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THE DUE PROCESS OF STATE TAXATION
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No patent medicine on earth was ever put to wider and more varied use than the Fourteenth Amendment to the Constitution of the United States. Its panaceatic lure for a litigant with but a penury of argument in his favor or for a court striving after a desired but elusive result has been, in most cases, irresistible. In consequence, without fault of their own, Due Process and its assistant concepts have been led in and out of our law in a manner unbecoming consistent careers. In their wake lie the ruins of many a case consigned to an “Index Purgatorius” and a view of their whole course incites the desire, felt by Mr. Justice Holmes, for an “authoritative list.”

Perhaps the most recent excursion with the Fourteenth Amendment has been into the field of conflicts in the taxing powers of the states where for some thirty years following Union Refrigerator Transit Co. v. Kentucky it has waxed in usefulness and power. With 1939, however, has come the era of the lean years and it now seems likely that all save the fringes of these fertile fields will henceforth be closed against the entry of Due Process of Law.

In Curry v. McCanless and in Graves v. Elliott a majority of the Supreme Court moved toward a position that had been up to that time


1 See dissent of Mr. Justice Holmes in Baldwin v. Missouri, 281 U. S. 586, 595 (1930). The most recently “purged” case is Colgate v. Harvey, 296 U. S. 404 (1935), overruled by Madden v. Kentucky, 309 U. S. 83 (1940). In the latter case the Supreme Court deserted its previous view as to the application of the Privileges and Immunities clause of the Fourteenth Amendment to the state taxing power. Cf. Travis v. Yale & Towne Mfg. Co., 252 U. S. 60 (1920).

199 U. S. 194 (1905).
8307 U. S. 357 (1939).
only a dissenting drag on the progress of the Fourteenth Amendment into the deepest complexities of state taxation of tangible and intangible property. The thorough exposition of views to be found in these two decisions forbodes a final hands-washing by the Court of the whole unsolved mess of this phase of state taxation.

I

The course which the Supreme Court has made through the varied problems of conflicts among state property and inheritance taxes has been twisted by certain more or less fundamental disagreements between the majority and the dissent. It is fair to sum up their differences, in lay language, as principally over the policy of how many times the same economic interest should be taxable at the same time by different states under the United States Constitution. The majority thought once was enough and reached for that result by use of the Fourteenth Amendment as the readiest means at hand. The dissenters fell into immediate disagreement, not with the objective of single taxation, but with the strained and unnatural extension of the Fourteenth Amendment to govern a situation where it could not, to their minds, be honestly applied. They added that they supposed the taxpayers would find double taxation "disagreeable" but that the solution of this was for the states.  

6At the very outset it should be noted that no attempt is made here to deal with the vexed problem of conflict of domiciles and the jurisdiction of the Supreme Court therein. Some of the cases pertinent to this point are: Dorrance v. Pennsylvania, 287 U. S. 660 (1932); Hill v. Martin, 296 U. S. 393 (1935); Dorrance v. Martin, 298 U. S. 678 (1936), re-hearing denied, 298 U. S. 692 (1936); Florida v. Texas, 306 U. S. 398 (1939); Worcester County Trust Co. v. Riley, 302 U. S. 292 (1937); Pusey's Estate, 321 Pa. 248, 184 Atl. 844 (1936), cert. denied sub nom. Lively v. Young Women's Christian Ass'n, 299 U. S. 621 (1936). See Report of the Committee of the Nat. Tax Ass'n on Double Domicile in Inheritance Taxation (1936) PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION 92; Nash, And Again Multiple Taxation (1938) 26 GEORGETOWN LAW JOURNAL 288; Ohlander, Double Inheritance Taxation (1936) 14 TAX MAG. 387; Tweed and Sargent, Death and Taxes Are Certain—But What of Domicile (1939) 53 HARV. L. REV. 68.

6That the same economic interest can be taxed by only one state at a time has been the view of First National Bank of Boston v. Maine, 284 U. S. 312 (1932); Baldwin v. Missouri, 281 U. S. 586 (1930); Beidler v. South Carolina Tax Commission, 282 U. S. 1 (1930); Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930); Safe Deposit & Trust Company of Baltimore v. Virginia, 280 U. S. 83 (1929); Frick v. Pennsylvania, 268 U. S. 473 (1925). When the terms "majority" and "minority" are used herein they do not refer to fixed and unchanging groups. The personnel on both sides has altered. The dissent during the period 1905-1940 has usually been voiced by either the late Mr. Justice Holmes or Mr. Justice Stone.

7See dissent of Mr. Justice Holmes in Baldwin v. Missouri, 281 U. S. 586, 595 (1930).
The results achieved by the majority have several different aspects. The application of Due Process to achieve a single property tax on tangible personalty does not now seem greatly different from the interdiction of all property taxation of real estate save by the state wherein the reality is situated. But in the extension of Due Process to secure a single property tax on intangibles and a single inheritance tax on all personalty, at least two fundamental errors were indulged: (1) to reach this result as to the property tax on intangibles it was necessary to turn the fiction, *mobilia sequuntur personam*, to a restrictive use—to rule that intangible personalty is located solely at the domicile of the creditor-owner and thus completely out from under the taxing jurisdiction of all states other than that one; (2) to achieve a single inheritance tax on tangible personalty the Court had to take a view, out of line with all previously expressed ideas, that such a tax is a levy on property and may not be treated as a privilege tax on the rights of succession. To secure the same result as to intangibles, it was necessary to give free rein to both errors and to say that an inheritance tax on intangibles is a tax levied on the intangible property passed, which is located solely at the domicile of the creditor-owner.

II

The fundamental nature of these errors may be seen in their disregard of the bases for taxation in general which have long been acknowledged by the Court. At least three ideas underlying taxation have been noted: (1) the power of a state to levy and collect the tax in question; (2) the...
possible benefit conferred in exchange for the tax; and (3) the principle that each person or economic interest connected with a state ought to contribute in some equal way to its support.

Striking employment of the first two bases may be found in decisions of the Supreme Court early in the present century when considering state inheritance taxes. *Blackstone v. Miller* presented the case of an Illinois decedent some of whose property was in the form of deposits in a New York bank. The Court sustained the New York inheritance tax laid on these deposits, and Mr. Justice Holmes made the justification in these terms:

"If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the state of New York, then New York may subject the transfer to a tax. . . . Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death."  

The importance of the benefit conferred by the succession laws of the domicile was stressed in *Bullen v. Wisconsin*, in which case the inheritance tax of Wisconsin, wherein the decedent was domiciled, was allowed to reach stocks and bonds held by him in an Illinois corporation:

"As the States where the property is situated, if governed by the common law, generally recognize the law of the domicil as determining the succession, it

he emphasized, however, was this: when a state has power by some means or other to tax it ought to be allowed to do so. Its power should not be nullified by the arbitrary means of fictionizing its right away from it.

8See New York ex rel. Cohn v. Graves, 300 U. S. 308, 313 (1937); United States v. Bennett, 232 U. S. 299, 307*(1914); Blodgett v. Silberman, 277 U. S. 1, 8 (1928); Keeney v. Comptroller of New York, 222 U. S. 525, 533 (1912); Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202 (1905); see 1 Cooley, *op. cit. supra* note 8, § 19. It is obvious that the "benefit" may be so general in some cases, and appear so to accrue to all whether they pay taxes or not that the notion wholly collapses. Nevertheless, the idea is put to good use by such a professional realist as Mr. Justice Holmes who piles up his dissent in *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 216 (1930), around the benefit derived from the laws of Minnesota which kept the obligation alive even though the "benefit" was one largely required by the "contracts" clause of the Constitution.

10This concept is one used as a substitute when the "benefit" runs thin. Curry v. McCanless, 307 U. S. 357, 370 (1939); Lawrence v. State Tax Commission, 286 U. S. 276, 279 (1932); Maguire v. Trefry, 253 U. S. 12, 14 (1920); Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 58 (1917); Kirtland v. Hotchkiss, 100 U. S. 491, 498 (1879); see ELY, *TAXATION IN AMERICAN STATES AND CITIES* (1888) 6-7.

1188 U. S. 189 (1903).

12Id. at 205-206. The case of Wheeler v. Sohmer, 233 U. S. 434 (1914), is also in point.
may be said that, in a practical sense at least, the law of the domicil is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicil, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock.”

The third base has received important attention as recently as last year.

Not on one of these bases alone, necessarily, is the power to tax predicated but on combinations of them in varying degrees. Before the first use of the Fourteenth Amendment to sift double taxation by the states, a liberal attitude had played over these foundations of the taxing power. An easy interplay among them was countenanced and the varying degrees of double taxation which resulted did not move the Court from its position that the Constitution had no remedy for it. The attitude of the Court was very close to these observations of Mr. Justice Holmes in Blackstone v. Miller:

“... this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicil governs the whole. But these inconsistencies infringe no rule of constitutional law.”

The first extension of Due Process to interdict double taxation did not greatly disturb this arrangement. There had been general agreement among the courts that the property tax, a tax levied in exchange for the general benefits of protection furnished by a government, could only be reasonably put on real estate by the state wherein the realty was located, which state exercised the sole power and control over it and from which all such general benefit emanated. Tangible personalty

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16188 U. S. 189, 204–205 (1903).

17See Frick v. Pennsylvania, 268 U. S. 473, 489–491 (1925); Paddell v. City of New
located in some permanent way was considered with good cause to be largely similar to real estate in these respects and it appeared in many ways unreasonable for a state which exercised no control and conferred no benefit—as would a state in which the owner was domiciled separately from his property—to levy a property tax. The result of denying the power of the owner’s domicile to tax tangibles located outside its boundaries was not therefore startling. 18

When, however, the property taxation of intangibles was considered, a fundamental issue was raised. The power to levy such a tax was put, as in realty taxation, on the principle that only the state of the situs, wherein inhered both power and benefit, could lay the tax. But where property has no physical embodiment and consists only of relationships, it is obvious that it may be “located in,” receive benefit from, and be under the power of, more than one state when the persons or corporations making up the relationships are domiciled in more than one jurisdiction. Nevertheless, following the reasoning of real property taxation, the courts began with the premise that intangibles may be definitively located in one spot. With the aid of the idea that a debt is an asset only in the hands of the creditor 19 and of the fiction, *mobilia sequuntur personam*, the Court “located” the property at the domicile of the creditor-owner in entire disregard of the obvious benefit and power that come from the state of incorporation where the intangibles are in the form of securities or, in the case of debts, from the state of the debtor’s domicile whose laws give life to, and must be used to enforce a debt. The *mobilia*

York, 211 U. S. 446, 451 (1908); Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202 (1905); see 2 Cooley, *op. cit. supra* note 8, § 447; Gray, *op. cit. supra* note 8, § 72; Judson, *op. cit. supra* note 8, § 441. So deep-seated is this notion that it has carried over to attempt to thwart an income tax placed by one state on the rents and profits from land situated in another jurisdiction. *See* New York *ex rel.* Cohn v. Graves, 300 U. S. 308, 317 (1937); cf. Senior v. Braden, 295 U. S. 422 (1935), where what might have been called an income tax was actually stricken on the rationale suggested above. Similarly as to the inheritance tax. Maxwell v. Bugbee, 250 U. S. 525 (1919).

18Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905). In some respects and especially in keeping with the idea of equal contribution to the costs of government, a personal property tax is a collection from the owner of chattels measured by his ability to pay—i.e. the value of his property wherever located. It will be noted that if this idea were pressed to its logical conclusion, out-of-state realty as well as personalty might be taxed by the state of the domicile intent on making an accurate measurement of the ability of the citizen to pay. This result would nullify long-accepted law. In these circumstances a line must be drawn and on the side of reality will fall tangible chattels which closely resemble it.

19*See* Case of the State Tax on Foreign-Held Bonds, 15 Wall. 300, 320 (U. S. 1872); Kirtland v. Hotchkiss, 100 U. S. 491, 498 (1879).
fiction had been, up to that time, but a convenient "cliche" designed to bolster the right of the creditor's domicile to tax. It had not been enforced as an inflexible maxim and put to the restrictive use of depriving other jurisdictions of their power. This use of it was manifest error in view of the results it wrought.

Inheritance taxation presented a situation different from that of property taxation although it was not recognized fully as such. The levy here is one laid in exchange for the benefits of succession on death. It seems clear that several states, among them states having no physical connection with the property passed, may have a part in dealing this privilege, as for example the state of the decedent's domicile whose succession laws will govern the passage in another state of tangible personality. It does not appear, therefore, unreasonable for the state of the decedent's domicile to levy an inheritance tax on tangible parts of the estate located elsewhere. Nevertheless, by pressing into force the conclusion, out of keeping with all previously expressed views, that the inheritance tax is a tax on property, such action was branded arbitrary and capricious beyond the limits allowed by Due Process, creating a result which ignored benefit and placed all reliance on power.

The Court may have been misled here by the circumstances involved in the inheritance taxation of realty. In that instance it is true that all benefit is conferred by and all power inheres in, the state of the location of the property since its own succession laws govern and it supervises the succession. There was no error in the result, therefore, when the inheritance tax on realty was treated as a property tax. But when this

While the origins of *mobilia sequuntur personam* may be obscure, its entry and use in the field of tax law have often been explained. See *Curry v. McCanless*, 307 U. S. 357, 367 (1939); *United States v. Guaranty Trust Co.*, 293 U. S. 340, 345-346 (1934); *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395, 400 (1907); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 205 (1905); *State Board of Assessors v. Comptoir National d'Escompte*, 191 U. S. 388, 404 (1903); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22 (1891); *State Railroad Tax Cases*, 92 U. S. 575, 607 (1875); *St. Louis v. The Ferry Co.*., 11 Wall. 423, 430 (U. S. 1870); 2 *Cooley, op. cit. supra* note 8, §§ 440, 447-450; *Judson, op. cit. supra* note 8, § 446; *Story, Conflict of Laws* (8th ed. 1883), § 551. In the days when the usual moveable chattel of any value was in gold, silver or jewelry, the chattels important for tax purposes were actually carried by the owner in his personal possession or were likely to be concealed in such a way that dominion over them could only be had through power over the owner. The notions of power, benefit and contribution were thus in large measure satisfied in the practice of allowing the state of the owner's domicile to lay the tax on all tangible personality. The question of the taxation of intangibles was not then of great importance.

concept was carried over into the field of the taxation, at death, of tangibles the manifest unfairness, noted above, results. And when later it was pressed down as a guiding principle onto the inheritance taxation of intangibles, there was a doubling of errors. All that has been said of the faults that inhere in limiting to a single tax the property taxation of intangibles and the inheritance taxation of tangibles may be repeated here in unison. The irreverent results which came out of these ipse dixit of the Court are somewhat dramatized in the cases, the principals among which are considered hereinafter.

III

With these ideas as rough points of rally it is now safe to enter the seeming jungle of decision.

*Union Refrigerator Transit Co.* v. *Kentucky*\(^{22}\) is customarily taken as the point of departure and literally it was the first case in which the Fourteenth Amendment was used to prohibit the taxation of tangible personalty except where it was situated.\(^{23}\) Tangible personalty, it was considered, was of a nature similar to realty in that it could be located definitively and could be said to enjoy the benefits and be under the power of the state where it was so located. As a consequence, it was thought so arbitrary and capricious for Kentucky, which, it was considered, had no power over, and conferred no benefit on, the property, to levy a tax thereon that the state's action was held to infringe the Due Process clause of the Fourteenth Amendment, *mobilia sequuntur personam* to the contrary notwithstanding.

The Court was here dealing with a relatively simple situation and no great quarrel was made with the result which it reached although an

\(^{22}\)199 U. S. 194 (1905).

\(^{23}\)There had been rulings previously on the proper application of property tax on moveables, based on the facts of each case. Southern Pacific Co. v. Kentucky, 222 U. S. 63 (1911); Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409 (1906); St. Louis v. The Ferry Co., 11 Wall. 423 (U. S. 1870); Hays v. Pacific Mail Steamship Co., 17 How. 596 (U. S. 1854); *see* Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149 (1900); Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 (1891); Coe v. Errol, 116 U. S. 517 (1886). It is not strictly accurate to say that Due Process was first logged in to curtail double taxation by the states when in 1905 it was applied to the property tax on tangibles. The Court had long been puzzling over the property taxation of intangibles and had held that states other than the domicile of the debtor were without power to tax. The result was usually rested, however, on the *ibre dixit* that a state's taxing power does not run outside its boundaries and only occasional reference was made to due process. See cases cited note 26 *infra.*
immediate objection was registered as to its method.\textsuperscript{24} It was when it launched into the cases made complex by the questions as to the nature of intangible property and the theory of inheritance taxation that the mixture became turbid.

Intangible property had been from the start manhandled by a Court which had no new theories to apply to its special character. In considering property taxes laid on intangibles, the Court had borrowed concepts used in the taxation of tangible personalty and realty and had searched for the \textit{situs} of the property disregarding the fact that intangible property is by nature not single but diverse, consisting of relationships that run to as many places as there are things related. Its quest was nevertheless simple with the help of the now familiar \textit{mobilia} maxim, and intangible property was declared therefore to be situated at the domicile of the creditor and subject to taxation there only.\textsuperscript{25}

The full effect of this position, insofar as the property taxation of intangibles is concerned, has never rested on the states since an escape in the cases of the most obvious injustice is furnished through the concept of “business situs.”\textsuperscript{26}

The unfairness worked against the “have-nots” by this jurisprudence of the property taxation of intangibles has cropped up most plainly in

\textsuperscript{24}See dissent of Mr. Justice Holmes in Union Refrigerator Transit Co. \textit{v.} Kentucky, 199 U. S. 194, 211 (1905).

\textsuperscript{25}Safe Deposit and Trust Company of Baltimore \textit{v.} Virginia, 280 U. S. 83 (1929); Cream of Wheat Co. \textit{v.} Grand Forks, 253 U. S. 325 (1920); Fidelity & Columbia Trust Co. \textit{v.} Louisville, 245 U. S. 54 (1917); Rogers \textit{v.} Hennepin County, 240 U. S. 184 (1916); Hawley \textit{v.} Malden, 232 U. S. 1 (1914); Case of the State Tax on Foreign-Held Bonds, 15 Wall. 300 (U. S. 1872); cf. Schuylkill Trust Co. \textit{v.} Pennsylvania, 302 U. S. 506 (1938); Corry \textit{v.} Baltimore, 196 U. S. 466 (1905); Tappan \textit{v.} Merchants’ National Bank, 19 Wall. 490 (U. S. 1873).

\textsuperscript{26}The use of the intangible indicated, in a business conducted in a jurisdiction other than that of the owner-creditor’s domicile, has been held to confer power to tax on the former in the following cases: First Bank Stock Corp. \textit{v.} Minnesota, 301 U. S. 234 (1937) (bank stocks); Wheeling Steel Corporation \textit{v.} Fox, 298 U. S. 193 (1936) (book accounts and bank deposits); Safe Deposit & Trust Company of Baltimore \textit{v.} Virginia, 280 U. S. 83 (1929) (stocks and bonds); Liverpool & London & Globe Ins. Co. \textit{v.} Assessors for the Parish of Orleans, 221 U. S. 346 (1911) (open-book accounts); Metropolitan Life Ins. Co. \textit{v.} New Orleans, 205 U. S. 395 (1907) (unsecured loans); State Board of Assessors \textit{v.} Comptoir National d’Escompte, 191 U. S. 388 (1903) (unsecured notes); Bristol \textit{v.} Washington County, 177 U. S. 133 (1900) (mortgages); New Orleans \textit{v.} Stempel, 175 U. S. 309 (1899) (mortgages); see Wheeler \textit{v.} Sohmer, 233 U. S. 434 (1914); Scottish Union and National Ins. Co. \textit{v.} Bowland, 196 U. S. 611 (1905); Savings & Loan Society \textit{v.} Multnomah County, 169 U. S. 421 (1898); cf. Citizens National Bank \textit{v.} Durr, 257 U. S. 99 (1921); Buck \textit{v.} Beach, 206 U. S. 392 (1907).
two relatively recent cases, both involving the taxation of beneficial interests in trusts. In *Safe Deposit & Trust Co. of Baltimore v. Virginia*, Virginia sought to place a property tax on the interests which two of its citizens had as beneficiaries of a Maryland trust. The majority denied the right to tax to Virginia as an attempt by a state to reach property outside its jurisdiction, refusing to recognize the relationship between the beneficiary and the trustee as property which had any being in Virginia. Mr. Justice Stone acquiesced since the inartificial way in which the tax was laid made it appear to be a levy on the Maryland trustee, but Mr. Justice Holmes was consistently dissentient:

"The notion that the property must be within the jurisdiction puts the emphasis on the wrong thing. . . . It seems to me going still further astray to rely upon the *situs* of the debt. A debt is a legal relation between two parties and, if we think of facts, is situated at least as much with the debtor against whom the obligation must be enforced as it is with the creditor. To say that a debt has a *situs* with the creditor is merely to clothe a foregone conclusion with a fiction."  

In *Senior v. Braden* the Court adhered to this result in a situation with largely similar facts, but where the case appeared to the majority stronger because the trust property was real estate. These cases clothed with more judicial authority the *mobilia* maxim which by this time, out of the welter of its frequent application, began to rear like ancient wisdom framed for eternity.

The Court had shown an inclination here to put in a special category one type of intangible—corporate stocks—and to allow their taxation by the state of incorporation regardless of the domicile of their owners. In the most recent case, *Schuylkill Trust Co. v. Pennsylvania*, this line of authority has been followed.

When the Supreme Court moved from the field of property taxation to a consideration of the inheritance tax, it did not seem clearly to recog-

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27280 U. S. 83 (1929).
28Id. at 97-98.
29295 U. S. 422 (1935).
30302 U. S. 506 (1938). The most important earlier decision was Corry v. Baltimore, 196 U. S. 466 (1905). The basis of the taxing power in the state of incorporation in the latter case was put on the grounds of the power of the state to alter, amend or revoke the corporate charter. *Id.* at 474. This ground was alluded to in the *Schuylkill Trust case* but the rationale of the case is mainly founded on the fact that the share of stock represented property which "is of value, arises where the corporation has its home, and is therefore within the taxing jurisdiction of that state. . . ." 302 U. S. 506, 516. In this aspect, the force of the case should be felt throughout the field of the taxation of intangibles.
nize the change. The inheritance tax, as noted above, is, in theory, a levy on the power to transfer, the actual transmission, or the receipt of property at death. It may be based in one of these ideas singly, or a mixture of them may be in the legislative mind. But whatever the nature of the levy, death taxes have always been taken not as a levy on the property passed but as a tax on the privilege involved therein. Nevertheless, the view that an inheritance tax is to be treated as a levy on the property passing at death was established as the holding of the Supreme Court in *Frick v. Pennsylvania* where New York was denied the right to place a tax on that part of the tangible estate of its deceased citizen which was located in Pennsylvania. The principles were thus announced:

"... first, that the exaction by a State of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment; secondly, that while a State may so shape its tax laws as to reach every object which is under its jurisdiction it cannot give them any extra-territorial operation; and, thirdly, that as respects tangible personal property having an actual situs in a particular State, the power to subject

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In this way inheritance taxes bear a marked resemblance to income taxes which are acknowledged to be laid on the privilege of receiving the income. Guaranty Trust Co. v. Virginia, 305 U. S. 19 (1938); New York ex rel. Cohn v. Graves, 300 U. S. 308 (1937); New York ex rel. Whitney v. Graves, 299 U. S. 366 (1937); Lawrence v. State Tax Commission, 286 U. S. 276 (1932); De Ganay v. Lederer, 250 U. S. 376 (1919); 1 Cooley, op. cit. supra note 8, § 49; cf. Tuller, *The Taxing Power* (1937) 82-85, 139; see Brown, *The Nature of the Income Tax* (1933) 17 MINN. L. REV. 127. The analogy between the two taxes is a strong argument for the use of income tax principles to govern any claims of conflicts in inheritance taxation by the states. On this basis, the domicile of the privileged person would be allowed to tax on the theory of the benefit it conferred through its laws of devise and descent, Maguire v. Trefry, 253 U. S. 12 (1920), and, at the same time, the state of the actual location of the property, where it was tangible, would also be allowed to levy a tax on the basis of the power it could exert in the passage of the property. Shaffer v. Carter, 252 U. S. 37 (1920).

\[\text{\textsuperscript{268}}\] U. S. 473 (1925).
it to state taxation rests exclusively in that state, regardless of the domicil of the owner.\textsuperscript{34}

This is spoken, it may be observed, in terms of property taxation. It takes no cognizance of the fact that a state wholly unconnected with the property may have a part in extending the privilege of succession on death and thus have a legitimate base for taxation. Thereby no recognition was given to the part played by the laws of New York which governed the succession.

With all of the foregoing serving as background, the Court launched into the briar patch of the inheritance taxation of intangibles.\textsuperscript{35} In the first important case, \textit{Farmers Loan \& Trust Co. v. Minnesota},\textsuperscript{36} the newly made inheritance tax principles of the \textit{Frick case} were applied to the passage, at death, of intangible personality. The errors made in the \textit{Frick case} in the nature of inheritance taxation were here compounded by the restrictive application of the \textit{mobilia} fiction. On the basis of the latter the property was declared to be located solely at the domicile of the creditor-owner and there only, by virtue of the \textit{Frick case}, was its passage on death taxable.

The case is interesting because it involves an honest facing-up by the Court of the various possible places in which the property might be held to be located. At least four were acknowledged: (1) the debtor's domicile, (2) the creditor's domicile, (3) the "business situs" of the property, and (4) the \textit{situs} of the evidence of the debt.\textsuperscript{37} From these the Court settled on (2) as its choice. The majority considered its motive so unimpeachable that it was not backward in acknowledging that the result was founded on policy considerations for modern business:

"Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxa-

\textsuperscript{34}Id. at 488-489 (1925). \textit{See} City Bank Farmers' Trust Co. \textit{v.} Schnader, 293 U. S. 112 (1934).

\textsuperscript{35}The Court had in earlier cases already dealt with the inheritance taxation of intangibles by the state of the creditor-owner's domicile and had allowed the tax on the simple basis of \textit{mobilia sequuntur personam}. Blodgett \textit{v.} Silberman, 277 U. S. 1 (1928); Bullen \textit{v.} Wisconsin, 240 U. S. 625 (1916). Under the guidance of Mr. Justice Holmes it had also dealt with taxation by states other than that of the owner's domicile and had allowed the tax. Blackstone \textit{v.} Miller, 188 U. S. 189 (1903). The latter, however, proved to be a false start and was overruled by \textit{Farmers Loan \& Trust Co. v. Minnesota}, 280 U. S. 204 (1930).

\textsuperscript{36}Ibid.

\textsuperscript{37}Ibid.
tion, is matter of the greatest moment. . . . Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view to avoiding, so far as possible, unjust and oppressive consequences."

It is significant to note here the gist of the concurring opinion of Mr. Justice Stone whose present views appear to coincide with those of the present Court majority. The inheritance tax, he notes, is not a property tax and he therefore deserts the majority’s search for the *situs* of the intangible property. Benefit here, he states, is of the first importance and none flows from the laws of Minnesota which cannot be said to preserve a contract sanctified by the Constitution against state abrogation. Mr. Justice Holmes, standing by the just deserts of the laws of Minnesota, considers that state should be allowed to levy a tax.

In this case, then, were pitched in opposition the ideas, noted at the outset, to which each side persistently adhered. The differences stem, legally, from different conceptions of the nature of (1) inheritance taxation and of (2) intangible property. Inheritance taxes, ruled the majority, are to be taken as laid on the intangible personal property passing at death and thus the first job is to “locate” the property. Realistically, it would be viewed as divided among all the places suggested by Mr. Justice McReynolds in *Farmers Loan & Trust Co. v. Minnesota*. But the Court did not see how more than one state could constitutionally tax the same property interests in keeping with *Union Refrigerator Transit Co. v. Kentucky*. It might have adopted that case in its entirety as a precedent and have gone so far as to quarter the value of the property and allow each state to tax that part so allocated to it. This procedure of supervising a set of artificial fractions, perhaps, looked too little like the course of constitutional law. In any event, a single choice was made and on the postulates of property taxation hidden in the Court’s words this result entailed the exclusion of all states other than the chosen one.

The opinions of Mr. Justice Stone and Mr. Justice Holmes etch out the basic difference between their position and that of the Court: the inheritance tax is a privilege tax and to say this is not to speak idly—it is to set the pattern of inquiry and direct it to what privileges and benefits, what rights to call for contribution, may exist and thus give base to the constitutional levy of the tax. There is no necessity, therefore, to search for the property. It will only misplace emphasis. It can safely be said,

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38 *Id.* at 211-212.
39 *Id.* at 214.
40 This was the procedure followed in dealing with tangible moveables in *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158 (1935).
however, that if the minority had in this case gone searching for the property they would have found it at several different places where the majority did not.

These views both sides carried on into the cases that followed in short order. In *Baldwin v. Missouri* the situation was presented of an attempt by Missouri to place an inheritance tax on the passage of the intangible property of an Illinois decedent. The property consisted of bank deposits in a Missouri bank and promissory notes held for the decedent also in Missouri. It was held that only Illinois, the domicile of the decedent, could place an inheritance tax on the passage of the property.

Mr. Justice Holmes was as frank as the Court majority in his expressions. After referring to his view that the power of Missouri over the property was sufficient to give it the right to tax he concluded:

"It seems to me to be exceeding our powers to declare such a tax a denial of due process of law. And what are the grounds? Simply, so far as I can see, that it is disagreeable to a bondowner to be taxed in two places. Very probably it might be a good policy to restrict taxation to a single place, and perhaps the technical conception of domicil may be the best determinant. But it seems to me that if that result is to be reached it should be reached through understanding among the States, by uniform legislation or otherwise, not by evoking a constitutional prohibition from the void of due process of law..."

Mr. Justice Stone observed that the protection afforded the taxpayer's interests by the laws of Missouri, under which alone were his rights against the banks and debtors enforceable, are sufficient in this case to empower Missouri to tax.

Two other cases came within the next two years to test further the limits to which the majority would press its views. *Beidler v. South Carolina Tax Commission* presented an attempt by the domicile of the simple open-account debtor to tax the passage of the debt to the creditor's heirs when the creditor was domiciled in a separate state at the time of his death. The right was denied to the state of the debtor's domicile and in this way simple open-account debts joined the list made up then of bonds, bank deposits and notes. The question not raised in the *Beidler case* as to the power of the state of incorporation to tax the passage of the corporate stock on the death of its stockholders domiciled elsewhere was answered shortly thereafter in *First National Bank of Boston v. Maine* where Maine, the state of incorporation and the place where

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421 U. S. 586 (1930).
41Id. at 596.
42282 U. S. 1 (1930).
44284 U. S. 312 (1932).
the company's business was transacted, was denied the right to tax the passage on death of stock in the corporation owned by the decedent who was domiciled in Massachusetts. This decision blasted hopes that stocks would be treated differently from other intangibles, a reasonable expectation after *Corry v. Baltimore.*45

The Court in these cases pressed through in a thorough manner their views that the inheritance tax is to be applied as though it were a property tax and the intangible interests passing under it are to be taken as located solely at the domicile of the creditor-owner.

These decisions in the instance of the inheritance taxation of intangibles did varying amounts of violence to the bases for taxation which were examined above, although no quarrel can be raised at the outset with the result of allowing the domicile to levy an inheritance tax in every case. It retains central importance so long as it extends the benefits of its succession laws for the distribution of the personal estate. However, this result should not automatically exclude other taxing authorities which possess as good and sufficient reasons for collecting their levies. The state of the debtor's domicile, as pointed out in *Baldwin v. Missouri*46 has more real power in the recognition and enforcement of the succession than the creditor's domicile. In the same manner the state of incorporation confers as full an advantage as the creditor's domicile and exercises, in reality, more power. The state issuing bonds or the state of the location of the property in mortgage bonds similarly assume equal importance, in inheritance matters, with the creditor-owner's domicile.47 All of these states confer benefit and extend their laws to cover the decedent's interests despite the fact that he has chosen to reside elsewhere and, in a very real sense, these states have more power to recognize or refuse recognition to the succession than the state of the domicile of the decedent.

Upon analysis of these situations it is difficult to see how action in the creditor's domicile can be so different from that in any of the other states described as to make the one arbitrary and capricious beyond the limits of the Fourteenth Amendment and the other in keeping with due process of law. Indeed, it was only by giving full restrictive force to the fiction, *mobilia sequuntur personam,* and by indulging the theretofore rejected idea that the inheritance tax is a tax on property that the Fourteenth Amendment could be applied at all to these situations. If there were a

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45196 U. S. 466 (1905). But see note 30 *supra.*
47This is not so as to the state in which a foreign corporation may have some property. *Rhode Island Hospital Trust Co. v. Doughton,* 270 U. S. 69 (1926).
reversal of views on either of these two points, then so far as intangibles were concerned there could be no claim that Due Process had been infringed by double taxation at the domiciles of the debtor and the creditor.

IV

It was on this state of the law there arrived in May, 1939, the cases of *Curry v. McCanless*\(^4^8\) and *Graves v. Elliott*.\(^4^9\) Mr. Justice Stone, speaking this time for the majority of the Court, in each case sets to work at once to examine the whole course of the taxation of intangibles on death.

Contrasting intangibles with tangibles, he first points out that the former are unlike the latter in that intangible property consists only of the individual relationships which make it up and cannot be given a physical presence. It exists at the places where the things related exist and its existence cannot be restricted to the place where one of the related individuals resides.\(^5^0\) Then, turning to the theory involved, he states:

> "Whether we regard the right of a state to tax as founded on power over the object taxed, as declared by Chief Justice Marshall in *McCulloch v. Maryland* through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protection conferred by the taxing sovereignty, or both, it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles."\(^5^1\)

In the case at bar, Mr. Justice Stone points out that a decedent domiciled in Tennessee has created a trust with an Alabama trustee reserving to herself such powers to dispose of the corpus by will as made the property a part of her estate under Tennessee law and in such way has created a set of legal relationships which it is difficult to regard as "more in one state than in the other," or to see "upon what articulate principle the Fourteenth Amendment could be thought to have withdrawn from either state the taxing jurisdiction."\(^5^2\) Then:

> "If taxation is but a means of distributing the cost of government among those who are subject to its control and who enjoy the protection of its laws . . . legal ownership of the intangibles in Alabama by the Alabama trustee would

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\(^4^8\) 307 U. S. 357 (1939).
\(^4^9\) 307 U. S. 383 (1939).
\(^5^1\) *Id.* at 367-368.
\(^5^2\) *Id.* at 369.
seem to afford adequate basis for imposing on it a tax measured by their value. . . .” As for Tennessee: “The decedent’s power to dispose of the intangibles was a potential source of wealth which was property in her hands from which she was under the highest obligation . . . to contribute to the support of the government whose protection she enjoyed.”

The *Graves* case presented the companion situation of a decedent residing in New York with powers to revoke a Colorado trust. New York’s right to tax the relinquishment on death of this right in the corpus was sustained on the basis of the *McCAnless* case.

V

With abundant evidence that the Supreme Court is pitching today underneath many an ancient “howdah,” only the fearless would attempt to saddle on a new position on which he hoped to ride for any length. Certain implications, however, in the decision of *Curry v. McCAnless* seem deliberate. In the first place, it is announced that intangible property is no longer to be shackled into the concepts built for tangibles. It is a bundle of relations and where any stick of the bundle lies there also is the intangible subject to taxation. No one stick in the bundle such as the domicile of the creditor-owner is so different from any of the others as to warrant the invocation of some constitutional conception to set it apart from them. Nor does the Fourteenth Amendment compel the designation of one such chosen relationship.

This does not mean that Due Process of Law has no sphere of operation in this sector. The Fourteenth Amendment will necessarily still be in force to strike down the attempt of any state to tax which does not have a real basis in power or a legitimate reason to call for contribution in return for its benefits or protection. If a state should attempt to lay a tax when its pretext for so doing was so slim as to brand its act not a tax at all, it would seem to be an extortion and still within the prohibition of the Fourteenth Amendment.\textsuperscript{54} The Court thus has the outland lines left to be drawn if or when the states, failing to agree among themselves, make unjustified spoil of taxpayers who in some slight way have

\textsuperscript{53}Id. at 370.

\textsuperscript{54}This is the rationale running through most of the following cases: International Paper Co. \emph{v.} Massachusetts, 246 U. S. 135 (1918); Looney \emph{v.} Crane Co., 245 U. S. 178 (1917); Western Union Telegraph Co. \emph{v.} Kansas \emph{ex rel.} Coleman, 216 U. S. 1 (1910); Metropolitan Life Ins. Co. \emph{v.} New Orleans, 205 U. S. 395 (1907); Delaware, Lackawanna & Western R.R. \emph{v.} Pennsylvania, 198 U. S. 341 (1905); Louisville & J. Ferry Company \emph{v.} Kentucky, 188 U. S. 385 (1903); Dewey \emph{v.} Des Moines, 173 U. S. 193 (1899); cases cited \emph{supra} note 23; see GRAY, \emph{op. cit. supra} note 8, \S 71.
a connection with them. And the states thus have back in their hands the problems which they had begun to solve in 1930, to agree among themselves how their laws shall jibe, each in the interests of saving its own revenues and protecting its citizens from the too heavy hands of double taxation. 55

The decision appears to throw open the field of intangible property taxation far beyond the limits to which the "business situs" cases push the law. The Court now seems to take judicial cognizance of Mr. Justice Holmes' observation in Safety Deposit & Trust Co. of Baltimore v. Virginia that "the notion that the property must be within the jurisdiction puts the emphasis on the wrong thing." 56 The most important inquiry here may well lie now as to the power of the debtor's domicile to tax, a way opened somewhat by Schuylkill Trust Co. v. Pennsylvania. 57

The purpose which the decision did not serve, however, was to draw out clearly the basic theory of inheritance taxation. The case is chiefly a shaking off of the chains as to the nature of intangible property and it was only necessary to the result that it be pointed out that intangible property is not single by nature but diverse. In this way it accomplished more for intangible property taxation than for levies on inheritances. The drawing forth of the Court's views on the latter point is likely to result most pointedly when there is again before it the question of taxation by the state of the decedent's domicile of tangible personality located elsewhere. If the views of Mr. Justice Stone as expressed in Farmers Loan & Trust Co. v. Minnesota 58 are to prevail, the nature of the inheri-


56280 U. S. 83, 97 (1929).


58In his concurring opinion Mr. Justice Stone stated:

"As the present (an inheritance tax) is not a tax on the debt, but only on the transfer of it, neither the analogies drawn from the law of property taxes nor the attempt to solve the present problem by ascribing to a legal relationship unconnected with any physical thing, a fictitious situs can, I think, carry us very far toward a solution."

280 U. S. 204, 215 (1930).
tance tax as a privilege tax may well mean that *Frick v. Pennsylvania*\(^{59}\) will be overruled. With it will go *a fortiori Baldwin v. Missouri*\(^{60}\), *Beidler v. South Carolina Tax Commission*\(^{61}\) and *First National Bank of Boston v. Maine*\(^{62}\).

Whether this will come about as it is told is a question to be put to the wind.

\(^{59}\) 268 U. S. 473 (1925).
\(^{60}\) 281 U. S. 586 (1930).
\(^{61}\) 282 U. S. 1 (1930).
\(^{62}\) 284 U. S. 312 (1932).
A THEORY OF LAW
A PROPOSED RECONCILIATION

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I

THE NEED FOR A THEORY

It is the fashion among many modern legal practitioners and scholars to confront any theorist who proposes a philosophy of law with the pragmatic and not un-American question, "So what?" That is to say, what interests them is solely the practical utility of the theory. It will not do to quarrel with this brusque question, for, after all, it is highly sensible; it must be answered.

Therefore, let it be stated at once that the theory which will be here set forth seeks to be useful to certain specified types of people. First of all, it attempts to assist those who wish to see the place of morality and conscience in law, that is, all who are anxious that their legal judgments should correspond with their moral judgments, to the end that real justice shall accrue to others and peace of mind to themselves. Secondly, it attempts to help those who, in order the better to learn and practice law, desire to understand its nature and who feel that a comprehensive theory which gives perspective and structural insight into a bewildering varied subject is a most potent aid to such understanding. Thirdly, it endeavors to benefit legislators who desire a stable, rounded and consistent view of the functions of government. Fourthly, it seeks to assist those who take an academic or aesthetic interest in the proportions and the symmetry of law.

It would be a strange register of the temper of our times if most of us were not included in at least one of these groups, and it would reflect no credit upon our moral, intellectual or aesthetic character. The fact that jurisprudence, the great aims of which are to satisfy these several groups, is an unpopular subject (and a glance at the law reviews will show its state of neglect) might be urged by some as a proof that such is the temper of our times. However, there is much to be said for the more charitable view that the unpopularity of jurisprudence indicates not so much a failure of our age as a certain deficiency in our theories; in particular the want of harmony.

Undoubtedly, this does have much to do with the case, for certainly a reading of most of the articles published in the last few years will
serve only to discourage the average reader. That there is an unhappy state of conflict and confusion appears on every hand. Every new theory seems to add to the confusion of the old ones; and the old ones are already in an apparent state of belligerent irreconcilability. Extremists have pushed their views to the point of absurdity; terminology has been blurred; charges and counter-charges whirl through the air. One theory is too complicated to be comprehensible; another is so vague that it is meaningless and useless; a third is based on premises which are unyielding to later developments. The not unexpected net result is an increased skepticism concerning the efficacy of any theory.

Such, obviously, is not a desirable state of affairs. Potentially, as has been indicated, jurisprudence has many values. Otherwise we would not have such judges as the late Justice Cardozo searching so hard and long, even if in his own mind unsuccessfully, for an adequate philosophy of law; nor such scholars as Dean Pound so thoroughly and patiently exposing every point of view and calling for a new Realism; nor such lawyers as Thurman Arnold at pains to develop a legal philosophy even if it is only negative and iconoclastic; nor would there be so many law school students grasping at straws to extricate themselves from the muddled multiplicity and disorganization of legal rules.

The efforts of these people bear eloquent witness to the deep and urgent need to find an acceptable theory which will set our minds and hearts at rest. Surely, no one should scoff at their search because it is inspired by a noble instinct replete with potential benefits to everyone.

II

THE SOURCE OF AN ACCEPTABLE THEORY

Before embarking upon a search for a theory which will satisfy us, it

1A sample of this discord may be seen in such articles as Hall, Readings in Jurisprudence (1938); Cohen, Transcendental Nonsense and the Functional Approach (1935) 35 Col. L. Rev. 809; Kennedy, Functional Nonsense and the Transcendental Approach (1936) 5 Fordham L. Rev. 272.
2See Cardozo, The Growth of Law (1939), especially the chapter entitled, The Need of a Philosophy of Law as an Aid to Growth, in which he confesses his distance from his goal.
3Among the countless contributions of Dean Pound suffice it to cite here: Fifty Years of Jurisprudence (1937) 50 Harv. L. Rev. 557; (1938) 51 Harv. L. Rev. 444, 777; A Comparison of Ideals of Law (1933) 47 Harv. L. Rev. 1.
4See Pound, The Call for a Realist Jurisprudence (1931) 44 Harv. L. Rev. 697.
5See Arnold, Folklore of Capitalism (1938); Symbols of Government (1935); Apologia for Jurisprudence (1935) 44 Yale L. J. 729.
is well to state our precise objectives. It is submitted that for our purposes these may be reduced to three:

(a) The theory shall assist us to understand the structure and the substance of laws and legal principles, to the end that the lawyer, judge or legislator may use these laws not only as they were intended to be used but also with the greatest ease and practical effect. The surest road to a masterful command of legal principles is a thorough and deep understanding—a truism which, stated otherwise, means that the best practice is based on the soundest theory. Many hours of confused thinking can be saved by an adequate theoretical background. If such is the case with military science or contract bridge, why should we deny its application to law?

(b) It shall assist us to judge laws, that is, to evaluate their worth or significance according to the standards imposed by our religion or philosophy of life. This means that it shall establish a standard of justice, a scale of values (which may or may not be coincident with the law itself) which will enable the lawyer to reconcile his conscience with his professional activities—a not unworthy aim. It is true that many lawyers do not believe that a theory can do this, but without doubt they will welcome it if it does.

(c) Thirdly, the theory shall simplify legal rules and principles. This requirement means that it shall coordinate and subordinate the innumerable legal principles and rules to some sort of unifying concept. If it can accomplish this, it will not only be of immense practical advantage in applying and utilizing laws (as in the case of (a) supra), but also it will have made it an aesthetic pleasure to contemplate their symmetry and to array their arguments. No theory will succeed if it wraps itself up in a complex terminology requiring a mathematician to explain.

Conceding the need for a theory which thus would demonstrate and reveal the nature, the justice, and the simplicity of laws, where are we to find it?

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"This ideal is the source of that vast literature concerned with what it terms "The Nature of Law".

"This ideal has occupied man since the beginning of juridical thought. From Plato, De Republica, to Pound, Law and Morals (1922); from Thomas Aquinas to such moderns as Geny, Radbruch, Beryl, Levy, Brendan Brown, and others. See Radin, A Juster Justice, A More Lawful Law, in Legal Essays (1935).

"This does not imply that the law is simple; but merely expresses a hope that we may find it such. Simplicity means unity. Kelsen and Pound seem to have faith in the possibility of such simplicity. See Pound, Unification of Law (1934) 20 A. B. A. J. 695."
The Scholastics have their ideas. The Historicists have theirs. The Realists, the Utilitarians and the Functionalists have theirs. But the diversity of opinion speaks for itself. If any single theory contained the whole answer and a simple answer, we would not have such emphatic and widely separated schools of thought, each of which claims to possess, and undoubtedly does possess, advantages had by none of the others in a full measure. If there were such a theory, surely it would have converted the majority to its views. But conversion to one side has proved impossible. On the other hand, though the old theories do not fully satisfy us, it would be presumptuous to seek the solution in novelty of idea. The world is too old to have failed to state at least the germ of every good idea; and as Koheleth long ago pointed out, it is impossible to find a really new concept.

Thus, we are directed to a third approach which lies midway between that of adopting an old or creating a new theory—the approach of synthesis and conciliation. We must place a new emphasis on the old ideas and construct a theory which utilizes the basic values of each and welds them into a stable and unified whole. This is the manifest task of juridical statesmanship. It has been hinted at from a dozen quarters, which maintain that the times are ripe, in learning, in development and in need, to bring our speculation to fruition.⁹

Of all the several methods available to help arrive at a successful formula for reconciliation, perhaps the simplest is to ignore the apparent contradictions among the details of the several theories while forming a synthesis of the broad principles of each; and then, when the synthesis has been effected, to note whether or not the apparent contradictions in detail disappear by virtue of the new unity. Such a formula would not necessitate the sacrifice of one's basic views, for it would simply relate those views one to the other in an inclusive formula. Nor would it be necessary to adopt the views of others, except as an abstract possibility, for the formula would be amply beneficial if it brought to the theorists a mutual terminology, a clarity of relationship, and a sense

⁹Among those reaching expressly or impliedly toward some such conciliation are: Brown, Natural Law and the Law-Making Function in American Jurisprudence (1939) 15 Notre Dame Lawyer 9; Harris, Idealism Emergent in Jurisprudence (1936) 10 Tulane L. Rev. 169; Levy, Law in a Dynamic Integration (1936) 5 Brooklyn L. Rev. 417; Llewellyn, On Reading and Using the New Jurisprudence (1940) 26 A. B. A. J. 300, 418; Pound, How Far Are We Attaining a New Measure of Values in Twentieth-Century Juristic Thought? (1936) 42 W. Va. L. Q. 81; More About the Nature of Law, in LEGAL ESSAYS (1935); A Comparison of Ideals of Law (1934) 47 Harv. L. Rev. 1; Law and the Science of Law in Recent Theories (1934) 43 Yale L. J. 525.
of occupying a few degrees in a common circle, even though the remain­
der of that circle should exist for them in terms of mere possibilities—
that is, in their imagination.

III

A Formula of Reconciliation

A. The Several Theories

It is a bold undertaking to seek to reconcile and harmonize the major
theories of the nature of law. But this will not deter the writer from
an attempt, for an imperative need often gives a measure of encour­
gement and sanction even to the feeblest of efforts. Moreover, the task
may not be as overwhelming as it seems. There are those who think
that jurisprudists have gone out of their way to set their theories in
opposition to one another.

Let us therefore proceed swiftly to our search for the solving formula.
This resolves itself into a search for that synthetic arrangement of
words, that inclusive rule, which will represent the highest common
denominator of the several leading theories. How do the several groups
of thinkers conceive of law? What structure, what substance, what
essential nature do they give it? Looking beyond mere form and tech­
nical expression, it is possible to discern approximately four main trends
or schools of thought.10

First, there are the scholastics and the naturalists who visualize law
as that body of rules which the exigencies and requirements of nature
dictate to the Reason as logically necessary. Some would add that,
inasmuch as God created nature, so too he is the ultimate source of law,
the Supreme Law-Giver.11 Others like the Transcendentalists would
indicate that the reason alone working over the data of nature is suffi­
cient to induce the principles of legal science.12

Second, there are those who conceive of law as that practical body
of rules which society and its component members create to satisfy the
maximum amount of human needs, wants, interests and values with the
minimum friction. They call themselves utilitarians, or sociologists, or
pragmatists, or realists, and comprehend laws, not as abstract and uni-

10I have found in Hall, Readings in Jurisprudence (1938), and in Pound, Fifty Years
of Jurisprudence, loc. cit. supra note 3, two excellent preliminary guides by which to orient
and acquaint oneself with the many points of view. As to the Positivists, see note 30
infra.

11The Scholastics, among whom Thomas Acquinas is preeminent.

12For example, Kant. Transcendentalists fall within this general group.
universal rules, always and absolutely valid, from which logic may deduce particular justices, but as working instruments useful to effect by their politic action desirable results. Actual consequences concern them; and the methods of adjustment, compromise and balance of pressures and interests prevail.\textsuperscript{13}

Thirdly, there are the Historical Jurisprudists to whom law is an expression of the national will and who draw from the well of the past, with its tribal customs and usages, the origin and foundation of laws.\textsuperscript{14}

Fourthly, there are the Functionalists who conceive of law as the body of rules whose function is to regulate and guide the operation of all social functions. These appear to visualize society as a sort of organism possessing solidarity and integration like the human body, whose members effectively cooperate and serve one another to the ultimate benefit of all—a not unappealing visualization.\textsuperscript{15}

To be sure, the lines are blurred between some of these schools of thought. Often one nearly merges with another, or reacts adversely to another. Sometimes with the laudable motive of making themselves clear, the theorists have placed special, narrow, technical meanings upon words whose simple significance is intuitively understood by all. But by and large it is submitted that these four divisions give an approximate picture of the major trends of juridical thought.

That each is essentially noble in purpose few will dispute. It cannot be denied that each is proper and helpful in its place. Yet few people

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\textsuperscript{13}Pound has summed up the Utilitarians in \textit{An Introduction to the Philosophy of Law} (4th ed. 1930) c. 2, entitled, The End of Law: “For the purpose of understanding the law of today I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice.” 98-99. Von Jherling, Bentham, and Cardozo conceived of law in this sense. See Pound, \textit{The Scope and Purpose of Sociological Jurisprudence} (1912) 25 Harv. L. Rev. 489. This school includes, for our purposes, such Realists as Llewellyn, Felix Cohen, Frank. See Bishop, \textit{A Critique of Realism} (1938) 11 Rocky Mt. L. Rev. 31. See note 15 infra.

\textsuperscript{14}Savigny appears to have been the founder and leader of this school.

\textsuperscript{15}Leon Duguit appears to be the chief exponent of the Functional School. See Pound, \textit{supra} note 9, 43 Yale L. J. 525. Also Duguit, \textit{The Law and the State} (1917) 31 Harv. L. Rev. 1. There is a group of thinkers such as Felix Cohen who use the term “functional” in the realistic, skeptical sense of “pragmatic”. These are Realists, not Functionalists. This has caused much confusion between the meaning of “realistic” and “functional” in current discussion. There are many similarities between the two; but the former tends more to being a theory of method, while the latter approaches a conceptual scheme of society as a whole. Hence, we have placed the latter in a separate category. See such discussions of Realism as: Frank, \textit{Realism in Jurisprudence} (1934) 7 Am. L. School Rev. 1063; Fuller, \textit{American Legal Realism} (1934) 82 U. of Pa. L. Rev. 429; Llewellyn, \textit{Some Realism About Realism} (1931) 44 Harv. L. Rev. 1222.
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are satisfied with any of the theories exclusively, for none is exclusively valid. On the other hand, no single one of them is inclusive of all the others, no one theory embraces and reconciles all theories. While the lawyer appreciates the functions of law, he cannot accept the apparent a-morality of functionalism; while he believes in a realistic attitude, he still holds to certain transcendental and naturally inalienable rights; while he agrees that social welfare is a worthy aim of law, he also may submit that Divine Purpose is the guide thereto. He is truly in a dilemma—he cannot accept one theory as final nor can he effect a clear reconciliation of all. He ends up by being confused or convinced of the futility of the subject, and begins to ignore, even laugh at it.

B. A COMMON DENOMINATOR

This confusing situation justifies an inquiry into what the theories have in common, what possible denominator or formula of reconciliation may be adduced. It is submitted that a close examination will show at least one idea common to all of these theories. In every one the law is concerned with fulfilling the will, the intention, the nature of some person or group of persons, whether of the judge, the dominant class, the nation, or of society in general, or of some private individual. A rule of reason or nature is that which corresponds to the requirements of nature; a utility or value is that which serves an end or purpose of someone; a tribal custom is that which expresses the will of the tribe; a function is that which fulfills a purpose. In each case the law is a derivative of the nature, will, purpose or intentions of a person or group.

Furthermore, the words "nature", "purpose", "will", "intention", "end", have in common the concept of a directive principle, a design, an intention operating in and conditioning some object. If we consider physical nature as the object, then the directive principles or activating causes operating therein may be designated as gravity, atomic energy, heat, or some similar source of motion. But the Law is primarily concerned with human nature—with man—whose directive principles may be called simply motives. Motives may stem from the head (for example, intellectual curiosity), the heart (for example, love), or the body (for example, hunger), or possibly otherwise (for example, self-preservation); but in this paper we will not distinguish their type or cause, but shall designate them collectively by the interchangeable words "will", "intention", "purpose", "motive", "end", and "aim". Moreover, as used here, these words signify not so much volitional assent to a motive
nor physical activity to fulfill it, although these are included, but the motive itself.\textsuperscript{16}

We may state, then, that under the several theories, law constitutes that body of rules which purports to satisfy the requirements of each and every nature in the universe. It is that which endeavors to assure that what one calls purpose or intention, another desires or needs or wants, another the exigencies of nature, another functional end, may be enabled to fulfill itself.\textsuperscript{17}

It is to our advantage to simplify and shorten this generalization, provided this can be done without violence to its accuracy. Now the act of enabling an object to fulfill its purpose or nature certainly can be called a "good" act or a "good" work to or for some object; for a "good" is precisely defined by philosophers as that which fulfills the natural exigencies or tendency of some object.\textsuperscript{18} But to do good to an object is simply to render service to it, to serve it. Service is therefore our key word. By using it in place of the long phrase, our formula may be abbreviated to the following form: Law purports to assure that everything (more particularly, everyone) shall receive service. For the sake of clarity a tautological qualifying clause to the effect that law purports to assure that everyone shall receive the maximum possible service should be inserted. Not only is possibility implied as a condition of every purpose, but also it may be directly derived from the formula itself as will be pointed out subsequently.

The jurist will immediately recognize in this simple formula the essence of those nineteenth century schools of jurisprudence which are chiefly concerned with the maximum freedom of individual assertion and development.\textsuperscript{19} He will also recognize in it a standard of values

\textsuperscript{16}Thus hunger may be the principle which actuates the stomach and body and mind; while, mentally and volitionally speaking, the person conceives and wills: "I am hungry. I will get some food."

\textsuperscript{17}No aims are intrinsically evil, for, as this theory will attempt to show, the evil lies in the form of the relations between various aims. See note 28 infra.

\textsuperscript{18}So defined by the Scholastics, \textit{CARDINAL MERICRER, A MANUAL OF MODERN SCHOLASTIC PHILOSOPHY} (3rd Ed. 1928) 513; by the \textit{CENTURY DICTIONARY} "serving as a means to a desired end or purpose. . . ."

\textsuperscript{19}This great 19th century trend toward liberty of the individual has been pointed out by numerous writers, such as: \textit{Pound, HOW FAR ARE WE ATTAINING A NEW MEASURE OF VALUES IN TWENTIETH-CENTURY JURISTIC THOUGHT?} (1936) 42 W. VA. L. Q. 81; \textit{THE END OF LAW AS DEVELOPED IN JURISTIC THOUGHT} (1917) 30 HARV. L. REV. 201. The theory of laissez-faire was an offshoot. See \textit{Duncan, THE END AND AIM OF LAW} (1935) 47 JURID. REV. 157.
for the sociological jurisprudist of today.\textsuperscript{20} And he will not fail to note that it casts law as well as all things which affect the members of a community in a functional role; and that in doing so it describes in outline a relationship of interdependence among the members of a community—it describes a society.\textsuperscript{21}

It would be too much to ask that our formula correspond with all the theories on all their points. The skeptical Realist is greatly concerned with how the law serves the powers that be. The Sociologist is willing to compromise and balance off services one against the other in order to form the best working rule. The Utilitarian tends to elevate and exalt worldly services to the detriment of less tangible ones. The Scholastic is prone to express his theory in transcendental terms remote from the language familiar to the average lawyer. And so on. What we can ask is that our formula express a common and basic ideal of all the theories, a formula whose theoretical ramifications will achieve the results aimed at in all the theories, although possibly differing in detailed method. We have the formula; the hope of success is not so forlorn as to preclude our patient development of its logic and appraisal of its results, and to this task we will shortly proceed.

Before doing so, let it be noted that if this formula engenders of its own logic a body of rules which precisely corresponds with the laws that exist in the jurisdictions of the world, its development will in that respect present itself as a mere process of classification of laws. Thus by creating a system of classification it will verify and validate itself.

IV

Service

Not a few will raise objections to the employment of the word “service” as the significant word of the formula. Their objections will arise mostly from a personal revulsion against some of its modern connotations or from a conviction that it is too vague in meaning. To the latter objection, let it be answered that our present definition has given service a meaning at once philosophically broad and mathematically precise; on the one hand including a deeper and wider area than the limited, technical meaning attached to it by the laws of Master and Servant, and on the other hand excluding all cloudy references that do not fit into its precisely worded category.

\textsuperscript{20}The evolution of the Utilitarians’ scale and measure of value is noted in Pound, \textit{supra} note 19, 42 \textit{W. Va. L. Q.} 81.

\textsuperscript{21}That is to say, the “Social Solidarity” of Duguit.
To the former objection of dislike of its modern connotations, let it be replied emphatically that "service", "servanthood", "servant" are noble words. If the baser and more materialistic elements of modern society have seen in it only unexalted forms of service, if they have applied it solely to cheap and sentimental activities or to apparent services, so much the more reason to restore it to its primary glory and simplicity—to the glory and simplicity given to it by our Lord when he said, "He that is greatest among you shall be your servant"; to the glory and simplicity attached to it by knighthood to whom it meant something high and noble, something pure and chivalric, like the knight's lofty devotion to his Lord whom he served by great deeds and lofty exploits; to the glory and simplicity instilled into it by our great statesmen, our Washingtons, Lincolns, and Lees, to whom no greater compliment could have been paid than that they served their country, than that they were public servants.

If some believe that too great an effort would be required to repair this damaged word, can they suggest a better word? Can they choose a different one whose advantages more considerably outweigh its disadvantages? For the advantages of service do greatly outweigh its disadvantages. Firstly, it is one word, which is simpler than a phrase. Secondly, it signifies a relation rather than a thing, and law is nothing if not the formalization of relationships. Thirdly, it admits of a spiritual interpretation to the religious person, and of a material interpretation to the worldly person, neither of which interpretations are exclusive or conflicting. Fourthly, the word has neither predominantly moral nor predominantly earthly connotations; it plays no favorites. Fifthly, it is not an outworn word whose meaning has become blurred or confused; rather it is intuitively understood by almost all, and at the same time admits of a precise philosophical definition. Finally, it is perhaps the only word which includes within its meaning the concepts of function, of utility or value, of solidarity, of subordination, and of coordination, all of which have an important bearing on the nature of law.

In no sense therefore can it be said that it was haphazardly selected. If in spite of these enumerated excellences of the word, there are some who would still object and, while preferring to select no other known word, would suggest creating a new "unspoiled" word such as "wowzin" or "exx", suffice it to say that the difficulties of creating such a verbal infant would far exceed the labor of restoring service to its pristine state. And even if created and propagated, it would undoubtedly have the same unpleasant interpretations thrust upon it as the old word.
On the other hand to find no single key word at all and to leave
the formula in its former lengthy and rather labyrinthine state is to
invite all the confusions of terminology which we are seeking to remove,
as well as to cause awkward redundancies in expression.

It would be false to the aim of this paper to prescribe for anyone,
within the terms of the definition, the particular interpretation he should
place upon "service". One can choose the interpretation which attracts
him. To some, the services connected with satisfying material needs
will be eminently satisfactory. Intellectuals cannot justly deride such
an interpretation, for there is nothing base about digging potatoes, or
manufacturing medical instruments, or waiting on the table. But to
say that such economic services are not base is not to say that other
services may not be loftier. The statesman finds a higher application
of the word when he speaks of "public service", for he embraces within
its range such intangible work as the bestowal of liberty, of education,
and of culture upon his people.

Undoubtedly, however, the Christian finds the deepest and most satis­
factory significance in the word, for to him service represents the out­
ward shell of Christian charity. It is the practical consequences, the
work done, the exterior manifestation, of the holy motive of love. By
accompanying this exterior work with interior charitable intentions the
Christian may align himself with what he considers to be the first prin­
ciple of the universe and thus instill the deepest significance and nobility
in the word. If the civic laws are rules of giving service, they are
at the same time the rules and conditions for the operation of charity,
and are harmonious and consistent, even identical, with spiritual laws.
In this way human laws will naturally reflect Divine Wisdom, and as
such be both natural and transcendental.

Not to be overlooked is the fact that the payment of money to a
person constitutes a service, provided, of course, the person to whom it
is paid desires and can use the money. Money may be largely symbolic
in form, but it is no less a service on that account. Indeed, it is more
of a service because it is so much more transmutable and convenient,
so that not unnaturally many of the world's services are rendered in
the form of pecuniary payments. Of course, the lending of money and
credit are likewise services, as would be the leasing of property.

V

The Development of the Theory

From this simple structural principle that everyone shall receive the
maximum possible service flow several equally simple corollaries. The
most obvious corollary is that if all people shall receive service, then
all people, insofar as they affect one another, shall give service. These
are two necessary sides of the same requirement. In other words, there
can be relations only of service and there can be only servants in a
community. It might be said that law constitutes the rules of service
in the conduct of community life; that is, rules which instill and
maintain conditions of service in the particular society.

We need not elaborate here how obvious the design of service is in
nature and in society. Any object and any act may be shown to have
a purpose, a use, a function, with respect to something else. Air serves
plants, plants serve animals, animals serve men, men serve each other.
The members and organs of the body are integrated into a system of
mutual service. A marvelous integration of service occurs in the eco­

B nomic life of society, wherein the material demands of the populace
are served by a complex allocation of labor among manufacturers, farm­
ners, distributors, salesmen, and others.

We do not say that no disservice or absence of service ever occurs
in nature and society; we merely say that the basic elementary design
is one of interwoven services. It is exactly at the point of the failure
of service that law makes its entrance, that is, where there are flaws,
or gaps, or inefficient operations in the design of interwoven services.
Here law seeks to remedy the situation and to restore and perfect the
design.

The performance of this work divides itself into several functions.
We may at once postulate them as corollaries comprehending all sides
of the primary axiom, so that our theory outlines itself as follows:

EVERY PERSON SHALL RECEIVE THE MAXIMUM POSSIBLE SERVICE:

A. Hence the service shall be adequately designated.22
B. And insofar as possible servants shall be supplied who are capable
of rendering it.
C. And any disservices shall be negatived.

Without the first, purposes, which are the guide to what constitutes
service, would certainly not be fulfilled; and similarly, without its com­
panion principle. The third is merely the negative of the axiom.

These three principles might be combined or divided up or trans­

22A word has been sought to express the act (1) of deciding and determining and (2) of
communicating, the service sought. "Signify", "decree", "resolve", and "formulate" all
seem less satisfactory than "designate".
posed in many different ways; but our end here is to discover simplicity and comprehensiveness in the light of experience. The particular arrangement postulated represents, not all the possible propositions which might logically follow from the original formula, but rather those particular comprehensive propositions, engendered from the formula, from which in turn all other propositions may be generated by the necessities and facts of life, varying according to the period and the country. These propositions are the point of contact between living reality and abstract rule. The remaining development of the theory, to which we will now proceed, represents that segment of the theory which has been precipitated from the abstract by need.

A. THE SERVICE DESIRED SHALL BE ADEQUATELY DESIGNATED. This rule aims to make purposes effective by removing all weaknesses and defects in (1) the determination and (2) the communication of a service desired to the prospective servants, thus obviating the danger of self-frustration by the person seeking to be served. Law adopts measures accordingly which strike at such personal weaknesses and defects in the served as lack of knowledge, lack of capacity, lack of will power, and lack of adequate expression.

1. Determination of Service Desired

(a) Ignorance

Most services are measured by the consciously willed purposes of mankind. But to designate these purposes effectively requires adequate knowledge in the mind of the purposer. For he cannot designate with safety unless he perceives with accuracy. Ignorance (in which we include error) prevents a person from seeking what he would seek if he knew of the possibilities; it leads him to seek mirage-like things which are impossible or non-existent, to seek apparent rather than real services; it draws him along paths, replete with the hidden traps of unforeseen consequences. In particular, it betrays him into all sorts of self-contradictions and cross-purposes. This last is especially unfortunate, for to fulfill a small aim at the sacrifice of a larger aim is worse than futile, it is a negative injury to oneself; hence, nothing is more important than that everyone should know the relative results of his aims in life, especially the relation of immediate to ultimate aims.

All these evils attendant upon ignorance lead to the conclusion that the law has the unavoidable duty of ordering the revelation of any important truth the ignorance of which might influence and make less effective the intentions of the members of society. This duty is logically
and inexorably derived from the primary axiom which requires service at all events. It is a difficult undertaking for knowledge is not easily come upon.

Now clearly the law, with its innumerable rules and procedures, is an education in itself. Its sole purpose, according to our axiom, is to enable everyone's intentions to be fulfilled. Its rules will therefore serve to teach everyone how he or she may best achieve his or her aims. It will show them the logic and sense of the laws which are for their benefit, and reveal the condition of society which must obtain if one's intentions are to be effective. Therefore, the crime laws, the tort laws, and all the laws which expressly or by implication set up standards of conduct, are so many instructions which by enlightening prevent the falling into error through ignorance. The establishment of inspection standards for numerous agricultural products and for fertilizers and the drafting of a standard list of investments for trusts are examples of the setting of standards. We are speaking of laws solely as writings and proclamations, not as instruments of power or sources of rights. This educational function of law will become more clear as the various corollaries of the theory unfold.

But the mere proclamation of laws is far from sufficient. There are a thousand and one facts relevant to one's intentions that everyone should know: about himself, about nature, about the universe, about life. Is there a God? Then people ought to know about it so that they can act to their best advantage. Does uncleanness breed disease? Then people should know, so that they can, if they will, cleanse themselves. Will seeds grow in a certain type of ground? If not, then the people should be told that it is a waste of planting them. And so the law, as distinguished from the civil government established by the law, decrees that the people shall be enlightened, and delegates the job to those who know the truth in regard to the particular subjects. This might be public or private schools, universities, scientists, philosophers, churches or parents according to (1) who is qualified (see B (2) infra); and (2) who the people want to educate them and their wards (for the power of appointment stems from the consent of each individual) (see C infra). It goes without saying that any individual or institution so chosen has power only to teach and proclaim truth and not to compel anyone to live according to the wisdom of these teachings. Also, the function extends no further than enlightening, so that to teach falsehood automatically becomes illegal. Conversely, no institution has the right to suppress relevant truths.
If the truth is disputed, or not capable of strict proof, as where faith enters the picture, the law cannot pass judgment one way or the other, but must allow each individual to decide for himself and for those over whom he is guardian, since no one else can have faith or certitude for him. Be it remembered that it is the law, not any civil authority established by law, which requires enlightenment; and its principles alone, particularly those of freedom and of fitness, determine the mode of enlightenment. Hence, inquisitions and tyrannies of one sect can never legally arise.

(b) *Incapacity*

There are many purposes which, in spite of the enlightenment provided for under these principles, will fail to be properly designated to the prospective servant, for the simple reason that the person or object to be served is incapable of designating his or its purpose. For example, lunatics, infants and other incompetents have natural defects preventing such designation. To remedy this the law directs the appointment of committees, guardians and trustees to act in the capacity of a substituted personality, of a will by way of representation.

Similarly, such defects as lack of time, energy or perceptive powers prevent people from deciding whether a chemical, a commodity, a metal, and the like, are of the quality and quantity desired. Hence, the law delegates to Purchasing Agents, to Bureaus of Weights, Measures and Standards, to Inspectors, and a multitude of other officials, the job of acting as the eyes, ears and mind of others.

Finally, there are the purposes of unconscious objects which, having no volition of their own, cannot designate themselves, including, for example, the purposes of the members and organs of the human body, and the purposes of property. This situation is solved by giving to those whose duty it is to enlighten the person to be served concerning his own intentions (see A 1 (a) *supra*), the additional duty of enlightening the prospective servants as to the existence of these purposes insofar as they are not obvious. For example, it tells them what property is "for", what the lungs "do", etc.

(c) *Indecisiveness*

There remains to be considered one other cause of self-frustration which arises neither from ignorance, nor from lack of capacity, but from lack of the power of decisiveness. Often the human will is tempted to do things which it knows are to its own hurt, but which the force of
attraction makes seemingly irresistible. These actions are called by the law crimes against oneself, or sins, or vices (not including those aspects which are crimes, etc., against others); and though they cannot be legislated away, they can at least be partially restrained by the preventative threats implicit in the penalties imposed by the crime laws; by laws which, through the requirement of oaths, affidavits, and the like, and through the stimulation of pious practices and exercises, recall and restore men to their highest strength of will.

2. Clarity, Definiteness and Precision in the Communication of Service Desired

Ignorance, incapacity and indecisiveness are not the only causes of self-frustration with which law copes. A most dangerous cause is the failure to communicate adequately the service desired from the potential servant. Intentions being the test, a person is not apt to receive the service he wants from another unless he makes known exactly what he wants. Needless to say, adequate communication means to express oneself clearly, definitely and precisely to the party or parties by whom one is affected.

(a) By the persons served in general

Hence, if one wishes to make a gift, the law requires the donor not only to indicate a clear intention so to do, but requires delivery, constructive or actual, to make assurance doubly sure. If one wishes those who take jurisdiction over his property after death to distribute it as one desires, the law establishes a multitude of rules for making, witnessing, signing and changing wills, and prescribes language for indicating exactly one's intentions and develops rules of construction to interpret these intentions accurately. There are many other activities in which the law demands clarity, definiteness and precision in the communication of intentions.

(b) By persons exchanging services

Now it so happens that if anyone wants anything from another, he must obtain it with the consent and free will of that other; for, as we shall observe subsequently, to compel another to serve against his wishes is certainly not within the definition of a service and hence is a clear violation of our primary axiom that everyone should receive service. From this necessity of the assent of both parties, derives the very important principle that there should be mutuality and joint under-
standing between all parties acting in relation to one another. Here in brief is the origin of the first rule of the law of contracts—the rule of mutuality.

With this in mind, the necessity of precision and definiteness becomes doubly apparent; for instead of the danger of one person's intentions being frustrated, there is the risk of frustrating the desires of two or more persons. Consequently, the law surrounds these mutual arrangements, which it calls "contracts", with numerous safeguards. If something important is involved it requires the contract to be put in writing (the Statute of Frauds), and to be verified (acknowledgments), and to be accepted and put in operation by the parties (signed, witnessed, delivered), and in certain cases to be made a part of public record so that there may be no mistake about the arrangement (recordation laws). Moreover, the law provides for mistakes which may have arisen in these contracts and permits rescission or reformation as the situation may require. Also, it establishes elaborate rules for construing the contract so as to effect the intention of the parties; and for determining the operation of conditions; and for adjusting the contract to unexpected circumstances (excuse for impossibility). All these rules of law derive from its function of instilling precision and certainty in the expressions of a person's will, of insisting on exact mutuality in the minds of the parties. The law of consideration in contracts has a slightly different origin which will be noted subsequently.

(c) By the law

Now if the law requires others to be clear, definite and precise in signifying their intentions, surely it too must be clear, definite and precise. For the law is both servant and served. Its servant role is to assure the maximum service to everyone, according to its first principle. It is served in that the members of society subject themselves to its rules, conditions and requirements. Unlike many servants, its very nature requires that those who desire its service must, by obedience, serve it. In the latter capacity, as the served, it must signify its

23The importance of this needs no elaboration. However, see Brown, Lucidity in Law (1933) Scots L. T. 225; Cook, Certainty in the Construction of the Law (1935) 21 A. B. A. J. 19; Roguin, The Form of the Law (1933) 10 N. Y. U. L. Q. REV. 445.

24This does not suggest that law is a person. A material object or an idea may serve although inanimate. The primary axiom applies to every segment of nature in the universe; but primarily to human nature.

25Also secondarily in the other capacity, as the servant, for its unusual service is to express the mutual purposes and arrangements of the members of a community—making
requirements with the greatest possible exactitude. This it seeks to do in many ways. Thus it requires, in many instances, that its own laws be clearly drafted, entitled and digested, duly acted upon and decisively passed, and published and made available to those who will be affected by them. With a similar aim, it establishes exactly how a person may or must obey the law. Such procedural regulations are as varied as life itself—they govern such topics as the methods of pleading and practice in the courts; the methods of foreclosing a mortgage; of solemnizing marriage; of condemning land; of delivering a gift or an instrument; of taking possession of property; and so on. There are hundreds of procedural rules surrounding leases, deeds, bills of lading, negotiable instruments, all aimed at achieving certainty and definiteness in the signification of how the people are to follow the law. Indeed, the very statement and existence of the law is an attempt to make things certain and definite. Anything that will remove uncertainty is seized upon. The Declaratory Judgment is a direct assault upon indefiniteness. So are provisions for lapsed legacies, for presumptions of survivorship and rights upon death, for absentees, and for unclaimed holdings. Sometimes, the uncertainty is caused by the element of time, in which cases the law provides Statutes of Limitations, seven-year absentee laws and doctrines of representation of minors and unborn persons. Some of the "time" statutes have the further purpose of speeding up the operation of law in order to prevent the inconveniences attendant upon long years of waiting for certain results, but this function falls within a subsequent principle (see B infra).

It should be remembered that all of these laws would defeat their own purpose if they acted in any respect as hindrances upon the effectiveness of human purposes. Their sole aim is to assure the fullest effectiveness to man by giving all of his purposes vitality and adequate expression. They strive to enlighten, strengthen and express the personality of each individual, never to burden and enfeeble it.

B. SERVANTS SHALL, INSOFAR AS POSSIBLE, BE SUPPLIED WHO ARE CAPABLE OF RENDERING THE SERVICE DESIGNATED. This is the complement of the preceding principle that a person shall signify the service which he desires.

Before outlining the laws which derive from it, it is well to note the broad and fundamental limitations upon its fulfillment, the limitation it in effect a "social contract" and hence, as such an expression of the services desired or needed by the members of a community, it must be clear, definite and precise.
of nature and the limitation of our primary axiom. As to the latter, we have already observed that no one can compel a servant to serve, for that would be a disservice; the liberty of the servant, too, must be respected. As to the former, it is obvious that the facts of life impose a severe limitation; for many desirable services are largely incapable of being rendered, as for example, the curing of all diseases or the giving of the power of mental telepathy. Hence, our primary axiom stated that everyone shall receive the maximum possible service. The words “maximum possible” are in no sense an indication of a compromise or balance between the desires of several people, other than the compromise imposed by the lack of either the willingness or the ability to serve.

1. The Supply of Servants

With these conditions of ability and willingness in mind, we are in a position to inquire in what manner the law proceeds to assure an adequate supply of servants to fulfill the limitless ocean of desires, needs, in a word the intentions of the members of society.

The simple, basic, and obvious answer requires no elaboration; a servant can only be supplied through inducement. A person can and will render a service when the offer of an adequate return service persuades and empowers him so to do. Such inducements or return services may take many forms depending on the myriad circumstances of society. It may be simply the payment of money or the performance of labor. It may be the solace of love, or the removal of fear. It may be the offer of praise and honor. It may be a complex of motives involving service to the friends and associates of the potential servant. Or finally, it may be simply the granting by the served of obedience and subjection to another's authority and power.

Now the law can operate and effectuate its principles only through its agents and all those who subject themselves to its authority. Speaking broadly, the law must make everyone whom it governs a servant of its principles, of one sort or another, as we have noted previously. And since these servants must be willing and able to serve it, the law, like everyone else desiring service, must provide an inducement therefor.

These inducements are manifold, but they may all be summed up by our primary axiom which prescribes the duty to law of assuring the maximum possible service to everyone, which is to say, assuring the general welfare. Broken down into specific items this may mean any one of the hundreds of services from keeping the peace by its policing service
to paternal assistance to the poor. The size of the inducement will be commensurate with the needs of the persons whose obedience and support is sought. For example, a poor or oppressed man will not willingly subject himself to a system of laws which fail to provide even that he shall be kept alive. He may steal rather than starve because the state has neglected its duty. His need is a powerful lever with which benevolence may rightfully be demanded. Many people, particularly the rich, have a huge stake in the maintenance of authority. Accordingly, the law may demand more from the latter, particularly in the way of taxes. Yet, like a yoke, its authority must not become so onerous as to lose its beneficial character.

With this in mind, we may well consider the major duties that devolve upon the law as a consequence of its maintaining its authority. Some of these have been or will be mentioned under other sections of this theory. Under the instant proposition, namely, that of arranging for an adequate supply of servants, it is particularly concerned with two things.

The first of these is the natural duty of coordinating and conjoining prospective servants with persons desiring to be served. Nature herself is, of course, the most effective conjoiner; but where nature ends, the law endeavors to take up. Thus, it established employment and information bureaus; it provides public markets and marketing services; it creates and regulates the media of exchange, the money and credit system; it organizes sundry devices of distribution by means of barter arrangements, credit facilities and like. Indeed, the building of an adequate road and transportation and postal system is of major importance in this conjoining role. Nor should it be omitted that the machinery of democracy, that is, the system of election and representation, is in reality a device for placing served and servant in the most efficient relationship to one another.

A second important function of the law is the adjustment of scope and size of the inducements of life in order to produce the maximum efficiency. Thus, it will be seen at once that if a servant requires too great an inducement, it will prevent the person desiring to be served from offering it; while if it is too small, it will prevent the prospective servant from accepting it on the desired terms. The law therefore strives to fix and assure what may best be called an adequate rate of exchange—a proper inducement or reward for services. This activity is not a limitation on the liberty of the servant, rather it is a control by the served through law of his own inducement.
Ordinarily, the intention of the contractor or settlor, etc., governs the standard of compensation, that is to say, the inducement or reward bargained for shall be the one received. For example, a corporation or a government hires a man at an agreed upon salary and these terms will be enforced. (See section C infra for the origin of this rule.) Nothing could be more just. However, certain complications arise for which the law must provide a remedy. For example, where there is no express bargain the law provides the common counts which allow a fair return for work done, labor performed, money paid, etc., or it establishes copyright, patent, trade mark, salvage and estray laws for special types of work. Or again, the prospective servant may seek to take advantages or powers previously granted to him in order to interfere with the bargaining position of the person desiring the service. Hence, the law prevents interference with labor organizations and strikes, aiming thereby to equalize bargaining power. Similarly, there are laws fixing salaries, commissions, and fees of numerous officials, including trustees, clerks, sheriffs, notaries public, and receivers; regulations establishing rates and prices for utilities, railroads and certain industries, and fixing a fair rate of return on investments; statutes preventing usury, fixing limited tax rates, establishing maximum hours of work and minimum wages; procedures for enjoining excessive corporate salaries, and the like.

In addition to these two roles of conjoining and effectuating arrangements between prospective servants and people desiring to be served, the law undertakes to provide numerous special services many of which have been mentioned. Sometimes it directly employs and commissions servants to administer its laws and to perform these services for it. In this manner there arises a distinct civil authority—an officialdom of public servants. At other times it indirectly empowers and encourages others to perform certain work. Thus, it may stimulate desired activities by granting subsidies, as in the case of shipping or aviation concerns, or arctic expeditions or charitable institutions; or by granting tax exemptions to schools, churches or other benevolent organizations; or by supplying vocational schools and adequate equipment, as in the case of the granting of seeds to farmers or the exemption of tools and machinery from attachment and taxes; or the provision of cheap methods of financing new businesses. Similarly, religious observances are induced by Sunday and holiday laws; procreation is fostered by various marriage laws securing the family against disruption and insecurity; the apprehension of criminals and the destruction of vermin are fur-
thered by the offer of rewards; and a wide variety of noble services are stimulated by titles, medals, ceremonies and other honors.

We have already touched upon the situation arising where a person is so young or feeble or poor or otherwise handicapped that he or she is unable of his own effort to supply anyone with inducements sufficient in the ordinary course of events to obtain the necessary services, and where no one has rendered them voluntarily. It is not enough to say that the common feelings of humanity will supply his need, for while it is true that parents out of love and care for children, and masters out of responsibility will protect sick workmen, yet sometimes, indeed too often, these humane emotions fail and some deeper legal obligation is needed. As has been pointed out, such an obligation arises out of what often may be the only inducement which the needy person may supply—his obedience to the laws and authority of those who will help him. In this manner the law, and in particular the authority established by law, such as a parent or guardian or the government itself, purchases allegiance. Among the numerous activities of care and assistance which are offered there may be mentioned the establishment of poor houses and relief agencies; the provision of pensions for illness, old age, injury and unemployment; the maintenance of hospitals for the sick and asylums for the afflicted; the enactment of laws requiring parents to care for children and children to care for parents; and other laws directing that the property of an intestate shall be distributed to natural dependents (Dower, Descent and Distribution); and the provision of bankruptcy laws and exemptions and restrictions on taxation, assignment of wages, and attachment.

Someone will doubtless ask why all needed services should not be performed by the government, why all the people can't compel it to render all services. As has been pointed out, the law can provide services only in the measure in which it is supplied with agents, taxes, and the obedience from its subjects. The measure of these things which people are willing to confer on their government becomes largely a matter of possibility as tempered by requirements of efficiency, by fears, and jealousies, and by the relative bargaining positions of the various members of society. For example, the rich will pay more for a good government than the poor; while on the other hand, the poor are more

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26 The inefficiency of such a scheme as far as the normal exchanges of life are concerned is obvious, for it merely adds the civil government as an intermediary between servant and served; hence the inefficiency of communism as against capitalism. Of course, such an intermediary may be necessary at times.
oppressed by necessities. Then, too, there is always the question of establishing a useless middle-man. There will be some balance struck by social groups, changing with time, in a perpetual process of adjustment in which a bargain satisfactory to all is everlastingly sought.

2. The Capacity of Servants

All these laws have had the primary purpose of creating a supply of servants able and willing to satisfy human needs. Sometimes, however, the difficulty is not the lack of supply, but the degree of qualification of the servants. In such a case, the problem is largely one of restraining people from attempting to do what they are not trained to do or capable of doing. The restraining brake might be called a principle of fitness.

(a) In general

Under its command, the law prescribes for those cases where incompetence endangers the rendering of service. Depending of course on the particular community, it forbids the incompetent and the untrained from following certain vocations, by such means as the Civil Service Rules, Bar Examinations and Medical Examinations governing public officials, lawyers and doctors. Similarly, it examines and licenses a multitude of vocations ranging from barbers to pilots, from beauticians to druggists; it grants the exclusive right of carrying on certain business to railroads and public utilities and other corporations who have fulfilled certain appropriate qualification standards. Sometimes the very fact of granting the monopoly is itself the cause of making a person or group more competent because it rules out destructive competition.

Needless to say, nature itself is the most effective allocator of functions to the competent. People would not attempt to do certain things unless they believed they could achieve them; and natural aptitude guides them to attempt the possible. Consequently, law does not have such a formidable task.

The duty of educating and enlightening the people which was required under a previously discussed principle (see A supra) presents particularly difficult questions of qualification. Who is qualified to teach? The nature of the subject taught of course has much to do with the answer. We have noted in a previous section the rule that where faith and spiritual truths are involved each individual must decide for himself and for his wards. In a country of diverse faiths and opinions, there will be corresponding lack of uniformity in the systems of edu-
cution. In a Christian state there will spring up that two-sworded form of government in which there is a spiritual arm and a civil arm, each complementing and assisting the other, each limited to its preordained realm. Certain other spiritual functions besides teaching may be delegated to the spiritual arm by the governed; as for example, the solemnization of marriages. But the mode of delegation is a matter of the consent of the governed.

(b) The government and the law as servants

Subject to the qualifications set forth above (B (1) supra), a civil authority—usually referred to as the "government" or the "state"—is elected as most qualified to handle exclusively a vast number of matters ranging from the act of governing itself, including the establishing of legislatures and courts and the stating and applying of all the rules of law, to the provision of police and fire service; from maintaining schools and postoffices to managing the currency and weather bureaus. A glance at the United States Code or any State Code will give one an idea of the immense spread of government functions. Yet in spite of the cry of too much bureaucracy, in most cases the government is the only body of sufficient size, financial resource or disinterestedness to undertake the respective jobs. The work of the United States Department of Agriculture is a good example.

Within the government the principle of fitness must be applied just as carefully. Consequently, the law divides up the work of the government among its officials, agents and departments according to their adaptability. For example, the Legislature, the Executive and the Judiciary, are set up according to the doctrine of the separation of powers. And within each of these groups, law establishes jurisdictional rules, as for example among the various courts, whence we derive much of the law of jurisdiction.

Moreover, the law itself must be adequately adapted to its rôle; it, too, must be a capable servant. Slow or sloppy or vague enforcement of laws is sometimes worse than no law at all. To this end it endeavors to enforce itself as swiftly, as certainly, and as precisely as possible. We have already observed how law endeavors to be certain and precise for these characteristics were also required under the first proposition of the theory; and how it requires its administrators to be trained as required by the instant proposition. To these requirements we might

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See section C, particularly note 28 infra, as to form of government.
here add the rules of evidence which aim at accurate application of law through the adducement of relevant truths.

As to swiftness, the law endeavors to speed up its activities by numerous regulations establishing procedural time limits, as in the case of Speedy Judgment and Speedy Repossession Acts of various states; rules affecting the administration of debtors,settlers and decedents estates; and laws fixing times to plead and to try cases, granting priority of trial in certain cases, and requiring prompt answers in others. Moreover, the seven-year absentee statutes, the Statute of Limitations, the doctrine of representation of minors and unborn persons, all of which were mentioned above in Section I, serve to speed up the operation and effects of the law as well as to remove uncertainty.

C. SERVICES SHALL BE NEGATIVED. The previous propositions of the theory have provided for the designation of what services are wanted and for the supply of servants capable of rendering those services. There remains the negative function nullifying all disservices between the members of a community. Though stated last, this principle is perhaps the broadest in scope of all three.

1. The Scope of Disservice

What constitutes a disservice? Reversing our previous definition of service, it is that which interferes with the fulfillment of a person’s purposes. It follows that, if there are to be no disservices, then each member of society under this theory should be a free being—a soul, will, personality, or nature, free from either demands or restraints which interfere with the fulfillment of his purposes. But, under this rule, the freedom so assured cannot, of course, be permitted to impose demands or restraints upon that of others.

Here we encounter the problem of cross-purposes. Where two purposes conflict, which takes priority? Mr. Black and Mr. White both wish to purchase Farmer John’s property. Whoever succeeds will, according to the definition, apparently disserve the other. How is this situation resolved under the theory?

The answer will be found in a consideration of the manner in which a motive effectuates itself. Without going into the deep and difficult questions of the relationship between body and will, suffice it here to point out that every motive, in this world at least, in order to exist at all, as well as to effectuate itself, necessarily has its basis in some object. We might say that a motive or purpose occupies and identifies itself with the object; and that to that degree the object “feels”, or is “dom-
inated by a certain purpose, or is "designed for" a certain end. In the case of humans with whom law is primarily concerned, motives embody themselves in a variety of objects. These include first of all the body itself with its thoughts, feelings, expressions, and movements. It also includes external objects, such as property and other people, through which a person may carry out his will.

But it will be seen that these objects are themselves animated by certain intrinsic purposes or designs of their own. Thus the human personality embodies itself in many cells and organs each with a nature of its own; or in inanimate matter with properties of its own; or in other humans who each have motives of their own. How then can a motive effectuate itself in or through these outside objects, without imposing upon the motives or properties which are already intrinsically bound up with them? How can it avoid disservice?

There is only one way of achieving this under the theory, and that is by means of conforming to, or harmonizing with, the purposes of the object through which a purpose seeks to be carried out; for only in such a case will there be no disservice. In the case of such objects as real and personal property, or matter in general, it is merely a question of what use the property will lend itself to. Thus a gun-maker can make metal, but not glass, serve as the barrel of a musket. In the case of other people, it is a question of whether they voluntarily consent and agree, expressly or impliedly, to serve the purposes which are sought to be imposed upon them. Thus, as to the latter, the authority and power of masters, employers, parents, contractors and the government can arise only with the express or implied agreement of the servants, employees, children, contractees, and the citizens over whom the power is asserted. The sources of these rights of domination are the intentions of the dominated. Indeed it is often said that a government derives its just powers from the consent of the governed. It is more accurate to say that a government derives its just powers from the nature of the governed—using "nature" to cover all the conscious and unconscious, expressed or unexpressed, purposes of the governed, including those purposes involving conscious consent. In reality, there should be no "masters" (in the despotic sense) at all in the world, for the law thus almost literally provides that "He who is greatest among you shall be your servant."

Turning then to the problem of cross-purposes where both Mr. White and Mr. Black wish to obtain Farmer John's tract of land, it appears that we must search out who has established a right of dominion over
the land. As we have noted, such dominion can only be obtained when the object dominated, and any will or purpose or nature which is already embodied therein, consents to, or at least is in harmony with, the assertion of such rights. It therefore appears that Mr. White or Mr. Black can obtain the property only with the consent or, at least indifference, of the prior owner, in this case Farmer John. They cannot compel Farmer John to sell, nor prevent him from selling to whom he wishes, nor can they prevent one another from offering to purchase the property with their own money; for to do any of these things would be to commit the disservice of interfering with the free purposes already in control of the money and of the land. By the same reasoning Farmer John must have obtained dominion either with the consent (or indifference) of a prior owner, or in the absence of a prior owner. In the one case (consent or indifference) the rights of title by purchase, gift, testament, inheritance, and adverse possession are derived; and in the other (no one having assumed control) the right of title by occupancy.

This process and order of establishing rights, powers, or dominion over other objects and the intrinsic purposes or properties bound up therewith can be elaborated and complicated indefinitely; but the determining principle is that each object and the intrinsic properties or purposes identified therewith must be respected and must have precedence over any external or extrinsic purposes seeking to be effectuated therein. The distinction between extrinsic purposes and intrinsic purposes is often difficult; but it is as real as the distinction between the properties of, say, nitrates, and the use to which a chemist seeks to put them; or between the cells and organs of the body and the personality which dwells in them; or between a piece of property controlled by one man and the ambitions of another who would establish control.

In this manner the theory of service endeavors to give the fullest effect to all purposes by indicating the necessary conditions and order of harmony and co-ordination.²⁸

Of course, proposition A of this theory applies to the operation of these rules. The absence of dissent or the presence of consent must be adequately designated. Hence, law surrounds the rights of dominion, of title, and of mastery with numerous rules to make things clear, definite and precise. A person must actually take possession; title must be

²⁸According to this scheme, no directive principle or purpose of an object is intrinsically evil or wrong or diseased. The evil, or wrong, or disease is purely relative in the sense that it is a maladjustment or misapplication of these purposes in violation of the rule as to disservice to be set forth in this section. Lucifer himself is not intrinsically evil. To hate has a legitimate place as well as to love when the hate is applied to a disservice.
delivered; deeds, leases and wills must be written with due formality; all to the end that there shall be no miscarriage of intentions through ineffective signification of services desired.

2. The Negation of Disservices

Now when a disservice has occurred, the law has a simple, yet very subtle, duty to perform; and it endeavors to do it with as great precision as possible. It must create a second negative just sufficient to cancel out the first negative. It must commit a disservice to the disserver, so that, like a double negative, both are neutralized. But it can go no further than just far enough to extinguish the original disservice, for then it would be exceeding its function of nullification.

From this principle of negativing disservice can be deduced the rule that no war is a just war unless it is purely defensive (which, in the end, resolves itself into a question of fact), for in other words, one nation may fight another only so far as may serve to nullify the second nation's attempted injury to it. Thus, Germany would not be justified in attacking Poland except insofar as necessary to put an end to an injury to them by Poland, if any. England would not be justified in warring against Germany, as long as Germany did no harm to England, unless Poland, unjustly attacked, asked England for the service of protection. But if England were not being injured, and if she had no intentions of restoring Poland to the Poles, then her war would lack moral justification. Moreover, England might be correct in stopping Germany from conquest, but she certainly would have no right to impose a conqueror's mandate on Germany herself, for she thereby commits a new and positive wrong, unless Germany persisted in intending disservices.

Be that as it may, we shall limit ourselves here to a study of several special groups of laws which are concerned with the nullification of disservices.

(a) Interference with freedom

Now the most obvious type of law to prevent disservice is the freedom-granting type—the Bills of Rights, the Declaration of Independence, the constitutional guarantees of liberty. Within this group are laws preserving freedom of speech, of press, of worship, and of assembly; laws prohibiting slavery; relieving from too lengthy and burdensome contracts; granting the right of habeas corpus; allowing paroles; and establishing the privilege of making gifts, bequests, devises, legacies, and any other disposition of one's property that may be sought. Of course, the other principles of this theory may not be violated.
These rights to various forms of liberty are usually proclaimed with fervor to be positive and inalienable rights of man. In truth, they are in essence negative laws—not so much grants of the freedom which neither man nor his laws can rightfully remove, but protection against the removal of that freedom by either. It is not surprising that men should regard these laws with such deep feeling in view of the usurpations of tyrants and the insidious and the lurid experiences of history.

The procedural rules which are established to prevent and remove any infringement of these liberties flow naturally from this function of the law, and do not require comment for they explain themselves by their titles of remedies, injunctions, procedure, etc.

(b) Injury to person, property and rights

Another group of disservices are those which interfere with the embodiment of one's intentions by causing direct injury to that over which one has the title or right of dominion or mastery; including one's person, one's property, and one's contractual rights. These injuries are, of course, disservices only insofar as they are not desired by the injured party. They are called crimes in some cases and torts in others depending on their cause and the manner in which the law endeavors to negative them.

In the case of torts, the law grants to the injured party the power to insist on reparation (i.e. damages) for the injury done. By requiring the payment of damages proportional to the extent of the injury, the original disservice is considered erased. It is true that the mere handing over of money does not always efface the injury, but at least it is a considerable stride toward that goal. Many lawyers undoubtedly will object to the placing of tort law in this negative rôle, but it is difficult to see how it could be placed otherwise. The essential point is that a person causes damage to the property or person of another, and the law requires him to make amends for his mistake, to rectify it. The right of recovery derives from the objective of the law of negating the disservice—and under our theory has no other basis.

In a certain class of injuries there is a further factor to be negated by law if disservices are to be fully exterminated—that is, the evil intention of the disserver. It is not sufficient that restitution be made (although this, too, must be required where possible), because there remains the danger of future disservices. So long as the deliberate intention to harm anyone persist, the government knows that more disservices can be expected. Therefore, the law brands these intentional
injuries as crimes and enacts criminal codes which establish jails, peni­
tentiaries, reform schools, probation and deportation departments, to the end that the criminal may be prevented, either by incarceration, by removal, or by reform, from renewing his activities. Punishment cannot be justified by the desire for vengeance or by the urge to inflict pain for a past wrong; its sole sanction under our theory is the prevention of more wrongs, for only in this rôle is it limited to nullifying disservice.

It would be needless to name and classify the various crimes coming within this category, other than to point out that it includes not only such things as murder and theft but also such acts as inducing the breach of a contract by conspiracy or by bribes or otherwise. It also includes harm inflicted upon one’s own body.

It should not be overlooked that both the tort and the crime laws operate as a deterrent solely because of their existence. They discourage and prevent injuries by pointing out the painful consequences to the potential injurer. Like the “fire and brimstone” religious preachers, they threaten only in order to forestall.

In this preventative rôle the law has a much wider field to scan than is covered by the tort and crime laws alone. There are many potential danger spots in the activities of a community which experience and surmise have taught the government to recognize as the breeding spot of disservices. Therefore it enlarges its preventative activities and establishes a vigilance system, a surveillance, a supervision over these danger spots. It regulates, requires reports, and provides for inspections of banks, trust companies, insurance companies, railroads, public utilities, distribution of alcohol and narcotics, gambling and race tracks; it watches over petty loans and pawn shops; it supervises trusts, fore­
closure sales, and reorganizations; it zones the building activities of a city; it guides traffic; it places limitations on government debt; it pro­
vides constitutional provisions for the adherence of government bodies to their delegated powers; it requires safety appliances in some indus­
tries and clean establishments in others; and in many other fields it keeps a supposedly everlasting vigilance.

Incidentally, the right of acquiring easements of necessity is derived in a similar manner—for such easements are granted to prevent interfer­ence with one’s rights of dominion. They are however close to that borderline where it is difficult to determine which party is the aggressive interferor—the owner of the land or the taker of the easement.

(c) Imposition upon intention

There is a more subtle group of laws which are not primarily grants
of freedom or remedies for injuries, but like both of these purport tonullify anything which interferes with a person's fulfillment of hispurposes. These are the laws which deal with the effect of sundry decep-
tive impositions upon the subjective nature of a person's intentions.
Unlike the laws discussed under proposition A supra, dealing withfrustration caused by personal defects of the served, these laws aim to curefrustration or ineffectiveness, only insofar as they are caused by theservants.

(1) Duress

First of all, one's will may be paralyzed and rendered ineffective by
a threat of harm. While such threats may be justified when their sole
aim is to negative a potential disservice as we have seen above with
respect to torts and crimes, in any other case they certainly fall within
our definition of disservice. Therefore, laws are enacted to remove these
threats; they are called laws of Duress, and under them any control
gained over a person's intention by menacing is made void, as in the
case of a contract obtained by threat of force, or a will executed at the
point of a gun. Included in this category are that group of Labor Laws
which strive to remove coercion and intimidation of workers by em-
ployers. There is a tenuous line to be drawn between acts which threaten
harm and acts which withhold good. The law endeavors to distinguish
between what is duress and what is a reasonable and necessary require-
ment. In the case of public utilities the law will not hear of a company
which has been given monopoly powers in order the better to serve a
community extorting unnecessarily high rates from its customers.

(2) Fraud

Similarly, one's intentions may be frustrated or made ineffective by a
falsehood which is imposed upon one by another. Therefore, laws are
enacted to prevent the perpetration of such falsehoods. They are called,
according to varying circumstances, Fraud and Deceit laws; Blue Sky
laws; Pure Food and Drug acts; Fair Trade and Misrepresentation
laws; perjury statutes; laws against counterfeiting; laws requiring
affidavits; and the like. The laws which provide for the appointment
of guardians, trustees, and committees not only serve to prevent self-
frustration, as pointed out under A supra, but also serve to prevent
anyone else from imposing upon their wards, and hence likewise fall
partially within the instant proposition.
There is a still more subtle form of impositions upon one's intentions by which an act done willingly is subsequently converted into an act done unwillingly. Something entirely independent of a person transmutes what he had done in fulfillment of his intentions to the opposite, and a disservice results. Such a transmutation occurs under a contract where the inducing service by which one is persuaded to do something or to promise to do something in exchange is never rendered as promised. The law calls this a failure of inducement or a failure of consideration, and seeks to negative it. Consequently, it provides for such remedies as rescission, restitution, damages, injunctions and specific performance, all of which purport to retransmute involuntariness to voluntariness or to restore it as nearly as possible to the original status quo. But it is essential that some action in reliance be taken, some liberty be foresworn, as for example the payment of money, or the forbearing to sue, or the delaying to go to some other source of supply, or the binding of oneself to act in a certain way; otherwise no disservice will have occurred. Where there has been no such imposition on liberty, the law calls the contract unilateral, and as no disservice will have occurred, grants no remedies. For the law can negative disservices but cannot compel services. Thus a mere naked promise to give will not be enforced.

Thus it appears that the law of consideration is related to the law of fraud in that it is based upon one person's imposition upon another's intentions; but it is distinguished in that the imposition is not necessarily based upon a promise which is deliberately false but rather a promise which fails. 29

One type of failure of consideration which the law takes especial pains to negative is that arising where one person has loaned money or credit to another. To make sure that a person that has extended such a loan is restored as near as possible to the status quo or the status bargained for, statutes and rules are enacted which establish every sort of lien from mechanics and tax liens to maritime and innkeepers liens; and which grant rights of foreclosure, of compulsory bankruptcy, of receivership, and of setting aside fraudulent transfers. Similarly, there are given rights of attachment, marshalling of assets, sequestration, ejectment and subrogation.

29Professor Wigmore has discussed the basis of the law of consideration, and has arrived at a result somewhat analogous. See WIGMORE, The Scientific Role of Consideration in Contract, in LEGAL ESSAYS (1935) 64, in which the relationship of deceit and estoppel are discussed.
(4) Misappropriation

A related type of imposition upon a person's intentions arises where the person is unable to control the course of the service which he intends to render; as where anyone may avail oneself of the service regardless of the wishes of the servant. Such a case arises where the service consists merely in the development and exposition of an idea the benefit of which anyone might adopt without conforming to the wishes of the inventor or composer. To prevent this eventuality, the law grants patents, copyrights and the rights to trademarks and tradenames. For similar reasons the law grants salvage and estray compensation, and the remedies for work done under the Common Counts, all of which assure to the servant a measure of control over, and hence the value attached to, the service rendered. It is not exactly a case of failure of consideration, because no contract (unless a vague implied one) is involved; nor is it identical with the misappropriation of property, by theft or otherwise, which were remedied by the Crime and Tort laws.

3. Apparent Disservices.

Now there are certain types of apparent disservices which are not in reality disservices at all. Such apparent interferences arise when the consent of the person interfered with is obscured because it is remote or indirect or subconscious or in some way indirectly obtained. Thus, the government's power of eminent domain, of military conscription, of compulsory schooling, of granting monopoly franchises, of fixing rules against perpetuities and against too vast accumulations, are, or should be willingly granted to the governing authority by the governed. This willingness—or consent—is given either directly by oaths of obedience, or indirectly by accepting the benefits of the law in exchange for the grant of power. There is always a tenuous balance between the government and the governed in this respect because the former is in a much superior bargaining position and can demand in exchange for its services a great number of powers. The government could forbid the use of its roads, its parks, its courts, any of its services if a person disobeyed its just laws; whereas, the governed could only refuse to obey the laws and deprive the government of his own paltry services (taxes, etc.). But be it always remembered that the powers lodged in the government must have the sole purpose of serving the people and must be so used, otherwise they are illegal under the instant theory.
VI

THE LEGISLATOR, JUDGE AND LAWYER

This in brief constitutes the general outline of a theory of law based on the doctrine of the servanthood of all creatures. That it is incomplete, that it leaves a wide leeway of method, that it cuts across many groupings of laws so that there is necessarily much overlapping, that it puts law in an aspirational rôle, is obvious. But these do not militate against the theory, for in truth it is the very incompleteness, the very leeway, the very overlapping, the very aspiration of law towards maximum service, which constitute the reasons and justifications for the vocations lawyer, judge and legislator.

For it is the lawyer's job to determine and advise people just what is permitted under the laws—either by giving opinions or by litigation; and to assist them to do such permitted things by drawing wills, contracts, deeds, charters and other instruments, and by getting licenses, transferring property, and such work; and to prevent them from doing prohibited things.

It is the judge's job to assist the layman, the lawyer, or the official to determine what they are permitted to do, and in some measure to assist them to carry out such permissible activities.

And it is the legislator's job to make the principles of the theory effective in all branches of society. Indeed as a theory and program of state, this system should satisfy conservatives for its fixed sound principles which guarantee the maximum liberty to all and permits servants to freely acquire and enjoy the fruits of their labor; radicals, for its ideal of social justice to all and its care for the needy and oppressed, and its belief in an adequate and fair consideration for all laborers; democrats, because all are equal under its principles and privilege is enjoined from interfering with free individual efforts; aristocrats, because by its principle of fitness it recognizes a natural hierarchy of merit and ability and endeavors to let the best man have the best job; and Christians, because it embodies the principles of mutual charity in the material and transitory world.

When our axiom stated that everyone shall receive the maximum possible service, it expressed at once an admission and an encouragement. It confessed that law is at best an approximation to the ideal; but it implies that the more noble and able of our law-makers and law-enforcers are in the performance of their functions, the nearer this approximation can be. It instructs us not to destroy our legal system but to improve the statement and application of it.
VII

THE ACCOMPLISHMENTS OF THE THEORY

Here then is the conciliating theory. Can it not be fairly said that it has retained the basic ideas and advantages of the major schools of thought which it sought to reconcile? For it presents to the Scholastic, the Naturalist, and the Transcendentalist a system harmonious—even identical—with the laws of God and with the laws of Nature. It presents to the Social Utilitarians and those like Dean Pound who seek to satisfy the maximum wants with the minimum friction, the most logically derived and effective known method (i.e., existing laws—for they have been generated from and classified by the theory) of achieving that desirable result. It presents to the Historical Jurist a system which not only expresses in a full manner the national soul and spirit, but also one which by its own principles invites and even demands a fuller expression of all the spirits of all the members of a community. It presents to the Functionalist and Solidarist a system under which all functions are given the maximum efficiency and concordance and under which social solidarity is an essential feature.

The theory does each of these things and does them all at once. Realistic and pragmatic values are obtained without sacrificing the logic of universal rules; for it is absolute in end and relativistic and realistic in method. Morality is identified with function; the Ought is brought close to the Is. The Positivist, including the adherents of the "Pure Theory of Law" school, may find in it a logic of classification under which laws may be arranged schematically as so many descriptive facts or "meaning-contents", thus facilitating the discovery and use of laws; and the Analyst may find in it a symmetrical body of correlated principles from which all rules and judgments may be deduced.

All this is on the positive side of the ledger. On the negative side, the theory is forced to request the several jurists to sacrifice certain conceptions. It asks the Scholastic and the Naturalist to liquify their abstract rules and cast them into a dynamic, functional rôle. It requests the social utilitarians, pragmatists and the like to become more specific in their standard of value and utility, making the will or intention or purpose of each member of society the standard; a conception which provides an unmistakably clear and definite method of discover-

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*The Pure Theory of Law School is led by Hans Kelsen. Kelsen said that laws were neither spiritual nor physical, but "meaning-concepts". See Kelsen, The Pure Theory of Law (1934) 50 L. Q. Rev. 474. This school was not included in our four divisions, since it was primarily concerned with the systematic arrangement of laws rather than their nature.*
ing, and securing the interests of the individuals and groups of a community.\textsuperscript{31} It concedes to that special group of realists and pragmatists variously called Psychological, Economic and Skeptical Realists that the validity of law is measured by what happens, but invites them to enlarge their insight into what happens from the horizon of particular pressure groups, special economic classes, or judicial mentalities to include all groups, classes and mentalities alike. It requires the Historical Jurisprudist to carry out his principle of expressing the will of the nation to its most complete and logical stage wherein every individual is included. And finally it invites the Functionalist to describe and delimit more precisely functions and functional ends; to develop his theory to its final depths by giving expressly to law the super-functional rôle in society of governing all social functions.

There are many other minor differences which each theorist may suggest; but concentration on differences should not lead one to obscure general similarities. Indeed, by accepting this formula of similarity, perhaps the very perception of differences may serve to rectify, enlarge or otherwise improve the conciliating powers of the theory. For it is obvious that no single person, least of all the writer, has the power and ability to develop fully and accurately all the ramifications. If a common starting point shall have been shadowed forth in outline, the aims of this article will have been achieved.

That the third aim of the theory, as set forth in an earlier section, will have been achieved is clear. For it will be recalled that the third aim was to simplify laws; and certainly a reconciliation of the leading theories is a simplification. Moreover, there is nothing complicated about the primary axiom nor its several subordinate propositions. They provide a simple scheme of subordination and coördination; and thus enable the lawyer more easily to deduce, learn, remember and apply laws. Instead of multiplicity, it substitutes unity; instead of a chaos of disassociated particulars, it establishes a continuum of correlated principles.

But by simplifying laws the theory has assisted us to attain our second

\begin{itemize}
\item See Kreilkamp, \textit{Dean Pound and the End of Law} (1940) 9 \textit{Fordham L. Rev.} 196, 232, for a discussion of this need. One main difference between this theory and Pound's idea of adjusting the "wants" of society, as the writer understands it, is that under Pound's concept one want may be balanced off or sacrificed to a more important want, the relative weights being arrived at by some standard of practical importance; whereas under the present theory no want, no matter how trivial, may be sacrificed to another, except in the special negative case of nullifying disservices. This cannot be strictly called a sacrifice in Pound's sense.
\end{itemize}
objective, that of giving us *understanding* of laws, their purpose, their substance, their structure. The reduction of the field to a single correlated unity vastly assists comprehension; for philosophers say that the forming of an accurate "universal", or rule, or generality, of something is the very heart and act of comprehending. But the theory assists understanding not only by indicating simplicity, but by its particular explanation as to the purpose, substance and structure of laws. For by its very definition of service and its primary formula, it states the substance and the purpose of laws—namely, servanthood; and by its corollaries it demonstrates their structural arrangement. Moreover, it gives to intention, which is so often the key to understanding laws, as in the case of settlors, testators, contractors and legislators intentions, the highly important position which is due it.

Finally, just as simplifying laws furthered understanding of them, so does understanding of them further the achievement of the final aim of the theory—the aim of enabling us to judge, that is, to evaluate, the worth and significance of laws. For by stating that the purpose and nature of law is to promote service, the theory not only aligns itself with those schools of jurisprudence which base themselves upon justice and morality, but also it relates laws to all those religions and philosophies, in particular, Christianity, which proclaim that the first and last end of man is to love and serve God and his fellow man. Accordingly, as laws manifest this standard of value, or as they deviate from it, we can judge them good or bad, important or trivial; and similarly we can determine the goodness or badness, the justice, of all human activities.

So, too, may this theory be judged—by service—by the service it renders to everyone who searches for the fair trinity of justice, understanding and simplicity. For indeed, what greater, what deeper, what nobler structural principle can society adopt as a basis of judgment than that every soul shall consecrate itself to a good work of its own?
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ON OCTOBER 27, 1940 the Supreme Court refused to review a decision of the Seventh Circuit Court of Appeals concerning the extent to which the Wage and Hour Division of the Department of Labor may require employers to produce personnel records. In its opinion the court of appeals said:

"When Congress, acting in the public interest, has the power to regulate and supervise the conduct of any particular business under the commerce clause, an administrative body may be authorized to inspect books and records and to require disclosure of information regardless of whether the business is a public utility and regardless of whether there is any pre-existent probable cause for believing that there has been a violation of the law. Neither of the foregoing elements enters into the question of the reasonableness of the investigation."\(^1\)

Into this one sentence has been assembled the precipitated result of numerous decisions, conflicting and otherwise, that the courts have struggled with since the advent of the administrative agency into what formerly was a government based on a strict threefold division of powers. But the sentence is a very general one and consequently subject to the errors that frequently accompany all-inclusive statements. Moreover, there is reason to believe that this does not represent the final precipitate, but that it still contains a heterogeneous mixture of unsettled notions that must be removed by a more effective solvent than the denial of certiorari. This contention is substantiated by a review of the cases, for the path of the Supreme Court has reflected a comparatively large number of decisions decided on incidental jurisdictional or procedural matters when the question of the investigatory powers of administrative agencies was presented.\(^2\) On the other hand, the decision is in line with the

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tendency of the courts to enlarge the poetic expression "business affected with a public interest." At any rate, the decision represents an expansion of the powers given to the commissions and calls for a re-examination of these powers in the light of the present case.

In our system of jurisprudence, as in most others, every member of the community is under a duty to appear as a witness and testify. Like all other duties this can be a highly onerous one at times. Moreover, it is in conflict with the co-relative right all men have to keep their private affairs to themselves. Consequently, the law has been very reluctant to enforce this duty wherever it was not sure that the right would be well protected. Thus for a long time it was limited to use before judicial tribunals only. As late as 1887 Judge Field remarked that "the intrusion into, and the compulsory exposure of, one's private affairs and papers, without judicial process, or in the course of judicial proceedings, ... is contrary to the principles of free government and abhorrent to the interests of Englishmen and Americans." Undoubtedly this restricted use was all that was necessary 100 years ago. But business has changed. It has grown beyond the stage of laissez faire and government regulation is now needed to keep it in a straight course. Efficient regulation cannot exist without the aid of administrative tribunals and they, likewise, are helpless without adequate powers of investigation. But the battle to extend the power of compelling evidence to proceedings not entirely judicial has been a long and hard one. Since administrative tribunals do not have this power in themselves, it has to be given them; and since they are not created by the judiciary, but by the legislature, the first question is whether Congress itself has this power.

POWER OF CONGRESS TO COMPEL EVIDENCE

There is no express investigatory power given to Congress by the Constitution. But besides the express powers given in the Constitution, the very nature of certain provisions imply that other powers will go with them, for example, the power to judge elections carries with it by implication the power to hear witnesses, examine papers, etc. Likewise, Congress cannot legislate intelligently without power to investigate to see what legislation will be proper. But as obvious as this need appears, it wasn't until 1927 that it was definitely established that Congress had this power. Previous to this the courts had been very reluctant to

\*In re Pacific Railway Commission, 32 Fed. 241, 251 (C. C. N. D. Cal. 1887).
*McGrain v. Daugherty, 273 U. S. 135 (1927).*
recognize that Congress could compel testimony. In *Kilbourn v. Thompson*, an early case on the question, a witness before a House Committee refused to answer a question presented to him because he felt it was "irrelevant." The court sustained his objection and laid down the test that testimony could be compelled only where the questions were pertinent to a legislative purpose within the power of Congress and where the legislative purpose was expressly set forth.

But this case was decided at a very early date and by a court which did not understand the legislative problem. The law of the case has been greatly altered by the decision in *McGrain v. Daugherty*, which involved an inquiry conducted by a Senate Committee under resolution to investigate nonfeasance and activities in the Department of Justice. The Committee subpoenaed the Attorney General's brother to appear and testify. He refused. The Sergeant-at-Arms of the Senate presented him for testimony, but he was released on habeas corpus. The Supreme Court decided that the Senate Committee had acted properly. The Court held that there was a presumption in favor of a legislative purpose in a congressional inquiry, and said: "The two houses of Congress, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective."

The *McGrain case* decided that oral testimony may be compelled, but did not go into the question of whether books and documents may be subpoenaed. However, it is quite generally recognized that Congress has power to do this, as long as the demand is reasonable. The only case which has touched this question is *Hearst v. Black*, wherein the court

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503 U. S. 168 (1880).
6273 U. S. 135 (1927).
7Id. at 173.
8There were two subpoenas issued in the *McGrain case*, both of which were disregarded. The first subpoena required that Daugherty present himself and bring with him certain books and papers. When he refused to do this another subpoena was issued requiring only his presence. Since it was this second subpoena that was appealed, the court felt it was not necessary to decide whether the Committee had power to require the production of the books and papers.
987 F. (2d) 68 (App. D. C. 1937). The Senate appointed a Committee, with Senator Black as its head, to investigate the subject of lobbying in connection with proposed holding company legislation. The Committee requested of certain telegraph companies copies of all wires sent by Hearst, feeling that by getting all it would not miss what it was looking for. This being refused, Senator Black prevailed upon the Federal Communications Commission, which had the power of requiring the telegraph company to keep records, to coerce the companies into producing the wires. Hearst brought suit to enjoin the Com-
admitted the power, but held that the particular subpoena amounted to a dragnet seizure, or "fishing expedition," and hence was a trespass which a court of equity has power to enjoin.

Thus to say that Congress has the power of compelling testimony is a far cry from saying that there are no limits to this power. There are certain constitutional guarantees, such as the Fourth and Fifth Amendments, which cannot be violated. But our immediate purpose is to establish that Congress has this power. The limitations on it will be discussed in detail in the section dealing with investigations by administrative tribunals.10

POWER OF ADMINISTRATIVE TRIBUNALS TO COMPEL EVIDENCE

Since administrative commissions are created by the legislature, and derive their powers from the legislative act, they can only issue sub-

mission and the Committee from further taking private communications and to block the legislation attempted on the basis of the wires obtained. As to the Committee, the court held that it had no jurisdiction (on the theory that a court can strike down an unconstitutional statute only after enacted, but cannot restrain its enactment); as to the Commission it held that it had jurisdiction, but the bill was dismissed on the basis of a statement by the Commission that its activities were finished. The court said: "In principle, therefore, we think that a dragnet seizure of private telegraph messages as is alleged in the bill, whether made by persons acting under the color of authority from the government, or by persons acting as individuals, is a trespass which a court of equity has power to enjoin. As the Supreme Court said in Federal Trade Commission v. American Tobacco Co., 264 U. S. 298 . . . : 'It is contrary to the first principles of justice to allow a search through all respondent's records, relevant or irrelevant, in the hope that something will turn up.' . . . " pg. 71. This case also illustrated that the sufficiency of a subpoena can be tested by an injunction before the hearing takes place; while it is impossible to get a judicial declaration on the pertinence of an oral question prior to the hearing.

There is another problem which arises in an investigation by a Congressional Committee. This is the "pertinency" or "relevancy" question. It grows out of Rev. Stat. § 102 (1875), 2 U. S. C. § 192 (1934), which provides that "Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry shall be deemed guilty of a misdemeanor." Sinclair v. United States, 279 U. S. 263 (1928) has held that a bona fide belief that the question was not pertinent is not a good defense. Cf. United States v. Murdock, 290 U. S. 396 (1933). See also Townsend v. United States, 95 F. (2d) 352 (1938), where the court said: "A witness may exercise his privilege of refusing to answer and submit to a court the correctness of his judgment in so doing, but in the event he is mistaken as to the law it is no defense, for he is bound rightly to construe the statute." Despite the fact that the statute makes it a misdemeanor to refuse to testify at a congressional hearing, it does not impair the power of Congress to punish by direct proceedings for contempt. Jurney v. MacCracken, 294 U. S. 125 (1935).
poenas and require the attendance of witnesses and the production of documents, where the act authorizes them to do so. In general they have been so authorized. The Interstate Commerce Commission, the dean of administrative agencies, was given this power and it has served as a model. However, unlike Congress, the commissions have no power to force a witness to testify if he refuses to do so, for the powers of fine and imprisonment for contempt are restricted to the judiciary (and to Congress, of course, when acting under a legislative purpose or in a quasi-judicial proceeding). To get around this obstacle the commissions have devised a workable scheme involving three steps: (1) the commission first issues a subpoena requiring a witness to attend; (2) if he refuses, the aid of a court is sought to enforce the subpoena; and, (3) if the witness remains recalcitrant, he can be punished by the court for contempt of its order. But no sooner had this scheme been devised than it ran into one of the technical requirements of the Constitution—the "case and controversy" clause of Article III. In a decision in 1887 by Judge Field of the Circuit Court for the Northern District of California, the court held that the judicial power extended to "cases and controversies" only, and that the petition of an administrative body to force a witness to comply did not furnish one. But the effect of this decision was overruled seven years later by the Supreme Court in Interstate Commerce Commission v. Brimson where it was held that courts could compel testimony in an investigation by the Interstate Commerce Commission because a "case and controversy" was presented. While it is true that the two cases can be distinguished on the type of investigation pursued (the first being a mere fact-finding investigation with no power whatsoever to make laws, while the second was the result of a complaint made to the Commission of a specific breach of the law), yet, since the Brimson case, the law has been settled that agencies can compel testimony with the assistance of the courts. The Brimson case pointed out that the nature of the investigation was immaterial; what is determinative is whether the statute has imposed a duty on the witness to testify which he has violated.

11A very helpful summary of the investigative powers of the various commissions is given in the Monographs prepared by the Attorney General's Committee on Administrative Procedure (1940).
12 Interstate Commerce Commission v. Brimson, 154 U. S. 447 (1894); Langenburgh v. Decker, 131 Ind. 471 (1892). See Albertsworth, Administrative Contempt Powers: A Problem in Technique (1939) 25 A. B. A. J. 954 (arguing that the powers of punishing for contempt should be extended to the commissions).
13 In re Pacific Railway Commission, 32 Fed. 241 (1887).
14 154 U. S. 447 (1894).
Granted, therefore, that testimony can be compelled before an administrative body, the next step is to determine the limits to which the demands can go. Opposed to the powers of investigation stand the Fourth and Fifth Amendments to the Federal Constitution, guaranteeing freedom from unreasonable searches and seizures and protecting the individual from compulsory self-incrimination.

The protection against unreasonable searches and seizures did not originate in our Constitution, but was recognized in England long before its adoption here. Lord Camden, in the famous case of Entick v. Carrington\(^\text{15}\) held that searches and seizures could be unreasonable for either of two reasons: (1) they were taken without a warrant or with a warrant that was defective; or, (2) because the object of the search was to seize articles which could not be seized under a warrant, such as evidence of an incriminatory nature.\(^\text{16}\) This two-fold categorization has played an important part in its application to administrative agencies. To begin with, it is one of the reasons why subpoenas calling for the production of books and papers have fallen into the category of searches and seizures, despite the difficulty of showing how an orderly investigation and demand to produce is of the same nature as an invasion of the home by unwelcome officials who seize one's private effects. It also led to the dictum in the famous Boyd case, wherein the court, perceiving a close interrelation between the Fourth and Fifth Amendments, held that any proceeding which forces a party to testify against himself or produce testimony which is incriminatory or privileged, violates not only the Fifth Amendment, but also amounts to an unreasonable search and seizure. The court said:

"It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

\(^\text{15}\)Lord Camden conceded that the second reason would not apply to the search for and seizure of articles the possession of which was in itself unlawful. Hence a search for contraband is lawful if made under a search warrant based upon probable cause, and particularly describing the places to be searched and the thing to be seized. Adams v. New York, 192 U. S. 585 (1904).

\(^\text{16}\)Boyd v. United States, 116 U. S. 616, 640 (1885). But despite this the formalities
But does this mean that every statute which violates the Fifth Amendment also violates the Fourth Amendment? To hold that it does not only renders the Fifth Amendment superfluous in these instances (which was not likely the intent of the Constitution) but also removes entirely the concepts of physical trespass and forcible abduction that were the historical bases for the Fourth Amendment. How can there be a search or seizure by an officer of the law where a person is required by lawful subpoena to produce his papers in court? The inherent nature of the two acts is distinct, almost in utter conflict, and the disparity has been the subject of criticism by many writers. But the courts have seen fit not only to follow this questionable policy, but actually to extend it. In *Hale v. Henkel*, the secretary of a corporation being investigated under the anti-trust laws, was required by subpoena to produce in court practically all of the contracts, correspondence and transactions between his corporation and other corporations with which it did business. This was the extent of the description given. Obviously the subpoena was bad because of its uncertainty. As described by Justice Holmes it was a "fishing expedition" and void, for this reason, under the Fourth Amendment. But the court was not satisfied with this and went on to hold that such a search as this amounts to an unreasonable search and seizure when it results in the production of incriminating evidence. The court mentioned this despite the fact that it was a corporation against whom the subpoena issued and to whom the privilege against furnishing incriminating evidence does not extend.

But the decisions have stood and the law must be considered settled that the compulsory production of incriminating evidence is against the necessary to have a reasonable search warrant, are much stricter than those involving a subpoena duces tecum, for: (1) there is no necessity of showing probable cause in order to issue a valid subpoena, as there must be prior to the issue of a search warrant—Agnello v. United States, 269 U. S. 20 (1925); (2) there is no necessity in a subpoena duces tecum of designating each particular article, as long as they are described with reasonable detail—Consolidated Rendering Co. v. Vermont, 207 U. S. 541 (1908). Other cases, however, regard a subpoena duces tecum as being a search, and as such, subject to the rule of reasonableness under the Fourth Amendment. *Hale v. Henkel*, 201 U. S. 43 (1906). At any rate, later cases have upheld subpoenas which were very broad, upon the ground that what was demanded was suitably described and was material to the matter under inquiry. Consolidated Rendering Co. v. Vermont, 207 U. S. 541 (1908); Hammond Packing Co. v. Arkansas, 212 U. S. 322 (1909); Wheeler v. United States, 226 U. S. 478 (1913).

28Wigmore, Evidence (2d ed. 1923) §§ 2183, 2184; Atchison, Admissibility of Evidence (1925) 25 Col. L. Rev. 11.

29201 U. S. 43 (1906).
Fourth Amendment. However, steps have been taken in the form of immunity statutes guaranteeing protection against prosecution based on the discovery of such evidence. These immunity statutes have, generally, permitted such investigations to take place. They do not extend to corporations because they never were privileged against furnishing incriminating evidence. Nor can an officer of a corporation plead that the immunity guaranteed by a statute relieves him personally from making records from the books and papers of his corporation.

Thus the only objection that can be made to subpoenae duces tecum is that they are too broad or not reasonably relevant to the subject matter under investigation. The test of reasonableness does not lend itself to a classification that will operate at all times and on all occasions. It depends largely on the circumstances. All that can be said is that it is mostly one of "balancing of the public necessity of the investigation against the inconvenience and hardship caused those who are investigated."

But there is also another obstacle in the path of administrative agencies, namely, the extent to which Congress can delegate its powers. Besides involving the doctrine of separation of powers, the problem is intimately concerned with the due process clause. These considerations have given birth to such mystical phrases as "quasi-legislative" and "quasi-judicial." On all sides we hear statements that the problem cannot be approached from an analysis of the particular commissions themselves, for some come within both phrases, but only from a "functional viewpoint." Undoubtedly these statements are true and are founded upon an intelligent analysis of the cases. However, the subject is greatly confused. A large number of the cases, at least the landmark ones, were decided a comparatively long time ago when this functional distinction was not yet realized by the courts. Consequently they contain statements concerning one type of investigation which read as though they are to be applied to all types. As a result, it has only been recently that the courts have been able to find their way out of this maze of dicta. More-

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20 These immunity provisions, however, do not protect the individual against prosecution on the basis of evidence obtained prior to the production of the papers by law, for this is not within the Fifth Amendment. Sherwin v. United States, 268 U. S. 369 (1925).


22 Wilson v. United States, 221 U. S. 361 (1911).

over, since the early decisions, the statutes creating the agencies have been remodeled to get around the objections. As a consequence, any analysis of this problem must be entered with the realization that past decisions have not been insurmountable obstacles, that the law is still in a pre-crystallization stage, and that the powers of the commissions are being constantly changed by Congress to answer objections brought forward by the courts.

In general, there are two situations in which a person may find himself liable to an investigation by an administrative body: (1) Where the commission is investigating either to discover facts which will enable it to carry out its rule-making function or to provide information for further legislation on the part of Congress; and, (2) Where the commission is investigating a formal complaint of a violation of the act or is inquiring into the private affairs of a person to determine if he has complied with an act which requires the keeping of records. The first type has been generically described as "quasi-legislative" or, more appropriately, "fact-finding"; the second as "quasi-judicial."

As to "fact-finding" investigation: In general the attitude of the courts toward fact-finding investigations has not been a favorable one. Judges in deciding the cases were reminded of such words as "inquisitorial" and "anti-American." Thus in Harriman v. United States the Supreme Court decided that the Interstate Commerce Commission did not have the power to conduct a general investigation of carriers without a showing that there was a "specific breach of the law." This case involved an investigation by the Commission, on its own motion, and not upon complaint, of combinations of carriers. The Commission contended that it could make "any investigation that it deems proper, not merely to discover any facts tending to defeat the purpose of the Act of February 4, 1887, but to aid in recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact." Justice Holmes replied: "The purpose of the act for which the Commission may exact evidence embraces only complaints for violation of the act, and investigations by the commission upon matters that might have been the object of complaint."

211 U. S. 407 (1908).
2Id. at 417.
3Id. at 419. But the cases did not decide whether the power to compel testimony can be used in cases where the purpose of the investigation is merely to find facts, not to enforce a law. However, Federal Trade Commission v. Claire Furnace Co., 285 Fed. 936 (App. D. C. 1923) indicated that even this was bad, although the case was decided on the grounds...
But subsequent decisions have greatly limited the scope of the *Harri­
man* decision and recent changes in legislation have practically destroyed
its effect. Shortly after the case was decided Congress amended the
Commerce Act to provide that investigations can be made “concerning
which any question may arise under any provision of this Act, or relating
to the enforcement of any provision of the Act.”\(^{27}\) It was under this
amended provision that *Smith v. Interstate Commerce Commission*\(^{28}\) was
decided in 1917. The Senate, by resolution, had directed the Interstate
Commerce Commission to investigate the political expenditures of certain
railroads. There was no specific complaint involved. In holding that
the Commission had the power of investigation, the court said:

> "The Interstate Commerce Act confers upon the Commission powers of in­
vestigation in very broad language and this court has by construction refused
to limit it so far as the business of carriers is concerned and their relation to
the public. And it would seem to be a necessary deduction from the cases that
the investigatory and supervising powers of the Commission extend to all ac­
tivities of carriers and to all sums expended by them which could in any way
effect their benefit or burden as agents. If it is to be grasped thoroughly and
kept in attention that they are public agents, we have at least the principle
which should determine judgment in particular instances of regulation or in­
vestigation; and it is not far from true—it may be entirely true, as said by the
Commission—that 'there can be nothing private or confidential in the activities
and expenditures of a carrier engaged in interstate commerce.'”\(^{29}\)

This statement is typical of the distinction made between “private
businesses” and “businesses affected with a public interest.” Thus, the
investigations by the Federal Trade Commission, which usually do not

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\(^{27}\)36 STAT. 551 (1910), 49 U. C. C. § 15 (1934).
\(^{28}\)245 U. S. 33 (1917).
\(^{29}\)245 U. S. 33, 42 (1917).
involve businesses of public interest, have repeatedly met with failure. While it is true that most of these investigations were denied on the ground that the statute did not authorize them, many of the cases contain dicta expressing doubt whether such power could be constitutionally given. On the other hand, since the decision in the Smith case, the Interstate Commerce Commission has been allowed almost unlimited powers in their investigations of common carriers.

As to "quasi-judicial" investigations: In general, the law of this type of investigation is more settled than that of "fact-finding." Most courts agree that governmental agencies may compel testimony in the course of proceedings for the determination of legal rights and duties under existing laws. All courts agree that reasonable oral testimony can be compelled in a proceeding involving a specific breach of the law and resulting out of a complaint. The remaining frontier in this type of investigation is the regulatory act which requires the keeping of records and their production in court. And it is with this particular question that the case of Fleming v. Montgomery Ward & Co., Inc. deals.

Section 11 (a) of the Fair Labor Standards Act of 1938 authorizes the Administrator "to investigate and gather data regarding the wages, hours, and other conditions and practices of employment . . . , and (to) enter and inspect such places and records . . . and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of the Act, or which may aid in the enforcement of the provisions of the Act." Acting under this section and upon the complaint of employees that they were not receiving overtime pay required by law, the Administrator asked the court for a subpoena requiring Montgomery & Ward Company to produce "any and all of the reports entitled by respondents 'Gross Earning Reports' containing all entries pertaining to wages paid to respondents' employees employed in its mail order branch at Kansas City, Missouri, for the period beginning with the week ending October 27,

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33 114 F. (2d) 384 (C. C. A. 7th, 1940), cited supra in note 1.

1938, to and including April 11, 1939, both inclusive, together with the time clock cards for each of said employees for said period, and records showing the number of hours scheduled for each of the departments for said branch at Kansas City, Missouri, for the said period and the number of hours actually worked by each of said departments during said period. The petition further averred that since the respondent engaged in the mail order business, receiving at least 80% of its goods from outside the state and supplying merchandise to retail stores in five other states besides Missouri, it is engaged as an employer of employees engaged in the production of goods for interstate commerce, within the meaning of the Act.

In its brief the company argued that the order to produce its records constituted an unreasonable search and seizure because the Administrator must have good reason to believe that the company has violated the law before he can demand its records for inspection; the material asked for represented some 55,000 documents and constituted a fishing expedition; and, the production of the records would unreasonably disturb the company in the conduct of its business.

The Government’s brief contended that the Administrator had the right “to make inspections of records of employees relating to the wages paid employees and the hours worked by them, irrespective of whether the Administrator has information tending to show that the particular employer has violated any provision of the Act.” In support of this contention the brief argued that Section 11 (a) of the Act authorized such an investigation; that the Fourth Amendment did not limit the power of the Administrator to make routine inspections authorized by the Act; that there was a distinction between records required to be kept by private employers and those by public employers; and, that if the court should find that the Administrator should have reasonable cause to believe the company has violated the act before he could issue a subpoena, this reasonable cause was supplied by a complaint signed by ten employees charging a violation of the Act.

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114 F. (2d) 384, 387 (C. C. A. 7th, 1940).
36 W. H. R. 149 (April 15, 1940).
37 United States v. Wilson, 221 U. S. 361, 380 (1911) is quoted: “If (a public officer) has embezzled the public moneys and falsified the public accounts, he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-incrimination. The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of the restrictions validly established. Then the principle which exists as to private papers cannot be maintained.”
In holding that the Wage and Hour Division had power to compel the production of such records, the court said: "We are of the opinion that the terms of the Act necessarily indicate a legislative intent that the exercise of the investigatory powers of the Administrator be in no degree conditioned upon the existence of reasonable cause for the Administrator to believe that the industry, which is the subject of investigation, is violating the Act."\(^{38}\) It disposed of the objection that "no case has upheld a search and seizure in the absence of probable cause . . . except when the search and seizure has been directed against a public utility, common carrier, or the like," in two ways: First it pointed out that the cases cited in the support of this contention did not lead to the conclusion that there must be probable cause to believe that the corporation had been guilty of an unlawful act:

"The reasoning and holding of the Supreme Court in the foregoing cases are inconsistent with the contention that enforced inspection of the books and records of a corporation constitutes an unreasonable search and seizure in the absence of the existence of probable cause to believe that the corporation is guilty of an unlawful act. In general, the cases hold that there must be a demand suitably made by duly constituted authority; that such demand must be expressed in lawful process, and that the lawful process limit its requirements to certain described documents and papers which are easily distinguishable and clearly described. Also, there must be relevancy to the subject of investigation."\(^{39}\)

The court further pointed out that the principles cited were broad enough to apply to non-public as well as public utilities. It quoted from *Nebbia v. New York*\(^{40}\) to the effect that the phrase "affected with a public interest" can, in the nature of things, "mean no more than that industry, for adequate reason, is subject to control for the public good" and, that an "adequate reason" for national regulation exists if the activities of an industry substantially affect interstate commerce.\(^{41}\)

In deciding that the Administrator had access to all records at all times, the court went further than was actually necessary to uphold the power of the Division to gain excess to the records of Montgomery Ward & Co., Inc. Inasmuch as there was a charge of a violation of the Act, three courses were open to the court: \(^{42}\) (1) it could allow access to records concerning only violations reasonably suspected; (2) it could

\(^{38}\)114 F. (2d) 384, 388 (C. C. A. 7th, 1940).
\(^{39}\)Id. at 389.
\(^{40}\)291 U. S. 502 (1934).
\(^{41}\)114 F. (2d) 384, 390 (C. C. A. 7th, 1940).
\(^{42}\)(1940) 34 ILL. L. REV. 762.
allow access to all records if any violation was reasonably suspected; or, (3) it could hold that access was available to all records at all times. In granting this unlimited power of investigation the court went a long way from the decision in *Federal Trade Commission v. American Tobacco Co.* and extended the trend first evident in *Bartlett Frazier Co. v. Hyde.*

The *Bartlett case* involved regulations of Boards of Trade under the Grain Futures Act. The Grain Futures Act required the keeping of reports similar in nature to the Fair Labor Standards Act. In answering the objection that a search of such reports violated the Fourth Amendment, the court said:

"The Amendment, which declares the right of people to be secure in their persons and papers against unreasonable search, cannot be applied to regulations which require reports and disclosures in respect to a business which is affected with a public interest, so far as such disclosures may be reasonably necessary for the due protection of the public. Were it otherwise, railroads and public utilities generally could not be required to make reports or to subject their records to inspection by agents of the government."

Whether the Supreme Court would have denied certiorari in this case if no complaint of a violation had been filed, is hard to say. Although the wording of the opinion indicates that a complaint is not necessary, it is impossible to know whether the denial of certiorari indicates an approval of this conclusion. It also leaves unsettled the question of whether inspectors can go upon the premises and search the records there. This might not be allowed as readily, because it is directly opposed to

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43 264 U. S. 298 (1924).
44 65 F. (2d) 350 (C. C. A. 7th, 1933), cert. denied, 290 U. S. 654 (1933).
46 The court quoted from *Chicago Board of Trade v. Olsen,* 262 U. S. 1, 40 (1922) (to the effect that a Board of Trade is a "business affected with a public interest").
47 After being informed of the decision of the Supreme Court in denying certiorari, Colonel Fleming, Administrator of the Wage and Hour Division, said: "There can be no further excuse for employers refusing access to payroll records to the Wage and Hour inspectors ... whether or not complaints were filed ... This [decision] clearly upheld the right of the Division to make routine inspections as we have been doing." 3 W. H. R. 485 (1940). It is quite unlikely that any case not involving a complaint will reach the courts in the near future, due to the large number of complaints still before the Division.
48 Perhaps the question will be decided in one of the cases involving investigations of newspapers now before the courts. At present there are pending suits against the Easton Publishing Co., publisher of the Easton (Pa.) *Express,* the Plain Dealer Publishing Co., publisher of the Easton *Free Press,* and the Lowell Sun Co., publisher of the Lowell (Mass.) *Sun.*
the traditional concept of the Fourth Amendment. Nor does the case decide the extent to which these powers may be used in pure fact-finding investigations. Likewise, it must be remembered that the investigations must be confined to books prescribed to be kept by the Act, and cannot extend to any private records kept by the employer. 49

Despite these possible limitations, the case is exceptionally strong in extending the concept of public interest as a principal factor of the right to regulation from the realm of the public corporation into what was formerly thought of as quasi-public or private. It definitely indicates the trend of the Supreme Court to enlarge the concept of public agent that had its origin in the rate regulation cases more than a half-century ago. 50

JAMES A. MCKENNA, JR.

JURISDICTION OF COURTS OVER APPLICATIONS FOR FCC CONSENT TO TRANSFER OF RADIO STATION LICENSES

THE Supreme Court recently handed down its decision in the case of Federal Communications Commission v. Columbia Broadcasting System of California, Inc., 1 and reversed the Court of Appeals of the District of Columbia. The case is important in the determination of the "distribution of judicial authority under the Communications Act of 1934." 2 It is of particular importance in the determination of the jurisdiction for judicial review of Commission decisions refusing consent to a transfer of a radio station license.

The facts are brief. Associated Broadcasters, Inc., corporate licensees of station KSFO, San Francisco, and the Columbia Broadcasting System of California, Inc., requested the Commission's consent to the assignment of Associated's license to Columbia. The examiner's recommendation, following a hearing, was that consent be refused. Upon exceptions filed to the examiner's report, oral argument was had before the Broadcast Division of the Commission and later before the full Commission. On October 18th, 1938, the Commission handed down its decision and order, refusing consent to the assignment. Both Associated and Columbia appealed to the Court of Appeals of the District of Columbia. The Com-

2Ibid.

50Munn v. Illinois, 94 U. S. 113 (1876).
mission moved to dismiss on the ground that the court lacked jurisdiction.

On November 29, 1939, the Court of Appeals in a two-one decision (Justice Stephens dissenting) denied the motions to dismiss and entertained jurisdiction. The court took the position in its opinion that had Columbia "filed an application for a station license, requesting therein the same facilities as are now enjoyed by Station KSFO, denial of the application would, without question, have brought the applicant within the language of Section 402 (b)." The court then added that "by arranging for an assignment, frankly revealing the arrangement to the Commission, and complying in every possible way with the statutory requirements governing assignments, Columbia has deprived itself of a right of judicial review, which it would clearly have possessed if its application had been an outright request for the facilities of another station." The court concluded that such a result was not "sensible" and that Columbia was an applicant for a radio station license within the meaning of Section 402 (b) (1) and therefore entitled to appeal to the Court of Appeals from an order of the Commission refusing the application. Associated was Mary's little lamb throughout the whole litigation, being entitled to appeal under Section 402 (b) (2) only if Columbia was entitled to appeal under Section 402 (b) (1).

Justice Stephens in his dissent based his opinion entirely upon the doctrine that reenactment of a statute which has received a judicial construction will be presumed to be an adoption by the legislature of such construction. The prior statute in this case was the Radio Act of 1927, as amended in 1930; and the judicial construction thereof was the Pote case in which the Court of Appeals held that an appeal from the refusal of an application for transfer of a station license was not authorized by Section 16 of that Act. The dissenting opinion is instructive for what it has to say concerning that doctrine, but loses weight in the instant case, since the Supreme Court chose to place the determination of

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9 Id. at 739.
10 Id. at 738.
11 Ibid.
12 See note 15 infra.
14 44 STAT. 1162 (1927).
15 46 STAT. 844 (1930).
the case upon other grounds.  

The Supreme Court in its decision reversed the decision of the Court of Appeals. The economy of dialectic necessary to decide the case is arresting and leads one to wonder how the Court of Appeals could have reached a different conclusion. Under the Act the whole of judicial jurisdiction for review of orders of the Commission is found in Section 402 (a) with five enumerated exceptions. By Section 402 (b) Congress prescribes the jurisdiction for review of those five enumerated exceptions. An application for transfer of a radio station license is not by specific reference one of the five. However, as we have seen, the Court of Appeals concluded that such an application was included within an application for a radio station license, one of the five applications appealable to the Court of Appeals.

The Supreme Court's answer is contained in the following excerpts from the opinion:

"Primarily, our task is to read what Congress has written. . . . Refusing 'an application . . . for a radio station license' is hardly an apt way to characterize refusal to assent to the transfer of such a license from an existing holder. Nor is there anything to indicate that the peculiar idiom of the industry or of administrative practice has modified the meaning that ordinary speech assigns to the language. Instead of assimilating the requirements for transfers to

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applications for new licenses or renewals, the Act as a whole sharply differentiates between them. Different considerations of policy may govern the granting or withholding of licenses from those which pertain to assent to transfers. And Congress saw fit to fashion different provisions for them. Compare §§ 307, 308, 309, and 319 with § 310 (b). . . . A sensible reading of the jurisdictional provisions in the context of the substantive provisions to which they relate gives no warrant for denying significance to the classification made by Congress between those orders for which review can only come before the local district courts, and those five types of orders, explicitly characterized, which alone can come before the Court of Appeals for the District. And an order denying consent to an application for a transfer is not one of those five, for it is not an application for a 'radio station license' in any fair intentm ent of that category.\textsuperscript{16}

The Supreme Court is undoubtedly on sound ground in refusing to read into the Act what is not there in so many words. This holding is in accord with the general principle of court review of administrative determinations enunciated in the \textit{American Federation of Labor case},\textsuperscript{17}

"Such jurisdiction as it \[Court of Appeals for D. C.\] has, to review directly the action of administrative agencies, is especially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review."\textsuperscript{18}

The statement of the Court of Appeals that Columbia would have unquestionably been entitled to appeal had its application been for a station license asking KSFO's facilities, may be admitted, if by facilities the court meant the frequency, power, hours of operation, classification, etc., being used by the existing station under Commission license.\textsuperscript{19} Congress has nowhere declared that an applicant is prohibited from requesting the same frequency as may be enjoyed by an existing station. However, the court's deduction from that premise, namely, that an applicant for consent to a transfer of license is therefore entitled to the same right of appeal as an applicant for a station license, does not follow. The court's argument would be persuasive only if it appeared that Columbia could achieve the same result by applying for a license asking the same facilities as by applying for a transfer. It would then appear that the statute

\textsuperscript{17}American Fed. of L. v. N.L.R.B., 308 U. S. 401 (1940).
\textsuperscript{18}Id. at 404.
\textsuperscript{19}The word "facilities" might be understood as including the apparatus, equipment, and other broadcasting property of the existing station. This meaning could hardly have been in the court's mind, since, aside from all the other obvious difficulties of such a meaning, the Commission could not order the involuntary transfer of the existing licensee's property.
was in truth inconsistent; because in reaching the same result it would deny the right of appeal if one means were chosen and confer the right of appeal if the other were chosen. The fact that the court applied this logic to applications for license and for transfer explains why it was overruled by the Supreme Court. The argument disintegrates because there is no substantial similarity of result as between an application for a license asking the same facilities as an existing station and an application for transfer of the station's license. In the former, the rights and property of the existing station would not pass, although hypothetically the same frequency, power, hours of operation, classification, etc., would be licensed to the newcomer. In the latter the rights and property of the existing licensee plus its facilities would pass to the transferee upon Commission approval. Moreover, as pointed out by the Supreme Court, the sharp differentiations of applicable policy and administrative practice are not to be ignored. Therefore the rights conferred by the statute to the one cannot by analogy be conferred upon the other, because the analogy is insufficient.

It should perhaps be pointed out that if the application for station license requesting the facilities of an existing station was in bad faith and in fact a mere device between the applicant and the existing licensee to assure a right of appeal from an adverse Commission decision, it would undoubtedly be dismissed by the Commission. If an appeal were taken under such circumstances, it would probably have to be dismissed by the court on the strength of the ruling in the instant case, on the ground that one should not be permitted to accomplish by indirection what the Act, as construed by the Supreme Court, has declared cannot be accomplished directly and that the substance and not the form of the application determines the substantive rights of the applicant under the Act. Whether any person seeking a transfer of license will adopt the suggestion of the Court of Appeals remains to be seen.

It should be noted that in the Pote case the proposed transferee sought to bring himself within the appeal provisions of the Radio Act of 1927, as amended in 1930, by contending that an application for transfer of license is in effect an application for modification of license. The court rejected this contention and added,

"The right of appeal to this court from any decision of the Federal Radio

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2144 STAT. 1162 (1927).
2246 STAT. 844 (1930).
Commission is not allowed as a matter of course, but is purely statutory, and the terms of the statute must be strictly followed."

Justice Groner voiced a lone dissent in the *Pote case*, saying that the proposed transferee was entitled to appeal to the Court of Appeals, as one who had been denied an application for a radio station license. Six years later in the instant case, Justice Groner's dissent was adopted by the Court of Appeals, as represented by Chief Justice Groner and Justice Miller, with Justice Stephens dissenting. The Supreme Court in the instant case, however, was constrained under the Act to reach the same result as the Court of Appeals reached in the *Pote case*, arising under the former Act.

A case which asks for judicial interpolation of statutes should present reasonably clear-cut grounds for such action. At best the arguments propounded by Columbia fall short of substantial cogency. Therefore it rather should have been expected that the Supreme Court would confine its analysis to a reading of the Act. Under that Act, as construed by the Court in the instant case, Columbia must seek review of the type of proceeding that it has instituted before the Commission by taking its case to a three-judge court in accordance with Section 402 (a).24

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24See note 14 *supra.*
THE grave concern of the United States over the trend of the European War was crystalized on May 16, 1940, when President Roosevelt personally delivered to Congress a message calling attention to the Nation's defense needs—airplanes, tanks, manpower, guns, and other \textit{blitzkrieg} weapons.\footnote{86 \textit{Cong. Rec.} 9534-9536 (1909).} Determined not to allow this country to be subjugated by force, Congress within an interval of a few months appropriated for national defense the unprecedented peace time total of nearly fifteen billions of dollars.\footnote{Pub. L. No. 588, 76th Cong., 3d Sess. (June 11, 1940) § 1 \textit{et seq.}; Pub. L. No. 611, 76th Cong., 3d Sess. (June 13, 1940) § 1 \textit{et seq.}; Pub. L. No. 667, 76th Cong., 3d Sess. (June 26, 1940) § 1 \textit{et seq.}; Pub. L. No. 781, 76th Cong., 3d Sess. (Sept. 9, 1940) § 1 \textit{et seq.}; Pub. L. No. 800, 76th Cong., 3d Sess. (Oct. 8, 1940) § 1 \textit{et seq.}} The President appointed various leaders, industrial and otherwise, to a National Defense Advisory Commission and they were given the responsibility of supervising and expediting the defense program.\footnote{May 28, 1940.} "Full speed ahead!" was the order of the day.\footnote{President Roosevelt's address at the University of Virginia, June 10, 1940.}

However, the immediate mechanized needs of the Nation were apparently far greater than the Nation's industrial capacity. The National Defense Advisory Commission encountered difficulty in placing orders for materiel.\footnote{\textit{Joint Hearings on Excess Profits Taxation, 1940, before the House Ways and Means Committee and the Senate Finance Committee}, 76th Cong., 3d Sess. (1940) 47-61.} The Secretary of War, testifying before a Congressional Committee, asserted that of the 4,000 airplanes for which funds had been made available in June 1940, contracts had been signed for the construction of but thirty-three though seven weeks had elapsed.\footnote{\textit{Id.} at 22.} It seemed that business was unwilling to invest additional capital in new facilities for the manufacture of defense needs during the emergency, which emergency might end before manufacturers had recouped their capital, until assured they would be permitted to amortize such capital as a deduction from any income earned. As the Special Senate Committee (Nye Committee) on the Investigation of the Munitions Industry reported:

"... the mere fact that war calls for new facilities indicates that without the war demand those facilities may be useless. The prospect of tax avoidance increases industry's natural wartime demand for liberal amortization allowances..."
and the Government's desire to encourage expanded production conflicts with its need of revenue."  

To remove this so-called bottleneck—industry's reluctance to invest additional capital—on August 29, 1940, the Ways and Means Committee, under a most drastic rule, brought before the House of Representatives H. R. 10413, popularly known as the Excess Profits Tax bill, Title III of which was headed "Amortization Deduction". On this very technical and complicated bill general debate was limited to but two hours; only the amendments of the Committee were in order, and all points of order against the bill were waived. After a more deliberate sojourn in the Senate, the Second Revenue Act of 1940 was ultimately approved.

In the formulation of this legislation Congress was not without experience. A similar situation, because of World War I, existed in 1918; consequently an amortization provision was incorporated in the Revenue Act of 1918, and was reënacted, with but slight change, in the Revenue Act of 1921. The ensuing history is not an impressive one because of the inherent weaknesses of that Act. One circuit court of appeals has held:

"... as a result of the statute—we should rather say as a result of administrative and judicial activity and inactivity in its interpretation. For that interpretation, such as it is, has proceeded for more than twenty years in at least partial disregard of one of the salient standards by which the application of the statute is limited."

Many problems of statutory construction were incident to the administration of the Act. The Bureau of Internal Revenue was confronted with the problem: What is included in "or other facilities" or is meant by "or acquired", "the production of articles", and "contributing to

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11 Sec. 214 (a) (9) applicable to individuals is identical to Sec. 234 (a) (8) for corporations:
"In the case of buildings, machinery, equipment, or other facilities, constructed, erected, installed, or acquired, on or after April 6, 1917, for the production of articles contributing to the prosecution of the present war, and in the case of vessels constructed or acquired on or after such date for the transportation of articles or men contributing to the prosecution of the present war, there shall be allowed a reasonable deduction for amortization. ... At anytime within three years after the termination of the present war, the Commissioner may, and at the request of the taxpayer shall, reexamine the return. ..."
12 Kelly Springfield Tire Company v. United States, 110 F. (2d) 823, 824 (Feb. 15, 1940).
the prosecution”; and by what sign posts should the Commissioner be guided in determining “a reasonable deduction”? The Select Committee (Couzens Committee) on Investigation of the Bureau of Internal Revenue concluded that the impotence of the Bureau had resulted in improper allowances amounting to over $400,000,000. After a study of some 168 cases, each involving more than $500,000, its report summarizes:

“... the regulations have contained no adequate statement of the principles to be observed in determining amortization allowances. No ruling or instructions for the guidance of either the engineers of the income tax unit or taxpayers were published until after the expiration of the time fixed by law for the redetermination of claims. . .

"While the purpose of the amortization provision was to encourage the acquisition of facilities for the production of war necessities, a large part of the allowances are upon facilities acquired by contract entered into before April 6, 1917.

"Amortization has also been allowed on pre-war facilities in full operation on April 6, 1917, because they were transferred from a corporation to its subsidiary or by a group of corporations to a consolidation without any real change of ownership or increase of capacity for war production.

"There has been gross discrimination in arbitrarily allowing amortization for reduced postwar cost of replacement in some cases and in denying it in others similarly situated, in allowing amortization to some transportation companies, while it is generally denied others, and in allowing amortization on land.”

Some striking illustrations are revealed by an examination of the individual cases, viz.: The Chino Copper Company, Hurley, New Mexico, was allowed amortization for dwelling houses constructed for the use of its employees. Proctor & Gamble Company, Cincinnati, Ohio, was allowed $3,997,848 amortization on facilities used in the manufacture of soap and by-products—the Committee questioned whether such facilities “contributed to the prosecution of the war”. Notwithstanding the ruling of the Solicitor of the Bureau of Internal Revenue and the decision in Hampton and Langley Field Railway v. Noel that railroads were not entitled to amortization, the Bureau permitted allowances to some railroad corporations on the ground that their stock was owned by corporations entitled to take amortization on other facilities.

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14 Id. at 130.
15 Id. at pt. 2, 64.
16 Id. at pt. 2, 104.
18 300 Fed. 438 (E. D. Va. 1924).
Subsequently the Senate Committee on Finance recorded some amusing, though illogical, allowances. Some manufacturers of chocolate, who had small contracts with the Red Cross and other relief organizations, were allowed a deduction on the argument that chocolate was a food. Manufactures of cigarettes were given a deduction. Fertilizer was held to be an article that contributed to the prosecution of the war since the fertilizer factories produced an article which was sold to farmers. A manufacturer of a product called ensilage knives, used in the cutting of corn and other feeds, was allowed amortization because, as he contended, "he produced an article which was used by farmers to cut corn, that the corn was used to feed dairy cattle and beef cattle, some of which may have gone to the Chicago marts, there was slaughtered, and some of the meat possibly undoubtedly would go to France, because the packers had large contracts with the Federal Government." 20

The judicial history of this legislation is no more impressive. In United States v. Corona Coal Company, 21 involving the cost of opening shafts in coal mines, the Government's contention that such openings were as necessary for peace time business as for war was overruled on the ground:

"The construction sought to be given the Statute by the Government is entirely too narrow. It is notorious that any work constructed during war period, involving employment of labor and the use of materials, was very much more expensive than if done before and very materially depreciated in value after, the war. The intention of Congress to encourage the production of articles useful in prosecuting the war can be very clearly deduced from the Statute. It is also clear that, in allowing a deduction as to ‘other facilities’, it was not intended to restrict the meaning of ‘facilities,’ by the preceding words, ‘buildings, machinery, equipment’, but to enlarge it to take in anything and everything contributing to the general result of winning the war”.

In Bryant and Detwiler v. United States 22 the construction of a building and leasing it for use in the production of war materials did not entitle the owner to amortization, whereas in Belfast Investment Company v. Commissioner 23 a deduction was allowed for a hay warehouse, constructed and rented to the Federal Government during the war. In The Appeal of G. M. Standifer Construction Corporation and Vancouver Home Company, 24 buildings erected by a corporation to house employees

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20 Hearings before Senate Finance Committee on H. R. 5529, 74th Cong., 2d Sess. (1936) 242-244.
21 23 F. (2d) 673 (C. C. A. 5th, 1928).
22 50 F. (2d) 481 (Ct. Cl. 1931).
23 17 B. T. A. 213 (Sept. 11, 1929).
24 B. T. A. 525 (1926).
of an affiliated corporation engaged in constructing ships for the Government were "facilities acquired for the prosecution of the war". In *The Appeal of Manville Jenckes Company*, the Board of Tax Appeals held that the taxpayer was entitled to relief regardless of when facilities were contracted for, as the purpose of construction depends on the purpose of the taxpayer at date of construction and not that which led to commitments prior to April 6, 1917. However, it is encouraging to note that a more vigorous and realistic approach to the situation was recorded in *Kelly-Springfield Tire Company v. United States* wherein the court held that the taxpayer's "motive", rather than his "intention", is the criterion.

Because of the difficulties resulting from the unjust assertion by so many taxpayers that they be allowed to amortize and the incident cost to the Government through loss of revenue the Special Senate Committee on the Investigation of the Munitions Industry recommended that in the future no amortization of war facilities be allowed. As a substitute it was proposed that governmental loans and subsidies be authorized for such construction as may be found necessary.

In 1936 the Senate Finance Committee studied the problem while considering a War Revenue Act. Their proposals were summarized in the Committee's report as accomplishing these principal objectives:

"(1) To determine in advance whether any project for wartime construction of a facility or vessel shall be amortized.

"(2) To allow amortization only as to construction actually begun after the declaration of war for the production of articles or commodities essential to the prosecution of the war.

"(3) To deny amortization of the cost of construction of projects either begun or contracted for prior to the declaration of war and designed to meet peacetime needs.

"(4) To deny amortization of the cost of facilities in existence prior to the declaration of war but which are thereafter transferred to new owners, where no amortization would be allowable in the absence of such transfer.

"(5) To allow amortization only in connection with depreciable property.

"(6) To provide a definite period of three years after the termination of the war to be used as a yardstick in determining the amount of amortization ultimately to be allowed."

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25 B. T. A. 765 (1926).
26110 F. (2d) 823 (C. C. A. 3d, 1940).
27Intention of "merely producing"—perhaps with existing facilities—as contrasted with motive of "expanded production" by new facilities.
With the aforesaid experience in mind Congress formulated Title III of the Second Revenue Act of 1940. The deduction, granted only to corporations, is predicated upon a certification issued jointly by the Advisory Commission and either the Secretary of War or Navy, under such regulations as the President may prescribe, that the facility is necessary in the interest of national defense during the emergency period. Certification is limited to any facility, land, building, machinery, or equipment, or part thereof, constructed, installed, or acquired subsequent to July 10, 1940. To be effective, certification must be made within 120 days after enactment of the Act, or prior to the beginning of such construction, installation or date of acquisition.

Having obtained the foregoing certification the taxpayer may elect to amortize the entire cost of the facility over a period of sixty months or to receive regular depreciation. He may elect by notice in his tax return to begin amortization the month following the construction, installation, or acquisition or to begin it the year following. At anytime within the sixty month period he may elect to substitute regular depreciation in lieu of amortization for the remaining cost of the facility. If, before the expiration of the sixty month period, the emergency ends or the Secretary of War or Navy certifies that the facility is no longer necessary in the interest of national defense, the taxpayer may elect to accelerate the amortization by substituting the shorter period. And similarly a taxpayer receiving depreciation in lieu of amortization may belatedly elect to revise his decision and receive the benefits over the shorter period. In these cases the taxpayer is entitled to have a recomputation of his previous tax returns. If he receives compensation for the cancellation of a government contract he may deduct such amount for the month it is considered income except insofar as the deduction

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8Pub. L. No. 801, 76th Cong., 3d Sess. (Oct. 8, 1940) § 1 et seq.
9Id. at § 124 (f) (1): “There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after June 10, 1940, as the Advisory Commission to the Council of National Defense and either the Secretary of War or the Secretary of the Navy have certified, within the time specified in paragraph (3) of this subsection, and under such regulations as the President may prescribe, as necessary in the interest of national defense during the emergency period.”
10Id. at § 124 (f) (3).
11Id. at § 124 (a).
12Id. at § 124 (c).
13Id. at § 124 (d) (3).
14Id. at § 124 (f) (1).
15Id. at § 124 (b).
16Id. at § 124 (d) (1-2).
17Id. at § 124 (d) (5).
would exceed the adjusted cost of the facility. If the taxpayer has been or will be reimbursed by the United States for all or a part of the cost of the facility then amortization is conditioned upon a certification by the Advisory Commission and either Secretary that such contract adequately protects the interest of the United States.

While the determination of eligibility for amortization will be made in advance, there is a strong possibility that there will be discrimination. The National Defense Advisory Commission within itself has no authoritative head, and the attitude of the Navy Department may differ from that of the War Department as to what considerations should be given applications for certification. The Navy Department, at least in some cases, considers that business is doing the Government a favor by accepting peacetime contracts. It recommended to Congress that amortization be allowed regardless of whether the construction, installation, or acquisition of the facility occurs during peaceful times or during an "emergency".

Existing facilities, provided they are acquired subsequent to July 10, 1940, are eligible. Consequently only administrative discretion will prevent circumvention of the primary statutory purpose—increased production—by the subterfuge of transferring a facility from a corporation to its subsidiary or otherwise affiliated corporation. It should be noted also that Congress has sanctioned the eligibility of non-depreciable property by including land within its definition of "emergency facility".

In behalf of a liberal amortization plan, it may be argued that any loss of revenue will be ultimately recouped, since after the full value of the facility has been depreciated the taxpayer's book or paper income will be commensurately higher. This is not necessarily true. An amortization deduction of 20 percent, rather than a depreciation deduction of 4 percent (an average rate), of the cost of a facility might possibly allow the corporation to escape an excess profits tax or at least subject its excess profits to a lower percentage rate per the graduated scale of rates contained in Title II of the Second Revenue Act of 1940.

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40 Id. at § 124 (h).  
41 Id. at § 124 (i).  
42 Individual members are responsible directly to the President.  
43 Joint Hearings on Excess Profits Taxation, 1940, before the House Ways and Means Committee and the Senate Finance Committee, 76th Cong., 3d Sess., 28-46.  
44 "Pub. L. No. 801, 76th Cong., 3d Sess. (Oct. 8, 1940) § 124 (c) (1): "... the term 'emergency facility' means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, or installation of which was completed after June 10, 1940, or which was acquired after such date, and with respect to which a certificate under subsection (f) has been made."  
45 Id. at § 1 et seq.
as, sixty months hence through a cessation of the "emergency" prosperity, or a general business policy, or by competitive necessity, the corporation possibly may not have sufficient profits to invoke the excess profits tax or at least as severe a rate as might have been invoked in previous years, thereby again escaping taxation. Recoupment is most problematical and is conditioned on the corporation's having as much or more profit during the years subsequent to the expiration of the sixty month amortization period as it has during the period. The liberality of the statute, particularly regarding the "elections", justifies the assertion that with respect to amortization industry stands appeased.

FINIS L. HEIDEL
NOTES
PUBLIC POLICY IN THE TAXATION OF ILLEGAL INCOMES

In Humphreys v. Commissioner of Internal Revenue,¹ the Board of Tax Appeals held that "protection" payments and ransom money constituted taxable income to the petitioner. This holding is in complete agreement with the overwhelming majority of cases.² The theory behind Mr. Justice Holmes' statement that, "Congress may tax what it also forbids,"³ has been the basis of the multitude of cases which hold that the Government has the power to tax incomes from illegal transactions.⁴ However, behind this theory is a force which seems to guide the legislatures in enacting statutes and to control the justices in adjudicating cases. This force is invisible and powerful; it plays a notable part in the taxing of illegal incomes; this omnipotent is public policy.

TAXABILITY

As is the case when statutes are involved, the courts concerned themselves with the intention of Congress in enacting the Revenue Acts.⁵ If there was any doubt, it was resolved by Mr. Justice Holmes when he said, speaking of the Revenue Act of 1921:

¹42 B. T. A. — (Oct. 8, 1940). The Board through an extensive and complete disclosure of facts concluded that Humphreys received protection payments and ransom money and that this constituted taxable income. The petitioner claimed a deduction for automobile expenses as an ordinary and necessary business expense. The Board refused to allow him this deduction on the ground that they were "unable to conclude from the evidence of record that petitioner was engaged in only legitimate business." The petitioner was also held liable for a twenty-five per cent delinquency penalty and a fifty per cent fraud penalty.


³See cases cited supra note 2.

⁴An example of the sections of the various revenue acts which have concerned the courts
"We see no reason to doubt the interpretation of the Act, or any reason why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay."\(^6\)

The same opinion was expressed in *Steinberg v. United States*:\(^7\)

"Congress meant to levy a contribution upon every species of gain no matter how immoral or vicious the method of acquiring the same might be."

After having determined that the intention of Congress was to include all incomes, the next consideration was whether Congress had the power to tax such incomes. In resolving the question the courts reasoned that since it is established that Congress may tax what it forbids,\(^8\) it is logical that it should be able to tax the income from that which it forbids.\(^9\)

As a result the Government has the power to tax the income from unlawful transactions.\(^10\) Furthermore, the Revenue Department does not concern itself with the fact that the money taxed as income may be recovered at the suit of the party who was defrauded,\(^11\) or who paid ransom and protection money,\(^12\) a usurious rate of interest,\(^13\) or an excessive railroad fare.\(^14\) Thus, the government will tax the income can be seen in § 22 of the Revenue Act of 1939. Int. Rev. Code § 22 (1939). This section, which defines "gross income", reads as follows: "Gross income" includes gains, profits and income derived from salaries, wages, or compensation for personal service ... of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. (Italics supplied). The phrases italicized would seem to indicate an intention on the part of Congress to include unlawful services, businesses, or sources. Also, the fact that in the Revenue Act of 1913 the word "unlawful" preceded "business" and was omitted in the subsequent acts seems to be a further indication of that intention.


\(^7\) 14 F. (2d) 564, 566 (C. C. A. 2d, 1926).

\(^8\) Wainer *v.* United States, 299 U. S. 92 (1936); United States *v.* Constantine, 296 U. S. 287 (1935); United States *v.* Staoff, 260 U. S. 477 (1923); United States *v.* Yuginovich, 256 U. S. 450 (1921); License Tax Cases, 5 Wall. 462 (U. S. 1862).

\(^9\) See Steinberg *v.* United States, 14 F. (2d) 564 (C. C. A. 2d, 1926), where this reasoning is set out clearly. Undoubtedly the same logic promoted the conclusions in the other cases.

\(^10\) See cases cited supra note 2.


\(^12\) Humphreys *v.* Commissioner, 42 B. T. A. —— (Oct. 8, 1940).

\(^13\) Barker *v.* Magruder, 68 App. D. C. 211, 95 F. (2d) 122 (1938).

even though the right to it is defeasible.\textsuperscript{15} The government treats it as income subject to a claim and if recovered it would be "a taxable loss in the year when recovered."\textsuperscript{16} The Revenue Department does not take sides in these controversies; nor will it allow the collection of revenue to be delayed while legal title is being investigated.\textsuperscript{17} In other words, in this game the government is only interested in who has the button and not who owns it.

The conclusion that Congress does not intend "to tax the law abiding and allow the criminal to go free,"\textsuperscript{18} has not been founded solely upon mercenary reasons, but rather on a basis of justice. It is obvious that the same amount of revenue could be realized by increasing the tax rate and limiting it to legal transactions; but the injustice of this is apparent. The courts do not tolerate such a measure because public policy demands that everyone share in the burdens of taxation since everyone is to receive its benefits; above all, one should not be permitted to set up his own crime as a shield to taxation. This view is more ably expressed in the case of \textit{United States v. Wamplas}:\textsuperscript{19}

"It may be thought beneath the dignity of the government to assess and collect taxes on such illegally gotten gains, but another point of view is certainly equally important for consideration in that there is no just reason why a taxpayer should escape his fair proportion of the burden of taxation because his gains are illegally gotten and thus increase the burden of taxation upon other citizens."

**DEDUCTIBILITY**

Public policy was not satisfied with this first step of making criminals share equally with the law abiders in the burdens of taxation. It demanded that they bear even a greater burden. The courts' compliance is evidenced by the fact that deductions for "ordinary and necessary expenses"\textsuperscript{20} which are allowed to incomes produced by legal transactions

\textsuperscript{15}But see Rau \textit{v. United States}, 260 Fed. 131 (C. C. A. 2nd, 1913) where insurance premiums embezzled by an agent were held not to be taxable income to the agent. Professor Magill suggests that this decision "may possibly be supported by the absence of any legal title to the funds." Magill, \textit{TAXABLE INCOME} (1936) 334, n.b.; cf. Steinberg \textit{v. United States}, 14 F. (2d) 564 (C. C. A. 2d, 1926).


\textsuperscript{17}National City Bank of New York \textit{v. Helvering}, 98 F. (2d) 93 (C. C. A. 2d, 1938).

\textsuperscript{18}Sullivan \textit{v. United States}, 15 F. (2d) 809 (C. C. A. 4th, 1926).


\textsuperscript{20}Section 23 of the Revenue Act provides "all the ordinary and necessary expenses paid
are not allowed to incomes derived from illegal transactions. Mr. Justice Holmes once again expresses the attitude of the Supreme Court toward such deductions with the pregnant remark:

"... it will be time enough to consider the question when a taxpayer has the temerity to raise it."

Here the reasoning of the courts is questionable. When the question of taxing incomes has been before the courts, no distinction has been drawn between lawful and unlawful incomes. Logically it would follow that since there is no distinction for taxing purposes, there should be none for deduction purposes. But the courts do not resort to logic in supporting this conclusion; it is public policy which underlies and promotes this legal sophistry. Actually the criminals are being penalized for obtaining income in an illegal manner. The penalty is in the form of a gross income tax as opposed to a net income tax imposed upon lawful transactions. It has never been construed as a penalty for the probable reason that if it were so construed, it would be unconstitutional. Specifically, in the case of a taxpayer who realized income in contravention of a state statute: if the non-deductibility measure were construed as a penalty for the violation of a state statute, it would be violative of the Constitution as "an invasion of the police power inherent in the states, and reserved from the grant of powers to the

or incurred during the taxable year in carrying on any trade or business ..." shall be deductible. Int. Rev. Code § 23 (1939).  

21 Humphreys v. Commissioner, 42 B. T. A. —— (Oct. 8, 1940) (expenses incurred in obtaining ransom and protection payments); Nicholson v. Commissioner, 38 B. T. A. 190 (1938) (sum paid to state senator for his political influence); New Orleans Tractor Co. Inc. v. Commissioner, 35 B. T. A. 218 (1936); Eastern Traction Equipment Co. v. Commissioner, 35 B. T. A. 189 (1936) (commissions paid to agent for securing political influence held not deductible as against public policy); Kelley-Dempsey Co. v. Commissioner, 31 B. T. A. 351 (1934) (graft payment to inspectors to get contracting work approved); Gano v. Commissioner, 19 B. T. A. 508 (1930) (sum paid to compromise a gambling debt); Burroughs Bldg. Material Co. v. Commissioner, 18 B. T. A. 101 (1929) (fines paid for violation of a state statute); cf. Terrell v. Commissioner, 7 B. T. A. 773 (1927); Appeal of Frey, 1 B. T. A. 338 (1925); Appeal of McKenna, 1 B. T. A. 327 (1925) where the Tax Board has permitted the offsetting of gambling losses against gambling profits. Contra: Steinberg v. United States, 14 F. (2d) 564 (C. C. A. 2d, 1926) (deductions for expenses incurred in the illicit sale of liquors allowed).  


Federal Government by the Constitution." Yet, despite the fact that by disallowing deductions from illegal incomes, the courts are for all intents and purposes imposing a penalty, and in doing so are in many cases violating the Constitution, one does not have to be a clairvoyant to predict that it will never be construed as a penalty simply because the result would be contrary to public policy.

LIABILITY

The force of public policy is felt again in the Tax Board’s investigations. Under the Fifth Amendment to the Constitution a party to any investigation may claim a privilege of not having to testify in such a way as to subject himself to a criminal prosecution on the basis of his answers. In order to deny the defendant or witness this right to claim the privilege, it must be shown that there is a statute which gives him immunity from prosecution on the basis of his testimony or any information gathered by the investigating body. The guarantees in the statute must be as broad as the guarantees in the Fifth Amendment.

It is doubtful that the section of the Revenue Act which covers immunity is as broad as the constitutional guarantees especially in view of the test laid down by the Supreme Court in Counselman v. Hitchcock:

“No statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.”

The immunity section of the Revenue Act seems to leave the “party or witness subject to prosecution.” Moreover, the doubt is further increased when this section of the Revenue Act and similar sections of other acts (which have been declared not to have satisfied the Fifth

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25A great majority of these cases involve violation of state law or state policy. See cases cited supra note 21.
26“No person . . . shall be compelled in any criminal case to be a witness against himself.” U. S. CONST. AMEND. V.
29Int. Rev. Code § 55 (1939). Note that the returns may be open to inspection by state authorities provided such inspection is . . . “for the purpose of obtaining information to be furnished to local taxing authorities . . .” it would seem that provision could be easily evaded, since a state official could avow the purpose required by this section and actually use the information for other purposes.
Amendment), are compared. Of course, Congress could have enacted this section so as to be sure it would fall within the Fifth Amendment as it did under the National Prohibition Act. However, Congress probably did not want to; nor did it have to. Public policy demanded that these criminals be imprisoned and would not stand for the Revenue Department impeding the attainment of this objective. Consequently, the Supreme Court responded by limiting the exercise of the privilege to those questions asked in a federal investigation which will subject the party to a federal prosecution. Furthermore, as to those disclosures which would subject the party to a federal prosecution, it is to be doubted that the criminal could refuse to disclose the amount of his income by claiming his privilege. Mr. Justice Holmes, in his most typical manner, dismisses an elaborate and excellent discussion of this question in the lower court by saying,

"It would be an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime."

Section 55f of the Revenue Act reads as follows: "It shall be unlawful for any collector, agent, clerk or other officer or employee to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, ... except as provided by law." Int. Rev. Code § 55f (1939) (italics supplied). Compare this section with the sections of the acts referred to and discussed in Arndstein v. McCarthy, 254 U. S. 71 (1921), cited supra note 27 and Counselman v. Hitchcock, 142 U. S. 547 (1892), cited supra note 28, where the Court held that the respective immunity sections did not satisfy the Fifth Amendment because it would not prevent the use of the defendant's testimony to search out other testimony to be used in evidence against him. The instant section seems to be subject to the same criticism especially in view of the exceptions in that section as indicated by italics.


The Justice gave no reasons for his conclusion, but undoubtedly the reason was public policy and no other. Thus, as a practical matter the criminal receives little protection under the Fifth Amendment where revenue matters are involved.\textsuperscript{36}

The government has a twofold interest in the criminals: first, to tax their illegal incomes, and second, to convict them because of the illegality. It is for the common good that both these objectives be accomplished and the courts seem more than unwilling to allow the attainment of the one to deter the attainment of the other. On the contrary, the courts seem to favor the one aiding the other by not restricting to a particular department the use of information disclosed.\textsuperscript{37} As a result the government can "have its cake and eat it too."

Thus, public policy has been influential in the three measures taken against criminals and their incomes. First, in the taxing of their incomes; second, in not allowing deductions from illegal incomes; third, in giving the Board practically complete freedom in their investigations. The aim behind the first measure is to apportion the burden of taxation on the criminal and law abider alike. And the aim behind the second and third measures is to discourage crime through the means of a penalty and imprisonment.

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\textsuperscript{36}See notes 29, 31 and 33 \textit{supra}.

\textsuperscript{37}In other words, the testimony gathered in the Board's investigation is not so restricted that it may not be used to search out other testimony for the purpose of a criminal investigation.
THE DERIVATIVE SUIT: ITS LIMITATIONS AND A SUGGESTION

VIEWED abstractly the derivative suit as a means of corporate redress seems adequate, but practically applied to the large corporation of today its disadvantages are found greatly outweighing its advantages and its own limitations rendering it an awkward and impotent remedy. The derivative suit is an equitable proceeding whereby a shareholder by means of a shareholder's bill is permitted to litigate corporate causes of action when those in control of the corporation will not bring suit. It has been generally conceded that the English decision, Foss v. Har-
bottle, was the first case affirming equitable relief in such cases, and the reason that relief was granted and is still allowed under such circumstances is that the complainant has no adequate remedy at law. The corporation is joined as a defendant in the litigation, thereby protecting creditors as well as the real defendants should the corporation sue on the same cause subsequently, and in the event of a recovery by the plaintiff the corporation and nominal plaintiff is certain to receive the proceeds of such recovery. The actual plaintiff does not sue in his own right notwithstanding efforts of the majority stockholders and board of directors to prevent the action; the cause of action belongs to the corporate body and not to all or any group of the corporate shareholders. The derivative suit is also referred to as a representative suit, but it should not be confused with the other type of representative suit in which the plaintiff is suing on his own behalf together with other shareholders similarly situated.

A prerequisite to the maintenance of a shareholder’s bill is an allegation on the part of the plaintiff that every reasonable effort has been made to protect the corporation by representations to and demands on the directors and shareholders of the wronged corporation. The

72 Hare 461, 67 Eng. Rep. 189 (Ch. 1843).
74 Bogart v. So. Pacific R. R., 228 U. S. 137 (1913); Wagner v. Biscoe, 9 S. E. (2d) 650 (Ga. 1940) (corporation on whose part plaintiff sues is an indispensible party to the litigation).
75 Kelly v. Thomas, 234 Pa. 419, 83 Atl. 307 (1912).
78 Green v. Victor Talking Co., 24 F. (2d) 378 (C. C. A. 2d, 1928), cert. denied, 278 U. S. 602 (1928) (stockholders’ right is only derivative and can be asserted only through the corporation); Mente v. Louisiana State Rice Milling Co., 176 La. 475, 146 So. 28 (1933) (damages a shareholder might have suffered by injury to corporation is too remote to be recovered by him in his own right); DiTomasso v. Loverro, 293 N. Y. Supp. 912, 250 App. Div. 206 (1937), aff’d, 276 N. Y. 551, 12 N. E. (2d) 570 (1937) (defenses good against the corporation are good against the plaintiff); Hidalgo v. McCauley, 50 Ariz. 178, 70 P. (2d) 443 (1937); Wal len Tel. Co. v. Staton, 46 Oh. App. 505, 189 N. E. 660 (1933) (though the plaintiff stockholder own all the corporate stock he cannot redress corporate wrongs in his own right).
Supreme Court per Miller, J., in Hawes v. Oakland has said, "... before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or actions in conformity to his wishes." Where a plaintiff feels that this demand and representation would be useless and neglects to make such, he then must set out substantiating facts showing the futility of compliance with the foregoing requirement.

The resultant difficulties in the application of the derivative nostrum are no secret, but rather have been the subject of much academic disclosure and conjecture during the past decade. The adequacy of this method of corporate redress has been challenged primarily on the grounds that it is vexatious, that it is dilatory and costly, and that the judges in such proceedings are incompetent to deal with the problems of a business nature. In the rules of practice and procedure, in redressing...
injuries against the corporation by the use of the derivative suit, repose these vexatious difficulties. The complexity of the corporate structure and the attendant and necessary unravelling of company detail in this form of the representative suit is provocative of great delay and expense.

Having complied with the conditions precedent, anticipating the institution of the derivative suit, the plaintiff may find himself in a host of real and potential difficulties. It is possible that he may be estopped by his own prior conduct; he may have been guilty of laches.

21See notes 15 and 16, supra. See also Gallup v. Caldwell, 32 F. Supp. 711 (D. Del. 1940) decided under Rule 23 (b), 28 U. S. C. § 723 (c) (1934). Rules for Civil Procedure of the District Courts, reciting that it is a condition precedent to any consideration of allegation in complaint in a stockholder action that it must affirmatively appear that plaintiff was a stockholder and how and when he became such.

22See notes 15, 16, 17 and 18, supra.

23The reports are replete with cases wherein the proceedings in the representative suit were hampered by complainants' shortcomings. Some of these are: Robbins v. Sperry Corp., 1 F. R. D. 220 (D. C. N. Y. 1940); Barnett v. Gound, 304 Mo. 593, 263 S. W. 836 (1924); Matthew v. Fort Valley Cotton Mills, 179 Ga. 580, 176 S. E. 505 (1934) (plaintiff must have been a stockholder when the action was instituted). But see Earl v. Lofquist, 135 Cal. App. 373, 27 P. (2d) 416 (1933); Brennan v. Barnes, 133 Misc. 340, 232 N. Y. Supp. 112 (1927) (holding where cause of action exists in favor of corporation stockholder thereof may maintain action though he acquired share after fraud complained of). Runcie v. Corn Exchange Bank Trust Co., 6 N. Y. Supp. (2d) 616 (1938) (stockholder may not maintain suit in interest of rival company); Blackman v. Central R. & B. Co., 58 Ga. 189 (1877) (under some statutes stockholder cannot plead or defend for the corporation except in cases expressly provided); McQuillen v. Nat'l Cash Register Co., 112 F. (2d) 877 (C. C. A. 4th, 1940), aff'd 27 F. Supp. 639 (D. Md. 1939) (where stock was not part of trust estate when plaintiff, instituting bill, became trustee, but stock was subsequently purchased by plaintiff as trustee, plaintiff could not complain of any transaction alleged to be illegal and fraudulent which had occurred before plaintiff acquired stock); Smith v. Lewis, 211 Cal. 294, 295 Pac. 37 (1930) (where corporation itself is disqualified the action cannot be maintained); Pourroy v. Gardner, 122 Cal. App. 521, 10 P. (2d) 815 (1932) (a shareholder may not join a cause of action in his own right with an action in the corporate right); Dresden v. Goldman Sachs Trading Co., 240 App. Div. 242, 269 N. Y. Supp. 360 (1934), noted 82 U. Pa. L. Rev. 862 (1934) (pendency of another action on same cause is bar to similar suit); Collins v. Penn-Wyoming Copper Co., 203 Fed. 726 (D. C. Wyo. 1912) (offer to place defendant in statu quo has been held to be a condition precedent to a suit to cancel an agreement under which the corporation has received money or property). Contra: Anderson v. Scandia Mining Syndicate, 26 S. D. 558, 128 N. W. 1016 (1910).

and to prosecute this action would be prejudicial to the real defendant; the statute of limitations might have run or the corporation may not now have a cause of action or may have decided to institute its own proceedings. It is not inconceivable that the corporation might be so disposed that it would in effect aid the real defendant, though in the majority of cases it would probably be best if the corporation to be benefited remained apathetic. The circumstances giving rise to the usual stockholder's bill, by the very nature of the action, indicate a corporate management not altogether in accord with the wishes of the minority group instituting the proceedings, for certainly in most cases there is more than a suggestion that the directors and majority shareholders have been remiss in the execution of their duties. Under such circumstances the management could easily be so averse to the bill that they would conceivably hamper the processes by an injunction, by seeking a change of venue, by refusing to take part in the proceedings, by appearing specially and objecting to improper service, or, having control of the company records, refuse or delay the use of such by the plaintiff.

The expenditure of time and money in the derivative suit by a single

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27Pourroy v. Gardner, 122 Cal. App. 521, 10 P. (2d) 815 (1932) (suit may not be maintained where the corporation has become inactive beyond stage of revival for in such case there would be no corporation to receive the benefits of the judgment); see Busch v. Mary A. Riddle Co. of Del., 283 Fed. 443 (D. Del. 1922) (stockholders' suit will not be permitted in a court having no power to subject the corporation to its jurisdiction).
29Washington, op. cit. supra note 19, at 362.
30Berlack, op. cit. supra note 19, at 603.
32Kelly v. Thomas, 234 Pa. 419, 38 Atl. 307 (1912).
33Grant v. Cobre Grande Copper Co., 193 N. Y. 306, 86 N. E. 34 (1908); see Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465 (1903) (stockholders in a foreign corporation may maintain suit for property of corporation found within jurisdiction although the corporation is not served with process within the jurisdiction and does not appear).
34Stockholders' ordinary remedy in such case is mandamus, but such relief would be granted by a bill in equity where bill sought relief properly within the jurisdiction of equity, since the jurisdiction of equity would attach to all matters embraced within the bill.
plaintiff or a small minority of the shareholders is seldom commensurate with the possible return, and while the complainant is reimbursed in the event of a successful suit, he is, however, liable for the whole of the expense should the judgment be in favor of the real defendant. Having successfully proceeded to a judgment or decree the plaintiff is further distressed by the vulnerability of the judgment to collateral attack.

II

Perhaps one of the greatest reasons for the disrepute into which the representative suit has found itself is attributable to the "strike suit." The unscrupulous stockholder has rendered himself a nuisance by the institution of such specious litigation on the slightest pretext or irregularity, intending to compromise his claim for a disproportionate amount to the value of his interest as the price for discontinuance.

Since the finding of fact in a stockholder's suit is res judicata, taking some active part in the trial is in the corporate interest, however the company is limited in its actions since the proceedings remain under the control of the plaintiff. While the corporation for whose benefit the action is instituted may possibly oust the stockholder plaintiff, it cannot

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McCourt v. Singers-Bigger, 145 Fed. 103 (C. C. A. 8th, 1906); see Edwards v. Bay State Gas. Co., 130 Fed. 242 (D. Del. 1904) (in the case of more than one plaintiff the liability is per capita rather than pro rata according to share held).

Smith v. Lewis, 211 Cal. 294, 295 Pac. 37 (1930) (wherein judgment obtained by stockholder on behalf of the corporation was held to be subject to collateral attack by showing failure to pay state license tax and that the corporation had no right to sue).

Washington, op. cit. supra note 19, at 374, "The usual means of fighting strike suits—and, all too often, legitimate suits as well—has been to tire the plaintiff out with motions, expensive excursions to take testimony, and the like." See McLaughlin, Capacity of Plaintiff-Stockholder to Terminate Stockholder's Suit (1937) 46 Yale L. J. 421, 427-431.

Note (1934) 34 Col. L. Rev. 1308, 1321, wherein the author makes an often overlooked observation, viz., "Strike suits are not an unmixed evil. The threat of them may tend to keep corporate managers within their legitimate powers; and when they stray therefrom, the plaintiff's motive seems an insufficient reason to justify permitting a continuation of improper conduct."


become a co-plaintiff,\textsuperscript{42} nor can it actively aid the real defendant.\textsuperscript{43} Often in cases involving a large corporation and large sums of money publicity has been a not uncommon accompaniment of the stockholders' suit which was purportedly instituted to benefit this large company. Such publicity could easily be detrimental to the best interests of such corporation and often many of the confidential records of the corporation are paraded publicly, much to the delight and interests of competing companies. It seems an injustice that a single corporate stockholder may institute a stockholder's bill, though the possibility of this injustice is lessened somewhat by the fact that in cases wherein the combined holdings of the plaintiff are small the court is unmistakably influenced, and possibly would not permit litigation.\textsuperscript{44}

A stockholder's bill having attributes similar to those of the aforementioned "strike suit" is the non-benefit suit wherein a stockholder plaintiff successfully avenges a corporate wrong but at the same time inflicts a net loss on the corporation which was to have been redressed—a resulting inequity where equity was sought and decreed. This loss in the non-benefit suit might possibly result in cases wherein a judicious corporation intervened and took an active part in the litigation to protect itself and such participation involved a financial outlay by the company far in excess of the amount recovered. No practical solution has been offered which has solved the paradox of the non-benefit suit or the burlesque of the "strike suit."

III

Suggestions have been made for removing or alleviating the limitations and hardships in the stockholder's suit. The most recent proposal has been "...a remedy in addition to the derivative suit—a remedy within the corporation, through the creation of what might be called a 'judicial' department."\textsuperscript{45} This judicial department would include a committee which might be composed of a lawyer, an accountant and one of the directors of the corporation, all members chosen annually by the stockholders. The committee would investigate and report on the merit of charges made by the stockholders; if the stockholder is not satisfied with the work of the committee he could proceed as usual with the deriva-

\textsuperscript{43}See Wickersham \textit{v.} Crittenden, 106 Cal. 329, 39 Pac. 603 (1895).
\textsuperscript{44}Calloway \textit{v.} Powhatann Imp. Co., 95 Md. 177, 52 Atl. 916 (1912).
\textsuperscript{45}Washington, \textit{supra} note 19, at 377.
tive suit. Such plan, if used by the stockholders and corporation, would certainly deter many innocently though unwisely instituted suits; but as the writer himself concedes it is but a "palliative which may occasionally prove useful."46 Private47 and public48 agencies have been suggested to investigate and prosecute charges of improper management. Dean Pound submits that a more frequent use of the visitatorial power of equity, through an information by the attorney general, would be well, such power having certain advantages not found in the derivative suit.49 Another writer has advanced a somewhat more severe procedure—a more frequent use of the "death sentence" found in judicial winding-up proceedings.50

Possibly some of the difficulties of the stockholders' suit could be solved by legislation. Bills providing for federal licensing of corporations have been before our national legislative bodies many times, and the present O'Mahoney-Borah bill51 provides an excellent substructure on which to found an administrative body capable of dealing with some of the problems presented in the derivative suit. The plan submitted below might easily be incorporated in this proposed licensing by the federal government of corporations.

To come within the purview of the O'Mahoney-Borah federal licensing proposal a corporation must have a book valuation of assets in excess of $100,000 and must also be engaged in interstate commerce.52 It is obvious that the large corporation, which is usually engaged in interstate commerce, is the principal cause of the most frequent and serious limitations imposed upon the derivative suit and its general ineffectiveness. It is suggested that the derivative suit in its present form be limited to cases involving corporations, whose redress the plaintiff seeks, not covered by the O'Mahoney-Borah bill. The litigation reserved for the equity courts under this suggestion is minus many of the objectionable features found in the present use of the derivative suit. Great financial outlays, delays and difficulties in circularizing shareholders, in order to make proper demand on the many and probably widely distributed stockholders to comply with the conditions precedent to institution of the suit, are minimized by this limitation.

46Id. at 375.
48Berlack, loc. cit. supra note 1.
49Pound, loc. cit. supra note 1.
50Hornstein, A Remedy for Corporate Abuse—Judicial Power to Wind Up a Corporation at the Suit of a Minority Stockholder (1940) 40 COL. L. REV. 220.
52Id. at p. 6, § 3 (a).
Under the O'Mahoney-Borah bill the Federal Trade Commission would be authorized to administer the licensing of corporations affected. Why not permit the minority stockholder, by means of a complaint, to present his problem of redressing wrongs of the federal licensed corporation to this administrative body for solution? The commission has the advantages of trained and expert personnel capable of understanding and dealing with the numerous technical problems involved in corporate litigation.

Investigations, if deemed necessary, should be made wholly by the commission, and stockholders should be relieved from participation in the investigation and the burden of its attendant expense. It would be advisable to confer on this administrative tribunal the legal powers required to compel the corporation being investigated, or to be investigated, to comply with the reasonable requests of the commission.

Since the derivative suit, if this suggestion were in effect, would be limited as indicated to corporations not licensed by the federal government, the aggrieved stockholder seeking to redress corporate wrongs of a corporation having a federal license would have no other remedy than that given by the commission. This stipulation would negative the probability of a stockholder, disappointed as a result of a commission holding contrary to his wishes, invoking the aid of equity by the use of the stockholder's suit. To allow one to use the derivative suit in such case would dissipate any advantage and finality the proposed commission plan might have had. Appeals from commission rulings, however, should certainly be allowed. The O'Mahoney-Borah bill has provided for such appeals.

This scheme has further advantages. The stockholder would no longer be harassed and vexed by efforts on the part of the corporation to stifle proceedings. Refusal of the corporation to take an active part in the proceedings, efforts of the company to seek a change of venue and the many other procedural hardships found in the derivative action would be absent. Moreover, the corporation would not be threatened with the non-benefit suit nor with the necessity of a compromise, so often resorted to in the settlement of "strike suits", since these and similar proceedings would have been obviated. For, as outlined in the fore-

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53Ibid.
54Ibid.
55Supra note 51 at p. 18, § 12 (a).
going, the commission should have exclusive authority in the investiga-
tion of the charge, which would include discretion as to the feasibility
of instituting an investigation after the stockholder's complaint has been
registered as well as concluding an investigation once it is undertaken.
Since the stockholder's disinclination to institute proceedings under this
plan would be reduced, the possibility of federal investigation alone would
prevent to a large degree unjust action by majority shareholders and
corporate directors.

EDWARD E. STOCKER
RECENT DECISIONS

CONSTITUTIONAL LAW—Tax on Gross Sales of Chain Stores—Stewart Dry Goods Co. v. Lewis Discredited?

The Minnesota Supreme Court decided that a gross sales tax on chain stores, which was graduated according to the volume of gross sales, was “unconstitutional”. In the opinion expressing this decision, the court discussed the prior Minnesota decisions which have been handed down in interpretation of the uniform taxation clause of the Minnesota Constitution and also the decisions of the United States Supreme Court which have applied the equal protection clause of the Fourteenth Amendment to taxation statutes. National Tea Co. v. State, 205 Minn. 443, 286 N. W. 360 (1939).

The United States Supreme Court granted certiorari, 308 U. S. 547 (1939), “because of the importance of the Constitutional issues involved in Stewart Dry Goods Co. v. Lewis, ... and Valentine v. Great Atlantic & Pacific Tea Co., ... which cases, it was asserted, controlled the decision below”. Minnesota v. National Tea Co., 309 U. S. 551, 552 (1940). Despite a syllabus by the Minnesota court which plainly held that “A gross sales tax which classifies chain store owners for the imposition of a varying rate of taxation solely by reference to the volume of their transactions denies the equal protection provision of U. S. Const. Amend. XIV, and is likewise violative of Minn. Const. Art. 9, § 1”, the majority of the Court were unable to determine whether the state court had based its decision solely upon the federal interpretation of the Fourteenth Amendment or whether they had also based it partly on their own interpretation of the Minnesota constitution. In this quandary the Court refused jurisdiction; but instead of dismissing the petition, it sent the case back for further proceedings so that “obscurities and ambiguities” might be eliminated from the Minnesota court’s opinion. Minnesota v. National Tea Co., supra.

After a rehearing in the Minnesota Supreme Court where counsel for the state urged that an opinion be rendered in such terms as would give the United States Supreme Court unquestionable jurisdiction to review the decision, the state court held per curiam that “our prior decision was right”. National Tea Co. v. State, 294 N. W. 230, 231 (Minn. 1940). Obligingly, the court stated without equivocation, “We think that the section of the statute here involved, L. 1933, c. 213 and 2 (b), 3 Mason Minn. St. 1936 Supp. and 5887-2 (b) is violative of the uniformity clause of our own Constitution.” Ibid. Thus, the United States Supreme Court was denied an opportunity to review its enunciation (in Stewart Dry Goods Co. v. Lewis, 294 U. S. 550 (1934)) of the principle that the graduation of a gross sales tax according to the volume of sales effects a discrimination so arbitrary as to be violative of the equal protection clause of the Fourteenth Amendment.

With an understanding born of hindsight, the first opinion of the Minnesota court seems clear enough. In fact it seems so clear that it leads to a conjecture that the Supreme Court may have had another purpose in granting certiorari in the first place. Although the method adopted is rather oblique, there can be no denying that the opinion of the Supreme Court in this case displays some desire on the part of that tribunal at least to discredit the Stewart Dry Goods Co. case. Evidently the Minnesota court sensed the impending doom of that decision, for after affirming their own
former decision they added dryly, "We should not guess as to what the United States Supreme Court may do with its prior decisions, nor are we able to predict the bases upon which such supposed changes of opinion are to be founded. Until that court overrules its former well-considered opinions, there is no lack of uniformity between our interpretation of our Constitution and of that court's interpretation of the Fourteenth Amendment." National Tea Co. v. State, supra at 294 N. W. 231.

It will be remembered that the decision in the Stewart Dry Goods Co. case was by a divided court, with Mr. Justice Cardozo for the minority filing a searching dissent. The decision has been variously criticized, and although it was followed in Valentine v. Great Atlantic & Pacific Tea Co., 299 U. S. 32 (1936), it has probably always been upon a rather insecure foundation, especially since Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412 (1937).

The test of a classification made by a state legislature for the purposes of taxation is easily stated though difficult to apply. The classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike". F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 415 (1920).

The Stewart Dry Goods Co. case went on the theory that the only object of the legislation was the raising of revenue; consequently, there could be no valid relation between such an object and a classification which discriminated between two persons doing exactly similar acts. The Grosjean case, however, held that "Taxation may be made the implement of the exercise of the state's police power; and proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is therefore lawful". Great Atlantic & Pacific Tea Co. v. Grosjean, supra at 426. With this accepted as a legitimate purpose it would seem that the classification by volume of sales would be a sufficiently reasonable discrimination, i.e. one that would cause the incidence of the greater tax to be upon the corporations doing the largest business.

In any event, it is now probably safe to assert that the equal protection clause of the Fourteenth Amendment is no longer a restraint upon the power of a legislature to classify any tax gross sales according to a graduated scale of sales volume. Taxpaying chain stores, if they desire to challenge the validity of such measures, must look to the constitution of the state in which they operate for the necessary inhibiting influence. See Simms, Trends in Chain Store Legislation (1940) 29 The Georgetown Law Journal 165. The instant case should be ample illustration of this view.

ROBERT D. SCOTT


Plaintiff, a Texas cotton farmer, sought to recover from the defendant ginning companies amounts which, as penalties for cotton sold them in excess of his farm marketing quota fixed by the United States Department of Agriculture, they had deducted and withheld from him in accordance with the provisions of Section 348
of the Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended, 7 U. S. C. § 1348 (Supp. 1939). The defendants tendered into court the amounts of the penalties which, under an appropriate order, were placed in the registry of the court pending determination of the case, and the United States intervened to defend the Act. On appeal from an order of the District Court of the United States for the Southern District of Texas denying recovery, plaintiff attempts to distinguish the cotton marketing provisions from those pertaining to tobacco, sustained in *Mulford v. Smith*, 307 U. S. 38 (1939), and assails the Act on two grounds: first, that it is not a regulation of the marketing but rather of the production of cotton, a subject not within federal jurisdiction but reserved to the several states by the Tenth Amendment; and second, that it is invalid as to plaintiff since the sales upon which the penalties were deducted were not in interstate or foreign commerce but were purely local in character. *Held,* for appellees, since the intra-state sales penalized were sales in the stream or affecting the stream of interstate or foreign commerce. *Tropp v. La Sara Farmers Gin Company et al.,* 113 F. (2d) 350 (C. C. A. 5th, 1940).

In affirming the judgment of the district court, the circuit court of appeals upheld the cotton marketing provisions of the Act, as different from those pertaining to tobacco, sustained in *Mulford v. Smith*, supra, not intrinsically, but in their application to a different and distinct system of marketing. The court pointed out in *Mulford v. Smith*, supra, that at least two-thirds of the flue-cured tobacco sold at auction warehouses was sold for immediate transportation to an interstate or foreign destination and that in Georgia nearly 100% of the tobacco so sold was purchased by extra-state purchasers. In the instant case, however, the court was confronted with a more complex marketing mechanism. The cotton producers in Texas sell their cotton to companies which gin it; the ginning companies resell the cotton to merchants who compress and bale it; and the merchants resell or ship the cotton to important concentration ports in Texas where cotton from several states is received for shipment outside the State, chiefly to foreign countries. Prior to the sale which carries the cotton outside the state or vests title in an extra-state purchaser, all of these preliminary sales are made within the state of Texas to local buyers, practically all of whom are engaged solely in local business. However, the production of cotton is but a part of the entire cotton industry, an industry which embraces the activities and furnishes the livelihood of 11.5% of the total population of all the states. Moreover, in 1937, 75% of all the cotton produced in the United States moved in interstate or foreign commerce, over 50% of which was shipped to spinners in foreign countries, and practically all of the cotton produced in the State of Texas passed into such channels.

This case is illustrative of the broad scope of federal jurisdiction in the exercise of power under the commerce clause, a power limited only by the Constitution itself. *N. L. R. B. v. Jones and Laughlin Steel Corp.,* 301 U. S. 1 (1937); *Stafford v. Wallace,* 258 U. S. 495 (1922).

The extent of this jurisdiction may be noted both in the object controllable and in the point of incidence of such control. In *United States v. Butler,* 297 U. S. 1 (1936), the Court held the Agricultural Adjustment Act of 1933, 48 Stat. 31, 7 U. S. C. § 601 (1934), unconstitutional as an attempt under the general welfare clause to regulate and control agricultural production, a subject of state jurisdiction,
by a taxing and spending plan operating directly upon the intra-state activity, namely production itself. In *Mulford v. Smith*, *supra*, the Court sustained the tobacco marketing quota provisions of the Agricultural Adjustment Act of 1938, which under authority of the commerce clause, achieves indirectly the production controls attempted in the earlier Act, operating directly upon an interstate activity, namely, marketing. In the instant case the court upheld the cotton marketing quota provisions of the Act, accomplishing under the commerce clause the same result indirectly, by operating directly upon intra-state sales, which, the court held, were sales in the stream of interstate or foreign commerce.

Both intra-state activities important enough to affect interstate or foreign commerce and interstate activities of little importance come under this federal jurisdiction. In *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197 (1938), the Court, holding within federal jurisdiction under the commerce clause a public utilities company which was not involved in interstate commerce itself but which sold electricity to concerns which did operate in interstate commerce, said at page 221: "It cannot be doubted that these activities, while conducted within the state, are matters of federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the federal protective power. . . . In determining the constitutional bounds of the authority conferred, we have applied the well settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion." And, in *N. L. R. B. v. Fainblatt*, 306 U. S. 601 (1939), the Court, holding subject to the National Labor Relations Act a small clothing factory in New Jersey which sold its products to concerns in New York, said at page 606: "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small."

The preponderance of interstate commerce over intra-state business was stressed in the opinion of the Court in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, *supra*. But in *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453 (1938), federal jurisdiction was likewise upheld although all the fruit came from within the state and of the packed product only 37% passed out of the state.

In *United States v. Butler*, *supra*, purpose to control agricultural production was held to invalidate federal regulation under the general welfare clause. In *Mulford v. Smith*, *supra*, purpose was held irrelevant to the question of validity of direct federal regulation of interstate activity under the commerce clause. In the instant case the purpose to regulate and control interstate and foreign commerce affected thereby was held to validate direct federal regulation and control of intra-state sales. A further basis for federal jurisdiction under the commerce clause, as in the instant case, is not infrequently found in the fact that the effectiveness of regulation of interstate commerce depends upon the inclusion of intra-state activities within this regulation. *Mulford v. Smith*, *supra*; *Minnesota Rate Cases*, 230 U. S. 352 (1913).

That a broad scope of power over interstate commerce was necessary to eliminate the cut-throat competition between the states under the Articles of Confederation is well brought out by Mr. Chief Justice Marshall in *Brown v. Maryland*, 12 Wheat. 419 (1827). That such wide jurisdiction is necessary today is clearly shown on
page 27 of the stipulations of the parties in the instant case: "A poor cotton crop or a poor price for the crop stifles local, interstate, and foreign commerce in the whole cotton-producing area, adversely affecting millions of people, curtailing consumption in almost all kinds of products, including imported foreign made goods, and in a larger and less noticeable sense, directly and adversely affects traffic in, and consumption of, goods throughout the entire United States." Troppy v. La Sara Farmers Gin Co., 28 F. Supp. 830, 833 (S. D. Tex., 1939). It follows that the words of Mr. Chief Justice Hughes, speaking for the majority in N. L. R. B. v. Jones & Laughlin Steel Corp., supra at p. 37, are equally applicable here—"That power [to regulate commerce] is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Second Employers' Liability Cases, 223 U. S. 1, 51 (1912); A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935)."

JOSEPH F. GOETTEN

CONSTITUTIONAL LAW—State's Adoption by Reference of Subsequent Federal Laws and Regulations

In 1935 the Florida legislature passed an act which established a state Citrus Commission charged with the stabilization and protection of the citrus fruit industry and which provided for the inspection and grading of citrus fruit under rules to be established by the Citrus Commission and enforced by the Commissioner of Agriculture. Fla. Comp. Gen. Laws Ann. (Skillman, Supp. 1936) § 3254 (55-78). Section 12 of the Act provided that shippers should have the option of grading their fruit according to state standards established by the commission or according to federal standards as then fixed by the United States Department of Agriculture, "or as such standards may be hereafter modified or changed . . . ." Gen. Laws, supra, § 3254 (67). The grading option was made meaningless by the commission's Rule No. 2, which established as state standards the federal standards in force on September 1, 1936, "as same have been or may hereafter be modified or changed." The petitioners sought, on a number of grounds, an injunction restraining the Commissioner of Agriculture and the Citrus Commission from enforcing against them any of the provisions of the Act and from interfering with the petitioners for failure to observe Rule No. 2. From a decree of the chancellor denying the injunction, certiorari was sought of the Supreme Court of Florida. Held, that certiorari be granted and that injunction issue to restrain enforcement of those portions of § 12 and Rule No. 2 which purported to adopt future regulations of the United States Department of Agriculture, such provisions being, in the case of the statute, an unconstitutional delegation of legislative power to an agency of a foreign jurisdiction, and, in the case of the rule, an unconstitutional delegation of a delegated power. Hutchins v. Mayo, 197 So. 495 (Fla., 1940), rehearing denied Aug. 1, 1940.

The court did not question the right of the legislature to adopt the regulations of the United States Department of Agriculture as they then existed. However, rules thereafter adopted by the Department of Agriculture could not be controlling in intrastate transactions unless subsequently accepted and promulgated by the Citrus Commission. Correlatively, the Citrus Commission could not require future observance, as state regulations, of rules yet to be issued by the federal agency. Con-
ceding that the net result would be precisely the same if the commission should subsequently adopt as its own every new rule made by the Department of Agriculture, nevertheless it is the undelegable duty of the commission to promulgate under its own authority and on its own responsibility all the rules and regulations which the law empowers it to make. Furthermore, the commission, a creature of the legislature, may not do that which the legislature itself has no power to do.

In 1937 the Supreme Court of California had before it a controversy similar to that of the instant case. Section 5 of the Agricultural Products Marketing Act provided, with certain qualifications, that every rule, regulation or order, “heretofore or hereafter” made by the Secretary of Agriculture under authority of the Agricultural Adjustment Act should be applicable to intrastate transactions in the same commodities within California. CAL. GEN. LAWS (Deering, 1937) Act 146, § 5 (Supp. 1935). The court held that this was not an unconstitutional delegation of legislative power to Congress and the Secretary of Agriculture, inasmuch as the Act provided in § 6 (a), that when federal rules where initiated or changed the state director of agriculture should hold hearings to determine whether the innovations tended to carry out the purposes and conform to the standards of the California statute, and, if he should determine that they did so tend, he should issue similar regulations, making such changes as might be appropriate to intrastate circumstances. These qualifications, the court said, made the provision that future federal rules should be applicable to intrastate transactions simply a declaration of legislative policy and not an automatic incorporation by reference of future federal rules. Brock v. Superior Court, 9 Cal. (2d) 291, 71 P. (2d) 209 (1937). There appears to be no inconsistency between this decision and the instant opinion of the Florida court. It would be reasonable to assume that if the Florida statute had contained the qualifications found in the California statute, its attempt to keep state standards in line with federal standards would not have been held unconstitutional.

In the absence of an express constitutional prohibition, (N. J. Const. Art. 4 § 7; La. Const. of 1918, Art. 33) the right of a state legislature to adopt existing foreign statutes and regulations by mere reference seems never to have been questioned. “It is, of course, perfectly valid to adopt existing statutes, rules, or regulations of Congress or another state by reference.” Brock v. Superior Court, supra; cf. Note, (1934) 34 COLUM. L. REV. 1077, 1083; Scottish Union & National Ins. Co. v. Phoenix Title & Trust Co., 28 Ariz. 22, 235 Pac. 137 (1925); State v. Webber, 125 Me. 319, 133 Atl. 738 (1926); Santee Mills v. Query, 122 S. C. 158, 115 S. E. 202 (1922). The Maine Supreme Court has shown equal confidence that adoption by reference of future enactments of a foreign jurisdiction is universally held to be invalid. “The authorities are so unanimous on this question that extended citation is unnecessary.” State v. Vino Medical Co., 121 Me. 438, 443, 117 Atl. 588, 590 (1921), citing Cooley, CONSTITUTIONAL LIMITATIONS (6th Ed. 1890) 137; In re Opinion of the Justices, 239 Mass. 606, 133 N. E. 453 (1921); Brodbine v. Revere, 182 Mass. 598, 66 N. E. 607 (1903). Cf. Wylie v. Phoenix Assurance Co., 42 Ariz. 133, 22 Pac. (2d) 845 (1933); Brock v. Superior Court, supra; Ex parte Burke, 190 Cal. 326, 212 Pac. 193 (1923); State v. Webber, supra; State v. Gauthier, 121 Me. 522, 118 Atl. 380 (1922).

The Florida opinion under review does not indicate that at the time the petition was filed there had been any change in the federal grading rules which the Citrus Commission had sought to enforce against the petitioners under the automatic adop-
tion provisions of the statute and Rule No. 2. Other courts have made much of this point. In *Ex parte Burke*, *supra*, it was said that the only effect of a provision in the California prohibition law that future changes by Congress in the Volstead Act should be automatically incorporated in state law was that the provision itself was void, leaving unaffected the validity of the adoption by reference of the terms of the Volstead Act as they stood when the state law was enacted. In *Commonwealth v. Alderman*, 275 Pa. St. 483, 119 Atl. 551 (1923), the court declined to rule, except by way of suppositional *dicta*, on the constitutionality of a similar provision in Pennsylvania’s prohibition law, holding that the appellant could not properly raise this point as Congress had made no change in the Volstead Act between the time the state law was enacted and the date of the indictment.

**DAVID G. WILSON**

**CONSTITUTIONAL LAW—Freedom of Speech—Legality of Picketing**

Petitioner, Byron Thornhill, was convicted of the violation of *ALABAMA CODE ANN.* (Mitchie, 1928) § 3448, which provides that a person who loiters about or pickets the premises or place of business of another shall be deemed guilty of a misdemeanor. The specific acts committed by petitioner in violation of this statute consisted in participating in a picket line at the plant of an employer and in informing an individual reporting for work at such plant that “they were on strike and did not want anybody to go up there to work.” Petitioner, in the commission of these acts, was proven to have acted without anger and without the use of threats or force. *Held, § 3448, supra*, is invalid as an unconstitutional restraint on “freedom of speech and of the press.” *Thornhill v. Alabama*, 60 Sup. Ct. 736 (1940).

The freedom of speech and of the press which are secured by the First Amendment against abridgement by the United States are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgement by a state. *Schneider v. State*, 308 U. S. 147 (1939); *De Jonge v. Oregon*, 299 U. S. 353 (1937); *Grosjean v. American Press Co.*, 297 U. S. 233 (1936); *Stromberg v. California*, 283 U. S. 359 (1931). The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. *Schneider v. State, supra*; *Near v. Minnesota*, 283 U. S. 697 (1931). Freedom of discussion, in fulfilling its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of the nation to cope with the exigencies of the period. Thus, in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Schneider v. State, supra*; *Hague v. C.I.O.*, 307 U. S. 496 (1939). See *Senn v. Tile Layers Union*, 301 U. S. 468, 478 (1937).

Adhering to the principles enunciated in the above cases, the Court in the instant case pointed out that while the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the fruits of industry are subject to modification or qualification in the interests of the society in which they exist, it does not follow that the state in dealing with evils arising from industrial disputes may impair the effective exercise of the right to discuss freely.
industrial relations which are matters of public concern. As stated in DeJonge v. Oregon, supra, at p. 364, state legislative intervention with respect to rights of free speech, free press, and peaceable assembly can find constitutional justification only by dealing with the abuse of the rights; the rights themselves cannot be curtailed. Cf. American Steel Foundries v. Tri-City Council, 257 U. S. 184, 205 (1921). Recognizing this qualification, the Court indicated that the provisions of § 3448, supra, were so sweeping as to comprehend every practicable method whereby the facts of a labor dispute might be publicized in the vicinity of the place of business of an employer and held that the danger of injury to an industrial concern was neither so serious nor so imminent as to justify such a proscription of public discussion.

The decision in the principal case represents an affirmation of previously established principles of law governing state action in respect to fundamental rights of free speech, free press, and peaceable assembly. The effect of this decision should not, however, be underestimated. In view of the increasing number of problems arising today in the field of labor relations, the decision will no doubt serve as an important precedent in future cases involving the rights of employers and employees. This is especially indicated by the decision in the case of Carlson v. California, 60 Sup. Ct. 746 (1940) which was decided on the same day.

In view of the decision in the instant case can it be said that the door is now shut against the validity of other anti-picketing statutes? It would appear not. The Court has indicated that acts of picketing occasioning imminent and aggravated danger to a person’s life or property will properly justify a statute. American Steel Foundries v. Tri-City Council, supra. Care should nevertheless be exercised to draw such a statute narrowly to meet the precise situation giving rise to the danger. It is to be noted that in normal times the courts will scrutinize critically any statute affecting the rights of free speech and free press. However, in times of war, rebellion, and other great national emergencies we may expect a greater inclination toward sustaining the validity of statutes of this nature. Schenck v. United States, 249 U. S. 47 (1919). The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule, and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. Herndon v. Lowry, 301 U. S. 242 (1937).

FRANCIS E. MCKAY

EQUITY—Servitudes on Chattels—Property Interest in Published Records

An orchestra leader collaborated with the RCA Mfg. Co. to make musical recordings. The RCA sold copies of these recordings to the Bruno Corp. with reservations that they were “Not Licensed For Radio Broadcast.” These discs were later purchased by the WBO Broadcasting Corp. and used in disregard of the reservation. The orchestra leader after filing a complaint to enjoin the broadcasts discontinued his action in favor of an ancillary injunction by the RCA which had further asked that they be adjudged to have the sole common law interest. Held, the common law property of an orchestra leader and a corporation manufacturing records of his performances ends with the sale of the records, so that a radio broadcasting corporation cannot be restrained from using them; and neither the restrictions on the records
or envelopes can save the interest because the title to the discs cannot be clogged with a servitude. RCA Mfg. Co., Inc. v. Whiteman et al., 114 F. (2d) 86 (C. C. A. 2d, 1940).

Once again a manufacturer has failed in his attempts to maintain an interest in a manufactured chattel after it has passed to the ultimate consumer. History records that manufacturers have sought the aid of both legal and equitable devices to maintain a servitude on their products. The legal device sought to make the manufacturer a beneficiary of promises made between the subsequent vendors and vendees by accompanying the sales with a contract. Largely because of the practical difficulties which stood in the way of a long series of subcontracts from the manufacturer to the ultimate consumers, the legal device fell into general disuse. As a result manufacturers have turned to courts of equity. By attaching restrictions they attempted to develop a theory of uses for chattels analogous to those which already existed for real property. The equitable servitude is a non-contractual device. It consists in placing a notice on the chattel or its container, specifying the restrictions which are to bind all later owners and thus preventing them from being a purchaser without notice of the restrictions. Cf. Taddy v. Sterious [1904] 1 Ch. 354; Mc-Gruther v. Pitcher [1904] 2 Ch. 306. The judicial dawn shone with favor upon this theory, but an examination of the later decisions shows a general repudiation. Werederman v. Societe d'Electricite, 19 Ch. D. 246, 252 (1881); DeMattos v. Gibson, 4 DeG. & J. 276, 282 (Ch. 1858); Tulk v. Moxhay, 2 Ph. 774 (Ch. 1848). Today the theory exists in but a few jurisdictions. Meyer v. Estes, 164 Mass. 457 (1895); New York Ice Co. v. Parker, 21 How. Pr. 302 (N. Y. 1861); Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 658 (1913). Elsewhere it has been effectually killed by the courts. Elijah v. Mottinger, 161 Ia. 371 (1913); Garst v. Hall Co., 179 Mass. 588 (1901); see Notes (1924) 32 A. L. R. 1087, (1922) 19 A. L. R. 925, (1920) 7 A. L. R. 449. The Supreme Court rejected it even where it was applied to statutory monopolies. Straus v. Victor Talking Mach. Co., 243 U. S. 490 (1917); Bauer v. O'Donnell, 229 U. S. 1 (1913); Dr. Miles Med. Co. v. Park, 220 U. S. 373 (1911); Bobbs-Merrill Co. v. Straus, 210 U. S. 339 (1908). The best that can be said of the theory is that it survives merely as a struggling conception. Cf. (1928) 41 HARV. L. REV. 945, 960.

The rights of a manufacturer and an orchestra leader present different problems. So far as the rights of the former are concerned the only theories upon which he could seek a remedy are contractual or equitable. There having been no subcontract to the broadcasting corporation and the Supreme Court having rejected the doctrine of equitable servitudes, the manufacturer was clearly without any basis of recovery. The rights of the orchestra leader, however, are governed by the prevailing rules of literary and artistic property. Where the right has not been replaced by statute it still exists under the common law rules. It consists in a monopoly of the right to reproduce artistic works. Turner v. Robinson, 10 Ir. Ch. R. 121 (1860); Prince Albert v. Strange, 1 Mac. & G. 25 (Ch. 1849). This right is not a perpetual one and ceases upon a publication of the work. Ferris v. Frohman, 223 U. S. 424 (1912); Nutt v. National Institute, 31 F. (2d) 236 (C. C. A. 2d, 1929); McCarthy & Fischer v. White, 259 Fed. 364 (C. C. S. D. N. Y., 1919). Mere performance over the radio, or before the public is not such a publication as would terminate the common law property right. Cf. Waring v. Dunlea, 26 F. Supp. 338 (E. D. N. C., 1939). The same acts which amount to a publication of works copyrightable under the Copyright Act, 37 STAT. 488 (1912), 17 U. S. C. § 5 (1934), amount to a publication of

Three years ago for the first time the courts were confronted with the problem of property rights in phonograph recordings. Eager in its desire to sustain the orchestra leader’s interest, the Pennsylvania Court upheld the restrictions on the discs and coupled the doctrines of equitable servitudes and unfair competition to effectuate a remedy. *Waring v. WDAS Broadcasting Station*, 327 Pa. St. Rep. 433, 194 Atl. 631 (1937). But even then the whole court could not agree upon which judicial hook they should hang their good conscience. Justice Maxey, in his concurring opinion based his decision on the right to privacy and pointed out that the majority of the court had considerably stretched the accepted definition of unfair competition.

The court, in the instant case, paying the usual judicial respect to the “great court” of Pennsylvania, considered it “idle to invoke the deus ex machina of ‘progress’, which is probably spurious” as an excuse for stretching the established doctrines. The decision was based upon two grounds. First, the orchestra leader by recording his performances and permitting them to be sold to the general public made a publication which ended his property rights. Second, even if the property right survived the sale, the playing of records is not a violation of the orchestra leader’s common law copyright.

In their present circumstance orchestra leaders are helpless to prevent radio corporations from playing their recordings—equitable restrictions are unavailable. In some instances this may work a benefit; in others it may result in substantial harm. For the latter the use of sub-contracts is a possible remedy. Notwithstanding the practical difficulties, the courts of this country have been favorable to the use of sub-contracts “allowing consideration to move otherwise than from the promisee.” 1 *Williston Contracts* (1920) § 114,354; cf. *Dunlop Pneumatic Tyre Co. v. Seffridge* [1915] 2 Ch. 275.

[The interested reader is referred to an article to appear in the January issue of this Journal concerning the current dispute between ASCAP and the major radio chains—Ed.].

MILTON A. NIXON

FEDERAL PROCEDURE—Scope of Deposition Under the Federal Rules of Civil Procedure

In suit to recover damages for the alleged negligent death of a pedestrian caused by defendant, plaintiff secured an order of court directing one Trapnell, insurance adjuster for defendant’s insurer, to prepare for examination by plaintiff, and to bring with him the names and addresses of all persons, known by him to have been near the scene of the accident, as well as any and all statements of such persons or accurate notes thereof, as may have been taken by him or by persons under his direction and control, touching the issue in the cause. Defendant filed a motion to vacate the order and to quash the subpoena *duces tecum*, contending that the witness (Trapnell) had no personal knowledge of the facts, but merely investigated the circumstances of the accident after it had occurred, and that the names and addresses of witnesses to the accident were otherwise available to plaintiff. Plaintiff relied on Rule 26 (b) of the Federal Rules of Civil Procedure, providing that “... the de-
ponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action... including the identity and location of persons having knowledge of relevant facts,” but in argument counsel treated the motion as one largely under Rule 30 (b), providing that “... the court... may make an order... that the scope of the examination shall be limited to certain matters....” Held, the scope of the examination should be limited to the identity and location of persons having knowledge of relevant facts, and that the witness should not be required to make available to plaintiff the statements, written or oral, of the persons whom he had interviewed and who might be called as witnesses at the trial, such statements being, as to him, merely hearsay, and therefore not admissible in evidence. 


Prior to the adoption of the Federal Rules of Civil Procedure, it seems to have been the established rule in the federal, English and in most state courts that an adverse party could not be compelled to disclose the names of his witnesses. Keith v. Endicott-Johnson Corp., 75 F. (2d) 249 (C. C. A. 2d, 1935); Stanley Co. v. American Tel. & Tel. Co., 5 F. Supp. 380 (D. Del. 1933); Watkins v. Cope, 84 N. J. L. 143, 86 Atl. 545 (Sup. Ct. 1913); Knapp v. Harvey [1911] 2 K. B. 725. The rule was based on the fear of tampering with witnesses and of the subornation of perjury, and on the belief that information as to the names of witnesses was not relevant. Knapp v. Harvey, supra. But now, under Rule 26 (b) of the Federal Rules of Civil Procedure, the doctrine has almost universally been accepted that the court has discretionary power to require that the names of witnesses be disclosed in reply to interrogatories. Kingsway Press v. Farrell Pub. Corp., 30 F. Supp. 775 (S. D. N. Y. 1939); F. & M. Skirt Co. v. Wimphheimer & Bro., 25 F. Supp. 898 (D. Mass. 1939); Stankiewicy v. Pillsbury Flour Mill Co., 26 F. Supp. 1003 (S. D. N. Y. 1939); Unlandherm v. Park Contracting Corp., 26 F. Supp. 743 (S. D. N. Y. 1938). Contra, but distinctly in the minority: Poppino v. Jones Store Co., 3 Fed. Rules Ser. 26b. 22, Case No. 1 (W. D. Mo. 1940). It is said that this is also true where the interrogatory is taken under Rule 33 (dealing with corporations, partnerships and associations) since the scope of examination is the same. Comm. Fed. Rules Ser. 26b. 22-1. It is not of course, the primary purpose of this part of Rule 26 (b) to enable parties to discover the names of their opponent’s witnesses, but rather to give all the parties equal access to evidence upon which the merits of the controversy can be adequately determined. Persons having knowledge of relevant facts are not necessarily the witnesses of any particular party. Sunderland, Discovery Before Trial Under the New Federal Rules (1939) 15 Tenn. L. Rev. 737, 745. And the same reason should be applicable where the person whose identity is sought is capable of testimony unfavorable to the interrogated party.

While the other point raised on the motion, namely whether the witness should be required to produce the statements of persons whom he had interviewed and who might be called as witnesses, was treated as one falling largely under Rule 30 (b) allowing the court in its discretion to limit the scope of the examination, other cases have considered it as one under Rule 26 (b) permitting examination of any matter, not privileged, relevant to the subject matter. However this may be, it should be safe to say that the one is meant to be supplemented by the other, Rule 26 (b) stating the general conditions under which the examination may be had, and Rule 30 (b) allowing the court in its discretion to limit the operation of that rule whenever it feels that under the circumstances such action is necessary.
That it is the purpose of Rules 26 through 37 of the Federal Rules of Civil Procedure to allow litigants great freedom of action in order to obtain the best possible evidence is too well-settled to admit of discussion. The majority of the courts have, however, seen fit to place certain limitations on this use, requiring among other things, that the questions put to the deponent be such as elicit answers admissible in evidence. *Gitto v. "Italia" Societa Anonima Di Navigazione*, 31 F. Supp. 567 (E. D. N. Y. 1940); *Schweirweurt v. Ins. Co. of North America*, 3 Fed. Rules Ser. 26b. 211, Case No. 2 (S. D. N. Y. 1940); *McCarthy v. Palmer*, 29 F. Supp. 585 (E. D. N. Y. 1939); *Rose Silk Mills Inc. v. Ins. Co. of North America*, 29 F. Supp. 504 (S. D. N. Y. 1939); *Price v. Levett*, 29 F. Supp. 164 (E. D. N. Y. 1939); *Bough v. Lee*, 28 F. Supp. 673 (S. D. N. Y. 1939). Another line of cases has reached the opposite conclusion, holding that the scope of examination before trial is not restricted to the precise issues or to adduce testimony which is admissible in evidence, but extends to all matters, not privileged, relevant to the subject matter in the pending action. These cases allow the use of Rule 26 (b) for the broad discovery of information which may be useful in preparation for trial. *Lewis v. United Air Lines Transport Corp.*, 27 F. Supp. 946 (D. Conn. 1940); *Pirnie v. Andrews*, 30 F. Supp. 157 (S. D. N. Y. 1939); *Union Central Life Ins. Co. v. Burger*, 27 F. Supp. 554 (S. D. N. Y. 1939). The Court in the *Lewis Case* thought that such matters should not be determined before the taking of the deposition, but might be ruled upon during the taking of the deposition or at trial. The reason given in these latter cases for allowing the examination, that such information may be useful in preparation for trial, has been the chief basis in at least one case for the court's refusal to permit the examination. *McCarthy v. Palmer*, supra. There the Court said, "To allow a party to inquire into investigations made by the adverse party would be to penalize the diligent and put a premium on laziness." The rule of the majority has not, however, been extended to include written statements obtained by officers of defendant's liability insurance carrier from plaintiff and his passengers at the time of the accident; nor does it extend to reports of physicians concerning the injuries sustained by the parties. *Price v. Levett*, supra. And such statements are not privileged and may not be made so by turning them over to defendant's attorney.

When one comes to consider the avowed purpose of the Federal Rules of Civil Procedure, *viz.*, that of securing to all litigants the greatest proportion of their rights in the shortest possible order, it is not difficult to see that the rule of the majority on both points in the principal case is the better one. A refusal to allow discovery of names of possible witnesses of one party amounts in substance to a refusal to allow the other party to present his case in the best possible light. Surely justice is not best served by permitting a party to cast the cloak of secrecy around the identity of persons who might otherwise strengthen the case of his adversary. The other rule supported by the majority requiring the examination to be restricted to matters admissible in evidence is certainly the more reasonable and the better suited to modern practice. So long as argument is to be permitted on the motion, is it not better to clear away as many disputed points as possible? In doing so, either the time of the parties necessarily present at the deposition is saved, since the number of exceptions taken is lessened and the record there is not filled with inadmissible material; or the time of the court, and incidentally that of the jury, is not consumed while the inadmissible material is stricken from the bulky record taken at the deposition. Moreover, the rule advocated by the minority allows one party to
sit idly by while the other prepares his case, and then to call on that party for his material after the labor is completed. It is submitted that if for no other reason, such a rule should not be enforced.

JOHN R. HIGGINS

FEDERAL RULES OF CIVIL PROCEDURE—Dismissal: Rule 41 (a) (2)

In an action which had been removed from a state to a federal court, the plaintiff moved for a dismissal without prejudice after an answer had been filed by the defendant. The motion was opposed by the defendant unless the plaintiff should be required as a condition to the dismissal to reimburse the defendant in the amount of expense to which it had been put. Held, motion sustained only if the defendant be compensated. Rule 41 (a) (2) providing for voluntary dismissal by order of the court without prejudice under such terms and conditions as the court deems proper, contemplates the only terms and conditions practicable, namely that the plaintiff should compensate the defendant for the expense to which it has been subjected. McCann v. Bentley Stores Corp., 34 F. Supp. 234 (W. D. Mo. 1940).

Prior to the promulgation of the Federal Rules of Civil Procedure, a plaintiff in a federal district court had the same right to take a nonsuit as was given to him by the law of the state in which the court was sitting. Barrett v. Virginian Ry., 250 U. S. 473 (1919). In general, the time during which a dismissal can be taken depends upon the status of the case, controlled by the statutes and practice of each particular jurisdiction, some courts holding that the right exists at any time before the submission of the case to the court or jury, while in other jurisdictions it is the rule that the right may be exercised at any time before verdict has been rendered or the finding of the court has been announced. Huffstutler v. Louisville Packing Co., 154 Ala. 291, 45 So. 418 (1908); Cooney, Eckstein & Co. v. Sweat, 133 Ga. 511, 66 S. E. 257 (1909).

Rule 41 (a) was promulgated to allay the abuses incident to the indiscriminate use of the nonsuit. Section (a) with the exception of subsection (a) (1), relating to dismissal by the plaintiff without order of the court, provides an elastic and equitable method of disposition of the problem by the trial court. The principles affecting the judge's consideration in such cases are well stated in Lawson v. Moore, 29 F. Supp. 175 (W. D. Va. 1939). There the judge said at p. 176: "The court on a motion such as this should weigh the equities and should make that decision which to the court seems fairest under all of the circumstances."

As a general rule the court will not permit a plaintiff to dismiss without prejudice over the objection of the defendant except under special circumstances. Forstner Chain Corp. v. Gemex Co., 2 Fed. Rules Serv. (1940) 426, 61 Dept. Justice Bull. 7 (D. N. J. 1940). Where the defendant has undergone considerable expense and inconvenience preparing for trial and the case has been pending for some length of time, it seems to be the disposition of the court not to grant a nonsuit. Cincinnati Traction Bldg. Co. v. Pullman Standard Car Mfg. Co., 25 F. Supp. 322 (D. Del. 1938); Chandler Bldg. Corp. v. Shannon, 1 Fed. Rules Serv. (1939) 511 (D. D. C. 1939). A dismissal will not be allowed without prejudice on plaintiff's request after judgment for the defendant, Western Union Tel. Co. v. Dismang, 106 F. (2d) 362 (C. C. A. 10th, 1939), nor after a motion for a directed verdict has been argued and

Two cases are illustrative of the flexible manner in which the rule is being administered. In *Baker v. Sisk*, 1 Fed. Rules Serv. (1939) 511 (D. Okla 1938), the plaintiff's motion to dismiss without prejudice, filed after service of answer disclosing that the suit had been barred by the statute of limitations, was denied because of the frank admission of the plaintiff that it intended to refile the same case in a state court for less than the amount required to invoke federal jurisdiction, in the hope of getting a more favorable ruling on the question of limitations. On the other hand, in *Lawson v. Moore*, supra, the defendant's objection to a dismissal by the plaintiff except upon condition of further litigation being had in a federal court, was refused by the judge where it appeared that the plaintiff's claim for damages in the state court would be smaller by reason of the necessity of filing for less than the federal jurisdictional amount in order to avoid removal, and the trial would be had sooner due to the convening of the state court before the next term of federal court.

Paragraph 41 (a) (1), which is the complement of the section under discussion, provides for dismissal without prejudice and without resort to an order of the court, upon notice being filed before the answer of the opposing party, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state, an action based upon or including the same claim. In an interesting recent decision, *Rader v. Baltimore & Ohio R. R.*, 108 F. (2d) 980 (C. C. A. 7th, 1940), cert. denied 60 S. Ct. 722 (1940), it was decided that this means that where an action is first filed in a federal court, dismissed, and then brought and dismissed in a state court, a third chance may thereafter be had in a federal court; but however, if the sequence is begun in a state court, a second dismissal in a federal court applies a closure to the case. It is to be questioned whether a dismissal under section (a) (2) of the rule could be used as the foundation for the application of the rule in section (a) (1). A good guess would be that it could not, because section (a) (1) presumably relates only to dismissals without order of court; however, a case presenting strong equities toward an opposite construction could very conceivably move a court to hold the other way.

In the instant case the allowance of expenses to the defendant is quite novel. Traditionally, in America, taxable costs are, with rare exceptions, the only expenses recoverable in present litigation. In this case the defendant was permitted to recover full expenses including attorney's fees. Several other cases have been decided upon section (a) (2) of Rule 41 and section (d), which gives the court authority to make such order for the payment of costs as it may deem proper in an action which has been previously dismissed, before the new proceeding will be allowed to commence. None has ordered the payment of full compensation to the defendant, taxable costs only being allowed. This appears to be a salutary interpretation of the clause authorizing the court to order a dismissal under such terms and conditions as it deems proper, and may perhaps be regarded as symptomatic of a general trend toward the time when adequate costs will be allowed in litigation.

WILLIAM E. JENKINSON, JR.
MUNICIPAL CORPORATIONS—Power of city to change or vacate streets

Plaintiff seeks an injunction requiring city to remove obstructive curbings creating a cul-de-sac on the street on which his property abuts on the grounds that by statute a street could not be vacated unless the city passed an ordinance to this effect and also that he has a right to have the street kept open to the general public. Held, such action was not a vacation of a city street, that an abutting owner has no vested rights in the flow of traffic past his property and if his property is damaged by regulation of traffic his only recourse is an action at law. Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 29 N. E. (2d) 292 (Ill. 1940).

It is universally held that the sovereign power to create highways or streets also comprehends the power to change their course, and this power is in the legislature of the state and may be delegated to the individual cities as the legislature may see fit. City of Huntsville v. Gross, 223 Ala. 205, 135 So. 462 (1931); City of Pine Bluffs v. Arkansas Traveler Bus Co., 171 Ark. 727, 285 S. W. 375 (1926); Junction Water Co. v. Riddle, 108 N. J. Eq. 523, 155 Atl. 887 (1931). Generally the power of the city to change the streets, or to regulate the flow of traffic upon any given street is held to be under the police power of the city. If, in the opinion of the body charged with the public safety, it is advisable that certain streets be closed to traffic, it is well within their power to so regulate. Unless there is an apparent abuse of this power, the courts will not consider a suit for an injunction against such a body, on the theory that such regulations being for the good of the whole, must take precedence over the rights of the individual. Canady v. Coeur D'Alene Lumber Co., 21 Idaho 77, 120 Pac. 830 (1911); State v. Kansas State Highway Commission, 133 Kan. 357, 299 Pac. 955 (1931).

In many states such power of a municipality to change the course of highways or “main” streets is held to be ministerial. Therefore no enabling legislation of any kind is necessary, unless some very major change is being contemplated. Huffman v. State Roads Commission of Maryland, 152 Md. 566, 137 Atl. 358 (1927). In all cases the relation between the rights of the abutting owner and the rights of the general public are to be considered. If the abutting owner suffers the same kind of an injury as does the general public, he will have no action against the city. He must show a special injury of a different nature; a difference in degree is not sufficient. King v. Stark County, 66 N. D. 467, 266 N. W. 654 (1936); Jones Beach Boulevard Estate Inc. v. Moses, 268 N. Y. 362, 197 N. E. 313 (1935). On this particular point it has been held that an inconvenience of access, depreciation of land values, and a diversion of travel do not constitute special injury. Ragan v. Susquehanna Power Co., 125 Md. 78, 93 Atl. 425 (1915); Hartwell Iron Works v. Missouri-Kansas-Texas Ry. of Texas, 56 S. W. (2d) 922 (Tex. 1932). While the landowner has the uncontested right of egress and ingress to his property, when this right is in conflict with the safety of the highways, the courts will not guarantee him this right at any specific point. Jones v. Moses, King v. Stark County, supra. The court will usually strain its conscience to the utmost in declaring any exercise of the police power reasonable. However, this trend in regard to streets and highways is most predominant in the more commercialized areas. In the less congested states the property owner is more favorably treated. In Hiatt v. City of Greensboro, 201 N. C. 515, 160 S. E. 748 (1931) and Lowell v. Pendelton Auto Co., 123 Ore. 343, 261 P. 415 (1927) the courts held that an abutting owner does have a right to have the street kept open, not only for his own personal use, but also for the purpose of his business. If there
is any infringement upon this right, either by the municipality or by a private in-
dividual, he may restrain this infringement by an equitable injunction.

In the instant case, the plaintiff, following this later theory, contended that the
damage which would result to his gas station which was situated on the corner of the
street which had been cut off to traffic was of such a material nature that the injury
he would suffer was of a different kind than that suffered by the public. Here the
court, applying the modern concept, held that he had no inalienable right to have the
street remain open, and that such an abutting owner does not have a vested interest
in the flow of traffic past his property. Thus, if it serves the public safety best that
a main thoroughfare should be changed, any loss to abutting property owners may
only be compensated in an action at law for damages. And this remedy is of doubtful
efficacy since some courts will refuse to permit damages on the ground that the
public necessity admits of no such compensation. *City of Neenah v. Krueger,* 206
Wis. 473, 240 N. W. 402 (1931); *Mayor of Baltimore v. Bregenzer,* 125 Md. 78, 93
The right of compensation in some jurisdictions depends upon whether the courts
consider the change a "taking," a discretionary test at best, but deserving of some
merit. *Gibbons v. Paducah & Ill. R.R.,* 284 Ill. 559, 120 N. E. 500 (1918);
*Brown v. Florida Chautauqua Ass'n,* 59 Fla. 447, 52 So. 802 (1910).

Two recent Maryland cases directly on point hold that the abutting landowner has
absolutely no vested right in a public way that may be superimposed upon the public
right to safety. If the changing of the street is necessary from the point of view of
facilitating traffic movement and eliminating dangers of the road, the rights of the
landowner to the easement and his business interests in keeping the way open,
must give place to the superior right of the public. *Krebs v. State Roads Comm.,* 160 Md.
584, 154 Atl. 132 (1931); *Brehem v. State Roads Comm.,* 176 Md. 411, 5 A. (2d) 820
(1939).

Thus the modern trend, in cases wherein the property owner has endeavored to
establish his fundamental rights over those of the public, is all in favor of the public.
The basic test which the courts apply is the test of reasonableness of the police
power as exercised. However, due no doubt to the tremendous problem which con-
fronts the municipalities in controlling traffic movement, the courts seem ever more
willing to tip the scales in favor of the municipalities.

**QUENTIN O. YOUNG**

**TORTS—Proximate Cause—Mere Lapse of Time May be Sufficient to Break Causation**

Under the view of the plaintiff's evidence most favorable to him, it would appear
that the plaintiff, in crossing the eastbound track of defendant's railroad, was struck
by a train and thrown unconscious onto the adjacent westbound tracks. He lay
there unconscious for about twelve minutes before being run over by a westbound
train. In an action for damages for the second accident, the trial court instructed
the jury that if the plaintiff was guilty of contributory negligence with respect to
his colliding with the first train this contributory negligence "would extend right
through and prevent a recovery." The effect of the charge was that if the plain-
tiff was guilty of such contributory negligence it would as a matter of law bar
his recovery for the injuries suffered when he was run over by the second train. When the jury returned a verdict for the defendant, the trial court set this verdict aside on the ground that it had erroneously instructed the jury, stating that even though the jury found that the negligence of the plaintiff was a contributing cause of the first accident, whether that negligence was such as would bar his recovery for his injuries suffered when he was run over by the second train was a question of fact for the jury's determination. Defendant appeals, asserting that the original ruling was correct.


It would appear that at first the trial judge believed that all reasonable men properly instructed on the law would be required to come to one conclusion, namely, that the contributory negligence of the plaintiff was a proximate cause of the second injury; and thereafter he came to believe that reasonable men might differ on this point and that it was therefore a question of fact to be decided by the jury. The trial court conceded that, had the plaintiff after being hit by the eastbound train been thrown in front of another train passing at the time, his contributory negligence in walking into the first train would bar his recovery because of the simultaneousness of the events which occurred. It concluded, however, that the lapse of time was the determining factor, dividing the facts into two separate transactions, each distinct from the other, and that the first ended when the prostrate body landed on the westbound tracks.

This conclusion was adopted by the Supreme Court of Errors of Connecticut and is believed to be erroneous as applied to the facts of this case. In this connection it is to be noted that both the trial and appellate courts rejected the plaintiff's claim that the doctrine of the last clear chance was applicable stating that there was no evidence of any supervening negligence. In the case of McKeon v. Steinway Co., 20 App. Div. 601, 47 N. Y. S. 374 (2d Dep't. 1897) relied on by the court as showing that prior contributory negligence might be treated as a condition (part of "set stage") of the second injury, rather than its cause, the issue of proximate cause was referred to the jury because there was evidence "tending to prove that by the exercise of ordinary care on the part of the defendant's servant, having the motive of power of the car, the accident, such as it was at that place, might have been obviated." Supra at 376. The court further states that the consideration by the jury of the question of fact arising upon the evidence relating to the occurrence last referred to should not have been made dependent upon the fact that the plaintiff's negligence did not contribute to the previous collision. But a later case from the same jurisdiction holds that it is impossible to separate that part of a transaction which took place after the first contact of a car with a vehicle from what took place before, Rider v. Syracuse Rapid Transit Ry., 171 N. Y. 139, 63 N. E. 836 (1902). Quoting from the Rider case, supra at 838, "It was all one transaction, and to attempt to divide it into fragments, and impute one part of it to the negligence of both parties and another part to the defendant's negligence alone would, as it seems to us, entirely subvert the law of contributory negligence as applied to accidents of this character."

The second case relied upon by the court, Sherman v. Millard, 144 Misc. 748, 259 N. Y. S. 415 (4th Dep't. 1932) was modified in Sherman v. Leicht, 238 App. Div. 271, 264 N. Y. S. 492 (4th Dep't. 1933) the latter case holding that in view
of the evidence a passenger injured in collision between automobiles, who sustains further injury in a second collision after drivers of automobiles involved in first collision took her under headlights of automobile for examination, was not entitled to recover against drivers of first two automobiles under doctrine of last clear chance.

There is no satisfactory authority cited by the court in support of its position. In the absence of evidence of negligence on the part of the defendant in causing the second accident, it is difficult to understand how the jury could do anything but speculate on the question of proximate causation. The risk of being thrown upon adjacent tracks in the path of a train is certainly one of those risks to which a person negligently crossing one set of tracks subjects himself. Cf. Beale, *The Proximate Consequences of An Act* (1920) 33 Harv. L. Rev. 633. "If the defendant's active force has come to rest, but in a dangerous position, creating a new or increasing an existing risk of loss, and the foreseen danger comes to pass, operating harmfully on the condition created by defendant and causing the risked loss, we say that the injury thereby created is a proximate consequence of the defendant's act." *Supra* at 650.

Any suggestion that a person ceases to be contributorily negligent upon losing consciousness must be rejected. The true rule is that if a person loses consciousness without fault and not as a result of his own voluntary conduct, he will not be held liable for contributory negligence, as in the case of *Chicago G. W. Ry. v. Robinson*, 101 F. (2d) 994 (C. C. A. 8th, 1939), *cert. denied*, 307 U. S. 640 (1939); *King v. Conn. Co.*, 110 Conn. 615, 149 A. 219 (1930), but that he will be chargeable if his own indulgence in drugs or intoxicating liquors or his own exclusive or contributory negligence is the cause of his incapacity. *Carlson v. Conn. Co.*, 95 Conn. 724, 112 Atl. 646 (1921); *Olstad v. Fashse*, 204 Minn. 118, 282 N., W. 649 (1938); *Carpenter v. Kurn*, 136 S. W. (2d) 997 (Mo. 1940); *Goff v. St. Louis Transit Co.*, 199 Mo. 694, 98 S. W. 49 (1906); *McMichael v. Pennsylvania R.R.*, 331 Pa. 584, 1 A. (2d) 242 (1938).

If there had been evidence tending to prove that the railroad company had been negligent in discovering the plaintiff unconscious on its tracks or that its second crew had been negligent in managing the train with respect to his presence on the track, there would be no doubt as to the propriety of the court's charge, since a doubt to the directness of the causality might thereby be introduced. But mere lapse of time standing by itself is not believed sufficient to break the chain of causation. *Mahoney v. Beatman*, 110 Conn. 184, 147 Atl. 762 (1929). *Smith, Legal Cause in Actions of Tort* (1911) 25 Harv. L. Rev. 103, 108.

JOHN RICHARD WALL

TORTS—Liability of Teacher for Tort of Pupil

Suit against a teacher for injuries suffered at the hands of a fellow pupil. A member of a class of defective and incorrigible youths in a public school was struck by a milk bottle thrown by another during the teacher's absence. The complaint alleges that the teacher was negligent in: 1) leaving the schoolroom without putting someone in charge, knowing the vicious character of the assaulting pupil and his previous attacks upon the plaintiff; 2) furnishing and permitting pupils to possess
milk bottles; 3) failing to restrain the assaulting pupil for his attacks upon the plaintiff, and other allegations of failure to protect the plaintiff. The defendant demurred to the complaint. Held, the complaint does not state sufficient facts to show that defendant’s negligence was the proximate cause of the plaintiff’s injury. 


It is well established that one in a supervisory capacity is liable to third parties for a negligent failure to restrain those in his charge after he has been put on notice of the dangerous propensity of those charges. A passerby, hit by timber thrown from a passing train, recovered from the railroad for its failure to take steps to prevent such conduct after it had notice of it. Fletcher v. Baltimore & Potomac Ry., 168 U. S. 135 (1897). A factory owner was held liable for failure to restrain his employees from throwing articles out of the window at persons in the street below. Hogle v. Franklin Mfg. Co., 199 N. Y. 388, 92 N. E. 794 (1910). This same type of liability arises in the case of parent and child. Ryley v. Lafferty, 45 F. (2d) 641 (1930); Norton v. Payne, 154 Wash. 241, 281 Pac. 991 (1929). Since the relation of teacher to pupil is at least in a limited sense, that of one in loco parentis (Gaincott v. Davis, 281 Mich. 515, 68 P. (2d) 576 (1937)) it is appropriate to consider the duties and liabilities of a teacher in the light of this relationship.

The parent is not liable merely by reason of the parental relationship for the torts of the child. McCarthy v. Heiselman, 140 App. Div. 240, 125 N. Y. S. 13 (2nd Dep’t 1910). Nor is it enough to make a parent liable that he knew his child was heedless or vicious. It must be shown that the parent knew of the vicious inclinations of the child and failed to take proper steps to restrain him or encouraged the child in these habits. Steinberg v. Cauchois, 249 App. Div. 518, 293 N. Y. S. 147 (2nd Dep’t 1937). A teacher is charged with the same liabilities while the pupil is under his control. “... A teacher owes it to his charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances.” Hoose v. Drumm, 281 N. Y. 54, 22 N. E. (2d) 233 (1939).

The instant case finds some support in Thompson v. Board of Education of the City of New York, 280 N. Y. 92, 19 N. E. 796 (1939). There a pupil sued for injuries sustained when pushed from an exterior stairway during class dismissal. In reversing a verdict against the school principal the court held that upon the evidence presented it could be said as a matter of law that the principal was not negligent. The distinction between the two cases lies in the fact that in the Thompson case the decision was based on the evidence presented while in the instant case the court ruled that the complaint did not state a cause of action.

In the instant case the plaintiff stipulated five grounds of negligence on the part of the defendant. The court in its opinion bases the decision on only one, viz., the defendant’s absence. While the court is correct in its statement that, “Proximate cause is as much an issue in a tort case as any other issue,” yet the question of proximate cause must be considered in the light of all the attending circumstances. It is only where the facts are undisputed and give rise to but one inference that it is a question of law. In the instant case the court ignored the major part of the plaintiff’s complaint and seized upon one allegation to support its conclusion. It reduced the issue to the question whether the injury was due to the teacher’s absence. This distillation of the plaintiff’s case robbed it of most of its strength. If the court had considered the teacher’s absence in view of the attending circumstances it would have reached a different conclusion. The plaintiff’s third allegation was
negligence in furnishing and permitting pupils to possess milk bottles. "A parent is liable where he is negligent in intrusting to the child an instrumentality which, though not necessarily a dangerous thing in itself, is likely to be put to a dangerous use because of the known propensities of the child." HARPER, LAW OF TORTS (1933) § 283. The case for proximate cause is certainly stronger where the absence occurs under these circumstances. This coupled with the allegation of failure to restrain the assaulting pupil seems to establish a prima facie case. Hoos e v. Drumm, supra, was a suit for injuries suffered by a pupil when struck by a goldenrod stalk thrown by another pupil. In holding the trustees of the school not liable the court said, "The danger lay in the probability that the pupils would play as they did. The effective cause of the plaintiff's injuries was a failure to protect the boys against themselves. Any dereliction in this aspect was the fault of the teachers..."

It seems that when the plaintiff's case is considered in the light of a teacher's duties and the circumstances of the particular case, the questions of negligence and proximate cause were questions for the jury.

DAVID A. WILSON, JR.

TRUSTS—Validity of Long-Term Accumulations in the District of Columbia

Testator left the residue of his estate to trustees to invest and reinvest for twenty-one years after the death of A and B, two of his nieces then living, and to make payments out of the net income of yearly annuities to his sister, brother, two nephews and three nieces including A and B. The rest of the income was to be reinvested by the trustees for the benefit of the trust fund. Upon the expiration of twenty-one years following the death of the survivor of the two named nieces the trust was to terminate and the principal was to be paid to the lawful issue per stirpes of the two nieces named. Plaintiffs, as the substituted and successor trustees under the will, file this suit for a construction of said will. Held, the provision in respect of accumulation is invalid and cannot be sustained. Burdick v. Burdick, 33 F. Supp. 921 (D. D. of C. 1940).

The early common law of England held there was no rule against accumulation except the rule against too remote vesting of future interests. The settlor must provide for the vesting of the accumulations in interest not later than at the end of designated lives in being and twenty-one years thereafter. Harrison v. Harrison, 4 Ves. 338 (Ch. 1786); Thellusson v. Woodford, 11 Ves. Jun. 112, 32 Eng. Re. 1030 (H. L. 1805). But today the case would not be brought in an English court because of the Thellusson Act strictly limiting such accumulations. 39 & 40 Geo. 111, c. 98 (1800).

In America only twelve states have statutes limiting the creation of accumulation trusts: Alabama, California, Illinois, Pennsylvania, New York, North Dakota, South Dakota, Montana and Indiana. Arizona, Michigan and Minnesota have such statutes but they have no reference to the accumulation of personal property. Since the Thellusson Act, supra, was adopted after the Revolutionary War it obviously is not a part of the common law in America. In the majority of our common law jurisdictions the rule followed is that if the settlor provides for the accumulation of income and does not at once vest the ownership in definite persons, he must provide for vesting at a future date, and this future date must be not later than lives in being and twenty-one years thereafter. Fitchie v. Brown, 211 U. S. 321 (1908);
Moeller v. Kautz, 112 Conn. 481, 152 Atl. 886 (1931); Armory v. Trustees of Amherst College, 229 Mass. 374, 118 N. E. 933 (1917); Trautz v. Lemp, 329 Mo. 580, 46 S. W. (2d) 135 (1932); In re Helme's Estate, 95 N. J. Eq. 197, 123 Atl. 43 (Prerog. Ct. 1923). In a minority of jurisdictions trusts which might possibly be measured in duration by lives not in being at the commencement of the trust have been upheld. Greenwich Trust Co. v. Shively, 110 Conn. 117, 147 Atl. 367 (1929); Gambrill v. Gambrill, 122 Md. 563, 89 Atl. 1094 (1914); Grey v. Whittemore, 192 Mass. 367, 78 N. E. 422 (1906). The Supreme Court, considering the question of the validity of such a trust as the present one in a common law jurisdiction said, "It is conceded by all that the common law is applicable and that there is no statute in Hawaii governing the subject, except the statute making the common law applicable there; and that the utmost extent of a trust is limited at common law by lives in being at its creation and twenty-one years thereafter; that the lives must be selected by the testator in his will." Fitchie v. Brown, 211 U. S. 321, 329 (1908).

In the District of Columbia the common law in its entirety is to be regarded as in force, except in so far as it has been modified by statute or has been found repugnant to our conditions. Lisner v. Hughes, 49 App. D. C. 40, 258 Fed. 512 (1919); Tyner v. United States, 23 App. D. C. 324 (1904); De Forest v. United States, 11 App. D. C. 458 (1897). The common law of England is not to be taken in all respects to be that of America. America adopted only that part which was suitable and applicable to her situation. Crawford v. United States, 212 U. S. 183 (1909); Van Ness v. Pacard, 2 Pet. 137 (U. S. 1829).

Thus the district court in the instant case departs from the path so generally followed by the majority of courts in our common law jurisdictions when faced with this problem of accumulation trusts. This it justifies by relying on that saving clause often voiced by the courts of the District of Columbia—their refusal to accept any part of the common law that appears to them to be obsolete or repugnant to the form of government in the District of Columbia. This opinion stands out sharply when compared with an earlier opinion of the Court of Appeals for the District of Columbia. "The legacy is a gift and no good reason is apparent why a testator acting within the bounds of public policy may not impose any reasonable limitation upon the enjoyment of the gift which his judgment may dictate," King v. Shelton, 36 App. D. C. 1, 8 (1910), aff'd, 229 U. S. 90 (1913), and even more sharply when compared with a later opinion from the same Court. "Inasmuch as that instrument [the will] speaks when the voice of the testator is stilled by death, its provisions must be the guide of the court in determining the testator's intent. When the language of the will is unambiguous and no positive rule of law is violated, that intent ought to be given effect; and it will be assumed, in the absence of fraud or undue influence, that the disposition actually made by the testator represented his intentions." American Security & Trust Co. v. Blair, 63 App. D. C. 170, 171, 70 F. (2d) 774, 775 (1934).

[It is submitted that this is a most unfortunate example of judicial legislation. Rules of law, particularly those regarding property rights, should be fixed, certain, and free from retroactive changes. If they are to be determined by a judge's conception of changing public policy, no one, however fully advised on the law, can devise property with any assurance. No unprecedented situation was involved here; if Congress had regarded such trusts as being against public policy it could have so declared at any time during the last hundred years.—P. F.]

JAMES C. TOOMEY
BOOK REVIEWS


"Time," wrote Mr. Justice Frankfurter when he was still a mere law professor, "is an almost indispensable condition for weaving the impress of distinction upon the work of the Court." The idea has been given an implementation by Dean Pound who has laid down twenty-five years of judicial service as the very minimum test of judicial greatness. ¹

Unfairly premature, then, would be any attempt to survey the measure of Mr. Justice Frankfurter's mark on the Court when he has been there but a term and a half. Yet the straws released in his opinions at the last half of October Term, 1938, and at October Term, 1939, though comparatively few in number, appear to be sufficient to give us a pretty fair notion of the probable direction of future winds. It may therefore be of interest to compare these with the haystack whence they have been drawn.

For Law and Politics is truly such a stack, representing, as it does, an accumulation of the published thoughts of Mr. Justice Frankfurter extending over almost the whole period of his public life. Moreover it is permissible to employ the views stated therein for purposes of comparison with the author's more recent utterances from the Bench, since their publication at a time just a little after the Justice's ascendancy has been justified as the presentation of a chart of the "social and economic and political thinking of a man who may well sit on the Supreme Court for the next quarter of a century." ²

Of course Mr. Justice Frankfurter's opportunities on the Court have been too limited in point of time to permit of extensive translation of many of the views set forth in Law and Politics. Thus his views on labor, particularly on the use of the injunction in labor disputes, which serve as the subject of five of the essays in Law and Politics, have not

¹LAW AND POLITICS (1939) 115. (Only the page number will be given in referring to this work infra. The title will not be repeated except where deemed necessary.)

²Foreword by Dean Pound to POLLARD, MR. JUSTICE CARDozo—A LIBERAL MIND IN ACTION (1935) 2.

³At p. xi of the singularly distinguished foreword of Mr. Archibald MacLeish who, with Mr. E. F. Prichard, Jr., edited the papers comprising the work. These papers consist of articles written for law reviews and other periodicals, unsigned editorials appearing in the New Republic, transcriptions of addresses, and excerpts from other books. It is not at all a disparagement of what appears in the body of Law and Politics to observe that the best single item in the book is Mr. MacLeish's foreword.

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yet found expression in judicial media. This may seem surprising when one notes that the Justice has participated silently in no less than ten labor decisions of the Court. In nearly thirty cases decided at the terms concluding in June 1939, and June 1940, Mr. Justice Frankfurter was assigned to write for the Court. Some of these ranged over such fields as constitutional law, taxation, administrative law, and federal procedure (jurisdiction); others presented narrower questions involving construction of the Bankruptcy Act, the National Banking Act, and the Organic Act of Puerto Rico. Many were merely run of the mill, but more than a few presented questions of intrinsic importance, and in several instances the case was given a dignity greater, perhaps, than its merits deserved by the quality of the opinion deciding it. Some of the Justice’s dissenting and special concurring opinions seem to have received wider attention than the opinions in which he has written for the Court. Though his dissent in *Texas v. Florida et al.* was quickly marked, the spotlight of public attention was reserved for what he had to say a little later in his concurring opinion in *Graves v. O’Keefe* concerning the “unfortunate remark” of Chief Justice Marshall that “the power to tax involves the power to destroy.” It was here that he gave formal notice of the shape of things to come:

*None of these presented questions concerning the labor injunction, however; all but one involved the National Labor Relations Act, and the one exception, Apex Hosiery Co. v. Leader, 60 Sup. Ct. 982 (1940), involved the Anti-Trust laws. In *Mayo v. Lakeland Highlands Canning Co.*, 60 Sup. Ct. 517, 519 (1940), Mr. Justice Frankfurter managed to work in one short reference to the Norris-La Guardia Act in whose adoption he played so important a part: “The withdrawal of the injunctive process in industrial controversies made by the Norris-La Guardia Act . . . was in no small part due to the belief by Congress that experience had shown that the use of a legal remedy devised for a simple situation might in a totally different environment become a perversion of that remedy.”


306 U. S. 466 (1939).

7These refinements derived authority from an unfortunate remark in the opinion in *McCulloch v. Maryland*. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that ‘the power to tax involves the power to destroy.’ . . . The web of unreality spun from Marshall’s famous dictum was brushed away by one stroke of Mr. Justice Holmes’s pen: ‘The power to tax is not the power to destroy while this court sits’. *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218 . . . .” *Graves v. O’Keefe*, 306 U. S. 466, 489 (1939). Mr. Justice Frankfurter’s antipathy for dicta is reflected also in *Law and Politics*, where he wrote: “. . . in constitutional adjudications dicta are peculiarly pernicious usurpers. To let even accumulated dicta govern is to give the future no hearing.” Compare his concurrence in *Deputy v. Dupont*, 308 U. S. 488, 499 (1940): “. . . I prefer to make the conclusion explicit instead of making the hypothetical, litigation-breeding assumption that this taxpayer’s activities, for which expenses were sought to be deducted, did constitute a ‘trade or business’.”
"I join in the Court's opinion but deem it appropriate to add a few remarks. The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions. But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court."\(^8\)

In view of the shortness of his tenure and the limited opportunities afforded by the cases assigned to him it is mildly remarkable that Mr. Justice Frankfurter has accomplished a transference to the pages of the United States Reports of so much that appears on the pages of Law and Politics. One of the most marked instances of this coincidence is to be found in the Justice's very definite notions of the attitude appropriately to be assumed by the judge called upon to review the validity of state legislation under the Fourteenth Amendment. Of the language of the due process clause appearing in that Amendment he wrote in 1925 that,

"These words mean what the shifting personnel of the United States Supreme Court from time to time makes them mean. The inclination of a single Justice, the tip of his mind—or his fears—determines the opportunity of a much-needed social experiment to survive, or frustrates, at least for a long time, intelligent attempt to deal with a social evil."\(^9\)

This was an echo of an even more forceful statement of a year before:

"We have had fifty years of experiment with the Fourteenth Amendment, and the centralizing authority lodged with the Supreme Court over the domestic affairs of forty-eight widely different states is an authority which it simply cannot discharge with safety either to itself or to the states. The due process clause ought to go."\(^10\)

This last appeared in an editorial in the New Republic at another

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\(^8\)Graves v. O'Keefe, 306 U. S. 466, 487 (1939). Lately all members of the Court have participated in what seems a wider tendency than formerly prevailed in the matter of separate expression of individual views. See, for example, Coleman v. Miller, 307 U. S. 433 (1939), Hague v. C. I. O., 307 U. S. 496 (1939), and McCarroll v. Dixie Greyhound Lines, 60 Sup. Ct. 504 (1940). Compare Newark Fire Ins. Co. v. State Board, 307 U. S. 313 (1939). On the whole Mr. Justice Frankfurter has indulged in dissents and special concurrences less frequently than may be popularly supposed. Thus while others (almost invariably including Mr. Justice McReynolds) have either dissented or indicated a qualified concurrence in approximately thirty per cent of the cases in which Mr. Justice Frankfurter has written for the Court, he himself has limited his dissents to less than a half-dozen, and his special concurrences to approximately the same proportion. Nor have even these few dissents provoked individual expression in every case; in one instance, indeed (McCarroll v. Dixie Greyhound Lines, supra), Justice Frankfurter played Athos to the Porthos and Aramis of Justices Black and Douglas, the three presenting the united front of an anonymously authored dissent.

\(^9\)P. 196.

\(^10\)P. 16. (Italics supplied.)
part of which the writer observed of the Court's decision in *Burns Bakery Co. v. Bryan*, that "... we have never had a more irresponsible period in the history of that court."\(^ {12} \)

Now, sixteen years later, the pendulum has swung so far back as to permit Mr. Justice Frankfurter to say for the Court:

"A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted. ... It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."\(^ {13} \)

It is an interesting bit of irony that in his first\(^ {14} \) opinion for the Court Mr. Justice Frankfurter was called upon to voice a decision invalidating a statute of Florida levying a tariff on imported cement.\(^ {15} \) It was done because it had to be done, but it was done with an apology:

"It can never be pleasant to invalidate the enactment of a state, particularly when it bears the imprimatur of constitutionality by the highest court of the state. But it would not be easy to imagine a statute more clearly designed than the present to circumvent what the Commerce clause forbids."\(^ {16} \)

Ironical, too, was the clash of concepts in the *Flag Salute case*,\(^ {17} \) where the Justice's devotion to the "Liberties of a Free People"\(^ {18} \) (dem-
onstrated by his dispassionate plea in behalf of Sacco and Vanzetti, by far the most forceful of the six essays on the subject included in *Law and Politics*), and his solicitude for the integrity of state legislation, were compelled to submit to the adjustment of a delicate compromise. The resultant pulling and counterpulling is evident in the following:

"National unity is the basis of national security . . . it is not the personal notion of judges of what wise adjustment requires which must prevail . . . The flag is the symbol of our national unity, transcending all internal differences. . . . For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crotchety beliefs . . . to the legislature no less than to the courts is committed the guardianship of deeply-cherished liberties . . . Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people." 19

The idea that the courts would do well to leave half-baked legislative experiments to accomplish their own disproving is frequently reiterated in the Justice's pre-judicial writings. Writing of Mr. Justice Brandeis in 1931 Mr. Justice Frankfurter said:

"The veto power of the Supreme Court over the social-economic legislation of the states, when exercised by a narrow conception of the due process and equal protection of the law clauses, presents undue centralization in its most destructive and least responsible form. The most destructive, because it stops

follow: The Supreme Court; The Elements of Judicial Greatness; Labor and the Courts; Government and Administration; Business and the Courts; Law and Science; A Political Autobiography.

29*Minersville School District v. Gobitis, 60 Sup. Ct. 1010, 1013-1016 (1940). Though the abrupt juxtaposition may be a bit unfair, the entire opinion in the *Flag Salute case* makes exceptionally interesting reading alongside an editorial entitled "Can the Supreme Court Guarantee Tolerance?", written in 1925 in comment on the decisions of the Court in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), and *Meyer v. Nebraska*, 262 U. S. 390 (1923). Earlier the writer had asserted that "The due process clause ought to go." (See note 10, *supra*). Now he is forced to consider whether it ought to be retained as a protection against state interference with such things as freedom of speech, religious worship, and education. "Before one can find in the Oregon case (Pierce v. Society of Sisters, *supra*) proof of the social value of the Supreme Court's scope of judicial review a balance must be struck of all the cases that have been decided under the Fourteenth Amendment. . . . No calculus has yet been invented to make such a precise accounting." *Op. cit. supra* note 1, at 196. The problem is further considered in another chapter (at p. 189) entitled "The Supreme Court Writes a Chapter on Man's Rights," carrying a commentary on the Court's decision in the famous *Scottsboro case* (Powell *v. Alabama*, 287 U. S. 45 (1932)).
experiment at its source, preventing an increase of social knowledge by the only scientific method available: namely, the tests of trial and error. The least responsible, because it so often turns on the fortuitous circumstances which determine a majority decision, and shelters the fallible judgment of individual Justices, in matters of fact and opinion not peculiarly within the special competence of judges, behind the impersonal authority of the Constitution.\textsuperscript{20}

Many years before (in 1912) he had expressed the same notion:

"... The courts should be a restraining, but not a hampering, force. Doubtless, grave mistakes in legislation will thus go unchallenged through the courts, but legislation is essentially empirical, experimental, and the Constitution was not intended to limit this field of experimentation. Think of the gain of having experience demonstrate the fallacy of a law after the Supreme Court has sustained its constitutionality. For, as a wise man has truly said, to fail and learn by failure is one of the sacred rights of a democracy."\textsuperscript{21}

The transference of these views from essay and address to court opinion has been accomplished not only in the \textit{Flag Salute case},\textsuperscript{22} but in such other cases where Mr. Justice Frankfurter wrote for the Court as \textit{Osborn v. Ozlin},\textsuperscript{28} the \textit{Texas Oil Pro-Ration case},\textsuperscript{24} and by his opinion for himself and three other members of the Court in \textit{Newark Fire Ins. Co. v. State Board},\textsuperscript{25} where, speaking of the distribution of tax burdens, he said that, "It belongs to that range of the experimental activities of government which should not be constrained by rigid and artificial legal concepts."\textsuperscript{26}

More specialized fields in which the transference of thought from expression in essay form to that of judicial opinion has been brought about are those of administrative law and public utilities, two of the subjects taught by Mr. Justice Frankfurter when he was known as Professor Frankfurter. His deservedly well-known "Task of Administrative Law" is given renewed publication in \textit{Law and Politics},\textsuperscript{27} and many of the statements appearing therein find close parallel in such decisions as \textit{Federal

\begin{itemize}
\item \textsuperscript{20}P. 119.
\item \textsuperscript{21}P. 9.
\item \textsuperscript{22}See supra note 17.
\item \textsuperscript{23}See note 13, supra.
\item \textsuperscript{24}Id. at pp. 323-324. At this point Mr. Justice Frankfurter quoted from the opinion of Mr. Justice William Johnson (to whom he had referred in his concurring opinion in \textit{Graves v. O'Keefe}, 306 U. S. 466, 489 (1939), as "one of the most trenchant minds on the Marshall court") in the case of \textit{Anderson v. Dunn} (a quotation which also appears in \textit{Law and Politics} at p. 246): "The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment." 6 Wheat. 204, 226 (U. S. 1821).
\item \textsuperscript{25}307 U. S. 313 (1939).
\item \textsuperscript{26}60 Sup. Ct. 758 (1940).
\item \textsuperscript{27}P. 231.
\end{itemize}
Communications Commission v. Pottsville Broadcasting Company. Occasionally the essay statements illuminate the interrelation of decisions whose connection is obscured by the ad hoc treatment of the judicial process. Thus the relation of the Rochester Telephone case, where the opportunities of appeal from administrative determinations were widened, to the Texas Oil Pro-Ration case, where the scope of review was so drastically curtailed, is suggested by some of the discussion in the "Task of Administrative Law."

The central thought of one of the three articles on public utility regulation included in Law and Politics finds a striking reproduction in the special concurring opinion in Driscoll v. Edison Light and Power Co., where Mr. Justice Frankfurter throws his weight behind that of Mr. Justice Black (as voiced in his notable dissent in McCart et al. v. Indianapolis Water Co.) in arguing for an abandonment of the "mischiefous formula for fixing utility rates in Smyth v. Ames..."

But the most complete carry-over of ideas from classroom to courtroom is to be found in the field of taxation. More frequently than any other single topic do the author’s views on taxation punctuate the pages of Law and Politics. They are emphasized in the essay on Mr. Justice Holmes, in that on Mr. Justice Cardozo, and in that on Mr. Justice Brandeis. In the first of these three tributes the present Justice wrote:

"Taxation is perhaps the severest testing ground for the objectivity and wisdom of a social thinker. The enormous increase in the cost of society and the extent to which wealth is now represented by intangibles, the profound change in the relation of the individual to government and the resulting widespread insistence on security, are subjecting public finance to the most exacting demands. To balance budgets, to pay for the costs of progressively civilized social standards, to safeguard the future, and to divide these burdens fairly among different interests in the community, put the utmost strain on the ingenuity of statesmen. They must constantly explore new sources of revenue and find means of preventing the circumvention of their discoveries. Subject as they are, in English-speaking countries, to popular control, they should not be denied adequate latitude of power for their extraordinarily difficult tasks."

Almost as an echo comes the following statement in the opinion of

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2860 Sup. Ct. 437 (1940).
30See supra note 13.
31"Public Services and the Public," appearing in LAW AND POLITICS at 253.
32307 U. S. 104, 122 (1939).
33302 U. S. 419, 423 (1938).
35P. 78.
Mr. Justice Frankfurter in the *Newark Fire Ins. Co. case*:

"Wise tax policy is one thing; constitutional prohibition quite another. The task of devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statesmen. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The adjustment of such relationships, with due regard to the promotion of enterprise and to the fiscal needs of different governments with which these relations are entwined, is peculiarly a phase of empirical legislation. . . . Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the national government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended."

In the Cardozo essay stress is laid on the importance of taxation as an instrument of social control. "Taxation primarily for revenue can hardly exclude social consequences. . . . Beginning with Theodore Roosevelt's administration, taxation has assumed a mounting share in the process of social adjustment." The matter receives more extended treatment in the article entitled "Social Issues before the Supreme Court" where, observing that "we must recognize the profound shift in the very purposes of taxation," the writer continues:

"No finicky limitation upon the discretion of those charged with the duty of providing revenue, nor jejune conceptions about formal equality should circumscribe the necessarily empirical process of tapping new revenue or stopping new devices for its evasion. The fiscal difficulties of government at best are hard and thorny. They ought not to be made insuperable by reading into the Constitution private notions of social policy. Too often, talk about scientific taxation is only a verbal screen for distributing the incidence of taxation according to traditional notions. Judgments of fairness in taxation, as in other activities of government, are functions of their time. Governing ideas of taxation of the eighteenth century, or even of the nineteenth century, were not permanently frozen into the Constitution."

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*Newark Fire Ins. Co. v. State Board, 307 U. S. 313, 323 (1939).*

*P. 93. Compare Mr. Justice Frankfurter's views on such spurious uses of the taxing power as that which was involved in the *Child Labor Tax case* (Bailey v. Drexel Furniture Co.), 259 U. S. 20 (1922). Commenting on this case in one of his contributions to the New Republic, he wrote that, "This decision will doubtless check further sham use of the taxing power—always excepting the tariff!—by Congress; in any event we may expect, in the future, should new instances arise, increasing frankness from the Supreme Court." P. 208.

*P. 48.*

*P. 51.*
And a little farther on comes a statement which assumes an added significance in the light of what its author had later to say when, speaking for the Court in *Whitney v. State Tax Commission*, he commented that, “Presumably the policy behind estate tax legislation like that of New York is the diversion to the purposes of the community of a portion of the total current of wealth released by death,”—to date the most explicit recognition by the Court of the social objectives of death taxation (though there was more than a hint of such recognition in Mr. Justice Black’s opinion for the Court in *United States v. Jacobs*):

“Foreigners are fond of calling this the land of paradoxes. Our public finances certainly justify that characterization. The richest country in the world has been the most dilatory in balancing its budget, and appears the most distracted and embarrassed in its accomplishment. I venture to believe that a major explanation is the systematically inculcated hostility to the taxation of wealth. For a decade the press has sedulously repeated the Mellon doctrine that the immunity of the rich from taxation is a blessing for the poor. In times of prosperity taxes on bloated incomes will discharge enterprise; in days of adversity there are no bloated incomes—such was the governing philosophy.”

Then follows a blistering indictment of the Court’s decision in 1932 in the case of *Heinar v. Donnan*:

“. . . The history of taxation is, to no small extent, a battle of wits between skill in devising taxes and astuteness in evading them. By creating constitutional obstructions to safeguards against evasion, the Supreme Court has put the Constitution at the disposal of the evaders. A few years ago the Supreme Court sheltered great wealth by interposing the benevolent ‘due process’ clause on behalf of rich donors who made gifts in anticipation of tax measures especially designed for them. One might suppose the Supreme Court would at least be friendly to the effective enforcement of the inheritance tax. The social justification of that tax has become an accepted postulate even of our individualistic society. But the other day the Court, again under the blessed versatility of ‘due process,’ nullified the attempt of Congress, in response to the compelling experience of the Treasury Department, to prevent gross evasions of the inheritance tax . . . .

“This decision does not touch technical issues that are in the special province of learned judges. How taxes are evaded and how fine a net must be woven to keep big fish from escaping, what the experience of a decade of federal estates administration indicated, and what means are adapted to prevent whole-

403 U. S. 530, 538 (1940).
4Law and Politics, p. 54.
4285 U. S. 312 (1932). In this case the Court held invalid a statutory provision raising a conclusive presumption that certain dispositions of property made within two years of the donor’s death were made in contemplation of death so as to be subject to the federal estate tax.
sale evasion—these are matters which tax administrators, members of the Ways and Means Committee, students of public finance, are as competent to understand as Mr. Justice Sutherland and his brethren. Is it not the plain truth that Mr. Justice Stone's powerful opinion deals with actualities and demolishes the hollow fabric of unreality erected by the majority? And if it be the truth, the Supreme Court has its duty towards a balanced budget—it ought not to sanctify gross tax evasion or call the word-spinning by which it does so the Constitution.

It is not inconceivable that the writer of these lines may one day have the satisfaction of writing off the books the decision in *Heiner v. Donnan* even as he has already disposed of another "word-spinning" opinion of Mr. Justice Sutherland in the field of death taxes. This was the opinion in the case of *Helvering v. St. Louis Union Trust Co.* which, with the companion case of *Becker v. St. Louis Union Trust Co.*, fell under the withering pen of Mr. Justice Frankfurter in *Helvering v. Hallock*.

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44Pp. 54, 57.
47309 U. S. 106 (1940). Outlet for the author's views on tax avoidance was also afforded in *Griffiths v. Helvering*, 308 U. S. 355 (1939), where the taxpayer's "technically elegant arrangement" (p. 357) was summarily stalemated. Still another tax decision in which Mr. Justice Frankfurter wrote for the Court was *O'Malley v. Woodrough*, 307 U. S. 277 (1939), wherein, one may suspect, the writer took especial satisfaction in the opportunity presented to make majority law out of much of Mr. Justice Holmes' celebrated dissent in *Evans v. Gore*, 253 U. S. 245 (1920). Nor is it to be imagined that the feat lost any of its satisfaction because accomplished in reliance upon what Mr. Justice Butler's dissent refers to as "selected gainsaying writings of professors—some ... lawyers and some ... not; notes published in law reviews ... presumably ... prepared by law students," (at p. 298) and decisions from the courts of Saskatchewan, Australia, and South Africa, which also were thought by Mr. Justice Butler to "shed no light upon the issue in this case." (Ibid.) The influence of Mr. Justice Holmes on the opinion in *O'Malley v. Woodrough* is evident from a comparison of that opinion with the dissent in *Evans v. Gore*, where he wrote that,

"To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions under which their well-being if not their life depends." (At p. 265).

And Mr. Justice Frankfurter in *O'Malley v. Woodrough*:

"To subject them [that is, the judges of federal courts] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden
Returning to the trilogy of essays on Justices Holmes, Cardozo, and Brandeis, the following statement from the tribute to Mr. Justice Brandeis has an obvious pertinence today in the face of recent proposals from the Treasury Department:

"(Mr Justice Brandeis) has consistently refused to accentuate the fiscal difficulties of government by injecting into the Constitution his own notions of fiscal policy. In the 'vague contours of the Fifth Amendment' he reads no restriction upon historic methods of taxation. Nor has he found in the Constitution compulsion to grant additional immunity or benefit to taxpayers merely because they already hold tax-exempt securities."\(^4\)\(^8\)

Enough has been written to indicate the precision of pattern between the views set forth in *Law and Politics* and those from time to time appearing in the pages of the United States Supreme Court Reports. Limitation of space prevent a more thorough sampling of those views, but they are there for the reader who would know the mind of a Supreme Court Justice in the making, and who in this knowledge would catch a glimpse of what lies ahead.

Yet an additional word needs be said about some glimpses of the past which are nonetheless interesting because they belong to the past. For the emphasis that has been placed upon the circumstance that the views of the author are now in part the views of a Justice of the United States Supreme Court smokescreens another circumstance of at least comparative importance—that long before his elevation to the Bench the author was an individual of stature sufficient to make his opinions of interest to all concerned in the affairs of men. And it is part of the price that must be paid for judicial peerage that whole chunks of human affairs about which one may have, and express, opinion as an individual must, under accepted conventions, be foreclosed when one puts on the ermine. For the freedom of speech of the judge is not the freedom of speech of the law professor. Consequently the readers of the New Republic who were told the reasons why the writer was for La Follette in 1924,\(^4\)\(^9\) and of the government whose Constitution and laws they are charged with administering." (At p. 282).

More than one such parallel is to be found in the opinions of Justices Holmes and Frankfurter. Compare, for example, the former's famous observation in his dissent in *Lochner v. New York*, 198 U. S. 45, 75 (1905), that "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," (quoted in *Law and Politics*, 74), with Mr. Justice Frankfurter's comment in *Osborn v. Ozlin*, 310 U. S. 52, 62 (1940), that, "It is equally immaterial that such state action may run counter to the economic wisdom either of Adam Smith or of J. Maynard Keynes. . . ."

\(^4\)P. 118. (Italics supplied).

\(^9\)P. 314.
for Smith in 1928,\textsuperscript{50} and the radio listeners who heard why the speaker was for Roosevelt in 1932,\textsuperscript{51} could not be given another \textit{pro apologia} in 1940 that might have been the best of them all.

And there will be other connections in which Professor Frankfurter will be missed as a champion, leaving the pages of \textit{Law and Politics} to prove how great was the worth of the championing. Not the first to be forgotten, it is ventured, will be the spirited defense of the "Young Men (Who) Go to Washington,"\textsuperscript{52} and its challenge:

"The fear of brains will not advance the solution of problems that call exigently for solution.\textsuperscript{53} . . . It was not accident that the founders of the republic were mostly young men. . . . A first-rate, well-trained, lively mind of twenty-five is better economy for the government than the services of those who, in the language of Civil Service Commissioner Leonard D. White, ‘have failed to achieve success in the competitive world, and who in middle life seek refuge in the official world.’\textsuperscript{54}

Nor will there soon be matched the reasoned support of those aspects of the New Deal which so intimately relate it in common genealogy to "the 'square deal' of Theodore Roosevelt, and the 'new freedom' of Woodrow Wilson,"\textsuperscript{55} of which the following, like all that has been set out above, are but a taste of the pudding that is \textit{Law and Politics}:

"In our day no government, whatever its party livery, can avoid responsibility for insuring minimum economic security.\textsuperscript{56} . . . Mr. Roosevelt's admirable Tennessee Valley project is an example of what must be done on a large scale.\textsuperscript{57} . . . Alphabetical agencies will continue, or analphabetical agencies will take their place\textsuperscript{58} . . . we cannot get out of the present difficulty by yielding to the fears of men who are too much in the grip of the past and are still guided by economic views that leave out of account the profoundly changing forces of America today. . . ."\textsuperscript{59}

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FRANCIS C. NASH\textsuperscript{*}
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\begin{itemize}
\item \textsuperscript{50}P. 320.
\item \textsuperscript{51}P. 238.
\item \textsuperscript{52}P. 346-247.
\item \textsuperscript{53}P. 240.
\item \textsuperscript{54}P. 241.
\item \textsuperscript{55}P. 329.
\item \textsuperscript{56}P. 243.
\item \textsuperscript{57}P. 65.
\item \textsuperscript{58}P. 343.
\item \textsuperscript{59}P. 343.
\end{itemize}

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