAL 375.

 Another group of writers, largely academic, have criticized this latter view and have warned of the necessity of avoiding a narrow conceptualism which may obstruct the usefulness of the Rules before they are fairly launched. This group points out that previous determinations of what is “substance” and what is “procedure” have all been made with entirely different purposes in view than the solution of the problem to which these concepts are now applied. Tunks, Categorization and Federalism: Substance and Procedure After Erie R. R. v. Tompkins (1939) 34 ILL. L. REV. 271; Clark, Procedural Aspects of the New State Independence (1940) 8 GEO. WASH. L. REV. 1230; Pike and Fischer, What Law Governs Matters of Substance in Federal Practice (1940) 2 FED. RULES SERV. 627.

 The third line of thought is represented by the instant case and relies on an inferred determination by the Supreme Court and Congress that the Rules do not modify any substantive rights. The view adopted by this decision is particularly facile in its effect; for it avoids the blighting effect of both § 1 of the enabling Act and the doctrine of Erie R. R. v. Tompkins. But it is probably the very facileness of the theory that will cause it to be criticized. The reasoning seems to hint of question begging. Already the theory has been criticized on the ground that a determination made by the Supreme Court prior to the adoption of the rules amounts to an advisory opinion in the absence of a case or controversy. (1940) 26 VA. L. REV. 823. This criticism was adopted in a dissent to the instant decision. It should be noted also that the dissenting opinion was based squarely on the view that Rule 35 (a) involved a definite substantive right. The view of the majority is supported by other cases. Countee v. United States, 112 F. (2d) 447 (C. C. A. 7th, 1940); Sibbach v. Wilson and Co., Inc., 108 F. (2d) 415 (C. C. A.

Still one other approach to the problem has been suggested. Section 1 of the Act empowers the Supreme Court "... to prescribe, by general rules, the practice and procedure in civil actions at law." Section 2 provides that "... the court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of action for both. ..." Nothing is said in § 2 about "substantive" rights. See Tunks, supra, at 285. Apparently these sections were laid in the alternative, thus giving the Court the choice of prescribing rules of procedure at law under § 1 (in which case no substantive changes were to be made) or of merging actions in equity and law under § 2 (in which case substantive changes would be permissible). (Query: Is it possible to merge equity and law procedures without affecting matters of substance?) Both sections contain a provision for a time at which the rules may become effective; consequently, either section could stand alone.

Even the fact that there was a difference between the two methods by which the Rules were to become effective seems to be significant. In § 1, which prohibited any substantive changes, the newly prescribed rules could have become effective six months after their promulgation—and this without any further action of Congress. Section 2, on the other hand, required that the rules as promulgated be submitted to Congress at the beginning of a regular session, not to become effective until the close of the same session. This distinction seems to indicate that Congress foresaw that some substantive changes would be necessary if the Court acted under § 2, and realizing that these changes could not become law without a legislative enactment, chose a method of legislating which would afford them an opportunity to veto any undesirable changes, but which at the same time would allow the changes to be enacted into law, if they had no objection to the changes proposed, by the automatic operation of a statute. If this interpretation of the statute could be upheld, the restrictive clause of § 1 would be avoided; for the Court actually proceeded under § 2.

But whether this interpretation could be upheld or not, it is evident that such an interpretation was not contemplated at the time the rules were being drafted; for at that time, the Chief Justice, speaking to the American Law Institute, remarked that "... the court has decided not to prepare rules limited to common law cases, but to proceed with the preparation of a uniform system of rules for cases in equity and actions at law so as to secure one form of civil action and procedure for both so far as this may be done without the violation of any substantive right." (Italics supplied). (1935) 21 A. B. A. J. 341. Thus the Chief Justice read the two sections of the enabling Act together, at least in part. When the Court made the order which gave effect to this decision, the same restrictions were included; the Advisory Committee was ordered to proceed "Pursuant to Section 2. . . ." but "... without altering substantive rights." Order of June 3, 1935, 295 U. S. 774.

The suggested interpretation is of course subject to the major criticism that it does not avoid the doctrine of the Tompkins case. Once having admitted—as this theory does—that the Rules may contain substantive changes, the courts would then be forced to apply that doctrine. The only way out of this dilemma would seem to be a reinterpretation of the Tompkins case.

ROBERT D. SCOTT
The plaintiff's husband applied to the defendant insurance company for a policy of life insurance. He died before the company had finally passed upon his application. The plaintiff, named as beneficiary in the application, brought an action in tort for alleged negligent delay of the company in passing on the policy. Verdict in lower court was for the plaintiff. Held, affirmed, plaintiff may recover the amount to which she would have been entitled as beneficiary, if the policy had been issued. Beken v. Equitable Life Assur. Soc. of U. S., 273 N. W. 200 (N. D. 1940).

Even granting the existence of a duty on the part of the insurance company to act promptly on an application for a policy, and given a breach of that duty resulting in loss, the question is still to be determined to whom that duty is owed. The unanimous holding of those courts allowing recovery has been that the right of action exists, in the estate of the applicant, and not in the intended beneficiary. Royal Neighbors of America v. Fortenberry, 214 Ala. 387, 107 So. 846 (1926); Forck v. Prudential Ins. Co., 228 Mo. App. 316, 66 S. W. (2d) 983 (1933); Veser v. Guardian Life Ins. Co., 44 Ohio App. 293, 183 N. E. 565 (1932); Stray v. Western States Life Ins. Co., 63 Wash. 329, 300 Pac. 1046 (1931).

This case holds that the right of action exists in the proposed beneficiary. The plaintiff recovered the full proceeds of the proposed policy, as beneficiary, though she sued as administratrix of the estate. In every tort action based on negligence the question turns on whether the plaintiff has sustained harm through a violation by the defendant of a duty imposed by law. There cannot be, it has been said, negligence "in the air." Palsgraf v. Long Island Ry., 248 N. Y. 339, 162 N. E. 99 (1928). Courts will not award damages for loss sustained by those persons not in such legal relationship to the doer of an act to require as to them that the act be done well. There can be no conceivable basis for finding that relationship in the insurance company where the only interest involved arises from the fact that the party's name appeared in the application as beneficiary, and that she might have been the beneficiary in the policy, had the company acted in a timely manner and issued the policy. "An application for life insurance is not a contract. It is only a proposal to contract on certain terms which the company to which it is presented is at perfect liberty to accept or reject. It does not in any way bind the company to accept the risk proposed, to make the contract requested, or to issue a policy." Travis v. Nederland Life Ins. Co., 104 F. 486 (C. C. A. 8th, 1900). Until it does, the proposed beneficiary has no legal interest to be protected. Courts will not award damages for non-intended injuries to mere expectancies. La Société Anonyme de Remorquad v. Bennetts, 1 K. B. 243, 27 L. T. Rep. 77 (1911); Homan v. Hall, 102 Neb. 70, 165 N. W. 881 (1917); (1919) 28 YALE L. J. 507.

A proposed beneficiary is removed from the insurance company by at least two degrees of expectancy in that, (1) the insurance company may in the end reject the applicant as an undesirable risk, and (2) if the application is accepted, the beneficiary named cannot collect the proceeds until the insured dies. To say that such a possibility of expectancy is a legal interest is to give anyone's expectations the assurance of compensation for invasion. What logical obstacles would there be, for instance, to awarding damages to a proposed beneficiary's son, who, it could be alleged, might have been well provided for but for the insurance company's negli-
gence? The court seems to recognize its tenuous position. Against a background of disassociated statements as to the rights of a third party beneficiary to a contract already formed is cast this summary disposal of the case. "We are fully aware that the general holding of the courts...is to the effect that the right of action...is vested in the estate of the applicant, and not in the person named as beneficiary of the application. We are not concerned with whether under the facts in the cases where such holding was made the rule was correct or incorrect. We are agreed that under the facts of this case the duty of the insurance company extended to the beneficiary named in the application."

The moving force evidently is the feeling of sympathy by the court for the unfortunate spouse, left unprovided for by the dilatory conduct of the insurance company. Such conduct is regrettable, but cannot become actionable unless made so by legislative enactment. Startling as the decision in the principle case is in its sudden departure from established concepts of law, some such development could hardly be said to have been unexpected. Anterior to the question as to whom the duty is owed is the question whether there actually exists in law such a duty.

On this subject the trend of judicial opinion till very recent years, upholding such a duty, reflects the same disregard of legal concepts evidenced in the decision of the principal case. A glance at this trend reveals the dynamics of both judicial extensions. The tremendous expansion of the business of insurance in recent decades has resulted in the abandonment of the old over-the-counter methods of conducting insurance negotiations in favor of more regularized proceedings pregnant with disadvantage to the insured. This has provoked the comment that the contract of insurance is a contract of 'adhesion', drawn up by the insurance company, to which the insured merely 'adheres,' (1919) 33 Harv. L. Rev. 222, and the statement "few persons solicited to take policies understand the subject of insurance or the rules of law governing the negotiations, and they have no voice in dictating the terms of what is called the contract. They are clear upon two or three points which the agent promises to protect, and for everything else they must sign ready-made applications and accept ready-made policies carefully concocted to conserve the interests of the company." Pfeister v. Missouri State Life Ins. Co., 85 Kan. 97, 116 P. 245 (1911).

These circumstances reasonably call for some legislative adjustment of the rules of a legal system devised to govern the formation of ordinary contracts between man and man, to fit the differing conditions of the insurance contract. This the Supreme Court of the United States has recognized in its declaration that the business of insurance is so far affected with the public interests as to justify legislative regulation of its rates. German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 405 (1913). Many courts, however, were disturbed by the inclination of the legislature to move slowly, thereby finding themselves frequently faced with the necessity, under established rules, of denying claims intrinsically just. They felt obliged to erect, by a process of judicial legislation, new standards previously nonexistent in the law, with which to judge such cases. Such has been the lot of the cases involving delay in acting on insurance applications, the course of decisions, until recently, having been to impose the duty to act promptly. The courts find such 'duty' in the fact that the peculiar characteristics of insurance transactions require that a duty be imposed. The same considerations were used to justify legislative regulations. De Ford v.
RECENT DECISIONS


Placed in the perspective of this trend the psychology of the judicial extension in the present case is more readily understandable. Broadening rules of law to the point of finding a duty to act promptly makes it not unreasonable to extend that duty to proposed beneficiaries. It would be inconsistent to set up a duty based on the consideration that it ought to be owed and not to extend it to some one to whom it ought to be owed. It is no more illogical at any rate than to allow the estate which suffers no more than nominal damages to recover. After all, as shown in Funk, The Duty of an Insurer to Act Promptly on Applications, (1927) 75 PENN. L. REV. 207, 224, 225, the beneficiary is the one who bears the real loss. He is the one who would have benefited by prompt action on the company's part. Having already held that the legal obligation exists, by the same process of reasoning, it may be held to exist for the benefit of the real party suffering, that is the beneficiary named in the application.

From that point it is a very simple matter to go along with the court's holding that though plaintiff sued as administratrix, she may recover as beneficiary. In the interest of intrinsic justice, where it is not necessary for a plaintiff to sue as executor or administrator, the fact that he styled himself as administrator or executor may be disregarded and all averments in his petition to his official capacity may be treated as mere surplusage.


What will be the future of this doctrine? It may well be that it, together with the anterior doctrine of a duty owed, the house that judicial legislation built, will come tumbling down while errant courts hold their ears and duck behind the protective walls of a newly arising legislative uniformity. It lies within the power of legislatures to change the vacillating judicial opinion in this field into a power for sustained, uniform and continuous law. By enacting statutes defining the responsibility for efficient action on the part of insurance companies courts will have definite standards by which to judge what the law is. Such a statute (requiring insurance companies to pass on hail insurance within twenty-four hours) has been sustained by the United States Supreme Court as a valid exercise of the police power. N. D. COMP. LAWS ANN. (Supp. 1925) § 4902; National Union Fire Ins. Co. v. Wanberg, 260 U. S. 71 (1922).

SAMUEL WEINTRAUB
As a result of defendant's refusal to agree to unionization of its plant, a sit-down strike was instituted and continued for several weeks. As a consequence of this and resulting acts of violence, great damage was inflicted upon the property. Only eight of the twenty-five hundred employees of the plant were members of the union at the time. The manufacture and flow of the plant's product was halted, eighty per cent of which moves in interstate commerce. Jurisdictional ground invoked to bring the case into the federal realm was an attempt to establish a violation of the Sherman Act. Held, for the respondents since, although their acts did substantially restrict interstate commerce so that such acts might be reached by the commerce power if Congress saw fit to exercise it, there was, nevertheless, not such a restraint, intended or resulting, as would amount to a violation of the Sherman Act. Apex Hosiery Co. v. Leader, 60 S. Ct. 982 (1940).

It is the nature of the restraint and the effect upon interstate commerce that is the controlling factor in the mind of the Court. In N.L.R.B. v. Finnblatt, 306 U. S. 601 (1939), the Court stated, "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small." In Coronado Coal Co. v. United Mine Workers, 259 U. S. 344 (1922), the mining of coal was held not to be interstate commerce. The mere obstruction of coal mining, though it may prevent coal from moving in interstate commerce, was held not to be a restraint of that commerce, unless the obstruction to mining is intended to restrain commerce in it, or has such a direct, material and substantial effect to restrain it that the intent must reasonably be inferred. In the United Leather Workers Union v. Herbert and Meisel Trunk Co., 265 U. S. 457 (1924), the Court stated, "It is true that they were hoping that the loss of business would furnish a motive to the complainants to yield, but they did nothing which in any way interfered with interstate transportation of the complainants' product." The real question, then, arising from the above discussion, is, does such an act, or acts, as have been committed here constitute such a conspiracy of the type the Act aims at.

The words of the Act, "every contract, combination, or conspiracy in restraint of trade," have been held in some instances to include labor unions and their activities. In the case of Loewe v. Lawlor, 208 U. S. 274 (1908), it was said "at common law every person has individually and collectively a right to require that the course of trade should be kept free from unreasonable obstruction." However, it is equally clear that the Court has never held the Act could be applied to all labor unions affecting interstate commerce. The terms of the Sherman Act were stated so as to give broad construction and interpretation thereto, but it should be construed in the light of the evils towards which it was specifically intended. Appalachian Coals v. United States, 288 U. S. 344 (1933). The legislative history of the Sherman Act shows that it was not intended as a means of policing interstate commerce. The apparent end sought by the passage of the Act in question was to prevent restraints of free competition, markets and prices which affected production, prices, and purchases of the general public.

In cases like the present, in which it was not shown that the restrictions on shipments had operated to substantially restrain commercial competition, the Act has not usually been applied. First Coronado Case, Leather Worker's Case, supra. "The
statute was drawn in the light of the existing practical conception of the restraint of trade.” Standard Oil Co. v. United States, 221 U. S. 1 (1911). “The words ‘restraint of trade’ at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts, or agreements, or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade.” United States v. American Tobacco Co., 221 U. S. 106 (1911). These two illustrations shed light on the court’s reasoning as gathered from its examination of the legislative history of the Sherman Act. Generally, therefore, it has been applied where the effect is upon the market and market price to an extent contrary to the public interest. It must be generally construed to apply only where the “inherent advantages of the freely competitive system are likely to be interfered with.” Nor should the present case be viewed in connection with cases where it was found that labor unions were being used by combinations of those engaged in an industry as the means of suppressing competition and fixing prices. The primary object in this case was to compel the petitioners to accede to the labor demands of the respondents and the only intent present was to accomplish this end. The delay of the shipments of the petitioner’s product did not and was not intended to have an effect upon the market price of that product. Therefore, there were not such circumstances present as to bring the actions of the respondents under the terms of the Act in the light of its judicial interpretation. Restraint of trade comes within the prohibitions of the Act where a secondary boycott was involved which was directed at the manufacturer’s customers. Loewe v. Lawlor, supra. A clear example of conspiracy was found in the Eastern States Retail Lumberman’s Ass’n v. United States, 234 U. S. 600 (1914), when a blacklist was found to be contrary to the Act, since it intended to restrain commerce. A secondary boycott at the instigation of a sympathetic strike is considered a substantial restraint. Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921). In the Bedford Stone Co. v. Journeyman Stone Cutters’ Ass’n, 274 U. S. 37 (1927), there was a refusal to work on the product made during a labor dispute. The Court there said “restraint of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint.” It should be noted in both of these cases that the means employed was not a strike but an attempt to prevent purchases of the product while in interstate commerce. They were done with the explicit design of suppressing the interstate market for such goods. The Act was held applicable only because activities were found which were directed at control of the market.

In the present case it was found that the acts committed were in furtherance of the union position and not with the intent to affect competition in the market. In all of the above-mentioned cases, the Court found that the restraint operated to suppress competition in the free market. The instant case is decided upon the ground that notwithstanding an effect on interstate commerce and illegal acts of the feasors, there was not sufficient implied intent to restrain commerce.

The Court evidently fears widespread abuse of the Sherman Act in the labor field if it gives too great a latitude of construction. It is properly applied in such cases where a monopoly element of some nature exists. This principle was applied in the Second Coronado Coal Co. Case, 268 U. S. 295, 310 (1925), where it was found
that the acts complained of "would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines." Emphasis is laid on the fact that the Sherman Act was never intended to police interstate commerce, and cannot be used to afford a remedy for acts which do not in some way affect the market price of the goods or services involved.

From the discussion of the case it appears that the Sherman Act cannot be used to avert the evils of a sit-down strike, unless there is present a clear intent to restrain commerce in the sense forbidden by judicial and legislative interpretation of the broad terms of that Act. The Act was aimed at other evils of another day. The Court has chosen to maintain it in their light. It was intended as a bulwark of protection for the utopia of the rapidly growing system of classical economics which was the vogue at the time of its passage. Certainly since then different concepts have become current and if the Sherman Act is to maintain its archaic dignity, then there is an anomaly in the law of today. To date the Court has not yet met the present problem of when a restraint exists. Will they discover another loophole to get around the application of the Sherman Act?

HENRY MERRITT CUNNINGHAM

TAXATION—Federal Estate Tax—Benefit Theory Enlarged

Donnelly established a trust for his wife in 1933, the income from the trust to be paid to the wife, and used by her for family expenses and her own maintenance and support. Upon the settlor's death the wife, if living and married to the settlor at that time, was to receive $100,000, whereas the husband was to receive the entire trust property if he survived the wife. The settlor further reserved the right to terminate the trust at any time with his wife's consent. Donnelly died in 1934, and the question here is, was the $100,000 then distributable to the wife properly included in his gross estate for federal estate tax purposes under § 302 (c) or (d) of the Revenue Act of 1926 as amended, 44 STAT. 9 (1926), as amended by § 803 of the Revenue Act of 1932, 47 Stat. 279 (1932), 26 U. S. C. § 411 (1934)? Petitioner, here the Commissioner of Internal Revenue, seeks a review of the decision of the Board of Tax Appeals holding that the $100,000 was not subject to an estate tax under § 302 (c) or (d) of the Revenue Act of 1926 as amended, supra.

Held, reversed, here the settlor had retained for a period, which did not in fact end before his death, the right to the income from the trust property within the meaning of § 302 (c) as amended, supra. Helvering v. Mercantile-Commerce Bank and Trust Co., 111 F. (2d) 224 (C. C. A. 8th, 1940).

Section 302 (c) of the Revenue Act of 1926 as amended, supra, provides that the tax shall apply, "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property. . . ." Treasury Regulations, 80 Art. 18 (1937 ed.) in construing this Section of the Revenue
Act of 1926 as amended says, "If for any such period the use, possession, rents or other income (in whole or in part) were to be disposed of in discharge of a legal obligation of the decedent or otherwise for his pecuniary benefit, then to that extent the use, possession, rents or other income will be treated as having been reserved to or retained by the decedent."

It is a basic principle of taxation that retention of control of the trust property by the settlor will render the gift incomplete until such power is relinquished. Sanford's Estate v. Commissioner of Internal Revenue, 60 S. Ct. 51 (1939); (1940) 28 GEORGETOWN LAW JOURNAL 508. To be effective, the relinquishment of control must be such as to remove the property from the possession, enjoyment and control of the donor. Heiner v. Donnan, 285 U. S. 312 (1932). In passing upon the merits of each case, as to whether or not the settlor has or has not retained control over the trust, the courts have not concerned themselves so much with refinements of title, as with looking to the actual command over the property. Corliss v. Bowers, 281 U. S. 376 (1930).

There is no doubt that Donnelly was liable for the taxes on the trust income during his life time. There is no foundation for a decision which would prevent the laying of a tax against one who seeking the discharge of his obligations, also seeks to enjoy the benefits of the income, as though he had personally received it. Douglass v. Willcuts, 296 U. S. 1 (1935); Helvering v. Fitch, 60 S. Ct. 427 (1940). The salary earned by a husband which he had assigned to his wife, under a valid contract is taxable to him. Lucas v. Earl, 281 U. S. 111 (1930). Cf. Burnet v. Leinninger, 285 U. S. 136 (1932); United States v. Boston and Maine R.R., 279 U. S. 732 (1929).

The court, in reaching its decision in the instant case, looked to the meaning of the phrase, "... has retained the right to the income from the property." They decided that the true meaning of this phrase considered in the context of § 302 (c) of the Revenue Act of 1926 meant the opposite of, "surrendered the right to the income." Here the decedent had no apparent right to the trust income, for the income was being paid to his wife. But, by the very terms of the trust itself, the wife was bound to use the income for family expense and her own maintenance and support. Hence the income from the trust was discharging the settlor's own legal obligations. While the decedent apparently had no right to the income, still he had not surrendered the right to the benefit of the income within the meaning of the act. For the creation of a trust, by the taxpayer to serve as the channel for the application of the income to the discharge of his obligation, leaves the nature of the obligation unaltered. Burnet v. Wells, 289 U. S. 670 (1933).

The trust as created in the instant case was not intended to avoid estate taxes, nor to serve as a substitute for a testamentary disposition. Its purpose was to protect Mrs. Donnelly from economic want, in case the decedent might, as he frequently did, incapacitate himself by excessive consumption of liquor. His aim was to care for his wife when he would be unable to do so. Actually he did not reserve control over the trust and the court was unable to apply the control theory in fixing tax liability. The importance of the principal case lies in the application of the benefit theory of tax liability, heretofore restricted to income tax cases (where settlor created an irrevocable trust for the education of minor children, the income was taxable to him as it was discharging his legal obligations. Helvering v. Stokes, 296
U. S. 551 (1935); Helvering v. Schwertzer, 296 U. S. 551 (1935); also, where settlor created trust to relieve herself of a business obligation, the income is taxable to her. Helvering v. Blumenthal, 296 U. S. 552 (1935)), to cases involving estate taxes. Under the present decision both theories of tax liability, vis. benefit and control, are to be used in determining liability for federal estate taxes.

FRANCIS X. MCDONOUGH

TAXATION—States Power to Tax Interstate Sales

Appellants challenge the constitutionality of a New York tax statute, which imposes a levy upon sales and transfers of shares of stock. The sale of the shares was completed after negotiation by mail and telephone with buyers in Philadelphia and Washington. Collection of purchase price of shares was made through sight drafts sent to banks in those cities. But the actual stock certificates were delivered to a broker in New York, who acted as agent for purchasers. Appellants argue that the tax is a burden on interstate commerce, and may result in multiple taxation of an interstate sale. Held, the sale and delivery to broker in New York constituted a taxable event prior to interstate delivery which could found jurisdiction for state taxation; and therefore the tax was properly assessed. O'Kane v. State, 28 N. E. (2d) 405 (N. Y. 1940).

This case represents another step in the trend away from the old doctrine of immunity from state taxation for interstate transactions. Brown v. Maryland, 12 Wheat. 419 (U. S. 1827). The ever-pressing needs of the state for revenue have precipitated this trend. The case also reveals the confusion resulting in the law of this point from the recent case of Berwind-White Coal Co. v. McGoldrick, 309 U. S. 33 (1940). This case was the culmination of the new determination of the Supreme Court to require interstate commerce to pay its own way. The old doctrine of immunity had permitted interstate transactions to enjoy an advantage over intra-state sales. The desire to equalize the tax burden first prompted the Court to sanction a state tax on a sale that was interstate. Wiloil Corp. v. Pennsylvania, 294 U. S. 169 (1935). In that case it was held that the sales contract for a purchase of oil, which did not require that the sale be interstate, though actual delivery was interstate, was not such an interstate sale as would be exempt from state taxation. Following this breach in the wall of interstate commerce immunity, the court permitted a gross receipts tax on income from space sold to out-of-state advertisers. Western Live Stock Co. v. Bureau of Revenue, 303 U. S. 250 (1938). In an effort to offset the advantage to business concerns operating in a state without a sales tax selling to customers in states with sales tax, the latter states adopted the device of a tax on the use of the article in consumption within their boundaries. Such a tax, which permitted a full deduction for any sales tax the goods had previously paid, was upheld. Henneford v. Silas Mason Co., 300 U. S. 577 (1937). Subsequently a use tax was sustained without the deduction provision, where the facts presented no actual double taxation. Southern Pacific Ry. v. Gallagher, 306 U. S. 167 (1939).

Meanwhile the rule was twice affirmed that any tax which actually permitted a multiple burden on interstate transactions was invalid. A gross receipts tax applying
to receipts from sales of goods in other states was held invalid. *Adams Manufacturing Co. v. Storen*, 304 U. S. 307 (1938). An excise tax measured by gross receipts including out-of-state sales was overturned. *Gwin, White & Price v. Henneford*, 305 U. S. 434 (1939). These taxes were invalid because the taxable event was equally within the jurisdiction of another state than the taxing state.

Subsequently in the *Berwind-White case* the Court was faced with a taxable event similar to that considered in the *Southern Pacific Ry. case*; but the tax in question was a sales tax, not a use tax. However, it was an easy step to sustain this tax on like principles. Following the new policy of considering each taxation case on its particular facts, the opinion clearly outlined a taxable event within the state after the goods had left interstate commerce. This was a valid and a clear rule but feeling the narrow scope of this finding, they continued, developing at length the new doctrine that interstate commerce must pay its own way. The test of a state tax on interstate commerce became that of no actual discrimination against it. *Note (1940) 28 Georgetown Law Journal* 970, 983 et seq.

The confusion which resulted from the *Berwind-White case*, is manifest in the efforts of other states to modify their tax laws so as to enjoy its fruits. Many states felt that their statutes already covered the situation. Others concluded that their use taxes were achieving the same result. Several states, notably Illinois, Kansas, Utah, Virginia and Washington, revised their taxes to take advantage of the ruling. The new statutes included as a taxable event the transfer of possession. But in almost every one of these new tax statutes the taxable event of the *O'Kane case* is expressly excluded from taxation. The Illinois statute reads in part “. . . the tax does not extend to receipts from sales in which the seller is obligated . . . to make a physical delivery of the goods sold from a point in the State to a point outside the State”. Cf. Kan., Utah, Wash. statutes. 1 C. C. H. Interstate Sales Tax Serv. 13, 17 et seq.

Thus the *O'Kane case* has established a precedent for taxing the sales agreement before interstate transfer. Already delivery after transfer was considered taxable. It is to be remembered, however, that the *O'Kane case* involves a separate tax statute, a state tax on stock transfers, from the New York City sales tax involved in the *Berwind-White case*. These would seemingly be authority for a double taxing of the buyer and the seller of an intrastate transaction. In discussing the possibility, in the *O'Kane case*, p. 905, the court said “. . . an intrastate transaction would (then) be liable for two taxes in all. . . . There is no reason why the same kind of transaction, when carried on between two states should not bear the same total burden. . . . According to the argument of the appellants, the interstate transaction would obtain an advantage.” The multiple burden test would then disappear entirely.

Thus the state courts are left to wrestle with the problems resulting from the *Berwind-White case*. They follow the rule that no actual discrimination against interstate commerce being present, the tax is valid. Perhaps the Supreme Court will have to face the actual problem of multiple taxation. It is impossible to split every transaction into two taxable events which are both distinct from actual interstate transfer. Then the Court will settle which state has paramount jurisdiction to tax an interstate sale.

*Lewis R. Donelson III*
Plaintiff, three days before publication of the libels complained of, delivered a public speech in which he spoke of a political writer on defendant's newspaper in opprobrious terms. Among other things it was contended at the trial that the defamation upon which the action was based had been provoked by the statements made in the speech. The jury was instructed, in substance, that if they believed that the libels were so provoked, that fact might be considered determining the amount of damages, provided that the offensive writing was not published after "there was sufficient time for the anger or passion of the defendant's agent . . . to cool off." To the part of the instruction rejecting the provocation from consideration if defendant was no longer in anger, exception was taken. Upon appeal to the Supreme Judicial Court of Massachusetts held, instruction correct: where a libel is provoked by plaintiff and published while the defendant is still in "hot blood" that may be considered in mitigation of damages. Conroy v. Fall River Herald News Co., 28 N. E. (2d) 729 (Mass. 1940).

In the judicial systems of slightly less than one third of our states this doctrine is not novel. With various qualifications and restrictions it has been asserted and respected in about forty-five cases. The median conception permits a very recent provocation to be used in mitigation of damages, Keiser v. Smith, 71 Ala. 481, 46 Am. Rep. 342 (1882) (but not in defense of the action, Shattuc v. McArthur, 25 Fed. 133 (C. C. E. D. Mo. 1885)) where defendant's statement had a definite reference to, Child v. Homer, 13 Pick. 503 (Mass. 1833); and was in answer to, or commenting upon, Maynard v. Beardsley, 7 Wend. 560 (N. Y. 1831); or in explanation of, Hotchkiss v. Lathrop, 1 Johns. R. 286 (N. Y. Sup. Ct. 1806) the libel in question, or was part of the same transaction, Keiser v. Smith, supra. While the rule is one relating to the admission of evidence, many of the states, either by statute or case rulings, require matter in mitigation to be pleaded in the answer. Dickerson v. Dail, 159 N. C. 541, 75 S. E. 803 (1912); Brandt v. Story, 161 Iowa 451, 143 N. W. 545 (1913); McCormack, DAMAGES (1935) 439. At common law evidence tending to mitigate the damages was introduced under the general issue.

It is clear, then, that the law as annunciated in the Conroy case, has made an impression that is widespread, if not universal, in the United States. This is due, undoubtedly, to the fact that it is authorized by venerable precedent. The doctrine appears to have found birth in Finnerty v. Tippen, 2 Camp. 72, 170 Eng. Repr. R. (C. P. 1809) 1085, a libel action, in which Mansfield permitted the introduction of evidence showing that plaintiff had previously libeled defendant. However, though the doctrine was respectably born and has been guardedly followed, a striking feature of the cases in which it has been applied, (the Conroy case included) and the texts in which it has been recognized, is the uncertainty and lack of accord as to its true basis.

Various theories have been advanced to justify the principle. In general, they fall into four main groups. Courts in the first group admit evidence of the provocation on the theory that a defamatory remark or writing by one in "hot blood" will be taken at a discount and is therefore less harmful. Walker v. Flynn, 130 Mass. 151 (1881). Unless publication of the libel were under such circumstances as would reveal to the audience the condition of the provocation, this reasoning would
fail. Where these rather singular facts coincide, application of the rule permitting evidence to be admitted in mitigation would, without question, be salutary to the purposes of the action.

A second group proceeds upon the theory that mitigation of damages is a punitive measure required by the facts of the case. The plaintiff, it is reasoned, is also an offending party, and ought not to recover full damages for the wrong he incited defendant to commit. *Scheffill v. Van Deusen*, 15 Gray 485 (Mass. 1860); *Odgers, Libel and Slander* (5th ed. 1911). In this connection various situations can arise. Plaintiff's provocation may range anywhere from a mere insult not cognizable by the law to situations approaching *pari delicto*. If defendant's grievance were the greater could a negative verdict be given? The third group considers that defendant's act is under the circumstances somewhat excusable, that the provocation is part of the transaction and that evidence of it is admissible as part of the *res gestae*. *Keiser v. Smith*, supra. It would seem that this theory is a subterfuge, since by indirection it achieves diminution of damages. These two latter classes are, in effect, imposing punitive damages upon the plaintiff for his part in causing the offense. Ordinarily, punitive damages may only be imposed in the face of proof of actual malice, ill-will, or conscious disregard of the rights of others. Are these elements present in the cases where such damages are imposed (in truth, actual damages diminished) on the theory that plaintiff's provocation was reprehensible and should be punished? Are they present where the mitigation resulting from admission of the evidence of provocation has punitive effects though it is not so labelled?

A sensible theory, if the principle is to be recognized at all, is that adopted by the last group. Where the facts are such that the provocation may be considered in mitigation of damages, it may only operate upon what exemplary damages the conditions of the case may warrant. *Brandt v. Story*, supra. This, it is offered, is a sound and logical doctrine. The pre-eminent function of the actions which lie for defamation is to recompense the injured party for the damage to his reputation. Certainly the extent of the injury, except in the one case where the provocation is known to the audience, is not at all affected by how it came about. Under this rule these constants are left unaffected, for only to the extent that defendant may be penalized for malice by imposition of exemplary damages may plaintiff be penalized for having provoked the wrong by mitigation of the recovery.

In conclusion, it appears, upon the hypotheses recognized, that there is only one situation in which evidence of provocation should be considered in mitigation of actual damages. That is where the provoked libel is attended by notice to those who read the publication of the facts and circumstances of the provocation. In any other case where the facts properly permit the provocation to be brought in it should be restricted to mitigate only the exemplary damages.

HOWARD LINKOFF
BOOK REVIEWS


Anyone familiar with Professor Bogert’s excellent handbook on trusts, published twenty years ago, his recent monumental text on Trusts and Trustees, and his review of Professor Scott’s text, in this Journal last year, would naturally be strongly predisposed toward a case-book by him on the same subject. To this reviewer, the only surprise in an examination of the work comes from the emphasis on the practical aspects of the administration of trusts, as compared to the one-time preoccupation with what may loosely be termed “the substantive law of trusts.” Yet the subject, The Creation of Trusts, is amply covered in the sixteen headings of the three hundred page chapter under that title. And the student’s knowledge of what a trust is and how it operates will be much enlarged through the succeeding chapter, Problems of Trust administration, which covers another three hundred pages, divided under nineteen headings. The final chapter is entitled Remedies Available For Trust Enforcement.1 Certainly, considering the very practical and entirely current treatment of trust administration, the student will keep this book to carry with him into practice. He will then have more occasion, than the time available to him in school makes possible, to utilize the subject matter of the seventy-page appendix, which includes the various pertinent uniform acts, selected federal statutes, and regulations, a statement of principles of trust institutions, and forms of trust provisions.

In the manner of other volumes in the University Case-book Series, practically every case in the book bears some annotation. These give citations to cases showing other jurisdictions which follow the rule in the case reprinted, with indication of contrary authority where it exists, references to law review material, and quite often the trend of authority on related subject matter. The citations are full, including reference to the unofficial reports and selected case compilations. As a welcome feature, the editor often gives the purport of the decision in cases so cited. One detail, which now appears more praiseworthy than it would have been considered when the case-book first came into vogue, is the frequency with which the editor presents his own succinct analysis of the facts.

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1One hundred forty-four pages, 636-780, covered in twelve topics.
involved in the case, in lieu of the recital of facts in the official report. The feature of inserting footnote numbers within the case reprinted, and presenting on that page, as a footnote, the facts of a case which the court has cited, or presenting other comment, can lead to confusion as to whether the footnotes are those of the court or of the editor.

The circumstance that the court, in several cases reprinted, quotes Professor Bogert, naturally will increase the student's respect for the compiler's case-book, and add a justifiable note of personal interest. This observation applies with especial force to one case: on the capital and income problem covering stock dividends, the Restatement of Trusts and Professor Scott favor the Pennsylvania Rule. Professor Bogert does not. And he is both fortunate in having available, and alert in reprinting in his case-book, Powell v. Madison Safe Deposit and Trust Company, in which the court quotes his text, and supports his view, in an elaborate opinion that is well considered. It is interesting to find, too, that Professor Bogert has included Proctor v. American Security and Trust Company, and also Dumaine v. Dumaine upon which latter case the appellant, in a case now pending, principally relies to avoid the decision in the Proctor case.

(a) See pages 41, 137, 144, 146, 205, 242, 281, 295.
(b) That device might well have been employed in reprinting Coleman v. Coleman, 48 Ariz. 337, 61 P. (2d) 441, 106 A. L. R. 1309, 1313 (1936), Bogert 627, in substitution for the first three paragraphs as reprinted.
(c) The reprint of Post v. Grand Rapids Trust Co., 255 Mich. 436, 238 N. W. 206 (1931), Bogert 551, should begin with the sentence, (from the official report) "From decree ordering advancement to adult beneficiary, defendant's appeal." As now reprinted, and in view of the second paragraph included in the reprint, the precise import of the word "such" in the last sentence of the opinion is not readily apparent, and the exact scope of the decision is obscure.

For a case not annotated by the court, but by the editor in his reprint, see Holmes v. Holmes, 65 Wash. 572, 118 P. 733 (1911), Bogert 269. A case in which annotations by the court are reprinted by the editor is Helvering v. Trust Co., 296 U. S. 85 (1935), Bogert 616. A case annotated by the editor from a court which had not annotated this case, but does annotate some of its cases, is Proctor v. The American Security and Trust Co., 98 F. (2d) 599 (App. D. C. 1938), Bogert 511; cf. Duehay v. Acacia Mutual Life Insurance Co., 105 F. (2d) 768 (App. D. C. 1939). That the annotations in the reprint of the Proctor case are those of the editor is clearly indicated by the language used.


16 N. E. (2d) 625 (Mass. 1938).

American Security and Trust Co. v. Frost, No. 7481, in the United States Court of Appeals for the District of Columbia (argued May 9, 1940).
The selection of cases and their editing is thus in character with the superior type of effort expected of the editor, even though naturally any other thinking person would have some differences of opinion.\(^8\)

Consideration of the terms of the Trust Indenture Act of 1939\(^9\) (and the fact of its enactment) and consideration of the terms of the American Bankers' Association "Clauses Recommended For Grant of Maximum Discretionary Powers to a Trustee"\(^10\) makes one wonder whether the bankers forget the experience of the insurance underwriters? A reading of the "Clauses Recommended" indicates that the trustee is to be granted the greatest possible freedom of action in administering a trust with the least possible chance of liability. The first object is designed to forward the trustor's intent, and the second to avoid, in so doing, liability on the trustee. However, will not furtherance of these two purposes, in this way, in time, by \textit{encouraging} dangerous action by the trustee—who relies upon both the powers granted and the immunity assured—give occasion for restrictive judicial action and regulatory legislation, similar to that which now resolves almost all doubts between insurer and insured in favor of the latter? Human beings and corporations by them conducted are not infallible nor impeccable. Any effort to clothe them with power to act, and immunity from the consequences of their action, as though they could not (or would not) err, can be convenient, but it can also invite a critical counter-action. This may have been foreshadowed by problems already raised\(^11\) and may be initiated by the Trust Indenture Act of 1939.

\(^8\)For instance: (a) there is more than one case in the section entitled, Selection of Trustee, which another person might consider better to include elsewhere; (b) Matter of Totten, 179 N. Y. 112, 71 N. E. 748 (1904), \textit{Bogert} 310, has a significance which makes it seem inappropriately included in the sub-chapter, Wills Acts; Constructive Trusts; (c) Carpenter \textit{v.} Carpenter, 12 R. I. 544, 34 Am. Rep. 716 (1880), \textit{Bogert} 369, although it is a case involving unique facts, seems not a happy choice for inclusion in this book, unless I fail to get its exact purport; (d) and it seems strange that the student should reach the cases on the primary question of consideration, only after considering those on the specialized problems of spendthrift and related trusts, and of charitable trusts,—even though \textit{the logic} of the editor's arrangement is apparent.


\(^10\)\textit{Bogert}, 866-870.

\(^11\)Consider, for instance, the problems: (1) whether professional trustees should be held to a higher standard than others, \textit{Notes} (1932) 77 A. L. R. 505, (1930) 30 \textit{Col. L. Rev.} 1166, 1171, (1930) 29 \textit{Mich. L. Rev.} 125, \textit{Bogert} 336, n. 1; and (2) whether a trustee should be
In presenting such matters in his appendix, and in the preponderance of pages which he devotes to the "adjective law" of trusts, Professor Bogert increases the utility of his book as a vehicle for teaching, and extends its usefulness beyond the classroom.

VICTOR S. MERSCH*

THE LAW OF BANKRUPTCY REORGANIZATION—by Thomas K. Finletter.†

To meet the growth and changes in the business activities of the country since the passage of the Bankruptcy Act of 1898, Congress, in 1938, enacted a complete revision of the federal bankruptcy law. During those intervening forty years, some amendments were made to keep afield of the many changes in economic and business conditions. But it was recognized that there was need for a complete and thorough revision, and this need has been met by the enactment of the Chandler Act. This Act reflects the views of the National Bankruptcy Conference, the thought of bar associations, credit organizations, and various individuals, to whom a series of drafts were submitted for study and criticism. The hearings before the Senate and House Judiciary Committees extended over a period of two years.

At the same time, the amendments to the Bankruptcy Act enacted in 1933 and 1934 (Sections 77 and 77B, among others) drafted more or less under the stress of the emergency created by the depression, were deemed not sufficiently satisfactory to solve the new and pressing problems confronting the country. Accordingly, these sections, too, were amended and "modernized". Whether or not the changes will result in more satisfactory handling of reorganizations remains to be judged. In any event, these changes are responsible for the rewriting of Professor Finletter's treatise of 1937 (Principles of Corporate Reorganization).

Practitioner and student should find this new work the most helpful of the general treatises on corporate reorganization, not simply because it is timely but also because it offers a dependable exposition of the law,

held to the standard which before accepting the trust, he professes to maintain. BOGERT, TRUSTS AND TRUSTEES (1935) 1712.

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tracing its relationship to preceding statutes and judge made law, and referring to the interpretative decisions of the courts which are carefully compiled and analyzed.

The arrangement follows Professor Finletter's earlier works:

Chapter one deals with the origins of the reorganization provisions; Chapter two, with the petition; then follows treatment of the jurisdiction of the court (Chapter three), administration of the estate (Chapter four) and claims against the estate (Chapter five).

Chapter six treats of the plan—the applicable substantive rules (subdivision A), the procedure for putting it into effect (subdivision B), and the effect of the reorganization on federal income taxes and capital stock declarations (subdivision C). Interventions and appeals and dismissal of the proceedings are dealt with in Chapters eight and ten, respectively.

Professor Finletter has also given us exceedingly valuable discussions on three other branches of the law of great importance in bankruptcy reorganizations—the principles of valuation (Chapter seven), the law of taxation as applied to the proceedings (Chapter six, subdivision C), and the rules determining the extent orders of the reorganization court are subject to collateral attack in other courts and in the bankruptcy proceeding itself (Chapter nine).

Since the publication of the book, various decisions have been handed down by the higher courts which may necessitate a rewriting of some of the chapters. Probably the most important part affected, in the light of *Case v. Los Angeles Lumber Products Company, Limited,* is the lengthy treatment of the *Boyd case*. Precisely what this case adds to the presently understood principles remains to be seen but undoubtedly future decisions will be at odds with various propositions in the text.

Other features of the work are commendable: a table of articles and text books, a table of cases, a table of references to sections of the Bankruptcy Act, and a general index.

The inclusion of the provisions of the Act and the general orders in bankruptcy seems unnecessary. The omission of a set of forms is to be regretted. Be that as it may, the book will be the standard work on bankruptcy reorganization until a better one is written.

DONALD L. STUMPF*

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1 308 U. S. 106 (1939).
3 Pp. 699-845.
4 *Member of the Bar of New York; Former Editor of this Journal.*

This work by the distinguished writer on American diplomatic history, Professor Charles C. Tansill of Fordham University, was published two years ago, in April of 1938, but it has the rare quality of being as timely and as invaluable as it was on the day of publication. While the United States has so far stayed out of the second World War, the great question in the minds of all Americans is whether this happy condition may continue to prevail. We have as yet enjoyed fewer months of non-participation than we did in the fateful years 1914 to 1917. It is about the thirty-three months of those years, during which America marched from neutrality into war, that Dr. Tansill has written. Various aspects of that period have been treated in scholarly monographs; in C. Hartley Grattan’s pioneer work, Why We Fought; in Walter Millis’ popular account (which owed much to Grattan), The Road to War; and in H. C. Peterson’s Propaganda For War. But it is generally agreed, and certainly it is the opinion of this reviewer, that Professor Tansill has produced the outstanding work on the subject, comprehensive, exhaustive in research, brilliantly written, with a force and timeliness that have had a profound influence upon his own generation of fellow-Americans.

The stage is set with a summary of the German-American relations from 1870 to 1914, a background of distrust on the part of many Americans because of German activities in the Caribbean and Pacific, and the saber-rattling speeches of the Kaiser. With the outbreak of the war distrust and suspicion were powerfully accentuated by the effective war guilt and “atrocity” propaganda of a Britain which controlled the media of communications, and had thousands of influential and articulate partisans in the United States. From the first there was a pronounced pro-British sentiment. For a generation there had been Anglo-American cooperation in certain problems of world politics, and for a much longer time Anglo-American business ties had been intimate. Dr. Tansill, however, rightly gives great weight to the non-economic ties, to the sentimental and intellectual bonds, connecting Americans with the British Empire. “The plays of Shakespeare, the legal lore of Blackstone, the novels of Dickens, and the poems of Burns,” he states,1 “had established

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1P. 16.
stronger and more enduring bonds between the English-speaking peoples than all the financial obligations arranged through the House of Morgan."

He does not by any means neglect or minimize the economic bonds between the United States and the Allies. As a good historian, however, he rejects the "personal devil" theory of history. He fully appreciates the complexities in the background of any great movement or event. While he agrees with other writers that the direct cause of our entrance into the conflict was the renewal of German submarine warfare, he seriously questions whether this would have come about had the Wilson administration heeded Secretary Bryan and previously adopted a different policy towards submarine attacks on both armed and unarmed belligerent merchantmen. He portrays the many underlying factors which conditioned the thinking and the policy of the Wilson administration, and he tells us² that "... the real reasons why America went to war cannot be found in any single set of circumstances. There was no clear-cut road to war ..." but one of the many trails along which President Wilson traveled "... with early misgivings and reluctant tread was that which led to American economic solidarity with the Allies."

Aided by the thousands of exhibits in the files of the Nye Committee, Professor Tansill sets forth the close relationship between the munitions trade (with the Allies) and American business recovery, and American business expansion. He believes that if Mr. Wilson in 1914 had followed the European neutrals in embargoeing munitions, and had followed his own embargo of 1913 as to the Mexican civil war, America might not have been drawn into the World War. When Wilson reversed his policy of opposition to war loans, yielding to the importunities of Secretaries McAdoo and Lansing, he³ "turned from the idealism of Secretary Bryan to the realism of Wall Street." America was not drawn into the war, however,⁴ "solely through the devious manipulations of certain banking houses." This simple theory is not supported by the Nye Committee evidence. As far back as August, 1914, it was apparent that the United States would incline towards the nations that absorbed her huge exports; and early in 1915 editors of business journals detected the specious quality of the protests that Secretary Lansing sent to London with reference to British violations of American rights. "It was very difficult seriously to quarrel with nations that had literally dragged America from a deep slough of economic despond."

²P. 134. ³P. 104. ⁴P. 133.
The author points out that the House of Morgan was scrupulously careful always to consult with the Administration in regard to the extension of credits and the flotation of loans. He gives a proper evaluation to the hysterical cablegram sent by Ambassador Page from London on March 5, 1917, urging immediate entrance into the war in order to bolster Allied credit and to save America's export trade; it was a communication which contained nothing not familiar to the Administration, and it had little influence in shaping Mr. Wilson's decisions. Most effective use has been made of the manuscript records of the Neutrality Board. These had escaped the attention even of the argus-eyed Nye Committee, yet they are invaluable to any understanding of the complex problems of American neutrality from 1914 to 1917.

The crisis in our foreign relations, Dr. Tansill believes, came with the sinking of the British steamer *Fallaba* in March of 1915, by the German submarine U-28, with the drowning of an American passenger. War with Germany might have been averted, he thinks, if the United States at this time had followed the advice of Secretary Bryan, rather than that of Counselor Lansing, and prohibited Americans from venturing into submarine zones on munition-laden British vessels. The *Lusitania* incident of May, 1915, would not have involved the loss of American lives, and sent American opinion reeling on towards war. "The real fight for American neutrality," he says, "was waged in April, 1915, and it is important to note that at this stage in our relations with Germany 'big business' played no part in influencing the mind of the President. America finally entered the war because of serious difficulties with Germany arising out of submarine warfare. . . . If the President had taken any decisive action against the admission of armed British merchantmen into American harbors, and if he had warned American citizens of the dangers that attended passage on belligerent vessels, America might well have been spared the great sacrifice of 1917-1918. The responsibility lies squarely on the shoulders of the President. The official who above all others helped to place it there was Robert Lansing."

The advance along the road to war, the many serious problems with all their involutions and ramifications, are told with scholarly detail and in a graphic manner. Every phase of the story is subjected to keen and thorough analysis: the sinking of the *Lusitania*, and its aftermath; the resignation of the frustrated Bryan; Britain's black list and interception

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*P. 258.*
of American mails; the damaging conduct of the German and Austrian envoy; the Arabic incident; and Wilson's attempts at mediation. The amazing activities of Colonel House, and the crisis in Washington of February, 1916, when "Congress Calls a Halt When the President Moves Towards War," are pointedly related. Throughout Professor Tansill has written a sharp indictment of British policy and practice, yet one which draws abundant support from an immense amount of source material. His treatment of Lansing, Page, and House is likewise sharply critical, and is likewise well supported. Bryan, who opposed the forging of economic ties with the Allies, and who repeatedly urged the expediency of forbidding Americans to travel on belligerent ships, emerges from these pages with greatly increased stature.

The story marches on to the climax of April 6, 1917, marches dramatically despite the wealth of detail and the crowded background of pre-war personalities and events. Especially well done are the Hundred Days preceding our entrance into the war, when world attention was focussed upon a Woodrow Wilson, "whose struggle for peace became more fervid as the odds against him grew greater. Surrounded by advisers who were eager for war, rebuffed by diplomats who had no thought of peace, President Wilson strove desperately to find some compromise which not only would put an end to the war then raging but would serve as the basis for a new world order. The defeat that attended his efforts was a tragedy whose evil results still stalk mankind."

BERNARD MAYO*

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*P. 631.

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BOOKS RECEIVED

A number of the books listed below will be reviewed in the November issue of the Journal


