MUSIC, RADIO BROADCASTERS AND THE SHERMAN ACT*

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On December 27, 1940, the United States Department of Justice announced that instead of proceeding with the suit which had been filed against the American Society of Composers, Authors and Publishers (hereinafter referred to as ASCAP) under the Sherman Act on August 30, 1934, and which, sometime in June of 1935, by mutual consent of the parties, had been indefinitely postponed, it would begin new criminal prosecutions against ASCAP, its rival, Broadcast Music, Inc., and the two major networks, Columbia and National. On January 1, 1941, three-fourths of America's 800 radio stations and the three major networks adopted a policy which prohibited the broadcasting of compositions by composers who are, or prior to their death were, affiliated with ASCAP.

Among others, these composers are Irving Berlin, Victor Herbert, George M. Cohan, Jerome Kern, Cole Porter, Sigmund Romberg, John Philip Sousa, George Gershwin, Fritz Kreisler, Deems Taylor, and Oscar Hammerstein. These events are indications that a twenty year old feud between the radio broadcasting industry, on the one hand, and ASCAP,

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2Broadcasting, Aug. 1, 1939, 18; Id., March 1, 1938, 14.

3ASCAP has charged that this move by the networks is "another move to establish monopolistic control in the radio industry." N. Y. Times, Sept. 21, 1940, 21, col. 7.
on the other, has not subsided, but is, at last, reaching a determinative conclusion.

I. STATUTORY BACKGROUND

The background for this struggle was laid long before the commercial possibilities of radio broadcasting were contemplated. In 1896 a bill was introduced in the Senate, and passed by both Houses the following year, which had for its primary purpose enlarging the rights of authors and playwrights in their copyrighted works. As more or less incidental to the statute, a provision was included which provided that

"any person publicly performing . . . (a) musical composition for which a copyright has been obtained . . . shall be liable for damages. . . ."

The House Committee on Patents reported that this provision was made

"to secure to musical compositions the same measure of protection under the copyright law as is now afforded to production of strictly dramatic character."

4Rarely have two, otherwise respectable, organizations engaged in the name-calling of which ASCAP and the National Association of Broadcasters have been guilty. In the Oct. 1, 1939, issue of BROADCASTING, the radio-broadcaster's trade organ, an editorial begins: "War is hell, whether its purpose is to preserve democracy in Europe against a madcap dictator or to preserve it in radio against an arbitrary totalitarian ASCAP."

The late Nathan Burkan, counsel for ASCAP, during the hearings on the Duffy Bill, which was supported by the broadcasters, at one point remarked: "The 'racketeers' were the broadcasters who were making plans to use the work of these creators (of music) without payment." Hearings before Committee on Patents on Revision of Copyright Law (House of Representatives), 74th Cong., 2nd Sess. (1936) 58.

5On January 27, 1941, Broadcast Music, Inc., entered into a consent decree with the Department of Justice which is to become effective only if and when ASCAP likewise discontinues the practices prohibited by the decree.

Although the Department's press release of December 27, 1940, stated that Broadcast Music, Inc., was "controlled by the major broadcasting chains", and that therefore they likewise would be made defendants in the suit, for some unexplained reason the suit actually filed and the consummated decree names neither of the two major networks as defendants. See the Department of Justice's press release of January 27, 1941; VARIETY, Jan. 29, 1941, p. 30; Chicago (Ill.) Tribune, Jan. 28, 1941, 1, col. 3.

The negotiations of ASCAP with the Department of Justice for a consent decree seemed certain of consummation during the first two weeks of Dec., 1940. VARIETY, Dec. 18, 1940, 24, col. 1; BROADCASTING, Dec. 15, 1940, 13, col. 2. The reasons for the failure of these negotiations is fraught with trade gossip and rumors. See VARIETY, Dec. 25, 1940, 25, col. 3.

6It was not until 1920 that the commercial possibilities of radio were realized. Caldwell, Copyright Problems of Broadcasters (1938) 2 J. RADIO L. 287.

7REV. STAT. § 4966 (1897).

29 CONG. REC. 85 (1896). In England the performing right, as a separate right, was recognized in 1842. SHAFTER, MUSICAL COPYRIGHT (1939) 277. See the interesting chart illustrating the gradual extension of the copyright laws in AMDUR, COPYRIGHT LAW AND PRACTICE (1936) 94.
It went on to observe that

“the omission to include protective provisions for musical compositions in the (previous) law . . . was doubtless the result of oversight.”

Prior to 1897 a composer had but one right under the copyright laws: the exclusive right to print, reprint, publish, copy and vend his copyrighted work. Before the twentieth century the enforcement of this right assured to the composer that almost everyone who exploited his efforts—derived profit from them—would have to pay for such exploitation. But during the beginning of the twentieth century, and increasing in frequency every year thereafter, a new source of exploitation became more frequent—those who publicly performed the composer’s composition. The Congressional effort of 1897 was designed to force this source to pay the composer for its exploitation of his music. This Act of 1897 received the barest amount of discussion when it was proposed and passed by both Houses, for such large present-day users of music as radio and the

89 Cong. Rec., op. cit. supra note 8, at 85.

10Act of Feb. 3, 1831, 4 Stat. 436 (1831); Hearings, op. cit. supra note 4, at 1201. But even before this statute, musical compositions were copyrighted under the general copyright statute of 1790. SHAFTER, MUSICAL COPYRIGHT (1939) 26.

11Although the statute applies to musical compositions that are publicly performed, whether for profit or not, those Representatives who debated the issue in the House assumed that the statute would apply only if the performance were for profit. For example, Rep. Quigg argued that the composer “should enjoy a part of every profit which anybody obtains from the use of his copyrighted composition. Rep. Stewart referred to the “public singing of the song for profit.” 29 Cong. Rec., op. cit. supra note 8, at 90. (Italics supplied).

In defining under what circumstances a musical infringement would be a misdemeanor, however, the act provided that the performance must be “willful and for profit.”

12It was difficult for some of the members of the House to realize that a composer might have more than the one right of publishing and vending his composition. Rep. Cox argued that this statute would permit the composer to “sell it (presumably, the sheet music) more than once.” Rep. Lacy could see no reason “why a person who writes a popular song, sets it to music, prints and copyrights it, and publicly sells that music and song should still retain the right to say where it shall be used. . . .” 29 Cong. Rec., op. cit. supra note 8, at 89. Whether performance rights were recognized at common law is questionable. See Hutchins v. Romer, 4 Q. B. D. 483 (1879); WEIL, COPYRIGHT LAW (1917) 139.

13The Senate passed it with forty-six words of debate. 29 Cong. Rec., op. cit. supra note 8, at 132. The House debate covers six pages of the Congressional Record, most of which relates to other phases of the bill. 29 Cong. Rec., op. cit. supra note 8, at 85-91.

Rep. Draper, proponent of the measure, began the discussions by saying: “I do not suppose there will be need of discussing the measure at length, and I do not care to do so unless it is necessary. I call for a vote.” 29 Cong. Rec., op. cit. supra note 8, at 85.

In the Hearings, op. cit. supra note 4, 1,560 pages of testimony were taken on a proposed change of the copyright law. This perhaps, better than anything, illustrates the importance of the public performance of music in 1936 as compared to 1897.
"talkies" were unheard of. The only possible users which this act was designed to affect were those that operated establishments where orchestras and bands played music, dance halls, operas, concerts, and musical comedies.14 These were scattered over the country in an unorganized manner, and there was little, if any, pressure exerted by them to defeat the Act. Even had they been organized, there would have been little likelihood that they would have strenuously opposed such a measure, for, as a practical matter, this new right given the composer was, for the most part, impossible of enforcement. No composer could know when his composition was being publicly performed without his consent in any one of the forty-five states in the Union.

It should be noted that the 1897 Act was all inclusive, giving the composer the exclusive right to every public performance of his composition, and it was not until 190915 that this right was specifically limited to public performances for profit.16

II. ASCAP

The composer's inability to discover and prosecute unauthorized performances for profit in the innumerable places where they might occur,17

14Although the question of whether churches and charitable organizations were exempt from the copyright statutes arose during the discussions of the 1897 Act, it was not until 1909 that the statute specifically provided for their exemption. 29 Cong. Rec., op. cit. supra note 8, at 90; 35 Stat. 1082 (1909), 17 U. S. C. § 28 (1934). In foreign countries musical performances forming a part of religious worship are likewise exempted. See Shafter, Musical Copyright (1939) 288; but compare Hawkes & Sons, Ltd. v. Paramount Film Services, Ltd., (1934) 1 Ch. 593.


16Besides providing specifically that a musical performance must be for profit before it could be said to be an infringement, the 1909 Act made one other important proviso relating to musical copyrights: it granted the composer his often requested rights in the mechanical reproduction of his works. This latter proviso is interesting in that it demonstrates the soundness of Theodore Roosevelt's observation that the most effective method of forcing Congress to enact satisfactory legislation is to enforce stringently the unsatisfactory laws; see White-Smith Music Pub. Co. v. Apollo Co., 209 U. S. 1 (1908) and the reverberations of this case in the debate upon granting composers the right to the mechanical reproduction of their music in 48 Cong. Rec. 3764-3766 (1909).


17Gibbs v. Buck, 307 U. S. 66 (1939), transcript of record at 77; see also affidavit of Mrs. Ella Herbert Bartlett, daughter of Victor Herbert, at 177; Ken., March 23, 1939, 61.
led Victor Herbert, along with several other noted composers, to band together to organize ASCAP, in an effort to make real the benefits bestowed upon composers by the copyright laws, and perhaps augment their bargaining power. This organization is an unincorporated association to which composers assign but one of the three rights which are secured to them by the copyright laws, viz., the exclusive right to perform publicly for profit musical compositions. The Society, in turn, issues blanket licenses which give the licensees the right to perform publicly for profit any and all of the works which have been assigned to it. These licenses are not issued to the performers of music, such as vocalists, orchestras, and bands, but to the establishments wherein the performers appear. Licensees are not charged for the individual performances of single pieces of music, but pay a flat sum annually, based upon factors peculiar to each class of licensee. For example, theatres are charged according to their seating capacity; radio stations according to their annual gross business; restaurants, hotels, dance halls, and taverns according to factors peculiar to their trade, seating capacity, price policy, frequency of performance of music, and dependence upon music for patronage. All income, over and above operating expenses, is distributed to the members of the Society, the assignors of the public performance

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18For the history of performing rights societies in other countries, see SHAFTER, MUSICAL COPYRIGHT (1939) 310 et seq; for the history of ASCAP see KEN, March 23, 1939, 61 et seq; Affidavit of Gene Buck in Complainant's Order, Motion and Affidavits for Temporary Injunction, Buck v. Swanson, 33 F. Supp. 377 (D. Neb. 1939).

19The rights to publish and vend, publicly perform for profit, and reproduce mechanically.


ASCAP is not the assignee of every musical performance right. The assignments, however, do include probably 90 to 95 per cent of the published compositions, and, with but few exceptions, every composition that is profitable to perform publicly. (1938) 47 YALE L. J. 433, 446, n. 2. For some of the exceptions see Hearings, op. cit. supra note 4, at 432, 472.

21The controversy over this method of licensing is discussed infra, notes 110-124, accompanying text.

22Exhibits "F", "G" and "H" of Transcript of Record in Gibbs v. Buck, 307 U. S. 66 (1939), cited supra note 17, are contracts illustrating the forms used in licensing broadcasters, theatres and hotels. See also Exhibits "F", "G" and "H" of Transcript of Record, Buck v. Gallagher, 307 U. S. 95 (1939).

23Hearings, op. cit. supra note 4, at 19, 20, 91, 106, 473, 594; see text accompanying notes 115-118 infra.

24This amounts to about 17 per cent. KEN, supra note 18, at 62. The National Association of Broadcasters charges that this amounts to 33 per cent, but offers no proof to substantiate this figure. Portrait of a "Protector" (1940).

2576 per cent goes to members in the United States and 7 per cent to members of foreign
for profit rights which include composers and publishers of sheet music. Each member’s share in the net receipts is determined by gauging the use of his individual pieces over a period of time, the vogue, popularity and prestige of his repertoire, and the length of his membership in the society. Elaborate provisions are made for his appeal to certain administrative bodies of the Society if he is dissatisfied with his classification in the Society— which determines his percentage of the net proceeds.

III. ASCAP v. NATIONAL ASSOCIATION OF BROADCASTERS

During its infant stages, there was little, if any, criticism of ASCAP and its operations. This was due to three facts. First of all, ASCAP had not attained the efficiency in operation that it has today. Secondly, and in part because of the first reason, neither the users of music, generally, nor any one particular group of users, were banded together in an effective functioning body. But most important, no one foresaw how prevalent and lucrative the public performance of music would be in the future. Or stated differently, no one foresaw radio broadcasting in its present form.

The radio broadcasting industry grossed close to $200,000,000 in 1940, devoting about three-fourths of its operating hours to the

affiliated organizations. Ken, supra note 18, at 62.

Not every person who writes a song may become a member of ASCAP. There are certain minimum requirements. See note 12 supra infra.


23See the figures in Ken, supra note 18, at 62.

24It has representatives in every state in the Union who systematically investigate every establishment where music is played without a license to discover possible infringements. This method of investigation, especially by attorneys, has been severely criticised. “I am not in accord with the practice of attorneys, who are directly or indirectly retained by the Society, frequenting night clubs with the hopes that they may hear a composition played upon which they can base a case and obtain a fee, and then take the witness stand to prove the alleged violation. Such conduct cannot have the sanction of this Court.” Buck v. Elm Lodge, 29 U. S. Pat. Q. 444, 445 (N. D. N. Y. 1936), rev’d, 83 F. (2d) 201 (C. C. A. 2d, 1936).

25It was not until 1920 that the commercial possibilities of radio were indicated. Caldwell, Copyright Problems of Broadcasters, (1932) 2 J. Radio L. 287. As late as 1931 some moving picture houses carried broadcasts from their stages, as a special novelty feature. Variety, Jan. 24, 1931, 28.

26Allen, The Battle of Tin Pan Alley (Oct., 1940) 181 Harpers 514, 519. The United States Department of Commerce estimated that $900,000,000 was spent in 1936 for radio receiving sets, repairs, and commercial time. In 1935 the sum was $700,000,000. Hearings, op. cit. supra note 4, at 129.
broadcast of music.\textsuperscript{31} In 1940 these stations paid an annual license fee to ASCAP of over $4,000,000.\textsuperscript{32} That such a sum constitutes two-thirds of ASCAP’s gross revenue,\textsuperscript{33} is important in and of itself, but the figure has broader implications to the Society. Because of radio’s inherent reliance upon music,\textsuperscript{34} any one popular song is played over the air a great many times in one day.\textsuperscript{35} This constant repetition of a melody, paradoxical as it may seem at first blush, \textit{shortens} the life of a song, for generally speaking the life of a song varies \textit{inversely} to the frequency of its rendition.\textsuperscript{36} Before the present era, when radios are almost a household necessity,\textsuperscript{37} a song that was a “hit” sold at least two million copies,\textsuperscript{38} and the composer received royalty from each sale. Today a “hit” sells about 100,000 copies.\textsuperscript{39} This means that before the advent of radio, song writers received lucrative remuneration from the sale of sheet music, but since its advent—with the accompanying constant repetition of popular songs—this remuneration has dropped substantially and rapidly.\textsuperscript{40} In other words, ASCAP contends, radio broadcasting has been indirectly responsible for the loss of revenue to the composer,\textsuperscript{41} and ASCAP therefore, has turned more and more to the broadcasting industry to find financial reward for its members.

\textsuperscript{31}One estimate is 86 per cent. \textit{Henderson, The Law of Copyright, Copyright Law Symposium} (1939) 163. Another is 60 to 70 per cent. Caldwell, \textit{Copyright Problems of Broadcasters} (1932) 2 J. Radio L. 287, 293. And still a third is 80 per cent. \textit{Hearings, op. cit. supra} note 4, at 331.

\textsuperscript{32}Cf. the figures in \textit{Ken, supra} note 18, at 62, and \textit{Harpers, supra} note 30, at 521. In 1936 this revenue was $2,500,000. \textit{Hearings, op. cit. supra} note 4, at 18, 331.

\textsuperscript{33}Harpers, \textit{supra} note 30, at 515.

\textsuperscript{34}See note 31 \textit{supra}.

\textsuperscript{35}A radio station uses 200 compositions a day, dance hall 30, and theatre 100. (1939) 10 \textit{Air L. Rev.} 206, 207, n. 7. There are approximately 4,600,000 daily uses of copyrighted music. \textit{Ken, supra} note 18, at 62.

\textsuperscript{36}Watt, \textit{One Minute to Go, Saturday Evening Post}, April 2, 1938, at 8, 85; \textit{Hearings, op. cit. supra} note 4, at 131; see also Chicago (Ill.) Tribune, April 24, 1938, § 7, 2, col. 1.

\textsuperscript{37}In 1937 there were 24,206,000 family radios in the United States according to a survey made by the American Institute of Public Opinion. \textit{Variety}, Dec. 22, 1937, 31. In 1939 there were 44,000,000. \textit{N. Y. Times}, Dec. 31, 1939, 4, col. 4. In 1940, over 50,000,000. NAB Reports, Jan. 3, 1941, 7.

\textsuperscript{38}Variety, July 18, 1933, 63.

\textsuperscript{39}Harpers, \textit{supra} note 30, at 519.

\textsuperscript{40}While the sale of sheet music in 1927 was over $17,000,000, in 1933 it had dropped to $2,000,000. \textit{Hearings, op. cit. supra} note 4, at 128. How much of this decline was due to the economic conditions existing in 1933 is impossible to estimate.

\textsuperscript{41}Besides the decrease in revenue from sheet music, composers suffered an 80 per cent loss in mechanical reproduction royalties. Affidavit of Gene Buck, Buck \textit{v. Swanson}, 33 F.
This interrelationship of radio’s growth, and its consequent reduction of revenue to composers from other sources, could hardly have been visualized in 1914. But once it became a reality, it was imperative—from ASCAP’s point of view—that the broadcasters pay for their performance of copyrighted music at a rate which would compensate composers for their loss of revenue from other sources.42

Hence, the question arose of whether radio broadcasting came within the terms of the statute: (1) a performance, (2) to which the public was invited and (3) given for profit.43 Armed with Justice Holmes’ broad concept of what constituted music played for profit—when the “purpose of employing it is profit”44—ASCAP set out to include radio broadcasting within the purview of the act.

ASCAP at first succeeded in collecting infringement damages from the sponsor of a radio program.45 Two years later a broadcasting station was likewise held liable for an infringement, its classification being that of a “contributory infringer.”46 The following year the broadcaster’s liability was extended to include musical renditions not played in the broadcaster’s studio, and not under his supervision,47 as when the music is “picked up” from a dance hall or at an athletic event.48

Supp. 377 (D. Neb. 1939) cited supra note 18, at 36. Since 1933, however, this source of revenue has probably increased because of the revival in the phonograph and phonograph-record business. Phonograph Records (Sept., 1940) 20 Fortune 72.

42This loss, of course, being due to radio’s advent. See text accompanying notes 34–41 supra.
43These three elements must appear before an infringement occurs. Buck v. Debaum, 40 F. (2d) 734 (S. D. Colo. 1929). That the defendant did not intend and was not aware that he was violating a composer’s rights in no defense. Buck v. Jewell-LaSalle Realty Co., 283 U. S. 191, 198 (1931) and cases therein cited.
46Jerome H. Remick and Co. v. American Automobile Accessories Co., 5 F. (2d) 411 (C. C. A. 6th, 1925), cert. denied, 269 U. S. 556 (1925). This was the first case wherein it was definitely held that a radio broadcast was (1) a performance, (2) for profit, and (3) for the public.
48Such infringements are termed “innocent infringements” by the broadcasters. See the testimony of Louis G. Caldwell, Hearings, op. cit. supra note 4, at 478.

Having thus been entirely successful in imposing liability upon the broadcasters of music, ASCAP then took up the fight against those who use radio music for profit on the receiving end. In Buck v. Jewell La-Salle Realty Co., 283 U. S. 191 (1931), Justice Brandeis, speaking
Such consistently unfavorable decisions, plus the enforced statutory minimum damages of $250 for each and every infringement, 49 made the radio industry aware that the days of undetected and unprosecuted infringements were over. It was then that they began a series of intensive efforts to deaden the effectiveness of the copyright law as interpreted by the courts, and at the same time to have ASCAP dissolved, thereby making the statutory protection of public performance for profit meaningless. 50

A. )  **STATUTORY MINIMUM DAMAGES.** 51 The first concerted effort was the unsuccessful attempt of the National Association of Broadcasters (hereinafter referred to as NAB) to persuade Congress to repeal the statutory minimum damage clause. 52 This provision is not a source of revenue to ASCAP; 53 its chief value is the deterrent effect it has upon those who would otherwise attempt non-discoverable infringements. If, prior to 1941, the average radio station broadcasted for one day without a license from ASCAP, it would be liable for infringement damages of about $50,000. 54 The risk of such an infringement suit made impossible

for a unanimous court, held that the reception, and offer to guests, of broadcasted music by a hotel was a public performance for profit. This case has been widely discussed; see Sprague, *Copyright Radio and the Jewell-La-Salle Case* (1932) 3 Air L. Rev. 417 and Notes, (1932) 20 GEORGETOWN LAW JOURNAL 215, (1932) 17 CORN. L. Q. 263, (1932) 10 N. C. L. REV. 203, (1931) 1 J. RADIO L. 367, (1931) 20 CALIF. L. REV. 77, (1931) 18 VA. L. REV. 70, (1931) 26 ILL. L. REV. 443, 811; see also 2 SOCOLOW, LAW OF RADIO BROADCASTING (1939) 1, 132 et seq.; AMDUR, COPYRIGHT LAW AND PRACTICE (1936) 415 et seq.

49 37 STAT. 489 (1912), 17 U. S. C. § 25(b) (1934). The statute also provides for reasonable attorney fees for a successful plaintiff. 35 STAT. 1084 (1909), 17 U. S. C. § 40 (1934). In M. Whitmark and Sons v. Colloway, 22 F. (2d) 412 (E. D. Tenn. 1927) the attorney’s fee was the same as the damages, $250. SHAFTER, MUSICAL COPYRIGHT (1939) 260. Cf. the criticism of the abuse of this statutory provision in Buck v. Elm Lodge, 29 U. S. Pat. Q. 444 (N. D. N. Y. 1936), rev’d, 83 F. (2d) 201 (C. C. A. 2d, 1936), quoted in part, note 28, supra.


51 On the general question of statutory minimum damages see *Hearings, op. cit. supra* note 4, which deals, for the most part, with this question; Note (1938) 47 YALE L. J. 433, 436 ff., LEGIS. (1938) 51 HARV. L. REV. 906, 918.

The statute also provides for criminal liability if the infringement is willful. 35 STAT. 1082 (1909), 17 U. S. C. § 28 (1934). Only once, between 1909-1937, has a plaintiff sought the protection of this section, however. (1937) 37 COL. L. REV. 487, 489, n. 21.

52 The NAB was the sole potent sponsor of the Duffy Bill, S. 2465, 74th Cong., 1st Sess. (1935), which had for its primary purpose the abolition of the statutory minimum damage clause. Note the number of times that representatives of NAB offered and gave testimony in the hearings on the bill. *Hearings, op. cit. supra* note 4.

53 In 27 years, ASCAP has collected only $8,800 in infringement suits. *Hearings, op. cit. supra* note 4, at 201, 374.

54 On the average basis of using 200 compositions a day. *Hearings, op. cit. supra* note 4, at
the operation of a radio station without a license. On the other hand, if there were no statutory minimum damage clause, each composer would have to prove what actual damages he sustained. The impossibility of such a task becomes obviously apparent when a concrete case is taken. Suppose a broadcaster in Omaha, Nebraska, with a 5,000 watt station played "God Bless America" without the consent of the composer or his assignee, ASCAP. On what possible basis could the composer prove damages? Would his damages be more if the station had been a 50,000 watt one? Had been located in Chicago? Had played the piece at noon? At nine o'clock at night? Suppose the program were sponsored? Would it make any difference if a "named", or a three piece, band played it? If the minimum statutory damages were abolished, radio owners could knowingly ignore the copyright laws and willingly subject themselves to suit, firm in the conviction, and rightfully so, that although any number of infringements could be proven against them, damages never could be.

B.) STATE LEGISLATION. Having been defeated in its efforts to repeal the statutory minimum damage clause in Congress, NAB then began a series of comprehensive and systematic attacks on ASCAP, through the medium of state legislatures. The thoroughness with which this tremendously broad, and yet carefully planned, campaign was carried on, bespeaks the amount of time and money which NAB spends to defeat the operation of ASCAP, and at the same time reveals how essential it considers its dissolution. NAB seems to have been the sole and only draftsman of these statutes. Its fingerprints are seen at every step in their passage and defense in courts. It should also be remembered that state legislatures are, generally speaking, unfamiliar with the intricacies of musical copyright and few have ever heard of ASCAP. The objectives of these bills are made exceedingly alluring; all are worded in an almost argumentative form and the words "monopoly" and "restraint" appear

439 ; Note (1939) 10 AIR L. REV. 206, 207, n. 7. This does not include attorney fees. Note 49 supra. Nor does it include court costs.

56 There are isolated instances where broadcasters have defied ASCAP, and refused to purchase a license, over a long period of time. Hearings, op. cit. supra note 4, at 1090.


67 Most of the statutes, of the same group, referred to hereinafter, are identical in language. In its zeal to adopt the Washington statute verbatim, the Michigan legislature overlooked the fact that the statute which they were copying provided for certain remedies "in the Superior Court." This they also included in the Michigan statute, although there are no "Superior" courts in that state.
repetitiously. Their introduction was a comparatively simple problem. To date thirty-five statutes dealing with musical copyright (and ASCAP) have been introduced in state and territorial legislatures. Two of these have been vetoed because of their dubious constitutionality, two failed of passage, twenty-one died in committees, eight have been passed and two are pending legislative consideration. Two cases involving them have been before the United States Supreme Court upon procedural points. Cases testing the constitutionality of the Florida

NAB has been accused of lobbying for all the bills. Harpers, supra note 30, at 520; see also Note (1940) 53 Harv. L. Rev. 458, 459, n. 13.

Michigan, Senate Enrolled Act No. 125 (1937). On July 22, 1937, the Attorney-General of Michigan, Raymond W. Starr, recommended to the Governor that the act be vetoed. Five days later Governor Frank Murphy vetoed the act declaring it to be, in his opinion, "unconstitutional and void in its entirety."

New Mexico, S. B. 85 (1939); passed Senate Feb. 15, 1939; passed House March 7, 1939; vetoed March 17, 1939.

Arkansas, S. B. 565 (Jan. 13, 1939); Oregon, S. B. 386 (Feb. 16, 1939).

Alabama, S. B. 359 (Aug. 8, 1939); California, H. B. 576 (Jan. 18, 1939); Colorado, S. B. 415, H. B. 576 (Jan. 18, 1939); Connecticut, S. B. 830 (Jan. 2, 1939); Georgia, H. B. 132 (Dec. 2, 1937); Illinois, H. B. 115 (Jan. 24, 1939), H. B. 567 (March 29, 1939); Indiana, H. B. 532 (Feb. 18, 1939), H. B. 228 (Jan. 24, 1939), H. B. 459 (March 1, 1937); Iowa, H. B. 289 (Jan. 18, 1937); Kentucky, H. B. 4 (Jan. 9, 1940); Louisiana, S. B. 72 (May 23, 1940); S. B. 237 (May 29, 1938); Michigan, H. B. 243 (Feb. 28, 1939); Minnesota, H. B. 1521, S. B. 460 (Feb. 10, 1939), H. B. 1529 (March 24, 1937); Mississippi, H. B. 807, S. B. 359 (April 1, 1940); Missouri, H. B. 633, 645 (March 14, 1939), H. B. 704 (March 28, 1939); New York, A. B. 1264 (Feb. 7, 1940), A. B. 2163 (March 7, 1938); Ohio, H. B. 455 (Feb. 13, 1939); Oklahoma, S. B. 207 (March 8, 1939); Pennsylvania, H. B. 198 (Feb. 6, 1939); Rhode Island, S. B. 246 (March 16, 1938); Texas, S. B. 468, H. B. 53 (1937); Wisconsin, S. B. 528 (June 23, 1939).


Colorado, H. B. 17 (Jan. 6, 1941); New Jersey, A. B. 264 (March 4, 1940).

It should also be noted that five statutes have been passed which regulate the activity of copyright owners or their assignees by imposing drastic taxes. Laws of Delaware (1937), vol. 1, c. 14, § 15 and 61; Laws of Georgia (1935) No. 216; La. Gen. Stat. Ann. (Dart Supp. 1939) § 8674.1-8674.3; Laws of Vermont (1939), No. 32; Wisc. Stat. (Brossard, 1937) § 177.01, amended in part, Laws of Wisconsin (1937), c. 247. The Wisconsin statutes have been sustained by a federal district court. Variety, Jan. 15, 1941, 39, col. 2.

The cities of Miami and Daytona Beach, Florida, have enacted ordinances limiting the activities of ASCAP. Miami, Ordinance No. 1164 (Sept. 12, 1935); Daytona Beach, Ordinance No. 622 (Jan. 22, 1935). A measure introduced in St. Louis, Missouri, failed to pass. Bill No. 209 (Oct. 23, 1934).

and Nebraska statutes are now pending before the Supreme Court.  
These statutes may be divided roughly into three groups. The Nebraska type of statute\(^6\) prohibits the activities of the Society entirely, and requires the individual composer, though acting individually, to abandon the system of blanket licensing in order to secure the benefits of the federal copyright act within the confines of the state. It further provides that when copyrighted musical compositions are sold, they must have printed upon them a price to be paid for all the conceivable uses of the work. If such a price is not indicated, anyone who purchases the sheet music shall be deemed to have bought all the rights in the music—including the right to perform it publicly for profit.

The Washington type of statute\(^7\) prohibits the Society from operating within the state as long as it continues its present practice of issuing blanket licenses, but provides that it may continue to operate within the state if it issues “licenses on rates assessed on a per piece system of usage.” If the Society desires to operate on this basis, it is required to file once a year, a complete list of copyrighted compositions, with monthly additions or revisions, accompanied by a list of prices charged. The name and date of the copyright on each separate composition must be listed, together with the names of the publisher and present owner. It also provides that composers who individually issue blanket licenses for the public performance for profit of their own, and only their own, compositions, are exempt from the provisions of the act.\(^8\)

The Montana type of statute\(^9\) is similar to the Washington type, except that it requires the payment of two cents for every composition filed.

It is evident that these statutes (and the pending suit against ASCAP under the Sherman Act) have for their chief purpose the abolition of the blanket system of licensing and the substitution of the per piece system.\(^10\)

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\(^7\)^ Laws of Nebraska (1937), c. 138.


\(^9\)^ In the case of this type of statute, the composer is placed in a dilemma. He may act individually, and thus be permitted to issue blanket licenses, but find that he is unable to enforce his rights under the licenses, for he is acting alone. Or if he prefers to act in collaboration with others, and join ASCAP, or a similar organization such as BMI, he finds that his bargaining agent must issue licenses in a manner that jeopardizes his interests.


\(^11\)^ The merits of these two types of licensing are discussed infra in text accompanying notes 110-124.
It is not the purpose of this paper to discuss the constitutionality of these statutes. It should be noted, however, that with few exceptions, they have been condemned as unconstitutional, because they attempted to give to the states the power to defeat the rights secured to composers by the Federal Copyright Act.

It has been suggested that NAB realized that these attempts to defeat ASCAP’s operations were unconstitutional, but that they were part of a broader scheme to influence Congress to pass federal legislation—undoubtedly constitutional—which would have the same objectives as the state statutes. Congress, in the past, has not been willing to modify the rights of the creators of musical compositions, but seemed resolved to foster and protect American composers. The constant narration of the plight of Stephen Foster seems to have had its desired effect. If, however, it could be made to appear that composers had abused the rights given them, had extorted fabulous and “monopolistic” fees in enforcing these rights, Congress might, in the future, view the position of the American composer differently. And hence, the suggestion runs, NAB will appear before future Congressional Committees, point to the countless attempts to regulate these rights, in the form of state statutes, and insist that this is concrete evidence that the composers have abused the rights which Congress has given them.

C.) STRENGTHENING THE BROADCASTER’S POSITION. The five year licenses which ASCAP had issued to radio broadcasters expired

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73Laymen have discussed the constitutionality of the statutes. An editorial in the Chicago Daily News, Oct. 17, 1939 observed: “There is small doubt that when the issue is brought before the Supreme Court, the unconstitutionality not only of the harsher statutes but of less severe laws in many other states will be fully established.” But compare the vitriolic attack upon this editorial, Broadcasting, Nov. 1, 1939, 44.
74ASCAP has repeated time and again the plight of Stephen Foster who died in a charity ward because there existed at his death no organization to represent composers. See, for example, the testimony of Rudy Vallee, Hearings, op. cit. supra note 4, at 142, and Mr. Buck’s testimony, Hearings, op. cit. supra note 4, at 181. Newspapers and magazines have begun to tell the tale. See the editorials in the Cleveland (Ohio) Press Editorial, Dec. 3, 1940, and the Columbus (Ohio) Citizen, Dec. 3, 1940; Pic, Dec. 10, 1940, 14.
75The description is Justice Black’s; see note 71 supra.
76As it has in the past.
on December 31, 1940. It was imperative that radio broadcasters strengthen their bargaining power sometime before that day, so that when negotiations with ASCAP began for the renewal of the licenses, they would not occupy the same dependent position they had in the past. For yet another reason broadcasters—and especially the two major networks, National and Columbia—felt that they must remove their dependency upon ASCAP. In the summer of 1940 ASCAP announced the terms upon which the new five year contracts beginning in 1941 would be entered into. In the past, none of the networks were licensed by ASCAP. Under the terms of the new contracts radio broadcasting stations would be required to pay less than under the former contracts, and networks, for the first time, would be required to become ASCAP licensees. The proposed contracts provided that the two major networks pay seven and one-half percent of their gross receipts. Though ASCAP reduced the license fee of the broadcasters by a million dollars, it sought to license the chain networks for the first time and to charge them four million dollars for their licenses. If the networks could devise a system whereby they could exist without ASCAP music, they could avoid a four million dollar payment for one of their essential raw materials.76

On September 15, 1939, when NAB met in Chicago, it was agreed that the members of the association should subscribe one and a half million dollars toward the organization of Broadcast Music, Inc. (hereinafter referred to as BMI). This corporation was organized for the purpose of securing the public performance for profit rights in new songs, and especially from new composers. Each of the members of the association subscribed to an amount of stock equal to fifty percent of what it paid ASCAP annually.77 BMI, as ASCAP, enters into blanket licenses with radio broadcasting stations which permit the latter to perform publicly

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76 A complete table showing revenues from various radio sources under the old and new contracts appears in Variety, Dec. 11, 1940, 31, cols. 1-2.

ASCAP charges that the networks, after refusing to accept the proposed contracts, have likewise refused to enter into negotiations for contracts. N. Y. Herald Tribune, Dec. 18, 1940, 27, col. 1. The networks, however, charge that it was ASCAP and not they who refused to enter into negotiations. ASCAP also charges that NAB is dominated by the networks and that BMI was organized through their efforts. N. Y. Herald Tribune, Jan. 8, 1941, 20, col. 6. See also Department of Justice's Press Release, Dec. 22, 1940, 2.

77 For a detailed account of the September meeting, and the proposal herein discussed, see the issues of Broadcasting from July 1, 1939, to and including Oct. 1, 1939. A poignant—and still accurate—observation on the result of "people of the same trade . . . (meeting) together" was made a century and a half ago. See 1 Adam Smith, The Wealth of Nations (6th ed. 1793) 134.
for profit any of the compositions which have been assigned to it. At the present time BMI's contracts provide that the licensee shall pay for this right approximately one-half of the amount that it paid ASCAP in 1937. Over three-fourths of the American broadcasters have become BMI members and have adopted a policy of refusing to permit the broadcasting of ASCAP controlled music. BMI has made no effort to license chain broadcasters, and, undoubtedly, never will.

Such an effort to strengthen the position of radio broadcasters is not new, for similar attempts have been made in the past.\(^78\) Each failed for the same reasons. First of all, the organizations have had difficulty in securing rights to new compositions. If a member of ASCAP is the author of such a composition, he probably will not assign the performance rights to such an organization. And if the composer is not a member of the Society, but knows that such an organization is in existence, he will probably seek admission to it, realizing that ASCAP and not BMI is the recognized representative of composers and can secure for him far more remuneration than can BMI.\(^78a\) BMI, thus far, however, has had surprising success. A great number of composers have joined its ranks; their compositions have become hits.\(^79\) These tunes, it should be noted, however, were composed by relatively unknown composers and fall chiefly into the category of popular dance music. BMI, by encouraging the revival of compositions upon which copyrights have expired—those in public domain—has tapped a large source of supply for its members.

Assuming that BMI will make available to its members a large share of copyrighted and public domain compositions, radio broadcasters nevertheless will be faced with the inevitable problem of publicly performing compositions which have been assigned to the Society. The distributor of music, ASCAP argues, is at the mercy of the public's demand, and the

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\(^78\)Hearings, op. cit. supra note 4, at 1114; Gibbs v. Buck, Transcript of Record, op. cit. supra note 17, at 231.

\(^78a\)Under BMI's present contract with a radio licensee, it receives about one-seventh of what ASCAP received under the old contract. Should BMI supersede ASCAP and continue its present license contracts, composers will receive from one-third to one-half of what they would have received under the old ASCAP licenses. Variety, Jan. 15, 1941, 41, col. 3.

\(^79\)NAB Reports, Dec. 6, 1940, 4837; NAB Reports, Nov. 15, 1940, 4788. Perhaps BMI's greatest success, thus far, has been its successful negotiations with Edward B. Marks Music Corp., a sheet music publishing firm which for a long time had been an ASCAP affiliate. Variety, Dec. 11, 1940, 41, col. 3.

The increase in the radio audience during the first two weeks of January, 1941, was due to a "curiosity audience"—those who knew of the music boycott and were eager to pass judgment on it. Washington (D. C.) Star, Jan. 19, 1941, Pt. 1, 12, col. 2.
demand for the compositions of, for example, Victor Herbert, George Gershwin, John Philip Sousa, Irving Berlin, and Jerome Kern, all of whom have assigned the performance rights to their compositions to the society, will not vanish completely. This public demand is arbitrary and absolute and if a musical radio program does not satisfy it, the program has no audience. Radio broadcasting, as a competitive enterprise, is unique in this respect, for the commodity which it "sells" is free, and hence the public is in a position to seek out only that which it enjoys. There is no allurement in substitutes at cheaper prices. The radio stations which continue to be ASCAP licensees hold an extremely advantageous competitive position over their rivals who prohibit the playing of ASCAP music. If the non-ASCAP radio stations can induce the public to forsake the music which has proven to be its favorites and to which it listens without charge, it may well succeed in its struggle. Some boycotters of ASCAP music have reported that not only has the public not complained of the shift, but, in fact, has praised them for the new type of music which they broadcasted. ASCAP contends, however, that the popularity of this new type of music will be short-lived and that the popularity of, and consequent demand for, such songs as "God Bless America" and "The Stars and Stripes Forever", will not vanish because two-thirds of the American radio stations refuse to permit their broadcast.

Although BMI licensees have taken countless precautionary measures in order to avoid completely the playing of ASCAP music (and conse-

\footnote{In Buck v. Russo, 25 F. Supp. 317 (D. Mass. 1938) an orchestra leader testified that he "disinclined to play songs that had become popular." In rendering its judgment the court rebuked the witness of such testimony and added: "It seems ridiculous to suppose an establishment that was catering to the public would avoid presenting just what common knowledge teaches us the public demands. . . ."}

\footnote{For the experience of WFBL (Syracuse, N. Y.) see Variety, Dec. 25, 1940, 24, col. 2.}

\footnote{Besides ASCAP, there are other groups which will continuously remind the public that non-ASCAP stations are prohibiting the broadcast of musical favorites. Newspapers without radio affiliations generally have sided with ASCAP. See, for example, PM, Dec. 15, 1940, 58; Washington (D. C.) Times-Herald, Dec. 18, 1940, 12, cols. 1-2; Hughes, Radio's 20th Birthday Marred by Headaches (Nov. 30, 1940) 73 Editor and Publisher 8. The ASCAP licensees will remind the listening audience that only over their stations will certain musical favorites be played. Phonograph record manufacturers and their agents have begun an intensive advertising campaign which emphasizes the fact that most semi-classical music is no longer broadcast by the networks. See the full page ad in Washington (D. C.) Post, Jan. 21, 1941, 32. Churches and their news organs have complained bitterly against the network ban of most hymns. See Pittsburgh Catholic, Dec. 26, 1940, 8, col. 1. ASCAP is planning a weekly network broadcast over those stations to which it has issued licenses which will consist of performances by its members, Broadcasting, Jan. 20, 1941, 12.}

\footnote{Variety, Dec. 11, 1940, 30. BMI has completed negotiations for a million dollar
sequent liability for infringement fees of $250 plus attorney’s fees), the possibility of success in this endeavor seems remote. An orchestra playing a request number, an individual improvising, an amateur group deviating from its program, “pick-ups” from basketball and football games—these and other renditions of music offer fertile opportunity for the playing of ASCAP music regardless of precautionary measures.

If radio broadcasters fail in strengthening their bargaining position, the alternative is to weaken the “bargainee.” This has been tried through Congressional channels and failed, hence, the only alternative left—after having tried state legislatures as a vehicle—is the federal courts. Here also radio broadcasters have suffered defeat after defeat as long as they relied upon the interpretation of the Copyright Statutes, but there remains the possibility of dissolving ASCAP under the Sherman Act.

IV. ASCAP AND THE SHERMAN ACT

In 174th St. & St. Nicholas Ave. Amusement Co. v. Maxwell, et al., it was held that ASCAP’s operations were not a restraint of trade. This case, however, is not compelling for at the time of the decision, 1918, ASCAP was in its infant stages, its operations were different than they are today, and radio broadcasting had hardly begun. However, in more recent times in other Anglo-Saxon countries, organizations similar to ASCAP have been held not to violate the general common law notions of monopoly and restraint of trade. Such decisions, however, are not conclusive for our statutory federal anti-trust laws are, in fact, different than common law notions of restraint of trade, and depend upon factors

insurance policy against infringement suits. The networks have included in their new contracts with orchestras infringement liability indemnity clauses. Despite these precautions, ASCAP alleges that broadcasters were guilty of over one thousand infringements during the first three days of their operations without ASCAP licenses. N. Y. Times, Jan. 4, 1941, 15, col. 1.

Text III (A) supra.

Text III (B) supra.

Notes 45-47 supra.

26 Stat. 209 (1890), 15 U. S. C. § 1-7 (1934); see note 91 infra.


The report does not indicate whether the plaintiff also alleged violation of federal anti-trust laws.

The plaintiff was not a radio broadcaster.

Performing Right Society, Ltd. v. Magistrates and Councillors of the City of Edinburgh (1922) S. C. 165, 59 Sc. L. R. 194; Performing Right Society, Ltd. v. Thompson, 34 T. L. R. 351 (1918); Isaacs, Law of Theatres, Music-Halls, Cinemas (1927) 297; see also Per-
such as interstate commerce, that are found nowhere outside the United States. The question, therefore, of whether ASCAP is violating the federal anti-trust laws may be approached as one that has never been determined.\textsuperscript{91}

The petition which has been filed against ASCAP\textsuperscript{92} contains complaints of a great number of monopolistic and restraint of trade practices. There are in the main, two restraints of trade\textsuperscript{93} complained of: First, "all competition among members of [the] ... Society in the sole rights to perform publicly their respective musical compositions, which, but for the illegal combination and conspiracy . . . , would have existed, has been eliminated by said illegal combination and conspiracy"; second, "By the means described the . . . Society [has] destroyed the incentive of broadcasting stations to use the musical compositions of composers . . . who are not members of the . . . Society and have prevented non-members of defendant Society from receiving the compensation for the rights of public performance of their musical compositions, which they would otherwise forming Right Society v. London Theatre of Varieties, (1922) 2 K. B. 433; 91 L. J. K. B. 908; 127 L. T. 760; Performing Right Society v. London Theatre of Varieties, (1924) A. C. 1; 130 L. T. 450 (1924).

\textsuperscript{91}It should be noted, however, that on Aug. 6, 1926, the Department of Justice, having received "a large number of complaints" concerning ASCAP, investigated its activities, and reported in an informal press release that it saw "no reason for proceeding against it under the Anti-Trust Laws. . . ." The Federal Trade Commission on Jan. 2, 1923, informed Mr. Sidney S. Cohen, President of the Motion Picture Theatre Owners of America, that ASCAP's operations did not constitute "an unfair method of competition."

In a great number of infringement cases the defendant has offered as a defense that the plaintiff, ASCAP, violated the Sherman Act. Such a defense has uniformly been unsuccessful since the Sherman Act provides exclusive remedies. Harms v. Cohen, 279 Fed. 276 (E. D. Pa. 1922); Buck v. Newsrrel, Inc., 25 F. Supp. 787 (D. Mass. 1938); M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 470 (D. S. C. 1924), aff'd, 2 F. (2d) 1020 (C. C. A. 4th, 1924). Judge Cochran's language in the District Court in the Witmark case at 480, is typical. "The next defense is that the agreement between plaintiff and other copyright proprietors . . . constitutes a monopoly, in violation of the Sherman Act. It is not necessary to decide whether the agreement constitutes a monopoly, nor whether the rights affected can be considered trade or commerce, nor whether interstate commerce is directly affected or not. The Sherman Act does not make the party to an interstate monopoly an outlaw. It does not prevent such a party from asserting his rights in the courts."


A previous suit, Pennsylvania Broadcasting Co. v. Buck, filed in the United States District Court, S. D. N. Y., Sept. 7, 1933, was dismissed when the government's pending suit, seeking the same objectives, was filed.

\textsuperscript{93}The petition uses the phrase "elimination of combination" instead of the customary statutory terminology, "restraint of trade."
receive, and have limited and restricted the popular demand of the listening public to musical compositions controlled by defendant Society.”

The monopoly of which complaint is made is that the Society “has . . . a complete monopoly of the right to license for public performance for profit all the musical compositions of all its members” and, therefore, since “the Society has refused to agree to royalty payments based upon the actual use made of their musical compositions . . . each broadcasting station, in order to use the copyrighted musical compositions controlled by . . . [the] Society, . . . was compelled to accede to the demands of . . . [the] Society.”

A.) INTERSTATE. To dissolve ASCAP under the Sherman Act, the proof must show, first of all, either that ASCAP is engaged in an interstate activity, or that its activities have a direct bearing upon interstate commerce.94 In its operations the society sends nothing across a state border except contracts and, of course, ordinary business mail. It does not send any useable commodity from one state into another.95 The contracts by which licenses are issued are, as a matter of fact, usually negotiated within the state of the licensee, by a representative of ASCAP who resides in that state. The payments for these licenses—with the exception of broadcasters—are made directly to a local representative of the Society. Excluding the radio licenses, the licensee has no occasion to correspond with the Society at its home office in New York and hence the transaction is generally considered by the licensee as one that does not transcend state lines. Such considerations, however, are not conclusive of the question.96 The Society is organized on a national scale, and

94Although most of the cases arising under the Sherman Act deal with organizations or individuals who themselves operate in interstate commerce, the statute has been interpreted to include the activity of individuals or organizations which are exclusively intrastate, but nevertheless affect the operations of others who are in interstate commerce. Walker, History of the Sherman Act (1910) 50-55; see Industrial Association of San Francisco v. United States, 268 U. S. 64 (1925); cf. Dahnke Walker v. Bondurant, 257 U. S. 282 (1921); United States v. Patten, 226 U. S. 525 (1913).

95“Interstate commerce may transpire without the transportation across state lines of tangible property, e.g. telegraphy between points in several states is interstate commerce. W. U. Te. Co. v. James, 162 U. S. 650 (1896). . . . Similarly, radio broadcasting is a proper subject for federal regulation . . . 35 Opinions U. S. Attorney-General 126 (1926).” McLoughlin, Cases on the Federal Anti-Trust Laws of the United States (1933) 68, n. 10.

96Id.; United States v. Patten, 226 U. S. 525 (1913); cf. Williams v. Fears, 179 U. S. 270 (1900).

The Department of Justice, at one time, apparently took a different view, for on Aug. 6, 1926, it stated that “the . . . Society has nothing whatsoever to do with the published music or with any physical objects which enter into the course of interstate commerce, and that it
affiliated internationally. Its very source of effectiveness lies in the fact that it blankets all of the states, and attempts to license each and every establishment within the United States where profitable public performances are given. Such a systematic and comprehensive operation in forty-eight states might well be said to constitute interstate activity, even though each separate transaction is considered intrastate.  

Even though it were conceded that ASCAP itself was not engaged in interstate activity, the question would still remain whether or not it restrained other commercial enterprises such as radio broadcasters and motion picture exhibitors that were so engaged. And if it did, it would come within the interstate clause of the Sherman Act.

B.) COMMERCE. Assuming then that ASCAP's operations are interstate, it does not follow that it comes within the purview of the Sherman Act for its activities must not only be interstate, but commercial, i.e., interstate commerce. The various attempts to define categorically what is commerce, as used in the Sherman Act, have been futile, or at least fruitless in prognosticating what a federal court's disposition of a case involving the term would be. At best, one can argue only from analogy in attempting to ascertain whether certain activity is, or is not, commerce within the meaning of the statute.  

Although the constitutional usage of the word was involved in Paul v. 

has been held repeatedly by the Courts that acts similar to the granting of licenses for the local performance of music in a place of amusement do not constitute interstate commerce, even when the contracts are entered into in a different state from that where the performance may take place."


Restraints on Motion Picture Exhibition and the Anti-Trust Laws (1938) 33 Ill. L. Rev. 424, 445.

The phrase "interstate commerce" has generally been dealt with by the courts as one concept, when, as a matter of fact, two distinct questions are involved: (1) is it commerce? (2) and if so, is it interstate?

The Department of Justice has likewise fallen into this error. See note 96, supra.

The delimitation of interstate commerce in the Sherman Act as construed by the Supreme Court may be narrower than the same concept in the Constitution." MCLAUGHLIN, Cases on the Federal Anti-Trust Laws of the United States (1933) 83. Cf. the dissenting opinion of Chief Justice Hughes in Apex Hosiery Co. v. Leader, 310 U. S. 469, 525 at 526 (1940).
Virginia the insistence by Justice Field that insurance contracts are not "subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them" has left its imprint upon the word as used in the Sherman Act. Fifty-three years later, Justice Holmes observed, in ruling on whether baseball exhibitions were within the definition of commerce in the Sherman Act, that "personal effort, not related to production, is not a subject of commerce." In thus excluding such intangible commodities as "personal effort," he gave expression to a number of decisions which held that those engaged in artistic or literary expression were not engaged in commerce.

Owning, controlling and leasing theatres and producing grand operas have been held not to be commerce. In dicta—or, perhaps, an alternative holding—the performance of musical compositions has been held not to be commerce. These cases were decided in 1907, 1914, and 1922, at a time when theatrical presentations may have been professional, but Lord Mansfield's remark that "theatres are not absolute necessaries of life" was still held axiomatic. Dramatic entertainers were paid moderate salaries. Radio and theatrical entertainment had not been organized on the gigantic basis that we know it today. This shift of dependency upon entertainment within the past decade—as attested by

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104 In a later case, Hart v. B. F. Keith Vaudeville Exchange, 262 U. S. 271 (1923), the Justice observed, in referring to the baseball case, "that what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently." Professor W. W. Crosskey at the University of Chicago Law School, after reviewing these two cases, is fond of posing the question of whether or not the clothes which Louise Hovick (nee Gypsy Rose Lee) wore in her famous strip tease acts were "incidental" or whether they may have arisen "to a magnitude that requires (them) to be considered independently" and, therefore, her performance was subject to the Sherman Act.
106 Metropolitan Opera Co. v. Hammerstein, 162 App. Div. 691, 147 N. Y. Supp. 532 (1st Dep't 1914), aff'd, 221 N. Y. 507, 116 N. E. 1061 (1918); see also In re Oriental Society, 104 Fed. 975 (E. D. Pa. 1900); In re Duff, 4 Fed. 519 (S. D. N. Y. 1880).
what the public pays for it annually—may well lead a court to rule that
the performance of music is now commerce.

C.) **RESTRAINT OF TRADE THROUGH BLANKET LICENSES.**
If then ASCAP's operations are interstate and commercial, are they in restraint of trade? In the main, the charges that ASCAP operates in restraint of trade are based upon the fact that it issues only blanket licenses and has almost absolute discretion in setting their prices.

The performers of copyrighted musical compositions have insisted that ASCAP was guilty of restraining trade when it forced them to purchase the right to perform all of its repertoire, comprised of 3,000,000 compositions, when they desired to use only a fraction of them. By doing this, it is urged, the Society has eliminated competition between the various member-composers of its organization. This elimination of competition has two effects: (1) it places the performance rights of the members’ music on a non-competitive basis, and (2) it compels some would-be performers to refrain from using any music, since it is almost impossible to operate without an ASCAP license. Both of these effects, it is argued, amount to a restraint of trade.

This first alleged effect of the blanket system of licensing ignores the fact that the marketing of the performance of music has peculiarities not found in the marketing of any other commodity. There is no competition, as that word is ordinarily used, between composers and their respective compositions irrespective of what the mode of licensing is. Music as it is received by the largest listening audience, the radio public, is free, and consequently there is no allurement in price differentials to it. This being so, its demand is arbitrary, and can, therefore, force the performer to render only those compositions which it desires, thereby eliminating all of the ordinary factors that enter into a competitive marketing process.

Neither is there competition in a theatre or dance hall, for

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109 The radio listener, of course, pays no direct charge for his entertainment. He may, however, pay for his entertainment indirectly. Note 111, *infra*. Theatre-goers in 1936 paid about $1,000,000,000 in admissions. International Motion Picture Almanac, 1936-37, at 5.

110 Petition, United States v. American Society of Composers, Authors and Publishers, note 1, *supra*.

111 Whether the public must ultimately bear the cost of radio advertising, in the form of increased prices, is a matter of dispute. Respectable authority may be found to substantiate either side of the controversy. University of Chicago Round-Table Aug. 13, 1939, No. 74; see the very illuminating article, Braithwaite, *The Economic Effects of Advertising* (1928) 38 *Econ. J.* 16.

once the music listener has paid his admission, he listens to whatever music is played, free of charge. And the difference in the price which he pays depends upon the elaborateness of the theatre or the popularity of the orchestra, and affects in no way the music he is to hear. The music accompanying a moving picture, regardless of where the film is shown, will always be identical and, generally speaking, the compositions played by dance orchestras, at any one time, are the same.

Furthermore, musical compositions are *suis generis* and a person who desires to hear “Anchors Aweigh” will not be satisfied with “Alexander’s Ragtime Band.” If there is competition in any one class of music, as for example, dance music, it exists between the composer, on the one hand, and the public on the other, but never between two composers.

The second alleged effect of the blanket method of licensing—those performers of music who desire to perform only a very limited number of musical compositions find it impossible to perform any of the ASCAP’s music—assumes two facts that do not exist. In the first place, no orchestra, in a dance hall or at a radio station, will confine its repertoire to only a few numbers in the course of a year. The use of medleys, new compositions and the variations in types of music played by any one orchestra illustrates this. And in the second place, such an argument assumes that if the user of music negotiated directly with the composers, or ASCAP, their assignee, for the specific pieces of music he desired, the composers collectively, or ASCAP individually, would charge less for the specific pieces than ASCAP charges for the use of its entire repertoire. There can be no doubt that the composers, or ASCAP, could refuse to sell the performance rights, or place a prohibitive price upon them and, in so doing, be within their rights under the copyright law, and outside the scope of the Sherman Act. This being so, the only remaining question is whether ASCAP is, in fact, employing the blanket system of licensing to force licensees to accept and pay for a number of compositions that they will never use, and, what is important, thereby causing the license fees


114Although “tying clauses” (see Oppenheim, *Cases on Trade Regulation* (1936), c. 2, § 6) have generally been considered in relation to patents, it is conceivable that copyrights may be put to the same abuse. If so, the question arises whether the blanket licensing technique amounts to a “tying clause.”

Seven different types of these clauses are listed by Stevens, *Unfair Competition* (1917) 54 et seq. The first three are based “on the fact that in each case the concern imposing the restriction possesses a patent monopoly in a single article.” The next one “is based upon
to bear no relation to a reasonable price for the pieces actually used, thus making prohibitive the use of music. The answer to this question has been, is, and probably always will be, the same from the licensees and ASCAP; the former insist that the price they pay for a blanket license bears no relation to the reasonable price for the music actually employed and the latter contends that the price it charges for a blanket license is in direct proportion to the music actually used by the licensee. Such contentions are general and a proper evaluation of them must depend on what the actual charges are. Radio broadcasters, under ASCAP’s contracts, are asked to pay an annual basic fee, plus a percentage on net receipts ranging from three to five percent, varying with the gross receipts of the station.\textsuperscript{115} Theatres seating 800 or less pay 10 cents a seat per year; theatres having a seating capacity of from 801 to 1599 pay 15 cents a seat per year; and all those with seating capacities of 1600 or more pay 20 cents a seat per year.\textsuperscript{116} The average license fee to a hotel-restaurant is $90, this amount varying, of course, depending upon its size, number of dining rooms providing music, and the prices charged.\textsuperscript{117} There are instances where small dance halls have been forced to close, and restaurants to abandon music, because of the license fee demanded by ASCAP.\textsuperscript{118}

the fact that the concern making the requirement possesses a patent monopoly in two or more articles." And the last three "are based upon the fact that the concern making them possesses an extensive or predominant control of certain articles." The only conceivable class under which ASCAP might come is the second. But the vice of the tying clause here depends upon the fact that the patent (or patents), which is (or are) "tied" to the desired patent, is in competition with other patents. It has previously been pointed out that music compositions are not in competition with each other.

\textsuperscript{115}VARIETY, Dec. 11, 1940, 1, 2. For a copy of the contract prior to 1941 see that of KMO at Tacoma, Washington, reprinted at page 69 of Transcript of Record, Buck v. Gallagher, 307 U. S. 95 (1939), cited supra note 64.

\textsuperscript{116}On this basis, Radio City Music Hall paid $1,200 for one year, such fee covering not only the rendition of music in talkies, but also that of the orchestra of 100 musicians. Hearings, op. cit. supra note 4, at 19, 91, 106.

\textsuperscript{117}Hearings, op. cit. supra note 4, at 20; cf. the statistics at 597.

At first glance, the ASCAP system of pricing seems unfair, because of the scheme of graduating the prices according to the nature of the place where the performance is given. Everyone would agree that the value of a given song to the purchaser of the performance rights varies with the popularity of the place at which, and of the orchestra by whom, it is played. It is, therefore, arguable that the difference in value arises not from the song but from extrinsic factors for which the purchaser has already paid once in terms of rent, advertising and salaries. However, such an argument assumes that the song, as a fungible and tangible thing, is sold. In fact, what is sold is the right to perform the song under the given circumstances; although the song is the same, the right to perform it before a large audience is not the same as the right to perform it before a small one.

\textsuperscript{118}Statement of Harry Leeward Katz, General Counsel, Music Users’ Protective Association,
These isolated cases, however, are not the criteria by which to judge the reasonableness of an ASCAP license.

Some performers of music have insisted that a blanket license was the only practical method under which they could operate.119 Frequently a song is played spontaneously or without any knowledge on the part of the broadcaster or employer of an orchestra that a particular song will be performed on the program.120 (Encores and request numbers are of the first group. Music which is "picked up" in a parade or at an athletic contest are examples of the latter group.) In both of these instances it is impossible for the present licensee (who is held responsible for a copyright infringement) to know just what song will be played and negotiate for its performance ahead of time. But even if the songs to be performed are known before their rendition, the task of negotiating for each of their performance rights would seem to be overwhelming, considering the number of compositions that are performed by a radio broadcaster in one day, or a dance orchestra in one night.121 Furthermore, since each broadcasting station is considered a public performer of music when it broadcasts a chain program, how could it protect itself when there is a last minute change in music at the point of origin?122 And still another question presents itself when a dance orchestra is asked to repeat a rendition. If a per piece license were issued, it would be applicable for only one rendition, and, hence, once having played the music, it would be necessary to renegotiate in order to repeat it.

Perhaps the most convincing proof that blanket licensing is the only feasible method of licensing performers of copyrighted music is the fact that the organization which NAB organized to compete with ASCAP, BMI, has adopted this method. If the blanket licensing operations of ASCAP violate the Sherman Act, the operations of BMI do likewise. If the state anti-ASCAP statutes are constitutional and will, as a practical matter, prevent ASCAP's operations, BMI will likewise fail. Whatever charges broadcasters have leveled against ASCAP's blanket licensing system apply with equal force to its own creation, BMI.

The objections to the blanket system of licensing in Canada were in-

Hearings, op. cit. supra note 4, at 760-764; cf. the statement of E. C. Mills, General Manager of ASCAP, Hearings, op. cit. supra note 4, at 765-779.

119 See the testimony of the licensees of KLUF and WCAU in Affidavit of Gene Buck at 115, Buck v. Gibbs, supra note 17.

120 Hearings, op. cit. supra note 4, at 478-479; cf. note 48 supra.

121 See note 35 supra.

122 Cf. testimony of Louis G. Caldwell, in behalf of NAB. Hearings, op. cit. supra note 4, at 479-480.
vestigated by a governmental commission which concluded that it was the only workable method of licensing the public performance for profit of copyright music. In England an investigating commission arrived at the same conclusion. The fact that BMI uses this method re-emphasizes its indispensableness.

But even assuming that ASCAP’s mode of operation constitutes a restraint of trade, because it forces some performers to refrain from the use of music, it does not follow that it is in violation of the Sherman Act, for the restraint may be a reasonable one, and under the “rule of reason” as applied to trade associations in Appalachian Coals, Inc. v. United States, it would not be in contravention of the Sherman Act. There, in viewing the “realities [which] must dominate the judgment” of the Court in applying the Sherman Act, emphasis was placed upon “the economic conditions peculiar to the ... industry, the practices which have obtained, the nature of defendant’s plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in” the commodity affected. The chaotic conditions of, and practices that obtained in, the musical performance “industry” prior to ASCAP’s ascendancy, would seem to justify its operations. The plan under which it operates has been demonstrated to be the most feasible, and the “market prices” of performance rights would seem to be reasonable. However, in the light of the Supreme Court’s apparent desire to limit the applicability of the Appa-

124 Select Committee of the House of Commons to Investigate Performance of Copyrighted Musical Works, 1930, quoted, in part, Gene Buck v. Harry R. Swanson, supra note 18, at 34.
126 The so-called ‘rule of reason’ in the application of the Sherman Act seems to be admirably designed for the regulation of such an organization as ASCAP.” Note (1940) 53 Harv. L. Rev. 458, 465, n. 53.
lachian case the operations of the bituminous coal producers may be distinguished from those of ASCAP.

Both the broadcasters and ASCAP have argued that the Society, in one of its aspects, is comparable to a labor union. The former compares it to unions which "make illegal and exorbitant demands" while the latter contends that it functions as a collective bargaining agent which secures to its members adequate remuneration for their labors. NAB has made much of the fact that ASCAP, organized to protect composers, does not conform to orthodox democratic notions. It points to the Society's board of directors which retains self-perpetuating features. It cites figures (which ASCAP repudiates) purporting to indicate that the board, by its classification of members, has played favorites. ASCAP, in turn, points to the generous benefits which it has shared with its members. Such criticisms and defenses, however, are made primarily as public relations endeavors. They do not answer the question of whether ASCAP, as a labor union, violates, in its operations, the Sherman Act.

Judged by the standards of the Apex case—a violation of the Sherman Act occurs only when the purpose or effect of the labor combination is to raise or fix the market price—ASCAP's operations would seem to be well beyond the prohibition of the Act. ASCAP does not attempt to set the price at which non-ASCAP members should sell their performing rights, no more than BMI attempts to set the scale for ASCAP members. Whatever competition that may exist between composers remains unaffected by ASCAP's operations. Undoubtedly, there is a rigidity in the price structure of ASCAP music, but no more so than there is in the

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128 Philadelphia Record, Dec. 20, 1940, p. 9, col. 1 and 2; Hearings, op. cit. supra note 4, at 357; Labor, Dec. 31, 1940, 2, col. 8.

129 ASCAP distributed $305,000 in 1939 for pensions and relief payments to finance rent, medical care, funerals and insurance expenses for its members. HARPER'S, supra note 30, at 522.

One of the criticisms often made against ASCAP by those who formed BMI is that it does not accept into its membership every song composer who asks for admittance. ASCAP has certain minimum requirements of demonstrated skill. In this aspect of its operations, it is also comparable to labor unions.

Those composers who have become BMI members are predominately individuals who compose music as a hobby and not as a vocation. Herald & American (Chicago, Ill.) Jan. 10, 1941, 10, col. 6. ASCAP estimates that there are 20,000,000 such persons in the United States. Washington (D. C.) Star, Jan. 19, 1941, Pt. 1, 12, col. 2.

130 Apex Hosiery Co. v. Leader, 310 U. S. 469, 500-501; (1940) 29 GEORGETOWN LAW JOURNAL 120, (1940) 54 HARV. L. REV. 146.
wages of union members. A combination of laborers or composers, by its very nature, limits the fluidity of wages or of compensation for artistic efforts.

D.) MONOPOLY.131 If ASCAP does not restrain interstate commerce, the one remaining question is whether it violates the second section of the Sherman Act132 because it has had assigned to it a large number of the musical performing rights created by the copyright statutes, and thereby achieved somewhat of a monopolistic position. Or, stated broadly, does the Sherman Act limit in any way the monopolistic language of the copyright statutes?133

At the outset it should be noted that unlike some monopolistic patent organization, which withhold patents, ASCAP’s chief function is to promote the welfare of the composers and the progress of art, and is, therefore, not subject to the same criticism which has been leveled against such patentees or their licensees.134 It should also be noted that BMI’s

131 There are few cases dealing with copyright monopolies. But the language of the patent and copyright statutes are similar. They both give “exclusive” rights to the patentee and copyright holder, and thus make their positions, as far as the anti-trust laws affect them, identical. The cases and articles that are cited infra seem, therefore, to be applicable even though they generally deal with patent-monopoly questions.

132 Every person who shall monopolize ... any part of the ... commerce among the several States ... shall be deemed guilty. ... " 26 STAT. 209 (1890), 15 U. S. C. § (1934).

133 Feuer, The Patent Monopoly and the Anti-Trust Laws (1938) 38 COL. L. REV. 1145, 1146. In United Shoe Machinery Corp. v. United States, 258 U. S. 451 (1922), counsel for the defendants argued that the Clayton Act was unconstitutional because it conflicted with the patent provisions of the U. S. CONST. ART. I, § 8.

See Peaslee, The Effect of the Federal “Anti-Trust Laws” on Commerce in Patented and Copyrighted Articles (1915) 28 HARV. L. REV. 394 and the conclusion of the author at 400, “Except the Clayton Act, the ‘Anti-Trust Laws’ do not restrict the monopolies created by the patent and copyright laws.”


134 In his April 29, 1938, message to Congress, President Roosevelt suggested the need for the "amendment of the patent laws to prevent their use to suppress inventions, and to create industrial monopolies." N. Y. Times, April 30, 1938, 2; see also the remarks of Commis-
(at least) present success refutes the charge that ASCAP monopolizes the performance rights of music.

Most cases wherein patent pools have been held to violate the Sherman or Clayton Acts are not analogous to the copyright pool which ASCAP controls for the patent cases are based on the assumption that the patents involved are of a competitive nature,\(^1\)\(^3\) while performance rights to music, as has been previously pointed out, are not.\(^1\)\(^3\) In *United States v. Winslow*,\(^1\)\(^3\) however, the United States Supreme Court had before it a case wherein the defendants' patents, which had been turned over to the United Shoe Machinery Company, "did not compete with one another."\(^1\)\(^3\) The question of whether such a combination was a violation of the Sherman Act, Justice Holmes observed, "does not require lengthy discussion." It was evident to the Court that "The business of [the] several groups that [had] combined, as it existed before the combination, is . . . legal. . . . They did not compete with one another, [and] it is hard to see why the collective business should be any worse than its component parts." Counsel for the Government strongly urged that because this corporation controlled seventy to eighty percent of all the shoe machinery business, it violated the Act. To this the Justice replied that "we can see no greater objection to one corporation manufacturing seventy per cent of three non-competing groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each."\(^1\)\(^3\)\(^9\)

These words of the Court are particularly applicable to ASCAP's operations, for it must be conceded that the composer, acting individually, could sell his non-competitive music performance rights on whatever basis he desired.\(^1\)\(^4\) This being so, it is "hard to see why the collective business should be any worse than its component parts." And the fact that the organization which now owns these rights (a corporation in the

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\(1\)\(^3\) The thesis of Vaughan, *Economics of Our Patent System* (1925) depends on this assumption; note particularly pp. 25, 26 and 70.

\(1\)\(^9\) Text IV (C).

\(1\)\(^7\) 227 U. S. 202 (1913).

\(1\)\(^8\) The corporation had been organized for the sole purpose of holding these patent rights.

\(1\)\(^3\) United States *v. Winslow*, 227 U. S. 202, 217 (1913).

Winslow case, and a non-incorporated association, in the case of ASCAP) controls 90 to 95 percent of these rights "should [offer] no greater objection" to its existence.

It may also be urged that in one view of the society's operations, the members are licensing ASCAP, and it, in turn, issues sub-licenses. If such a view be tenable,\(^141\) there would be no objection to the composer designating at what price ASCAP might issue sub-licenses. The Supreme Court has been firm and consistent in one aspect of patent-monopoly litigation: the right of a patentee to designate the sale price to his licensee.\(^142\) If the patent laws permit patentees to do this without violating the Sherman Act, surely copyright holders possess the same privileges, and when ASCAP sets a price for a blanket license, it may well be viewed as the collective price set by the various copyright holders.

Although the "rule of reason"\(^143\) is generally understood to mitigate the literal meaning of Section One of the Sherman Act, the Supreme Court has given evidences of applying it also to Section Two.\(^144\) A monopoly because it is a monopoly, is not to be adjudged bad. A careful evaluation of all the factors of the monopoly's operations and their effect upon the public is the criterion by which it is to be judged.\(^145\)

**Conclusion**

The charges of the performers of copyrighted music against ASCAP, reduced to their essentials, are the sincere cry of every business man: he has to pay too much for raw material.\(^146\) Such an attitude will persist as long as we operate in a capitalistic system, and the only pertinent question which the complaint raises is whether or not he is, in fact, being dealt with unreasonably. What may be reasonable to one individual

\(^{141}\) The Supreme Court's view of what constitutes a license, as distinguished from a sale, would substantiate this thesis. United States v. General Electric Co., 272 U. S. 476, 489 (1926).


\(^{143}\) As set forth in Standard Oil Company of New Jersey v. United States, 221 U. S. 1 (1911).

\(^{144}\) Standard Oil Co. of Indiana v. United States, 283 U. S. 163 (1931).

\(^{145}\) "The solution, ... must depend, not on the extent of the patent monopoly, but rather on the degree of restraint and control that may be legitimately exercised under the Sherman and Clayton Acts." (1931) 45 Harv. L. Rev. 150, 156.

\(^{146}\) One large radio advertising agency has graphically, if not tactfully, described the ASCAP controversy as "over money, and everything else is just so much bunk." *Variety*, Dec. 4, 1940, 34, col. 2.
may be obnoxious to another, but considering the nature of the public performance for profits rights, the difficulty of their enforcement by an individual acting alone, and the fees which ASCAP charges, it may well be urged that ASCAP's system is, by and large, reasonable.

Such a potent monopoly, regardless of how benevolent it may have been in the past, carries with it the possibilities of abuse. Although its operations may be reasonable today, tomorrow its fees may become exhorbitant, its practices predatory. Some foreign countries have realized this latent potential danger and have, therefore, provided that if a controversy arises between the performing-right society and the performer over the amount of the fee to be charged, the matter should be submitted to arbitration before a governmental agency. The merits of such a procedure must be balanced against the disadvantages of governmental arbitration of price.

Attempts have been made by users of, and those interested in, music to induce the Federal Communications Commission to arbitrate the conflict between NAB and ASCAP. The Commission has replied that as long

_Australia, Commonwealth Acts (1933) No. 68; Canada, Statutes (1931) c. 8; New Zealand, Statutes (1928) No. 48; Norway, Law of May 30, 1930, reprinted 3 Arch. fur Funkrecht 580, § 9.6 (1930); Czechoslovakia, Law of April 24, 1936, Prager Archiv (1936) 1078 § 16 A (3); Latvia, Law of May 5, 1937, reprinted 3 Copyright 290, Art. 36 (1937); Italy, Law of June 14, 1928, 4 Raccolta Ufficiale Delle Leggi (1928) 440, No. 1800; but cf. the Russian provision, Decree of Sept. 24, 1927, reprinted 1 Archiv fur Funkrecht 654, Art. 2 (1928).

The arbitration board in Italy is composed of a representative of the copyright owner, the would-be performer, and a delegate of the Ministry of Communication. The Czechoslovakian statute provides that the Commercial Court of Prague shall sit as the arbiter. The other statutes designate governmental officers or existing arbitration boards.

I am indebted to Dr. M. Schach of Harvard Law School for tabulating and translating most of these foreign statutes.

One such protest was made by Frank Hummert, Vice-President of the advertising agency of Blockett-Sample-Hummert Inc., which placed over $10,000,000 worth of advertising on the networks last year. The agency is responsible for a number of programs which are built around musical favorites and which have, for the most part, been composed by ASCAP members. Editor and Publisher, Dec. 7, 1940, 12, col. 1. Besides eliminating signature music employed in the programs of Amos 'n Andy ("The Perfect Song"), Eddie Cantor ("I Love to Spend This Hour With You"), Edgar Bergen ("The Big Show"), and Bing Crosby ("Where the Blue of the Night Meets the Gold of the Day"), the break with ASCAP has forced the complete or partial abandonment of such programs as the Lucky Strike Hit Parade, Kay Kyser's College of Musical Knowledge, The Album of Familiar Music, and Musical Americana. Newsweek, Dec. 23, 1940, 52, 53, col. 2.

Ten prominent music educators are circularizing 2,000 educational institutions asking that they write the Federal Communications Commission and urge it to arbitrate the dispute.
as none of the principals sought FCC arbitration, it would not attempt a reconciliation of their differences.\textsuperscript{149} The replies, however, leave unanswered the question of whether the Commission would or could, under the powers given it by Congress, arbitrate these conflicting interests in the event any of the parties request it to take such action.

\textsuperscript{149}Broadcasting, Dec. 15, 1940, 34, col. 1.
EXCLUSIVE DEALER DEVICES IN THE MARKETING OF PETROLEUM PRODUCTS

Forrest Revere Black*

IN ANY comprehensive history of government regulation of business in America, one chapter must be reserved to relate the strange story of the ingenious strategy of the major oil companies in marketing their products through the so-called "Iowa Plan" and cognate devices, whereby the operator simulates the appearance of an independent dealer and the major producing companies thereby acquire an exclusive outlet and attempt to evade the obligations of chain store taxes, Social Security legislation, Workmen's Compensation laws, public liability insurance and labor troubles from attempts at unionization and collective bargaining. In a recent publication,1 we have described another clever major oil company strategy, whereby through the ownership and operation of their interstate pipe lines the major oil companies have evaded for more than thirty years not only the "Rebate-Device" section of the Elkins Act of 19032 through the "kick-back" in the guise of dividends, but also the common carrier status imposed upon them by the Pipe Line Amendment of the Hepburn Act of 1906,3 concerning which Mr. Justice Holmes succinctly remarked that the pipe lines would carry "all oil offered, if only the offerers will sell at their price."4

The retail marketing of petroleum products has gone through several

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1Black, Oil Pipe Line Divorcement by Litigation and Legislation (1940) 25 CORN. L. Q. 510.

232 STAT. 847 (1903), 49 U. S. C. § 41 (1) (1934); see also, Interstate Commerce Act, 24 STAT. (1887), 49 U. S. C. § 2 (1934), and an amendment to the Elkins Act, 32 STAT. 847 (1903), 49 U. S. C. § 41 (1934), which was part of the Hepburn Act, 34 STAT. 584 (1906), 49 U. S. C. § 1 (1934), and provides that in addition to the other penalties provided by the Act any person, etc., who shall knowingly receive any rebates, direct or indirect, shall forfeit to the United States a sum of money three times the amount of money so received or accepted. 34 STAT. 584 (1906), 49 U. S. C. § 1 (1934).

34 STAT. 584 (1906), 49 U. S. C. § 1 (1934) et seq.

4The Pipe Line Cases, 234 U. S. 548, 560 (1914).
The dominant consideration on the part of producers has been a mad race to secure additional retail outlets and increased gallonage and usually connected with this has been an attempt to exclude the sale of competitor’s products and to control the resale price. Although the various stages overlap, and some companies may at one time utilize two or more of these devices, there is a general chronological order.

THE LOANING OR RENTING OF EQUIPMENT

Starting about the time of the World War, the major oil producing companies embarked on the policy of loaning or renting equipment for the distribution of petroleum products. The charge was a nominal one, usually one dollar per year, to the filling station operator who owned or leased the site. The Federal Trade Commission in its report of 1925 indicated the prevalence of this practice. In 1920 the Atlantic Refining Company loaned 2,122 pumps; in 1921 it loaned 2,056 pumps, and in 1922, 2,513 pumps. The Standard Oil Company of New York at the close of 1922 had leased or loaned equipment to approximately 19,000 stations in New York and New England. This equipment was carried on the company’s books at a value of $4,500,000. The Sinclair Refining Company up until the close of 1922 had leased or loaned 1617 units at an investment of $375,000.

Legal steps to prevent this method of loaning and renting equipment were ineffectual. Starting in 1919 the Federal Trade Commission sought to check this system and in 1923 the question reached the Supreme Court in the case of Federal Trade Commission v. Sinclair Refining Company. The Court held that the practice on the part of a manufacturer of gasoline of leasing underground tanks with pumps to retail dealers at nominal rentals and upon condition that the equipment shall be used only with gasoline supplied by the lessor is not a violation of the Clayton Act (§ 3), nor is it unfair competition within the Federal Trade Commission Act, as regards either the trade in gasoline or the trade in such storage and pumping equipment. The Court said:

“There is no covenant in the present contract which obligates the lessee not

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7§261 U. S. 463 (1923).


to sell the goods of another; ... The lessee is free to buy wherever he chooses, he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. ... He may carry on his business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. ... No purpose or power to acquire unlawful monopoly has been disclosed. ... Upon the contrary, it appears to have promoted the public convenience by inducing many small dealers to enter business and put gasoline on sale at the crossroads."

Although this practice made the operator an exclusive dealer (provided he did not install equipment loaned or leased to him by another producing company), the Supreme Court held it to be legal. The practical effect of the Sinclair case was to give an impetus to the loaning device and to monopolize the numerous "one pump dealers." In 1927 the Chicago manager of the Vacuum Oil Company estimated that the total number of outlets had increased by this and other devices during the last five years from 12,000 to more than 250,000—or a station for every eighty automobiles. By 1934, the estimate was between 350,000 and 400,000 outlets. Although the Government failed to check this loaning and renting of equipment, the oil companies realized that this expansion must stop if profit suicide was to be prevented, and the voluntary marketing code of 1929 provided for the ending of this practice of loaning and leasing equipment.

But the loaning of equipment did not stop in 1929 with the signing of the Voluntary Code and in 1936 the Federal Trade Commission was asked to rule whether the loaning of pumps and equipment constitutes a violation of the Robinson-Patman Act. Acting on the request of members of the National Oil Marketers Association, several complaints were filed by Paul E. Hadlick, the secretary of that Association. The argument was advanced that the Robinson-Patman Act makes it unlawful for anyone engaged in inter-state commerce to grant "anything of value" as a discount or allowance. It was contended that this covers

7261 U. S. 463, 474.
11Stocking, Stabilization of the Oil Industry (1933) Oil and Gas J., Aug. 15.
the lending of equipment. There is also the provision prohibiting the "furnishing of any service of facilities connected with the handling of the commodities sold, unless the same offer is made to all purchasers upon proportionately equal terms." The argument was advanced that it was difficult to contemplate how pumps, lubesters, tanks and other equipment could be loaned and installed on "proportionately equal terms." The Federal Trade Commission has not made a ruling on this complaint.

**Producer-Owned Service Stations**

Foremost among the uneconomic marketing practices of the major oil companies—which could not be continued if their marketing operations were not subsidized by revenues from other branches of the industry—13—is the producer-owned filling station. The Federal Trade Commission Report of 1925 pointed out that among the 19 largest gasoline-marketing companies whose total sales were 83.4% of the total sales for the country, 19.3% of these sales were direct to the consumer through their own service stations.14 As early as 1922, the Shell Company of California marketed 44% of the gasoline which it refined through its own service stations and the Standard Oil Company of California in the same year marketed 37% of its gasoline through its own service stations.15 In 1923 the President of the National Petroleum Marketer's Association testified before the Senate Committee and said,

"The over-equipment, the over-development and the over-installation in the oil business is the greatest handicap that the business and public have today. It is almost incredible. I would venture the statement that with the curb pumps and filling stations installed in the United States at the present time, if there is not another tank put in or another filling station put in, except for replacement, the industry would not be overloaded to take care of the demands from now on for ten years to come with an increase of ten per cent in volume each year, or better."16

More than a decade later, Secretary Ickes17 protested against "the guinea pig theory" of marketing and suggested a "birth control clinic in an effort to control an output that has already put a severe strain on our whole economic system. Not only has every great company sought

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14Id. at 79 n. 9.
16Id. at pt. 2, p. 573.
to have a station "in every neighborhood of every city," but some of the producer-owned stations are luxurious, as for example, the Gulf Refining Company million dollar station on the wharf at Miami Beach, Florida, which offers complete petroleum service to motor cars and boats, has twenty modern hotel rooms, a magnificent lounge, cocktail bar, restaurant and a variety of shops. Where the producing company owns the station and the operator is a true agent or licensee or employee, price and exclusive dealer control can be exercised over the agent, licensee or employee-dealer. In Federal Trade Commission v. Curtis Publishing Co., the court held that a contract between a publisher and a distributor, as agent, whereby the former undertakes to consign its publications to the latter, retaining title until they are sold, and the latter agrees to supply the demand of distributors and dealers at specified prices; to promote sales; not to act as agent for, or supply at wholesale rates, periodicals of other publishers, or furnish names and addresses of customers to other publishers or agents, is not a contract of sale within the Clayton Act, but is a contract of agency and does not violate the Clayton Act nor is it an unfair method of competition within the Federal Trade Commission Act. In United States v. General Electric Company, the court held that the dealers were genuine agents, not purchasers in disguise and that the plan was not a device to fix prices after sale and to restrain trade and exercise monopoly in violation of the Clayton Act. In this case through a system of contracts between a company which owned the patents for electric lights with tungsten filaments and a large number of wholesale and retail dealers in electric supplies, the dealers were appointed agents of the company to sell, on commission, the lamps which were to be consigned to them by the company, transportation prepaid; the sales were to be at prices fixed by the company; the dealers were to pay all expenses except the original transportation, and to account to the company periodically for the amount, less commission, of all sales cash or credit; and all the stock entrusted to the dealers was to remain the property of the company until sold, and to be accounted for by the dealers.


21272 U. S. 476 (1926).
The Clayton Act (§ 3)\textsuperscript{22} forbids the making of a sale, contract of sale or lease on the condition, agreement or understanding that the purchaser or lessee shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of competitors of the seller or lessor, where the effect of such an arrangement may be to lessen competition substantially or to create a monopoly. The section was primarily directed at the tying practice of the \textit{Mimeograph case}\textsuperscript{23} and it is interesting to note that this case was overruled after the enactment of the Clayton Act, but in so doing the court did not rest its decision on section 3 of the Clayton Act.\textsuperscript{24}

Thus the Clayton Act forbids exclusive dealing arrangements only when ancillary to a sale or lease. Whether the contract is one of agency or sale must be determined from all the surrounding circumstances including the conduct of the parties. Merely styling it an agency contract and the parties principal and agent is not controlling.\textsuperscript{25} Nor will the mere inclusion in the contract of a clause reserving the title in the seller make the contract one of agency or consignment. A contract containing such a reservation may, nevertheless, be one of absolute or conditional sale.\textsuperscript{26}

In the \textit{Dr. Miles Medical case},\textsuperscript{27} which antedated the Clayton Act, the court held that contracts between the manufacturer of a proprietary medicine and jobbers dealing in the same which purport to be consignment contracts and to make the jobbers agents for the manufacturer until they are sold by the jobber to purchasers whom it has licensed to buy the same at prices fixed by it, but which obligates the jobbers to pay a fixed price for the medicine without the right to return it and under which the title is retained even after the price has been paid or “advanced,” are mere subterfuges to disguise purchasers in the mask of agency and to evade the law which would make open contracts of sale with the same restrictions upon resale illegal as in restraint of trade. The court held that these contracts are in fact contracts of sale and not of agency and warned that “hardly any two contracts raising the ques-

\textsuperscript{23}Henry v. A. B. Dick Co., 224 U. S. 1 (1912).
\textsuperscript{24}Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502 (1917).
\textsuperscript{26}In re Carpenter, 125 F. 831 (C. C. N. D. N. Y., 1903); Sutton v. Baker, 91 Minn. 12 (1903); Poirier Mfg. Co. v. Kitts, 18 N. D. 556 (1909).
\textsuperscript{27}164 F. 803 (C. C. A. 6th, 1908), aff'd, 220 U. S. 373 (1911).
tion of sale or agency are so nearly alike as to make an opinion con-
struing one an authority in another. It matters little what the parties
call such agreements. Whether the result is a sale or an agency must
depend upon the meaning and intent of the instrument as a whole.”

“LEASE AND LICENSE” AND “LEASE AND AGENCY” ARRANGEMENTS

The General Counsel of the Federal Trade Commission has esti-
1940] Devices in the Marketing of Petroleum Products 445
tated that at the end of 1932, 65% of the retail outlets for petroleum products
were controlled by exclusive dealing contracts. The “lease and license”
and “lease and agency” mechanisms played an important rôle in creating
this startling condition. Although there is some variation in the form
of these agreements, in general the oil producer leased the filling station
from the owner; the producer then licensed the owner to operate it to
sell only the products of the producer upon terms fixed in a sales agree-
ment; or the producer employed the owner on a commission basis (the
commission being equal to the margin between the wholesale and retail
prices on gasoline).

A typical example of the lease and license arrangement is found in the
Texas Company’s method of inducing the exclusive handling of its
products. Two or three contemporaneously executed instruments in
the form of, (1) a “lease” from the filling station operator to the Texas
Company covering the filling station property; (2) a “license” agree-
ment whereby the Texas Company “licenses” the operator to operate
his station, leased by the Texas Company, for the handling of the Texas
Company’s products exclusively; and (3) a “sales agreement” stating
terms and conditions upon which the Texas Company agrees to furnish
its products to the operator. The restrictive clause may appear in one
or more of these three.

A typical illustration of the “lease and agency” arrangement is found
in the method used by the Standard Oil Company of Indiana. Here, as
in the “lease and license” method, there is a lease and sales agreement,
but the second step, instead of being a license to operate, is an “author-
ized agency” to sell on a commission basis. The commission generally
has been the same as the margin between tank wagon and the service
station price. The restrictive clause appeared in the “authorized agents”

\[\text{\textsuperscript{28}Id. at 805.}\]
\[\text{\textsuperscript{29}Petroleum Adm. Board Release, March 5, 1935.}\]
\[\text{\textsuperscript{30}BURNS, THE DECLINE OF COMPETITION (1936) 426.}\]
\[\text{\textsuperscript{31}Petroleum Industry, Prices, Profits and Competition, SEN. DOC. 61, 70th Cong., 1st
Sess. (1927) 256-257.}\]
\[\text{\textsuperscript{32}Id. at 256, n. 26.}\]
agreement and provided that the Standard Oil of Indiana should keep the filling station "fully supplied."

The "lease and license" and the "lease and agency" arrangements spread rapidly and reached their greatest coverage in the N.R.A. days. The independent oil dealers objected strenuously to those practices at the hearings on the code for the oil industry under the National Industrial Recovery Act,\(^33\) and the conflict of interests between the integrated companies and the independents in the struggle for retail outlets resulted in the following compromise Code provision which is known as Petroleum Code,\(^34\) Art. V., Rule 19.

"Pending decision by the Federal Trade Commission as to whether the lease and agency, lease and license methods of marketing petroleum products constitute an unfair trade practice:

'(a) No new contract shall be written under either method.

'(b) Any such contracts now in effect shall not be renewed for a period exceeding one year, and the cancellation privilege shall be on notice not exceeding thirty days. . . .

'(c) Should the Federal Trade Commission fail to render a final decision on the validity of lease and agency and lease and license agreements within 60 days of the affective date of this code, the President, or agency designated by him, may make a final decision prohibiting such marketing methods, or authorizing them without condition or upon such conditions as he or it may prescribe; or the President or agency designated by him may in his or its discretion temporarily prohibit the use of such marketing methods pending the decision of the Federal courts, or he or it may temporarily authorize such methods pending decision of the Commission and of the courts, either without condition or upon such conditions as he or it may prescribe."

On November 2, 1933, the Federal Trade Commission informed the Administrator of the N.R.A. that the procedural requirements of the Federal Trade Commission and Clayton Acts did not permit the Commission to make a "final decision" within the 60 day period specified in the Code, but the Commission stated it had reason to believe that the oil companies employing the "lease and license" and the "lease and agency" methods of marketing might have violated the antitrust laws.\(^35\)


\(^34\)See Oppenheim, Saul, Trade Regulations (1936) 738-740, for excellent statements on "lease and license" and "lease and agency" agreements by the Petroleum Administrator and Fed. Trade Comm'r; see also, Hearings before the Temporary National Economic Committee, cited supra note 5 at pt. 16, 9347-9367, and pt. 15-A, 8799-8801 (Exhibit No. 1294).

\(^35\)United States ex rel. Cubberly v. Fed. Trade Comm., D. C. Sup. Ct. 1934 (not reported). A writ of mandamus to compel the Commission to rule on the validity of these contracts was refused. See F. T. C. Rep't (1934) 85.
Since the Commission was unable to render a final decision and in view of the even division of opinion among the membership of the Planning and Co-ordination Committee of the oil industry, further action was taken under Executive Order 6260-A, August 28, 1933, which vested authority in the Petroleum Administrator to make a decision governing actions under the Code. Accordingly, on March 4, 1935, the Administrator ruled as follows:

“(1) Exclusive dealing arrangements in sales of lubricating oil were prohibited.
“(2) ‘Any provisions in any exclusive dealing arrangement whereby the operator of a retail outlet or outlets receives any price advantage in return for the exclusion of the products of competitors from such outlet or outlets, are unfair competitive practices and in violation of this Code, provided that, pending decision by the Federal Trade Commission, this shall not apply to rent paid to operators of retail facilities leased by such operators to the supplying refiner, distributor, jobber, wholesaler or retailer or to price advantages allowed to bona fide agents.’
“(3) As to exclusive dealing contracts in gasoline or motor fuel, retail dealers were authorized to cancel the same on 30 days’ notice.”

On March 4, 1935, the Petroleum Administrator submitted to the Federal Trade Commission the following inquiries concerning the legality of certain types of exclusive dealing contracts:

“(1) Is it a violation of the Clayton Act or the Federal Trade Commission Act for a company engaged in the petroleum industry to secure the exclusive handling of its products at a retail outlet or to discriminate in price in favor of an exclusive dealer?
“(2) Is any such arrangement affected by (a) A leasehold interest in the retail facility by the supplying company; (b) An agreement of agency; (c) A combination of a leasehold interest in the facility with an agency agreement (1) where the lessor is the operator; (2) where the lessor is not; (d) A combination of a leasehold interest in the property with a license agreement?
“(3) Have companies used any types of agreements of this character in concert in violation of the applicable anti-trust laws?
“(4) In the event that any of these arrangements are prima facie valid, has their use, in view of the proceedings before the Commission and the investigations made by it, been sufficiently discriminatory against small enterprise and otherwise unfair to warrant their prohibition under the provisions of the National Industrial Recovery Act?’

On April 9, 1935 the Commission expressed its views subject to reconsideration, possible modifications or reversal in the event that a formal complaint involving similar matters is hereafter issued. The following summarizes the Commission’s views:

“(1) Acting individually, a producing company may legally establish retail outlets at sites owned and operated by it through bona fide agents. (2) The method of distribution becomes debatable when the producing company leases premises and the lessor is appointed exclusive agent. The method becomes more debatable when the lessor previously dealt in competitors’ products and is now obliged to deal exclusively in the products of the contracting company. (3) In the absence of concert of action or coercive measures, the Commission states that thus far it has no reason to believe that the contracts of the major companies are not bona fide agency and lease arrangements. Upon this the question of legality turns. A ‘pretended’ agency or lease would tend toward illegality. (4) The Commission has reason to believe that these methods are not unlawful as resale price maintenance under the Federal Trade Commission Act, or unlawful price discrimination or ‘tying’ contracts under sections 2 and 3 of the Clayton Act (15 U. S. C. A. §§ 13, 14) and probably they are not unfair methods of competition under the Federal Trade Commission Act. Even though these methods tend toward concentration in the hands of the integrated companies, and tend to eliminate small distributors and to exclude new distributors, nevertheless, the public policy of the anti-trust acts do not condemn huge size and integration unless such power is abused by overt acts of unfair competition or unless there are combinations or conspiracies in restraint of trade. (5) The Commission has reason to believe that the lease and license method of marketing violates the Federal Trade Commission or Clayton Acts, but further investigation is necessary to determine whether such a method substantially lessens the competition of independent distributors. The size of the corporation using the method and the general monopolistic intent should be considered. (6) Based on previous investigation the Commission has reason to believe that concert of action in the use of the foregoing methods has existed. But concert of action in this connection is not as vital a practical feature as in other types of anti-trust cases, e.g., price-fixing agreements and boycotts. ‘The concert of action could be sloughed off and the method remain intact.’

We conclude our discussion of the ‘lease and license’ and ‘lease and agency’ arrangements by the following summary: (a) These marketing devices were not outlawed by the administrative agencies of our government. The prolix report of the Federal Trade Commission was stipulated to ‘be subject to reconsideration, possible modifications or reversal in the event that a formal complaint involving similar matters is hereafter issued.” (b) There has never been any effective litigation in the courts to check these exclusive dealer techniques under the Clayton Act.\footnote{Contracts of exclusive dealing requiring a purchase not to buy goods of a vendor’s competitor were enforceable at common law, see Note (1923) 23 Col. L. Rev. 595; Newell v. Meyendorff, 9 Mont. 254, 23 Pac. 333 (1890). Further such agreements are not in violation of the Sherman Act, 26 Stat. 209 (1890), 15 U. S. C. § 1. Whitewell v. Continental Tobacco Co., 125 Fed. 454 (C. C. A. 8th, 1903). In fact this device was used effectively by the trusts to stifle competition and monopolize the market. See}
in the marketing of petroleum products. (d) Both plans, however, have been held to subject the refining company to a chain store tax law on the ground that the refining company did “operate” and “control” the filling stations thereunder. In *Gulf Refining Company v. Fox* 38 there was involved a *lease and license* arrangement whereby the dealer, (1) leased the premises to the Gulf Company; (2) then the Gulf Company gave a license to the dealer for the retail sale of Gulf products on the premises; and (3) ε contract for the sale of Gulf products by the Gulf Company to the dealer. A three judge court said, “It may be conceded that it (the Gulf Company) does not exercise full control over all of the actions of the dealers in a legal sense, but its actual control is so effective that little room is left for independent action on their (the dealers’) part, while full enjoyment of the advantages inherent in a chain store system on its part is insured.” In *Ashland Refining Company v. Fox* 39 the same court held that the *lease and agency* arrangement subjected the refining company to the chain store tax law. The lease and agency arrangement was in two parts, consisting of, (1) a lease from the operator to the refining company, and (2) a lease back from the refining company to the operator, coupled with a consignment and limited agency agreement. The court held that under this set-up the refining company did “operate” and “control” the filling stations within the meaning of the chain store tax law.

**The “Iowa Plan”**

The term “Iowa Plan” is a loose expression covering a series of legal arrangements, 40 the general effect of which is to make the operator *simulate the appearance of an independent dealer* when he is in reality in the position of a manager of a chain store. The general strategy under the “Iowa Plan” as exercised by the major companies is to convert their “agency” stations to so-called “independent dealer” stations. The usual procedure has been for the major company that owns the

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*Jones, The Trust Problem in the United States (1922) 174. The Clayton Act, 38 Stat. 730 (1914), 15 U. S. C. § 12 (1934) was designed to remedy this by prohibiting a sale requiring exclusive dealing, where the probable effect would be substantially to lessen competition or tend to create a monopoly. Standard Co. v. Margrane-Houston Co., 258 U. S. 346 (1922) cited supra note 20.*

*38*297 U. S. 381 (1935).

*39* *Ibid.*

*40*In response to a questionnaire from the Temporary National Economic Committee, the Shell Company submitted the following contract forms: Selling Agency Contracts; Service Station Lease (3 forms); Split Pump Dealer Contract (2 forms); 100% Dealer Gasoline Contract.
station to choose one of its salaried employees and enter into a "lease" with this employee for the station and its equipment and contemporaneously to execute with this "lease" a sales agreement. This revolutionary movement in the retail marketing of petroleum products, starting in Iowa in 1935, spread rapidly among the major companies, especially, and in March 1937, the National Petroleum News\footnote{March 3, 1937, p. 9, col. 1.} stated that "it has culminated in virtually the entire country being put on the dealer, or Iowa Plan, of marketing."

Two important legislative developments in the last decade have tended to curb the building of additional producer-owned stations and have caused the legal advisors of these major companies great embarrassment in attempting to formulate ingenious devices of evasion to protect the existing marketing facilities of these companies. The one legislative innovation was the enactment of chain store tax laws in many of our states; the other was the enactment of the federal and state social security legislation. In the absence of adroit subterfuge, the producer-owned station was a chain store and the persons operating the filling station were employees within the Social Security set-up.

Although the plan derives its name from an attempt to evade the Iowa chain store tax law, which went into effect on July 1, 1935, it should not be understood that that law was the cause of this new legal mechanism known as the Iowa Plan. The legal experts who created it had a much more ambitious program in mind. The retail marketing methods of the major companies had been uneconomical, and here was a chance for the major companies not only to "get out from under"\footnote{See, N. Y. Leg. Doc. No. 90, 160th Sess. (1937) 8. Report of Joing Legislative Committee to study gasoline, motor fuels and oils.} but also the opportunity to evade workmen's compensation laws,\footnote{(1936) Nat. Pet. News, Oct. 28. Address by E. I. Barringer. Published by Bureau of Public Relations, Nat. Oil Mark. Ass'n, Wash., D. C.} labor troubles from attempts at unionization and collective bargaining, public liability insurance, and to top it all the majors had the sanguine hope that they might undermine the intensity of the complaints from independent marketers on the ground that they were proceeding, piecemeal it is true, to carry out the slogan of the Independent Retailers Association—"disintegrate the integrated."

The claim that the operator of an "Iowa Plan" station is an independent dealer is grotesque.\footnote{The author is indebted to Mr. Elliot Moyer, Esq., of the Social Security Board for a portion of the analysis which show that the operator of an "Iowa Plan" station is not an independent dealer.} It is common knowledge that an indepen-
ent business operator has certain rights and privileges among them being, (a) the right to buy in a competitive market and deal with several companies, if he so desires; (b) the right to select his own fixtures and equipment; (c) to determine his own sales policy; (d) his method of advertising; (e) the manner of display of his products; (f) the good will of his business is his own, transferable at pleasure and for a consideration satisfactory to him; and (g) the continuation of his business is not dependent on the will of another. Literally the Iowa Plan operator enjoys not a single one of these privileges. The outstanding characteristic of the Iowa Plan in operation is not independence, but uniformity; uniformity of service, of products, of marketing facilities, of advertising, of credit arrangements, of price posting. There is too much uniformity in fact to be explicable on the basis of coincidence. Behind that uniformity in fact is a cleverly concealed control by the major oil companies through their so-called Iowa Plan contracts.

We desire at this point to analyze some of the factors that make the major oil companies, in reality, masters in the common law sense over their Iowa Plan operators. The cumulative effect of the various factors discussed below should destroy the “independent dealer myth” and should demonstrate that the so-called “rights and privileges” of the operator are no greater than those of a manager of a chain store.

(1) The Iowa Plan is not a product of free contract, which became popular and swept the country because of its mutual advantages to both of the contracting parties. As its name indicates, it is a PLAN imposed upon an industry, not by government, but by the owners of that industry and for the purpose of evading certain responsibilities which have already been pointed out.

(2) The parties to the contracts are the major oil companies on the one hand and former employees on the other, and the inequality of economic power represented by such a relationship spells control on the part of the powerful owner, and this regardless of the particular phraseology of the contract. In the quaint language of Mr. Justice Cardozo, “on the one side, there is an intimacy of control and on the other a fullness of submission that imports the presence of a ‘sovereign,’ as the master, we are reminded, was sometimes called in the old books.”

An Iowa oil executive speaking one year after the Iowa Plan had started said, “We saw hundreds of former employees transferred overnight to the status of managers and employers. A radical change, to say the least. Many of them were not capable of, or ready for the change.

Revolutionary methods are usually costly when abruptly made effective on a large scale. The mortality rate in lessees has been high. It was not easy to find men capable of operating these places efficiently and possessed of the means to finance the stocks. Frequently they were lacking in one or the other requirement. The mortality rate still continues high.  

(3) But in addition to the economic inequality of the parties and in addition to the fact that the parties formerly occupied the rôle of employer and employee, there are several features of these contracts that make for control on the part of the oil companies. Although there is some variation in the contract forms of the major companies, two or more of the following devices will be found in each set-up: (A) A cancellation clause giving the privilege of cancellation to the oil company, on short notice, while withholding it from the operator; (B) Rental is often fictitious, and is utilized as a threat to maintain control; (C) Iowa Plan operators cannot bargain at the source of their supplies—the major-controlled price structure controls the retail price and the retailer's profit; (D) The fact that title to goods is vested in the operator has no legal significance; (E) The fact that exclusive dealer provisions are not written into the contract does not mean that the station is free to handle other company's products; (F) The fact that the sales' agreement and lease are contemporaneous acts means that the control by the company through the cancellation of the latter may make the former valueless in fact.

A. Cancellation by One Party to the Contract

A former employee, having been chosen by the oil company to act as "independent operator," enters into a "lease" for the station and its equipment. Leases are usually for one year, subject to renewal, and are cancellable by the company on short notice (often five days). The operator is not given the privilege of cancellation. At the outset, it should be understood that a provision of a lease of a filling station which gives one party the right to terminate upon notice without preserving such privilege to the other party is not *per se* invalid.  

There is much confusion of statements in the books on the subject of mutuality, but the better view is that lack of mutuality renders a contract invalid only when it amounts to a lack of consideration, and if a contract is supported upon good consideration, a provision giving one of the parties a

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47Standard Oil Co. v. Veland, 207 Iowa 1340, 224 N. W. 467 (1929).
right to terminate the contract is not a ground for declaring the contract invalid.48

This one-sided cancellation device, which has been found in every contract we have studied, is more than a bare power to terminate the lease. It is the potential power to take over and operate the station and carries with it all the concomitant powers to impose the company’s will on the operator as a condition of his continued employment in such operation. The mere threat of cancellation is a compelling weapon by means of which the company determines the rights and privileges of the operator.

B. Fictitious Rentals As a Weapon of Coercion

The New York Joint Legislative Committee49, investigating the oil industry in that state in 1937, had the following to say about rentals under the “Iowa Plan.” “The rental is frequently fictitious and the full amount not charged unless for some reason, such as lack of cooperation, the company wants a particular owner to pay the stipulated rent. Frequently the so-called ‘independent’ is unable to operate his station at a profit and is forced to relinquish it and in many instances his notes are enforced against him.” Provided that there is “a fullness of submission” on the part of the operator, the major company is willing to forego the rent, if that is all that the traffic will bear in respect to the particular filling station. In setting a profit for the operator, based on his past salary or commission as an employee in that particular station, the oil company can afford to utilize the item of rent as a weapon of coercion.

C. Iowa Plan Operators Cannot Bargain at the Source of Their Supplies; The Major-Controlled Price Structure Controls the Retail Price and the Retailer’s Profit

A fundamental of free competition under democratic government is ability to bargain at sources of supply. This is denied to Iowa Plan operators of major oil company filling stations. The dealer operates within a narrow margin in which the floor is fixed by the major oil company, as wholesaler.50 The retail ceiling is being continually bombed by a bargain-hunting public. The huge profits of the major companies have been made through control of pipe lines and patents and special

48See Notes (1931) 83 A. L. R. 1416-1429.
50Hartley, Facts about the 1938 Kansas City Gasoline War, published by Petroleum Retailers Ass’n of Kansas City.
legislative investigating committees in New York\textsuperscript{51} and Pennsylvania\textsuperscript{52} have found that the wholesale prices of the major companies are substantially identical. One company maintains the price leadership and the others follow. The major officials in Pennsylvania territory who have been following one company's prices for fifteen years testified\textsuperscript{53} "that they did not feel that their actions were collusive." They explain the general uniformity of price changes "as due to just general competitive knowledge." In New York State the Committee found that the majors "blindly follow prices fixed in this state by Socony Vacuum Oil Company Inc."\textsuperscript{54} The excuse for a uniformly high wholesale price is found in the fact that nationally advertised brands of petroleum products could not be convincingly kept before the public on strictly quality appeal if retail prices varied widely or if the price was not sufficiently high to convince the public that major oil company merchandise is of the highest quality.\textsuperscript{55}

As part of this picture, we must recall that the Iowa Plan was occasioned for the purpose of evading state and federal regulations but the fundamental purpose behind the plan is a race for gallonage. The new "independent" operators created by the plan, who were former employees, will be more obedient to suggestions and instructions if their profit is gauged by their former salary or commission. The strategy of the major oil companies has been to keep the margin of profit at such a figure as will assure an active outlet, increased gallonage, and an obedient operator. The New York Legislative Committee commenting on the point as to whether the majors did in fact enter into a retail-price fixing agreement said "as a matter of fact, if, as they seem to agree, most of the majors must blindly follow prices fixed in this state by Socony, there seems to be little need for price-fixing agreements so far as Socony is concerned. If Socony has the domination which is attributed to it because of its size and gallonage, it would seem unbusiness-like from its standpoint to enter into any such agreements for it would acquire nothing and it might suffer disadvantages thereafter.\textsuperscript{56}

\textsuperscript{52}The Oil Industry Investigation Committee of Pennsylvania (1938).
\textsuperscript{53}Id. at 38 n. 47.
\textsuperscript{54}Id. at 27 n. 46.
\textsuperscript{55}Id. at 10 n. 45.
\textsuperscript{56}Id. at 27 n. 46.
D. The Fact That the Major Companies Vest Title to the Goods upon Delivery at the Iowa Plan Stations Has No Legal or Economic Significance in So Far as Major Control Is Concerned

The "independent" Iowa plan operator can do nothing with petroleum products delivered at the station except to sell them at the station. The storage capacity is limited and the loss or gain by fluctuation in price is negligible. In *Midwestern Petroleum Corporation v. State Board of Tax Commissioners*, the Supreme Court of Indiana in upholding the Indiana Chain Store Tax Law as applied to filling stations of the Iowa Plan type corroborates the thesis we have advanced concerning the efficacy of certain control devices under the Iowa Plan. In this case the oil company (appellant) who owned the service station attempted to stress the point "that the appellant does not sell any merchandise at any of such dealers." The court said:

"The purpose of the ownership of the stations is the sale of appellant's products. Some of the dealers pay no rent. It is alleged that they are free to buy from other sources, but it is obvious that if they purchase all or a considerable part of their merchandise from any other source, appellant would cancel the lease since appellant is only benefited by the sale of its products. It is alleged that some of the dealers pay cash rental. To put it another way, some of the dealers look for their compensation to the retail profit of the station, and as compensation receive the entire retail profit, while others are required to pay to appellant part of the retail earnings of the station and retain the balance as their compensation. They are in the same situation as employees working on commission, notwithstanding title to the merchandise handled vests in them upon delivery. They are required to pay the wholesale price, but retain the retail price. To say that these stations in their operation are not under the control of appellant would be to ignore the plain fact that the operators must obey the every dictate of appellant or lose their contract and station." (Italics supplied).

E. The Fact That "Exclusive Dealer" Provisions Are Not Found in Lease or Sales Contracts Is Not Controlling

There was a time when the major companies wrote into their contracts exclusive dealing and "full line forcing" provisions. But with the enactment of chain store tax laws, the fashionable practice has been to accomplish the same *sub rosa*, and this in spite of the provision in many contracts to the effect that *any oral agreement or understanding that varies from the written agreement shall be considered null and void*. By reason

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57 206 Ind. 688, 187 N. E. 882 (1933).
58 206 Ind. 708, 187 N. E. 889 (1933).
of the cumulative effect of the various control devices discussed supra, the major companies have, in their Iowa Plan stations, accomplished in fact exclusive dealer outlets and in many of them have installed "full line forcing" to apply to other accessories. The claimed freedom of the operator to sell the products of another company of his choice is illusory. The operator will not endanger his chance of continuing his connections with an established station by selling competitive products and no other company would risk installing its equipment in a station, the lease for which could be terminated by a competitor.

Evidence introduced before the Temporary National Economic Committee\(^6\) shows the variety of forms of intimidation and threats, used singly or in combination, to enforce exclusive dealing arrangements, and to exclude the products of independent producers and refiners. These threats run the gamut of, (1) that the major producer will erect a competitive service station; (2) will cut off the extra margin and so give the retail outlets’ competitors an advantage in price quotations; (3) that the courtesy card privilege will be cancelled; (4) that the supply of gasoline will be cancelled; (5) that the contract or agreement will be cancelled and the installed equipment will be removed from the premises of the outlet.

An interesting case is Maxwell, Commissioner of Revenue of North Carolina v. Shell Eastern Petroleum Products Co.,\(^6\) wherein the Shell Company attempted to spell out in express terms that its stations were not "exclusive dealer" stations and that the operators were "independent" and were not subject to company control, and yet the court held this language to be unavailing. The Shell Company operated 130 Iowa Plan stations in the state. The "independent" operator was set up by means of a lease and a sales contract. The lease stipulated that the oil company had no right to cancel during the term except for failure on the part of the lessee to perform his covenants, but the sales’ contract which was executed contemporaneously with the lease provided that the oil company could cancel same on 10 days’ notice in writing. The lessee was not given the privilege of cancelling either the lease or the sales contract. Prior to June 1, 1935, the beginning of the tax year, a rider was added which modified the exclusive dealer provision and which substituted for that exclusive dealer provision a minimum gallon-


age requirement which was set at approximately 50% of the dealer's annual requirements. The Shell Company insisted that they did not have control which would subject them to the operation of the chain store tax law, for the reasons that they cannot dictate as to the 50% the kinds of goods that will be sold or the price at which they will be sold and that the oil company has no power to cancel the lease, although they do have the power to cancel on 10 day's notice the sales agreement. The court held that the Shell Company did have control of the stations and was subject to the tax. The court said:

"Notwithstanding these circumstances, it is a significant fact that during the whole of the tax year, not a single one of the 130 service stations under consideration made any attempt to sell the product of any other oil company, but in every instance continued throughout the year with the distinctive Shell colors and sold the Shell products exclusively. It seems clear that this course of conduct was not fortuitous, but was brought about by the control over the premises which the Shell Company exercised through its ownership or tenancy thereof, and through the agreements between it and the dealer. It is a reasonable inference that in each instance the dealer entered into the contracts of lease and sale, involving the painting of the premises with the distinctive colors, and the agreement to purchase at least 50 per cent of its Shell requirements from the company, with the purpose at the time of becoming a dealer in Shell products and of selling them exclusively at the station during the period of his tenancy. It was obvious to the parties to the agreements that no other oil company would be willing to sell its product at a Shell station; and indeed, if the Shell pumps and equipment were used, such sales would have been contrary to section 4870 (h) of the North Carolina Code of 1935, which forbids any person to sell any liquid fuels, lubricating oils, or similar products from any container, pump, or other distributing device than those indicated by the name, trademark, or other distinguishing mark appearing thereon. The sales contract provided that all of the advertising signs should remain the property of the Shell Company and that the dealer should not alter or remove them without the company's consent. Moreover, the company had the right under the contract from time to time to enter upon the premises and paint out the identifying colors of previous suppliers of the dealer, and to paint the station and the pumps with its identifying colors of yellow and red. This control effectually prevented the use of the station or equipment for the sale of a competing product.

"For another important reason, the use of the station for the distribution of the products of other oil companies was rendered impracticable by the arrangement between the parties. The Shell Company controlled the premises as owner or as tenant of the owner; and rival producers, knowing that it would not be possible for them to obtain permanent possession, would be unwilling to incur the expense of a temporary arrangement with the dealer for the sale of their products. The taxpayer has but made another attempt to evade the burden of chain store taxation while retaining the advantages that flow from
the operation of many places of distribution of its products under its general control." (Italics supplied).

To date, the companies have fared better under the Social Security law than under the chain store tax laws. As a result of legal chicanery on the part of the major oil companies, literally thousands of filling station employees are outside the protection of the Social Security Law and the companies have evaded the Social Security tax imposed by Titles VIII and IX. But the Supreme Court of the United States in interpreting the chain store tax law has looked realistically at the substance of the arrangement rather than the form.

In Fox v. Standard Oil Company a West Virginia chain store license tax was imposed upon complainants' 949 filling stations within the state. "Of the 949 stations there are 101 which are described as 'company owned'; they are both owned and operated by the complainant itself. 'Leased outlets,' 388 in number, and 'vending privilege outlets,' 460 in number, are leased by the complainant and operated by agents under commission contracts."

Mr. Justice Cardozo, speaking for the court, said, "The complainant's practice has been to bill gasoline to its stations at the current market prices, as if there were a sale to strangers. Such a mode of segregation, unless corrected by other data, will give at times a partial picture of the economic situation." The court held that all of the 949 stations were subject to the tax. The particular phraseology of the contract in regard to the "leased outlets" and the "vending privilege outlets" was not determinative. In all of the 949 stations there was either outright ownership or "by concession its control over those other outlets is so complete as to amount to operations within the meaning of the statute." The theory of the court seems to be that there was a holding out to the public that the 949 stations were members of a single chain. On this point the court said, "Through all these far flung instruments it distributes its own products and spreads through every hamlet its repute as a distributor. Ownership or control of a host of well-appointed depots, uniform in design and color, has put the chains in a position to bring home to the consuming public the knowledge of their wares and of the quality of their service in a way far beyond the capacity of the independent dealer with one station or a few."
F. Contemporaneous Contracts with Reference to the Same Subject Matter and to Effectuate the Same Purpose, Will Be Construed Together to the Same Extent As Though Made in One Instrument

We have seen that the major oil companies in arranging retail outlets have usually executed two or more contracts contemporaneously. In the "lease and license" and the "lease and agency" arrangements, wherein the company does not own the site, two contracts have been entered into simultaneously; the lease and license or the lease and agency. Under the Iowa Plan, there is usually a lease and a sales' contract executed at the same time. In Standard Oil Company v. O'Hare\(^\text{62}\) which was a lease and agency arrangement, the court held that the two instruments having been made at the same time with reference to the same subject, and to effectuate the same purpose, would be construed together to the same extent as though made in one instrument. In Texas Company v. Northrup\(^\text{63}\) the court afforded equitable relief to an operator who had entered into a triple contract arrangement which was proven to be unconscionable by later developments. In this case a local distributor simultaneously entered into three agreements, (1) a sales contract for the sale of the company's products, (2) a contract leasing his wharf premises to the oil company at a nominal rental and (3) a license agreement permitting occupancy by the lessor. The court held that parol evidence of circumstances of execution was admissible to connect the instruments. All three contracts were executed at practically the same time, and all looked to the purchase and distribution of the oil company's products in particular territory. The sales contract was for one year, and was thereafter subject to cancellation by either party on thirty days' notice, while the lease and license contracts were for five years, subject to termination by the oil company only. Before signing the lease and because of the threatened destruction of his business, the distributor consulted the company's district sales manager, and was assured that the true consideration for the lease was the sales agreement and that he would have the right to terminate the lease when the sales agreement was terminated, and the execution of the lease was upon this condition. The court said:

"If the company, in originally presenting and insisting upon the execution of the lease, then intended it to be construed as separate and severable without any reference to the circumstances and inducements under which it was exe-

\(^{62}\)126 Neb. 11, 252 N. W. 398 (1934).

\(^{63}\)154 Va. 428, 153 S. E. 659 (1930).
cuted, and if the purpose of so drawing the lease was to enable it to cancel the sales and license contract without canceling the lease, and so to retain the wharf property owned by the appellee for the nominal rent of $25 a year while the appellee owner was at the same time obliged to pay the taxes upon the property and otherwise to maintain it, then this, under the circumstances, was duress and actual fraud in the procurement of the lease, which justifies its rescission. If this actual fraudulent intent was not then conceived, and the purpose to take such an unconscionable advantage of the appellee was an afterthought, then this is constructive fraud, the insistence upon an unconscionable bargain which the court of equity will not sanction. This contract (and by contract we mean that which as a whole is evidenced by three documents so frequently referred to) cannot be partially terminated by the company so as to take to itself all of the substantial benefits of the lease and at the same time to repudiate all of its own obligations to the appellee under the inseparable sales and license agreements. This repudiation by the company is so substantial and fundamental as to defeat the object of the lease. The arm of equity is long enough to afford adequate remedy to the appellee."

A NATIONAL COURT OF APPEALS

EDWARD DUMBAULD*

IN CONNECTION with currently discussed plans for reform of the Federal judiciary,1 consideration might well be given to the proposal to create a National Court of Appeals, intermediate between the Supreme Court of the United States and the several circuit courts of appeals.

At present, unless the Supreme Court, by exercising its discretion to grant certiorari, indicates its willingness to hear a case, the decision of a circuit court of appeals is final (except where the decision holds a state statute unconstitutional, in which event an appeal to the Supreme Court may be had of right). A litigant may thus lose his case by the vote of two judges to two (if a divided circuit court reverses a decision in his favor by the district court) without any further opportunity to have the case heard by a full bench.

The right to appeal to the Supreme Court from decisions of the circuit courts of appeals “was practically abolished” by the act of February 13, 1925,2 a statute inspired by the wise policy of relieving the burden on the Supreme Court.3 A litigant now has the right to bring his case before the Supreme Court only if it is one

“where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity.”4

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1 SUPREME COURT REPORTER. (1937) 5-6; e.g., Fairman, The Retirement of Federal Judges (1938) 51 HARV. L. REV. 397.


45 STAT. 54 (1928), 28 U. S. C. § 344 a (1934) gives a corresponding right to review of “a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.” 45 STAT. 54 (1928), 28 U. S. C.
Such review, preclusive of review by certiorari, is

"restricted to an examination and decision of the Federal questions presented in the case."\textsuperscript{4}

Accordingly the bulk of the Supreme Court’s business comes to it on certiorari.\textsuperscript{5} Since the Supreme Court thus decides what cases it wishes to hear, and other cases are foreclosed in limine by denial of review, it is not surprising to learn that the Court has been able for several years to keep abreast of its current business.\textsuperscript{6}

One surprising result, however, is that the Supreme Court will not hear a case merely to do justice to the parties; but will hear a case simply because it arose later than a previous case.

This is the effect of the Court’s settled practice that review on certiorari will be denied unless the case is of importance to the public, rather than merely to the parties; but that review will be granted if there is conflict between circuits. Hence of two cases precisely similar, but arising one earlier than the other in different circuits, the first may never reach the Supreme Court because no sufficient public interest is

§ 344 b (1934) permits the Supreme Court to review by certiorari cases from the state court “where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.” This power to review “may be exercised as well where the Federal claim is sustained as where it is denied” by the State Court. Dobie, op. cit. supra note 3, at § 218.

Direct appeal from the district court to the Supreme Court is also allowed by 43 Stat. 938 (1925), 28 U. S. C. § 345 (1934) in five classes of cases. These are criminal appeals by the government and appeals from three judge courts in proceedings under the antitrust and kindred laws. Dobie, op. cit. supra note 3, at § 212.

Direct appeal from any United States court in suits in which the United States is a party and the decision is against the constitutionality of an Act of Congress was authorized by the act of August 24, 1937. 50 Stat. 752 (1937), 28 U. S. C. § 349 a (Supp. 1939).

\textsuperscript{6}Obligatory jurisdiction amounts to only 10 to 15% of the Court’s business. Over 70% of petitions for certiorari are denied. Moreover, under the doctrine of Zucht v. King, 260 U. S. 174, 176 (1922) incorporated in paragraph 1 of rule 12 (297 U. S. 733, 4 (1936)), even in cases of appeal “the court passes not only upon the question of its technical jurisdiction of the appeal but treats as jurisdictional the question whether the appeal possesses sufficient merit to warrant argument, thus exercising a discretion similar to that involved in passing upon petitions for certiorari.” Report of Solicitor General Stanley Reed, Rep. Att’y Gen. (1937) 23.

involved; while the second, if decided differently below, will be reviewed because of the conflict between circuits.

In examining petitions for certiorari the Court inquires, according to Mr. Justice Van Devanter’s testimony before a Senate subcommittee,

“whether the questions presented in the case are of wide or public importance, or concern only the parties to the particular case; next, whether there is any conflict between the decision that is complained of and decisions on the same question in other circuit courts of appeals or in the Supreme Court; . . . or . . . the court of last resort in the state. . . . Whenever we find such a conflict, that, without more, leads to the granting of the petition.”

An opinion by Chief Justice Taft squarely states that:

“The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.”

Chief Justice Hughes in a recent pronouncement likewise declared that

“when litigants have had their cases heard in the courts of first instance . . . and when the dissatisfied party has been accorded an appeal to the Circuit Court of Appeals, the litigants, so far as mere private interests are concerned, have had their day in court. If further review is to be had by the Supreme Court it must be because of the public interest in the questions involved . . . not in the mere interest of the litigants.”

The Court’s Rules are equally explicit. Rule 38, in paragraph (5), declares that:

7Hearings before Judiciary Committee on S. 2060 and S. 2061, 68th Cong., 1st Sess. (1924) 29; Dobie, op. cit. supra note 3, at 934.
9Letter of March 21, 1937, to Senator B. K. Wheeler, Sen. Rep. No. 711, 75th Cong., 1st Sess. (1937) 39. Similarly, the original bill in support of which Justices Van Devanter, McReynolds, and Sutherland testified in 1924 before a subcommittee of the Senate Committee on the Judiciary, and which led to the Act of 1925, would have abolished all appeals from circuit courts of appeals except on certiorari; “the theory being”, according to Justice McReynolds, “that after two trials in a Federal Court as of right . . . one in the District Court and one in the Circuit Court of Appeals . . . the matter should end, subject to a discriminatory review in the Supreme Court for some superior reason.” Hearings before Judiciary Committee on S. 2060 and S. 2061, 68th Cong., 1st Sess. (1924) 28. Further on he repeated: “The general theory is that after one has had two trials in the Federal courts—one in the District Court and one in the Circuit Court of Appeals—mere private litigation should stop.” id. at 45.
“A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court’s discretion, indicate the character of reasons which will be considered:

“(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

“(b) Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court’s power of supervision.”

It seems unfortunate that diversity between the decisions in different circuits should constitute a cause for review by the Supreme Court, while error or injustice in those decisions does not. It would therefore be wise to relieve the Supreme Court of this mechanical burden of ensuring uniformity among the circuits. Such uniformity could be attained equally well through a system providing for review of the several circuit courts of appeals by an intermediate appellate court of nationwide jurisdiction, such as the National Court of Appeals here being discussed.

The National Court of Appeals might also be substituted in the place of the Supreme Court as the tribunal to hear direct appeals from three-judge district courts. Likewise the Supreme Court’s appellate jurisdiction over questions certified by a circuit court of appeals desiring “instructions . . . for the proper decision of the cause” might well be transferred to the National Court of Appeals.

The Supreme Court’s appellate jurisdiction would then embrace only: (1) its present obligatory jurisdiction to review, on appeal, questions of

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10286 U. S. 593, 624 (1932); 266 U. S. 653, 681 (1925). Adopted June 8, 1925 as Rule 35, paragraph 5, effective July 1, 1925.

11Although as said by Mr. Justice Brandeis, dissenting in Di Santo v. Pennsylvania, 273 U. S. 34, 42 (1937); “It is usually more important that a rule of law be settled, than that it be settled right.”


constitutionality arising in Federal or State courts;\textsuperscript{14} (2) its present discretionary jurisdiction to review, on certiorari, federal questions from State courts;\textsuperscript{15} (3) a new discretionary jurisdiction to review, by writ of certiorari, the decisions of the National Court of Appeals.\textsuperscript{16} 

Not only would a National Court of Appeals be of value in enabling the Supreme Court to go further than at present in devoting its entire energies to consideration of cases involving constitutional law or issues of great public interest, but the new appellate tribunal of nationwide jurisdiction would also be a valuable instrument for administering justice more effectively by hearing cases and deciding them upon their merits. 

A litigant at present may well feel aggrieved when his case terminates in the circuit court of appeals with no possibility of recourse to a higher court, especially if he loses by the votes of two judges to two. A circuit court of appeals is not nearly so suitable to serve as a court of last resort as the proposed National Court of Appeals. 

In the first place, a court of only three judges ought not be the tribunal of last resort in the federal judiciary system. A full bench of at least five, and perhaps seven judges, ought to have the final word in cases which do not go to the Supreme Court. None of the states, except three sparsely populated ones, have courts of last resort composed of less than five judges.\textsuperscript{17} 

A court functions most effectively when its size approximates that of the average American appellate court. If there are fewer than five judges, there is apt not to be a "meeting of minds" entailing sufficient diversity of viewpoints to ensure a thorough analysis of the issues, giving due attention to every consideration relevant to the decision of a case. If there are too many judges, the court becomes unwieldy. A court ought not be so large that it members must raise their voices above a conversational level in order to be heard by their brethren in the conference room. A judicial tribunal should not become a public assembly or parliamentary body, requiring rules of order and formality in its private deliberations.


\textsuperscript{16} Perhaps the Supreme Court should have, in the interest of celerity in the administration of justice, specific power to take jurisdiction, by the discretionary writ of certiorari, of any case pending in any federal court. Cf. 36 Stat. 1162 (1911), 28 U. S. C. § 377 (1934).

\textsuperscript{17} Two-thirds of the states have either five or seven judges. Seven is slightly more popular than five. Ariz., Nev., and Wyo. have three. The rest have six, eight, or nine. The arithmetical average of all states is 6 1/3.
To a certain extent that shortcoming is noticeable in the workings of the Permanent Court of International Justice, whose procedure betrays a degree of formalism (due largely no doubt to diplomatic etiquette but perhaps partly to the size of the court) which exceeds what would be thought desirable in an American court. Yet the tribunal at The Hague functions quite successfully with fifteen judges. That court requires a rather large and representative personnel because of its cosmopolitan character. In order to give appropriate recognition to the jurisprudence of different countries, it is provided that not more than one judge may be elected having the same nationality; and those choosing the judges are required to

"bear in mind that not only should all the persons appointed as Members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world."

Moreover the Court’s docket is not crowded and its operations may proceed less hurriedly than is the case with most national courts.
In the second place, regardless of the number of judges composing it, a National Court of Appeals whose jurisdiction embraces the whole country ought to have the final word as court of last resort, rather than a tribunal whose jurisdiction, like that of the Circuit Court of Appeals, is limited to a restricted geographical area.
At present there are ten Federal judicial circuits. They are designated by number. It is not easy to remember what locality corresponds with a particular number. To try and name the territory embraced within a particular circuit would be difficult for the average lawyer. Likewise he might even have difficulty in naming all the United States judges in his own circuit, unless he has specialized in federal practice. Certainly to the ordinary citizen the operations of the federal courts are obscure and remote. Only the Supreme Court, in its marble palace in Washington, draws a swarm of visitors indicative of public interest in the administration of justice. Other United States courts escape notice.

18Thus during argument questions may be put to counsel by the judges only after notice to the President of the Court; opinions are drafted by a committee chosen by secret ballot, and are voted upon “like a legislative bill” after several readings. See Charles Evans Hughes, The World Court as a Going Concern (1930) 16 A. B. A. J. 151, 155-6; Hudson, The Permanent Court of International Justice (1934) 505; P. C. I. J. Ser. D, No. 2, at 218 et seq., 292, 300. (Acts and Documents relating to the organization of the Court.)
19Statute of the Court, Art. 10; Hudson, op. cit. supra note 18, at 126.
20Statute of the Court, Art. 9. See Hudson, op. cit. supra note 18, at 125.
Thus the obscurity which surrounds the operations of the circuit courts of appeals deprives them of the valuable sense of responsibility which attaches to a tribunal, such as the Supreme Court, whose workings are always in the public eye. Eminent judges, drawn from the entire country, and known throughout the entire country, would occupy the bench of a truly National Court of Appeals. Appointments to such a tribunal, as well as decisions rendered by it, would receive closer scrutiny from the profession and the public than is now enjoyed by federal courts. Such a court would undoubtedly command the confidence of litigants to a greater extent than is at present the case.

Moreover the prospect of promotion to the National Court of Appeals would constitute an appropriate honor and reward in store for outstanding judges in lower federal courts. There are many federal judges whose renown has spread far beyond their own district or circuit and whose talents and character have earned for them a national reputation. Yet, because of the peculiar character of the important matters coming before the Supreme Court, it has seldom proved wise to elevate to the Supreme bench an inferior federal judge. Because the Supreme Court must pass upon constitutional problems, which though presented as legal questions yet in their essence call for

"the application not so much of the principles of law which are ordinarily associated with the judicial function as the wise considerations of statesmanship," it is usually desirable that appointees to the highest court be men who have had fresher contacts with popular sentiment and wider experience in dealing with public affairs than most Federal judges are likely to have gained in the course of performing their duties. Appointment for life to a position requiring constant preoccupation with the baffling technicalities of federal jurisdiction and procedure, as well as the intricate peculiarities of federal substantive law (such as admiralty, bankruptcy, copyright, counterfeiting, immigration, patents, taxation), is not conducive to development of the subtle skill and profound vision required of Supreme Court justices if they are to be proficient in the delicate evaluation of conflicting claims within the vast and vague domain of public policy and general welfare which is committed to their charge by the Constitution. But on a National Court of Appeals there would be an opportunity for the most gifted among the lower Federal judges to devote to the benefit of the public, in a wider sphere of usefulness, the very abilities perfected by their previous training and experience.

CONCLUSION

The creation of a National Court of Appeals, intermediate between the Supreme Court of the United States and the circuit courts of appeals is desirable:

(1) To relieve the Supreme Court of the burden of hearing cases merely to establish uniformity of decision between the circuits.

(2) To relieve the Supreme Court of the other items of its present jurisdiction except appeals as of right *ex debito justitiae* in cases involving constitutional questions and discretionary review in truly important cases involving substantial public interest.

(3) To provide an appropriate appellate forum of last resort to review the merits of litigation in other cases where at present under settled practice the parties have no recourse to the Supreme Court and the pronouncement of the circuit court of appeals is final, even if by a divided court it reverses the decision below. By reason of the number and eminence of the judges appointed to such an appellate court of nationwide jurisdiction its prestige would command to a greater extent the confidence of litigants and of the public and would further the effective administration of justice.

In short, the National Court of Appeals would hear cases which at present the Supreme Court does hear but which it ought not to hear, as well as cases which the Supreme Court does not hear but which it (or some other appellate tribunal of nationwide jurisdiction) ought to hear.
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THE COURTS AND ADMINISTRATIVE AGENCIES

DEVELOPMENT OF THE "MAJORITY RULE" IN THE CERTIFICATION OF BARGAINING REPRESENTATIVES

The Supreme Court's recent denial of certiorari in the case of New York Handkerchief Manufacturing Co. v. National Labor Relations Board\(^1\) gave accord to the maturity of a rule which has harassed more than one administrative body harnessed with the difficult job of determining whether a labor organization commanded enough support, from those whom it claimed to represent, to deserve recognition. "Majority rule", in this connection, is a term which over its life of slightly less than a decade has had many meanings. An executive order issued by President Roosevelt\(^2\) to implement a shadowy part of the famous National Industrial Recovery Act, Section 7 (a),\(^3\) was the instance of its formal debut. Before then, it appeared as an interpretation of a minor administrative board.\(^4\) Since 1934, the year of the presidential pronouncement, it has been incorporated into two major federal labor statutes,\(^5\) under which it has been subject to a consistently expanding refinement by the boards there created and by the courts of review.

Though the courts before 1932 had uttered, in many cases, the privilege of labor\(^6\) to those rights which we now consider inherent, it was not until the NRA that there was any effective, positive expression guaranteeing the right to bargain collectively and to organize free from interference by employers. Section 7 (a) of the statute made it compulsory that every code adopted pursuant to the act include a statement of these rights of labor, which code members, by joining, agreed to respect.\(^7\)

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\(^7\)48 Stat. 198 (1933): "Every code of fair competition agreements, license approved, prescribed or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint and coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization for the purpose of collective bargaining or other mutual aid or protection."
It was contemplated that the machinery for the enforcement of this section would be the boards created by the industries and trades to administer the respective "codes of fair competition". Little progress in this direction was achieved due to the disputes caused by the general nature of the guarantees and the consequent hazard of enforcing an indefinite standard.  

That the manner of determining labor's representatives disturbed the code administrators is evident from their efforts to define a rule for that purpose. They stoutly maintained the principle of 7 (a), but hesitated to say exactly what credentials were necessary for those who desired its benefits. It was felt that recognition of a representative of the majority as exclusive bargaining agent would be in derogation of the privileges of the minority. For that reason they asserted the right of a minority representative, and even of an individual, to bargain with the employer. Under this premise, the impotence of Section 7 (a) is evident.

To put "teeth" into Section 7 (a), the President, on February 1, 1934, issued an Executive Order defining "representatives" as those "who are selected by at least a majority of the employees voting." Industry, in the person of the National Association of Manufacturers, protested this rule, claiming its application would result in industrial turmoil, and that the government was forcing unionism upon them. In response, it is supposed, General Johnson, administrator, and Donald B. Richberg, counsel for the NRA issued a joint press dispatch in "clarification" of the Executive Order. It was stated that the order provided a "method whereby any group of employees may select by a majority vote representatives clearly empowered to act for the majority in their relations with the employer." And again, "This selection doesn't restrict or qualify in any way the right of minority groups of employees, or individuals, to deal with employers."

On June 19, of the same year, to effectuate further the objects of the labor section of the NRA, the President was authorized, by a joint resolution of Congress, to "establish boards to investigate matters con-

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8N. Y. Times, Feb. 2, 1934, p. 8, col. 4. "... the issue on the method of representation is regarded as having caused more misunderstanding than any other point in dispute. ..."

9Ibid.

10See note 2 supra.

11Hearings before Committee on Education and Labor on S. 2926, 73d Cong., 2d Sess. (1934) 1-25.


nected with any controversies arising under section 7 (a).” Section 2 of the same resolution empowered the boards established under its authority to conduct elections to determine employee representatives for the purpose of the act. The National Labor Board, created pursuant to this authority, abided by the presidential decree in deciding cases. In situations where representatives were elected by a majority of those eligible to vote, no matter how small a majority, the choice was certified as bargaining agent. Though this construction was fought and criticized as depriving minorities of voice, it was maintained in subsequent pronouncements by the same body.

It is significant in the development of the rule that the amendment to the Railway Labor Act, approved June 21, 1934, expressly substituted for the former provision, which was as indefinite and uncertain as 7 (a), the stipulation that “the majority of any craft or class of employees shall have the right to determine who shall be the representatives.” The original prescribed that “representatives, for the purposes of this act, shall be designated by the respective parties in such manner as may be provided in their corporate organization, or unincorporated association, or by other means of collective action. . . .”

The National Mediation Board, interpreting this amendment, qualified the rule by conditioning its operation upon the participation in the election of a majority of those eligible to vote. Without such a majority, it was held, an election was not competent to indicate the representative. While this, by implication may have been in the minds of those who had been instrumental in the formation of the rule, it had not until this time been expressed. It had previously been presumed that those eligible to participate in the election would vote. The main case on this point is Virginia Railway Company v. System Federation No. 40. It was an appeal from a determination by the Board of two separate elections. In one, a majority of the majority eligible to vote indicated their preference; in the other, a majority had not participated. Only the representative named in the first election was recognized. The correctness of the ruling

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17Sargent, Majority Rule in Collective Bargaining Under Section 7 (a) (1934) 29 Ill. L. Rev. 275.
19See note 5 supra.
21300 U. S. 515 (1937).
was upheld by the circuit court. A very far-sighted observation, though obiter dicta with reference to the case being adjudicated, was this:

If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest and thwart the purpose of the Act, which is dependent for its operation upon the selection of representatives. There is the added danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer.20

The National Labor Relations Act provides: "Representatives designated or selected . . . by the majority of the employees . . . shall be the exclusive representatives of all the employees . . . for the purposes of collective bargaining." 21 The early NLRB cases required that an organization to be certified as representative be endorsed by a majority of those eligible to vote.22 Then, no doubt taking a cue from the Virginia Railway case, the Board conditioned certification upon a majority of those eligible participating in the election.23 The final phase in the development of the rule appeared in In the matter of RCA Manufacturing Company, Inc. and United Electric and Radio Workers of America.24 Two unions in a contest to be exclusive bargaining agent for the employees agreed to have the NLRB conduct an election. Union A before the election decided not to participate. It pledged all its members not to vote and wage a vigorous campaign to keep members of the opposing organization away from the polls. As a result a mere third of those eligible to vote participated in the election, that third being almost unanimously for Union B. The Board certified that organization. The decision in the case reasoned25 that the language of Section 9 (a) suggests three meanings of "majority": (1) a majority of those eligible, (2) a majority of the participants in an election participated in by a majority of the eligible, (3) a majority of those voting. It was held that the third was the true construction, since not to so hold "would put a premium on acts of intimidation, and sabotage, [and] give the minority organization too easy a power to prevent an effective election." This theory has been followed consistently.

20 Id. at 560.
22 In the Matter of Chrysler Corp. and Society of Designing Engineers, 1 N.L.R.B. 164 (1936).
24 2 N.L.R.B. 159 (1936).
25 Id. at 173.
The present case is an instance of perfect application of this rule. Due to coercion and intimidation by the petitioner only fifty-six of his two hundred and twenty-five employees participated in an election held by the Board for the purpose of determining whether the union in question deserved recognition. Upon fifty-three voting for the union, it was certified. Petitioner, denying that the union was exclusive representative, refused to negotiate with it. The circuit court, in affirming the Board’s stand, expressed itself to the effect that the doctrine of majority rule, without respect to the proportion of eligible participating, is restricted to the situation where the employer interfered with participation in the election. While this is the fact in the two most important decisions upon the point, it is suggested that this is not the Board’s conception of the rule. In some of the several cases where coercion or interference were not imputable elements, a majority of a minority of those eligible to participate in the election has been certified.

It would be difficult today to state with any degree of certainty the exact limits upon the use of the “majority rule”. It may be that the Board will consider itself bound to respect the limitation the circuit court placed upon the rule of the Handkerchief case, that is, to the situation where the employer interferes with the election. The Board’s own words

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26aIt does not follow, however, that the Board could justify itself in the exercise of such authority “in every case regardless of the number who participated in the election. Like any other authority, it must not be employed arbitrarily. In the instant case... petitioner, by its unlawful conduct, interfered with the right of its employees to participate in the election and, no doubt, was responsible for the small proportion of its employees voting.” New York Handkerchief Mfg. Co. v. National L. R. B., 114 F. (2d) 144, 147 (C. C. A. 7th, 1940).

27R.C.A. case, see note 24 supra; Handkerchief case, see note 1 supra.

28In the Matter of Williams Dismond and Co. and Port Watchman Local No. 137, 2 N.L.R.B. 859 (1937), where one employee voting, of the three eligible, warranted certification. And in In the Matter of F. E. Booth & Co., 16 N.L.R.B. 149 (1939), though coercion was charged to the employer and the other contesting union, the Board did not feel that the “results of the election were materially affected.” The objections did not “raise substantial and material issues with respect to the conduct of the election.” There was a vigorous dissent on the ground that there was a reasonable suspicion of an improper election. This charge was not considered as important to the certification of the union as exclusive representative of the employees of Custom House Packing Corp. (though only 77 out of 199 eligible voted) and E. B. Gross Canning Company (where only 120 out of 256 voted).
make that a respectable proposition.\textsuperscript{29} If not, perhaps the limitation will be made prescriptive by the courts reviewing a case yet to come up. Precedent could also support this holding.

Be that as it may, the conclusion is inescapable that the rule emerging as a result of this historical sequence is healthful, even in its development, to the workings of our labor statutes. By taking out of the employers’ power the ability to evade imposition of the standards of conduct exacted by the law, which depends for its operation upon there being recognizable representatives, the principle works toward the achievement of industrial peace.\textsuperscript{†}

HOWARD LINKOFF

\textsuperscript{29}A clue, perhaps, for one who is looking for a rationale of these conflicting holdings is this pertinent quotation from the Board’s decision of the Handkerchief case, 16 N.L.R.B. 532 (1939): “We can appreciate the potency of the respondent’s efforts to prevent employees from voting when we consider the nature of our experiences in conducting elections. In the thirteen month period from June 1, 1938 to July 1, 1939 we held 323 elections. In all but eleven, a majority of the employees involved . . . participated. Our experience has shown that as a rule 90\% of all workers eligible to vote in Board elections actually cast ballots.” Id. at 543.

\textsuperscript{†}A part of the problem which was felt to be outside the scope of this writing, though it is intimately related to the aspect considered, is the question of how to treat pluralities and apparent apathy toward being represented at all. These, too, are also closely connected with each other. The Board’s reaction to a case where of two competing unions neither could muster a majority is illustrated by In the Matter of International Agricultural Co., 16 N.L.R.B. 176 (1939) where a run-off election was ordered on the theory that not to do so would be to permit a small minority to frustrate the wishes of a majority for a union. Though there was a forceful and persuasive dissent, and there are cases of the same type holding it necessary that the union which receives the highest number of votes request such an order, this appears to be the rule. To meet the case that the employees do not desire to be represented by the union or unions seeking certification, the Board has adopted the practice of placing the alternative “or by neither” on the ballots. The virtue of this idea is not to be doubted inasmuch as it furthers ascertainment of the true will of those whose representative is to be determined. However, the dissent in In the Matter of Interlake Iron Corp., 4 N.L.R.B. 55, 63 (1937) (the foremost case on the point), while approving the practice, stated a very sensible qualification, the application of which might be of definite value. The practice, at least it is there asserted, is to condition certification upon a majority of the voters being in unanimity. It was suggested that, for an election to result in no union being certified, the “or for neither” votes be required to be in the majority.
FAIR LABOR STANDARDS ACT—INJUNCTIONS AGAINST VIOLATIONS

THE question whether the Wage and Hour Division of the Department of Labor is entitled, under the provisions\(^1\) of the Fair Labor Standards Act of 1938,\(^2\) to injunctive relief against violators of the Act, who have ceased all violations prior to the filing of the Division's complaint in the matter, has been anything but clarified by two recent decisions of United States District Courts,\(^3\) wherein opposite results were reached in cases which appear to be substantially identical as to factual composition.

In both of these cases, *Fleming v. Tidewater Optical Company*, in which the District Court for the Eastern District of Virginia granted an injunction, and *Fleming v. Phipps*, in which the District Court for the District of Maryland denied such relief, the Wage and Hour Division sought injunctions against employer violators of the Act. The following factual particulars are common to both cases: (1) violations complained of by the Division were failure on the part of the employer to pay minimum wages and to keep proper records, and such violations had been continuous from the time the Act became effective;\(^4\) (2) violations ceased immediately upon notification to the employer by an agent of the Division that the Act was being violated, and no further violations of any consequence occurred at any time thereafter; (3) the Division's complaint against the employer was filed with the court several months after the last violation of the Act had occurred; and (4) the employer professed to the court his intention not to violate the Act in the future.

The court in the Maryland case stated that it had carefully considered the slightly earlier opinion of the court in the Virginia case, and although the court said of that decision, "the oral opinion indicates that the facts there differed materially from those presented in this case," the only facts, which can be considered as material, as to which the two cases differ is with reference to (1) wilfullness in violating the Act and (2) failure to pay to employees wages due by reason of past violations; unless the fact that the defendant in the Maryland case was apparently

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\(^3\)Fleming, Administrator of the Wage and Hour Division, United States Department of Labor v. Tidewater Optical Co., Inc., U. S. Dist. Ct., E. D. Va., Oct. 11, 1940 (oral opinion); Fleming, Administrator of the Wage and Hour Division, United States Department of Labor v. Phipps, U. S. Dist. Ct., Md., Nov. 9, 1940.
\(^4\)Oct. 24, 1938.
only of very modest means,\(^5\) while the defendant in the Virginia case was a corporation with a considerable clientele,\(^6\) should be considered a material factor in differentiating the two cases.

With reference to the intent on the part of the employer during the period of violation of the Act, the court in the Virginia case found the defendant determined not to comply with, or at best indifferent to, the provisions of the Act and not, in spite of its contentions, ignorant of such provisions.\(^7\) The court also pointed out that the defendant did not, after it was advised of the findings made by the investigator for the Division, “take the initiative to test the validity and applicability of the Act to its business.”

In the Maryland case, on the other hand, the court stated it appeared that the defendant’s failure to comply with the Act was due to financial inability\(^8\) rather than wilful disregard of the Act, despite the contention of counsel for the Division to the latter effect. But this finding of the court should not be relied upon to reconcile the two opinions inasmuch as it was not considered by the court as a basis for its decision.\(^9\)

Then, as to the failure on the part of the defendant in the Virginia case to make adjustments with reference to back wages due its employees by virtue of the violations of the Act, the opinion in the Maryland case is devoid of any mention of such a complaint against the defendant in that case. This, however, it is believed, should not be taken to mean

\(^{5}\) “The defendant stated his net profits over a period of years in the past, after a very modest living expense, averaged possibly $500 a year.” Fleming v. Phipps, cited supra note 3.

\(^{6}\) The opinion states that the defendant’s customers numbered 303.

\(^{7}\) “Shortly before ... this Act went into effect, two of defendant’s competitors ... called up defendant with reference to complying with the minimum wage provisions of the statute. ... Each of those witnesses has stated that he received no encouragement from defendant and their testimony is not seriously contradicted. Evidence of that character negatives the idea of ignorance of the provisions of the statute, and rather indicates indifference or even determination not to comply.” Fleming v. Tidewater Optical Co., cited supra note 3.

\(^{8}\) The defendant discontinued operations for a period of ten days upon notice to him that he was violating the Act, resuming them only after making a new contract with the company, to whom he was supplying lumber, providing for an increased price for his services.

\(^{9}\) With reference to the absence of intent on the part of the defendant to wilfully disregard the Act the court said, “This, however, is of itself not very important because the defendant either knew or should have known that his Virginia operations with delivery of his completed work from Virginia into Maryland subjected him to the Act.” Fleming v. Phipps, cited supra note 3.
that a similar situation in this respect was not present in the Maryland case. For present purposes it is considered more logical to assume that this phase of the defendant’s situation as regards his employees was either not brought out at the hearing of the case or was omitted from the opinion of the court as immaterial to the decision. Indeed, if wages are owing to employees from their employer because of past violations of the Act, an appropriate remedy may be afforded without the granting of such an injunction as prayed for by the Wage and Hour Division in these two cases. The compulsion of payment of back wages has no connection with the restraining from future violations of the Act.

Next, it is true that the court in the Maryland case found that “there is nothing submitted to indicate the probability of any future non-compliance by the defendant,” but the opinion of the court in the Virginia case, wherein the injunction was granted, fails to contain a finding that there was any probability of intent on the part of the defendant in that case to violate the Act in the future. It would therefore appear that a reconciliation of the decisions cannot reasonably be based upon this factor.

Having disposed of differences as to factual make-up between the two cases, let us now turn to the reasons of the respective courts for their opposite decisions in the matter.

The court in the Virginia case argued that “Injunctions have been granted in cases where after action was instituted the defendant not only desisted from further violations but went out of business” and that the court is “not prepared to say that there is any great difference in principle between a case of this kind where great public interest is involved, and the defendant is continuing in the same business, but ceased violations before the Government had time to institute proceedings in normal course, and a case where the defendant continued the violations until suit was instituted and thereafter discontinued them and went out of business.” The court also stated that it takes notice of the fact that the Government through its different bureaus and agencies necessarily moves slowly, that frequently there is a great deal of unavoidable delay in instituting a suit of this nature, and that simply because the Government was of necessity slow in instituting suit and bringing the case to trial was not a sufficient reason “in a case like the present” for refusing to grant an injunction. And, lastly, the court pointed out that the defendant will in no way be affected by the injunction provided it in good

10Italics supplied.
faith thereafter complies with the Act, while if it does violate the provisions thereof the Administrator of the Wage and Hour Division will not have to institute a new suit in order to obtain appropriate relief.

These very reasons, stated by the District Court for the Eastern District of Virginia in support of its decision, as well as others offered by counsel for the Wage and Hour Division in substantiation of its complaint in the Maryland case,11 were either repudiated without reservation by the District Court for the District of Maryland in its opinion in the latter case, or failed even to receive consideration by that court. With reference to the reasons urged by the Division,12 the court said they seemed to be for "indirect and collateral objectives rather than in accordance with the usual equity rules relating to injunctions." The court then added, "It would seem to be elementary that the purpose of an injunction is to deter rather than to punish," and, "the injunction should not be granted unless there is adequate cause shown therefor in accordance with applicable principles of equity."13 Continuing, the court said, "It is a familiar rule of equity that an injunction will not be issued where the wrong complained of has fully and definitely terminated before the institution of the suit; and where the circumstances are such that the chancellor is convinced from the proof there is no likelihood of repetition [citing cases]."14

11Counsel for the Division urged that the fact of defendant's abandonment of violations long before the filing of the Division's complaint was not controlling and also that the injunction should have been issued for the following reasons: "(1) That the failure to issue the injunction in view of the admitted violation of the Act in the past by the defendant, would implyly be a vindication of the defendant and an encouragement to others engaged in similar business activities to violate the Act; (2) because the Administrator has a limited appropriation for the enforcement of the Act and is unable to effectively 'police' the industry in which defendant is engaged, and therefore wishes an injunction against further violations of the Act by the defendant so that he can be summarily disciplined on contempt charges without a jury trial; (3) that an injunction would be of assistance to the Administrator in possible future proceedings against the Long Lumber Company for alleged violation of the Act in the shipment in interstate commerce of lumber produced in violation of the terms of the Act." Fleming v. Phipps, cited supra note 3. (The defendant was engaged in supplying lumber to the Long Lumber Co.)

12See note 11 supra.

13The court makes it clear that "it is not necessary for the complainant to show irreparable injury in this class of cases where the injunction is asked to prevent violations of an Act establishing an important public policy." Fleming v. Phipps, cited supra note 3.

The court in the Maryland case did not, however, stop here with its reasoning. Regarding legislative intent the court said, "I do not find in the Act any indication that it was the intention of Congress that the injunctive powers of the court should be so extensively used in the enforcement of the Act. On the contrary the statutory requirement that the injunction should be issued only 'for cause shown', and the reference to 28 U. S. C. A. § 381, with respect to adequate notice, seem to indicate that the usual equity rules applicable to injunctions are to be regarded. ... A number of recent statutes of Congress have expressed its public policy in restricting rather than expanding the use of injunction by the federal courts. ..."16

In the light of the foregoing argumentation of the District Court for the District of Maryland it seems probable that in the future the Wage and Hour Division will experience great difficulty in obtaining injunctive relief from that court in cases, arising out of the Fair Labor Standards Act, of the caliber represented by the two set out here. And in view of the Division's success before the District Court in the Virginia case, as compared with the later adverse Maryland decision, it now appears that it would have been well for the Division's counsel to have served the defendant in the latter case with process in Virginia17 instead of in Maryland, thereby affording themselves the advantage of an adjudication by a court which had already shown, by previous decision, that it was in accord with the contentions of the Wage and Hour Division.

JACK W. DURANT


16See note 13 supra.


18There appears to have been ample opportunity for the Division to make such service of process, as the court states, "In the Virginia operation the defendant did not own the timber but merely fabricated it into lumber for the owner and delivered it a few miles from Virginia across the Maryland line. The latter activity is that which supplies the required element of interstate commerce which made the defendant subject to the Act." Fleming v. Phipps, cited supra note 3.
APPLICATION OF JUDICIAL PRINCIPLES TO THE REVIEW OF DECISIONS OF
THE BOARD OF TAX APPEALS

A RECENT decision of peculiar significance was decided by the Cir-
cuit Court of Appeals for the Fourth Circuit in the case of Legg’s
Estate v. Commissioner of Internal Revenue.¹ The question presented
was whether or not the court could decide the case on a point of law
which was not raised before the Board of Tax Appeals. The particular
point of law involved was set out in a similar case, Rothensies v. Fidelity-
Philadelphia Trust Company,² exactly in point, which was decided after
the Board’s decision and also after a petition to have the case reviewed
by the Circuit Court had been filed. The court held that this new point
of law, which in reality presented merely a changed situation with respect
to the law, was of sufficient vitality to consider this an exceptional case,
and to prevent a miscarriage of justice, the Circuit Courts of Appeal
may reverse decisions of the Board of Tax Appeals on a rule of law not
raised or pressed before the lower tribunal.

There are two important features exemplified by this case, which
appear unusual and outstanding. The first concerns itself with the ten-
dency of the courts when reviewing administrative decisions under legis-
lative authority to apply, wherever possible, established judicial, pro-
cedural, and substantive law, in the interpretation of such authority.
The second relates to a consideration of this as an exceptional case under
authority of the decision in Helvering v. Hormel,³ which appears clearly
distinguishable.

The federal statute⁴ gives to the Circuit Courts of Appeal the power
to review decisions of the Board of Tax Appeals. While this legislative
authority is a limitation on the power of the circuit courts to review de-
cisions of the Board, nevertheless, it is sufficiently broad to permit the
recognition of the same general rule and important exception, which are
prevalent in the review by the federal appellate courts of questions not
raised in the courts below.

114 F. (2d) 760 (C. C. A. 4th, 1940).
²112 F. (2d) 758 (C. C. A. 3d, 1940). This case was based on the ruling of the United
States Supreme Court in Helvering v. Grinnell, 294 U. S. 153 (1935).
⁴INT. REV. CODE § 1141 (c) (1939). This statute gives to the Circuit Courts the power
“to affirm or, if the decision of the Board is not in accordance with law, to modify or
to reverse the decision of the Board, with or without remanding the case for a rehearing,
as justice may require.”
Generally, in reviewing decisions of the Board of Tax Appeals, it is the function of the circuit court to decide whether the correct rule of law was applied to the findings of fact, and whether such findings were supported by substantial evidence. However, the rule that a circuit court cannot substitute its own judgment for that of the Board is subject to an exception in cases where the findings of the Board involve a mixed question of law and fact.

The general rule is that the federal appellate courts will not consider a question which was not raised in the courts below. The applicability of this general rule to the review by the circuit courts of decisions of the Board of Tax Appeals is definitely settled. The Commissioner, having failed to support a tax assessment on one ground, cannot support it on a new ground not raised before the Board. Similarly, the statute of limitations cannot be pressed for the first time on appeal from the Board’s decision. However, if the limitation extinguishes the cause of action and not merely the remedy, it may be urged as a defense before the circuit court, although not raised below. It is interesting to note that the circuit courts do not hesitate, in applying this general rule to the review of Board decisions, to cite cases relative to the review of lower court decisions.

Of greater significance than this, however, is the applicability of the exception to this rule, as adopted by the federal appellate courts in reviewing decisions of the lower courts, to the review by the circuit courts of the Board’s decisions. Probably the most outstanding expression of this exception as applied to the review by federal appellate courts of lower court decisions, was made by Mr. Justice Stone in the case of

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6Helvering v. Rankin, 295 U. S. 123 (1935), citing Old Mission Portland Cement Co. v. Helvering, 293 U. S. 289 (1934). Also, see Schoenfeld v. Commissioner, 103 F. (2d) 964 (C. C. A. 9th, 1939), holding that “this court has no power to make findings to supplement or supplant those made by the Board.”

7Hawke v. Commissioner, 109 F. (2d) 946 (C. C. A. 9th, 1940).


11Covington v. Commissioner, 103 F. (2d) 201 (C. C. A. 5th, 1939).

12Griffiths v. Commissioner, 50 F. (2d) 782 (C. C. A. 7th, 1931).
Duignan v. United States,\textsuperscript{12} in which he said: “This court sits as a court of review. It is only in exceptional cases coming here from the Federal courts that questions not pressed or passed upon below are reviewed.”\textsuperscript{13} This statement has been quoted in the opinions of many decisions of the circuit courts in reviewing decisions of the Board of Tax Appeals.\textsuperscript{14} This exception has been applied likewise to the review by the United States Supreme Court of a decision of the highest court in a state.\textsuperscript{15}

Thus, the exceptional case is the exception to the general rule that the federal appellate courts will not permit the introduction of a question which was not raised in the lower court. To come within the exception, the question presented for the first time on appeal must relate to the jurisdiction of the court or to the foundation of a right;\textsuperscript{16} or, as decided in Trapp v. Metropolitan Life Insurance Company,\textsuperscript{17} it must be such that to deny its introduction would “prevent a miscarriage of justice.” To indicate the point further, that this exception, as adopted by the federal appellate courts in reviewing lower court decisions, has been applied by the circuit courts in reviewing decisions of the Board, the Trapp case, relative to the review of a court decision, was cited as authority for the decision in Helvering v. Hormel,\textsuperscript{18} in reviewing a Board decision.

Thus, it is obvious that the general rule and exception, as adopted in the federal review of court decisions, have been applied in substance to the review by the circuit courts of decisions of the Board of Tax Appeals. It appears interesting to mention in this connection a statement of Mr.

\textsuperscript{12}274 U. S. 195 (1927).
\textsuperscript{13}Id. at 200. (Italics supplied.)
\textsuperscript{14}Blair, Commissioner v. Oesterlein, 275 U. S. 220 (1927); National Contracting Co. v. Commissioner, 105 F. (2d) 488 (C. C. A. 8th, 1939); See Kottermann v. Commissioner, 81 F. (2d) 621 (C. C. A. 9th, 1936).
\textsuperscript{15}Gulf, Col. and Santa Fe Ry. v. Dennis, 224 U. S. 503 (1912).
\textsuperscript{17}70 F. (2d) 976 (C. C. A. 8th, 1934), cert. denied, 293 U. S. 596 (1934), quoting Chief Justice Marshall in United States v. The Schooner Peggy, 1 Cranch 102 (U. S. 1801).
\textsuperscript{18}111 F. (2d) 1 (C. C. A. 8th, 1940), cert. granted, 85 L. ed. (Adv. Ops.) 56 (U. S. 1940).
Justice Frankfurter in a case\(^{19}\) reviewing an order of the Federal Communications Commission in which he said:

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

In considering the second point, it should be noted that the instant case\(^{20}\) has been classified as an exceptional case although part of the court’s rationale in the opinion is questionable. Circuit Judge Parker held that a changed situation with respect to the law subsequent to the Board’s decision “justifies our treating the case before us as an ‘exceptional case’, justifying departure from the general rule that we will not reverse on a ground not raised before the Board.”\(^{21}\) In support of this statement he cites Helvering v. Hormel,\(^{22}\) which appears clearly distinguishable from the present case although no attempt was directed by the court toward making such a distinction. In the Hormel case, the Circuit Court of Appeals for the Eighth Circuit reversed the decision of the Board of Tax Appeals on the basis of a decision of the United States Supreme Court in the case of Helvering v. Clifford,\(^{23}\) which was rendered after the Board had reversed the Commissioner and pending review by the circuit court. Obviously, this was a new point of law arising after the Board’s decision; and since it was decided by the United States Supreme Court, it was properly recognized by the court as a “changed situation with respect to the law.” Therefore, to prevent a miscarriage of justice the decision was based on a new point of law not available and consequently not raised before the Board. In the instant case, on the other hand, the basis for the “changed situation with respect to the law” was the case of Rothensies v. Fidelity-Philadelphia Trust Company,\(^{24}\) decided by the Circuit Court of Appeals for the Third Circuit and not the United States Supreme Court. The latter court grants cer-

\(^{19}\)Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 144 (1940) 28 GEORGETOWN LAW JOURNAL 929. See (1940) 29 GEORGETOWN LAW JOURNAL 68.

\(^{20}\)114 F. (2d) 760 (C. C. A. 4th, 1940).

\(^{21}\)Id. at 766. (Italics supplied.)

\(^{22}\)111 F. (2d) 1 (C. C. A. 8th, 1940), cert. granted, 85 L. ed. (Adv. Ops.) 56 (U. S. 1940).

\(^{23}\)309 U. S. 331 (1940). For discussion, see (1940) 38 MICH. L. REV. 885.

\(^{24}\)112 F. (2d) 758 (C. C. A. 3d, 1940).
tiorari frequently to clear up a conflict between courts of appeal of different circuits, which is indicative of the point that one circuit is not bound by the decisions of another circuit.25 Also, this point is further exemplified by the case of Janney v. Commissioner,26 which expressly disapproved of cases decided in three other and different circuits27 relative to the same principle. Therefore, it seems questionable that the decision in the Rothensies case in the third circuit should be considered as a basis for the “changed situation with respect to the law.”

It should not be overlooked also that Judge Parker asserted that the Rothensies case had received the sanction of the United States Supreme Court as evidenced by the decision in the case of Helvering v. Grinnell.28 The Grinnell case was decided in 1935, and consequently, its ruling was cognizable at the time of the proceedings of the instant case before the Board of Tax Appeals.29 Therefore, there appears no “changed situation with respect to the law” in connection with this aspect of the case.

Notwithstanding the above observations, however, the conclusion of the court in the instant case seems sound. Section 1141 (c) of the United States Code30 gives to the circuit court broad power to reverse if the decision of the Board “is not in accordance with law.” The present case was not decided by the Board in accordance with law because of the application of an incorrect theory for the basis of the tax assessment.31 Therefore, to prevent a miscarriage of justice, the Board’s decision was correctly reversed.

JOHN B. OLVERSON, JR.

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25In Helvering v. Grinnell, 294 U. S. 153 (1935), the United States Supreme Court granted certiorari because of an alleged conflict between decisions of two different circuits. The conflict related to the problem of whether property, within the meaning of Section 302(f). Revenue Act of 1926, would pass under a general power of appointment exercised by will, where the appointee elects to renounce the appointment and take as remainderman under another will, creating the power. The court held it would not, reversing Wear v. Commissioner, 65 F. (2d) 665 (C. C. A. 3d, 1933).

26108 F. (2d) 564 (C. C. A. 3d, 1939), cert. granted, 310 U. S. 617 (1940). This case held that where husband and wife file a joint income tax return, the husband’s losses could be used to offset the wife’s gains.

27The cases disapproved by the Janney case were as follows: Pierce v. Commissioner, 100 F. (2d) 397 (C. C. A. 2d, 1938); Sweet v. Commissioner, 102 F. (2d) 103 (C. C. A. 1st, 1939); and Nelson v. Commissioner, 104 F. (2d) 521 (C. C. A. 4th, 1939). It is interesting to note that Judge Biddle in the Janney case based his decision on the vigorous dissent of Judge Learned Hand in the Pierce case.


29The case was before the Board in 1939. It was reported in 40 B. T. A. 1074 (1939).

30Int. Rev. Code § 1141 (c) (1939).

THE ASSIGNMENT OF CLAIMS ACT OF 1940

THIS, the National Defense era of United States history has revolutionized the American economy into a quasi-war machine; has further modified the formerly sancrosanct concepts of individual freedom and property rights; has even been credited with the responsibility for the termination of the previously untrammeled “third term tradition”. Consistent with the American governmental system the National Defense Program has been promulgated primarily by means of legislative enactment. National defense legislation was the “business” of the 76th Congress, 3rd Session, the longest session in the history of this nation. A survey of the legislation enacted at this historic session is indicative of a realization by Congress of the absolute necessity for refusal to enact “pressure legislation” under the guise of national defense,¹ for preserving our American system of government and life, and at the same time effectively “streamlining” that system for national defense purposes.

An excellent illustration of legislating for national defense is the Assignment of Claims Act of 1940,² a legitimate child of the national defense program, but relatively unknown to the general public.

The Assignment of Claims Act of 1940³ amends Sections 3477 and

¹Apparently the most serious breach of this underlying principle was the passage of “An Act to safeguard the homing pigeon” which was vetoed by the President on Oct. 17 as follows: “I am returning herewith without my approval H.R. 7813, An Act to safeguard the homing pigeon.

“I have a feeling that this is carrying national defense a little too far in times of peace. I am inclined to think that there are no Americans, or at least very few of them, who would deliberately shoot or capture a homing pigeon. I think that there are practically no people who would deliberately remove or alter a message in the leg band of a homing pigeon. After all, homing pigeons do not closely resemble any wild-game birds.

“If any real need should emerge for the enactment of such legislation, there would be plenty of time to enact it. In the meantime, this seems like a somewhat unnecessary law.”


³That Sections 3477 and 3737 of the Revised Statutes be amended by adding at the end of each such section the following new paragraph: The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal Lending agency: Provided, 1. That in the case of any contract entered into prior to the date of approval of the Assignment of
3737 of the Revised Statutes to permit the assignment of "moneys due or to become due" under government contracts of $1000 or more to banks, trust companies, or other financial institutions including Federal lending agencies. Section 3477 of the Revised Statutes, in effect, voids all transfers or assignments of any claim upon the United States or any interest therein before the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.\(^4\) Section 3737 of the Revised Statutes prohibits the transfer of any public contract or order or interest therein.\(^5\)

It is not necessary to analyze the legislative history of Section 3477 of the Revised Statutes\(^6\) to determine legislative intent since judicial comment thereon is very complete. The mischiefs intended to be prevented by the Section are mainly two: (1) the danger that the Government's interests might be prejudiced by having to deal with several persons in lieu of one, and by the introduction of a stranger to the original transaction; (2) that by a transfer of such a claim against the Government to one or more persons not originally parties in interest

Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned; 2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment; 3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing; 4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with—(a) the General Accounting Office, (b) the contracting officer or the head of his department or agency, (c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and (d) the disbursing officer, if any, designated in such contract to make payment. Notwithstanding any law to the contrary governing the validity of assignment pursuant to the Assignment of Claims Act of 1940 shall constitute a valid assignment for all purposes.

"Any contract entered into by the War Department or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract.

"Sec. 2. This Act may be cited as the Assignment of Claims Act of 1940."\(^*\)


improper influences might be brought to bear in prosecuting the claim before the department, the courts, or the congress, as desperate cases so often suggest when the reward is contingent on success. In Spofford v. Kirk the Supreme Court said that the greater of the two evils was the possible combination of interests and influences in the prosecution of claims which might have no real foundation. In reviewing judicial comment on legislative intent the Supreme Court said in Milliken v. Barrow:

"There is a noticeable reiteration in the language of the Supreme Court with regard to the introduction of a party 'who was a stranger to the original transaction,' and the transfer of a claim to one or more persons 'not originally interested in it.'"

Comment was made on the purpose of this Section at the hearing on the assignment of claims legislation conducted by the House Judiciary Committee to the effect that it was intended to preclude trafficking in claims, duplication of assignments and, in general, frauds on the Treasury.

The purpose of Section 3737 of the Revised Statutes, as indicated by judicial analysis of its legislative history was similar to that of Section 3477 of the Revised Statutes. Both "were passed for the protection of the government." They were passed in order that the Government might not be harrassed by multiplying the number of persons with whom it was dealing until the contract was completed and a settlement made." "Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed." Section 3737, in operation, prevented a bidder or contractor from making several bids, one by himself and others by his

897 U. S. 484 (1878); cited supra note 7.
10Hearings before subcommittee of House Committee on the Judiciary on H.R. 10365 and H.R. 10341, 76th Cong., 3rd Sess. (1940)—see transcript of testimony presented at hearing—page 1 of statement of E. N. Mahoney, General Counsel's office, General Accounting Office (hearings not printed).
13Ibid.
14Ibid.
friends, to be afterwards consummated by assignments of the contract to the real bidder, for whom they all acted, and also dealt a death blow to contract speculators whose business was to sell Government contracts at a profit to bona fide bidders or contractors.\textsuperscript{15}

Because of the all-inclusiveness of these two Sections of the Revised Statutes, as judicially interpreted,\textsuperscript{16} and the important function which

\textsuperscript{15}(1888) 19 Rep. Att'y Gen. 187.

\textsuperscript{16}§ 3477 has been held to include all specific assignments, in whatever form, of any claim against the United States under a statute or treaty, whether to be presented to one of the executive departments or to be prosecuted in the Court of Claims and to make every such assignment void unless it has been assented to by the United States. Ball \textit{v.} Halsell, 161 U. S. 72 (1896). Pursuant to this broad interpretation of the intent of the section an assignment by a public contractor of a claim against the United States for money accruing on a building contract was declared void, both as against the United States, the contractor's surety, the laborers, and materialmen. Henningsen \textit{v.} United States Fidelity & Guaranty Co., 143 Fed. 810 (C. C. A. 9th, 1906), \textit{decree aff'd} 208 U. S. 404 (1908). \textit{Accord}, Hall \textit{v.} Chandler, 289 Fed. 675 (C. C. A. 1st, 1923), \textit{appeal dismissed}, 269 U. S. 592 (1925) and 269 U. S. 529 (1925). To demonstrate the scope of the section contrast the subject of the assignment in Ball \textit{v.} Halsell, \textit{supra}, with that in the case of Trist \textit{v.} Child, 21 Wall. 441 (1874), where it was held that a claim of an attorney to a specific part of money appropriated by Congress in a private act, and based on an agreement with the beneficiary of the act that for prosecuting the claim before Congress he should receive 25% of the sum appropriated is clearly within § 3477.

Generally the courts have held that § 3477 renders the prohibited assignments absolutely void, \textit{i.e.}, void as between all parties: "Congress intended to render all claims against the government inalienable alike in law and in equity, for every purpose, and between all parties." Spofford \textit{v.} Kirk, United States \textit{v.} Gillis, both \textit{supra} note 7; Nutt \textit{v.} Knuto, 200 U. S. 13 (1906); Manhattan Commercial Co. \textit{v.} Paul, 216 N. Y. 481, 111 N. E. 76 (1916), which held that assignments of a claim against the United States are void as between assignor and assignee as well as between all other parties, for failure to comply absolutely with the section. Under this interpretation that an attempted assignment is void even as between the assignor and assignee no rights are conferred in the assignee as against a trustee in bankruptcy of the assignor. National Bank of Commerce \textit{v.} Downie, 218 U. S. 345 (1910); see letter from Chester Morrill, Secretary of the Board of Governors of the Federal Reserve System, to the presidents and chairmen of all Federal Reserve banks and the members and secretary of the Federal Advisory Council, under date of Aug. 23, 1940. Thus, banks who relied upon the assignment of amounts payable under such contracts as security, found themselves in the position of general creditors of the contractors in the case of bankruptcy even though the funds which they advanced may have made the fulfillment of the contracts possible. In a few cases it has been held, however, that where the government has recognized an assignee's rights such an assignment is valid as between the parties. Thayer \textit{v.} Pressey, 175 Mass. 225, 56 N. E. 5 (1900); S. H. Hawes & Co. \textit{v.} Wm. R. Trigg Co., 110 Va. 165, 65 S. E. 538 (1909), \textit{rev'd in part} and \textit{aff'd in part}, 218 U. S. 452 (1910).

The outstanding interpretative limitation on the purview of § 3477 is that an assignment of a claim by operation of law as in case of passing of claims to heirs, devisees, or
they serve, definite statutory limitations were inserted in the Assignment of Claims Act of 1940. (1) The act relates only to assignments of "moneys due or to become due" under public contracts. The act does not permit such assignments in general. (2) "It is to be observed that the assignment permitted by the said act relates to the 'moneys due or to become due' under a public contract. The act does not authorize assignment of the contract itself, with the resultant shift of responsibility for its performance, etc., from the contractor to the assignee; consequently, irrespective of an assignment by a contractor of 'the moneys due or to become due', the contractor is charged with the duty of performing the contract in accordance with its terms." (3) Any contract may forbid an assignment of the "moneys due or to become due." (4) Unless specifically provided for in the contract partial assignments of "moneys due or to become due" are not permissible; "moneys due or to become due" may not be assigned to more than one person or reassigned except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing.

In addition, as indicated by the title of the enactment, "To assist in the national defense program . . . ", and its legislative history, this is

assignees in bankruptcy, or transfer of claims through a judicial sale under an order of court is not embraced by the prohibition. Goodman v. Niblack, 102 U. S. 556, 560 (1880); which also held that a voluntary assignment by an insolvent debtor for the benefit of creditors does not come within the section.

See note 3 supra.

Ibid., note 17 supra; see also Comp. Gen., B-13700, Dec. 2, 1940; see note 29 infra. To permit assignment of contracts, still prohibited by Rev. Stat. § 3737 (1875), 41 U. S. C. § 15 (1934), would be inconsistent with the national defense objective of the legislation.

Rep. McLaughlin (Neb.) speaking on the floor of the House during debate on H. R. 10464, Pub. L. No. 811, 76th Cong., 3rd Sess. (Oct. 9, 1940), in bill form, explains the insertion of this provision (see note 3 supra): "It was explained by the departments, however, that it is necessary in the national defense that some degree of secrecy be maintained with respect to these different contracts for the manufacture of materials used in national defense: War material, for instance, the character of which it would not be in the interest of national defense to disclose. In order to protect the Government it was necessary, therefore, to repose in the various departments the right to insist that the claim for the contract should not be assigned. It was pointed out that if the claim based upon the contract were assigned the financing institution to which the claim would be assigned would naturally insist that it be advised as to the nature of the contract because such insitution would not be willing to advance money on a claim without knowing anything about the contract upon which the claim was based." 86 Cong. Rec., Sept. 24, 1940, at 18965.

See note 3 supra.
national defense legislation, and although it does not automatically terminate at the end of the emergency it may be presumed that a repealing statute would be in order when the emergency ceases.21

The legislative history of the act22 indicates that its primary purpose was to remove an obstacle to the financing of contracts,23 especially those of small contractors,24 and thereby broaden the bidding field.25 The law enables a contractor, who requires money to finance performance of his contract or contracts to assign as security for a loan "moneys due or to become due" on government contracts. Incidental purposes which have been attributed to the legislation include the furnishing of an investment opportunity for private financing institutions,26 and, as a part

21It is difficult to explain why, in view of the admitted emergency purpose of this statute, it was not specifically provided that the act should be effective only during the emergency declared by the President on September 8, 1939, to exist, such a provision being used in certain other national defense legislation. It may be attributable to one of those inevitable legislative compromises.


23Apparently it was felt that all public contracts have their national defense aspects at the present time. Hearings before Subcommittee of House Committee on the Judiciary on H. R. 10365 and H. R. 10341, 76th Cong., 3rd Sess. (Aug. 28, 1940) 33.

24Rep. Youngdahl (Minn.) during debate said: "I am advised that the policy of the National Defense Commission is to spread out these contracts as much as possible with small contractors, thereby breaking down the larger unit into several units. The purpose of this bill, as I understand it, is to give these small contractors the benefit of this additional credit. . . ." 86 Cong. Rec., Sept. 24, 1940, at 18985. It should be noted in this connection that the first assignment of claims bills (H. R. 19341, H. R. 10365, and H. R. 10403, all of 76th Cong., 3rd Sess.) required that a contract within the terms of the proposed legislation must be for at least $10,000; when originally introduced, H. R. 10464, 76th Cong., 3rd Sess. dropped the figure to $3,000; when finally passed, the minimum was fixed at $1,000. See 86 Cong. Rec., Sept. 30, 1940, at 19330.

25Rep. Summers (Tex.) explained the purpose of the bill: "The agencies of the Government which have responsibility are themselves responsible for proposing this legislation. They came down to the Committee on the Judiciary, as the gentleman from Michigan explained, and indicated their desire to increase as far as possible the number of persons who could bid on these contracts, and who could help the Government in this emergency." 86 Cong. Rec., Sept. 24, 1940, at 18986-18986.

26Rep. Wolcott (Mich.) argued: "At the present time there are something over $6,000,000,000 of excess reserves in the banks of the Nation which are frozen tight, due to the fact that the Government has come in competition with private lending to the point where there is no demand upon the banks for this money. "Inasmuch as whatever prosperity we are enjoying or which we shall enjoy in the immediate future is going to be largely dependent upon Government spending, and inasmuch as Government spending is going to be largely through defense contracts, it seems only
of economic planning, to utilize some of the idle funds said to be stagnant.  

In order to accomplish the fundamental purpose of the legislation it was necessary to permit the assignment of "moneys due or to become due" thereby enabling a contractor to obtain funds in advance, but it was not requisite nor was it advisable to permit the assignment of contracts.

Practically speaking, what has been the effect of the act? The Army and Navy and the Advisory Commission to the Council of National Defense are eager to consummate contracts; contractors are both national defense-minded and possessed of business instincts, and often short on credit; and the banks are anxious to facilitate the national defense program and at the same time engage in a profitable loan business; logical that we take this way of thawing out some of these billions which are now frozen in the banks as excess reserves.

"... As I see it, this is a movement to allow private enterprise to get back some of the opportunity to invest private funds which has been constantly taken away from it during the past seven years." 86 Cong. Rec., Sept. 24, 1940, at 18988. To some extent this may prove to be wishful thinking on the part of Rep. Wolcott. The law specifically permits assignments to financial institutions, "including any Federal lending agency." See note 3 supra, also, note 30 infra.

"Ibid. Mr. Hobbs: "It will put idle money to work...." 86 Cong. Rec., Oct. 3, 1940, at 19746.

Note that although the official title of the legislative enactment is Assignment of Claims Act of 1940, it actually provides for more than the assignment of claims, which the Supreme Court has held, in interpreting Rev. Stat. § 3477 (1875), 31 U. S. C. § 203 (1934) do not arise until after partial or complete performance. Hobbs v. McClean, 117 U. S. 567, 575 (1886). It permits the assignment of "moneys due or to become due"; thus allowing assignment before there has been any performance. 86 Cong. Rec., Oct. 3, 1940, at 19760.

The War and Navy Departments insisted that the prohibition contained in Rev. Stat. § 3737 (1875), 41 U. S. C. § 15 (1934), against the assignment of contracts be unimpaired.

"... Both the War Department and the Navy Department protested most vehemently against permitting assignment of these contracts. They said that these contracts are for the production of munitions of war and should not be hawked around in the marts of finance so that the secrets of the Army and Navy might become public property.

"They said 'We will coöperate with the banks, trust companies, and other financial institutions as well as with American business; we welcome a law that will permit the financing of all our contractors; but there are some things we cannot allow to become public.'" 86 Cong. Rec., Oct. 3, 1940, at 19760.

By oversight H. R. 10464, in its original form was called Contract Assignment Act of 1940, but was amended to read, Assignment of Claims Act of 1940. 96 Cong. Rec., Oct. 2, 1940, at 19638. As was indicated above the official title is itself a misnomer. Note 28, supra.

The Commercial banks have by no means sat back awaiting loan applications. Under the leadership of the American Bankers Association and of the various State and local
hence, although there is no accurate way of determining the precise extent to which “moneys due or to become due” on public contracts are being assigned, it is reasonable to assume that the practice is quite prevalent. Certain evidences of the act being availed of are cognizable. The War Department has recently made public amended regulations on contract payments to conform to the provisions of the Assignment of Claims Act of 1940. The unique “emergency plant facilities contract” contains a bankable provision. The National Defense Loans Committee and the Bank Management Commission of the American Bankers Association are advising members of the banking fraternity on the assignment of claims under government contracts as security for bank loans.

groups, the territory has been mapped with an eye to aiding manufacturers in bidding on Government defense contracts and in providing financial assistance when necessary.” Condon, Banks Eager to Aid Defense Financing, N. Y. Times, Jan. 2, 1941, p. 36, col. 2.

It may be argued that the hand of private financial institutions has been forced, to a certain extent, by competition. The national defense activities of the Reconstruction Finance Corporation are very extensive. To illustrate: the R.F.C. Mortgage Corporation will loan at a rate of 4% up to 100% of the cost of a national defense building which the manufacturer wishes to finance. Where a manufacturer has an “emergency plant facilities contract” which he may offer as security, R.F.C. either directly, or through banks or the Defense Plant Corporation will finance national defense plant construction, etc., at 1½% (see letter of Jesse Jones, Federal Loan Administrator, to the Secretaries of War and Navy, made public on November 18, 1940 by press release.)

5 FED. REG. 5121 (1940).

Under the “emergency plant facilities contract”, designed by the Finance Committee of the Advisory Commission to the Council of National Defense, and now in use by the War and Navy departments, the Government reimburses the manufacturer specifically and directly and not as a part of price for the cost of its national defense expansion (facilities) at the rate of 20% per year, and if the emergency ends or the Government contracts end at an earlier date the Government pays the remainder of its reimbursement obligation at the date of the termination of the contracts or the emergency. The contract provides that title shall be in the contractor, but that he shall not permit any mortgage or other lien to become an encumbrance on the facilities, or make a transfer thereof without the prior written consent of the Head of the Department (see note 33 infra). When the Government has fulfilled its reimbursement obligation it takes over the facilities having progressively acquired an interest in them unless the manufacturer exercises his contractually guaranteed option to purchase the facilities at their then fair value. 5 FED. REG. 4147 (1940); Hearings before Senate Committee on Finance on H. R. 10413, 76th Cong. Rec., 3rd Sess. (1940) 166-187; Comp. Gen., B-11756, Aug. 16, 1940.

See Art. VII of the “EPF contract,” 5 FED. REG. 4147 (1940). It should also be noted that Art. I, § 3, of the “EPF contract” provides that the Government will not, because a mortgage or other lien has become an encumbrance upon the contract in violation of its provisions, refuse payment of sums due as Government Reimbursement for plant costs in excess of the indebtedness secured by such mortgage or other lien; to this extent, under such circumstances the assignee is protected. 5 FED. REG. 4147 (1940).

A nation-wide organization has been set up to explain the details of obtaining bank loans on Government orders.\(^{35}\)

When "moneys due or to become due" on the average public contract are assigned several parties are affected in addition to the actual parties to the contract, \emph{i.e.,} the Government, the contractee, and the contractor \emph{viz.}: (1) the assignee—the financial institution; (2) the surety or sureties upon the bond or bonds, if any, in connection with the contract; (3) the subcontractors and materialmen. This article will treat briefly of the position of each of the three.

The \emph{assignee}, the financial institution, is by no means in a position of absolute security. It is incumbent upon the bank, before accepting an assignment, in order to protect itself, to consider the usual criteria of a contractor's ability to perform since failure of performance on the part of the assignor renders the assignment valueless, the assignee having no better right than that of the assignor; the assignment does not operate as a guaranty by the Government of payment of the bank loan. Banks are being advised of certain protective provisions to be included in the loan agreement collateral to the assignment.\(^{36}\)

The law permits the inclusion in any War or Navy Department contract of a stipulation that payments to an assignee of any claim arising thereunder shall not be subject to reduction or set-off,\(^{37}\) and further provides that, where such a "no-set-off" provision is incorporated in the contract, the payments shall not be subject to reduction or set-off \emph{for any indebtedness of the assignor to the United States arising independently of such contract.}\(^{38}\) Thus, the Government may waive its right to set-off only with respect to claims against the contractor which arise


\(^{36}\) Consideration should be given in each instance to the desirability of incorporating in the collateral loan agreement a provision authorizing the bank to provide for the performance of the contract in the event that the contractor intends to abandon, cancel or terminate the contract and requiring the contractor to give the bank advance notice before taking any steps toward such abandonment, cancellation or termination. In this connection, consideration should be given to the relationship between the contractor and the surety." (1940) American Bankers Assn., \textit{Bank Management Comm. Bull. No. 82}, p. 16.

\(^{37}\) \ldots The Comptroller General has taken the position that his office will make set-offs in all cases except where Congress by specific direction provides that certain claims should be paid regardless of set-offs otherwise available." Advisory Commission to the Council of National Defense, Summary and Analysis of the Assignment of Claims Act of 1940, Dec. 9, 1940—1978, p. 4.

\(^{38}\) 86 Cong. Rec., Sept. 30, 1940, at 19330, Statement of Sen. Barkley (Ky.).
independently of the contract. “Progress and advance payments\(^3\) by the Government for work done under a particular contract obviously give rise to claims on behalf of the Government with reference to such contract, and not ‘independently’ of it. Accordingly, it would seem that the statute does not authorize waiver of the Government’s priority or right of set-off based upon such progress or advance payments.”\(^4\)

The *surety* or *sureties* upon the bond or bonds, if any,\(^5\) in connection with the contract are interested in the assignment by the contractor of “moneys due or to become due.” The act recognizes this interest only to the extent of requiring that notice be given the surety or sureties of an assignment pursuant to its provisions.\(^6\)

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\(^3\)Pub. L. No. 703, 76th Cong., 3rd Sess. (July 2, 1940) § 1 (c); as amended by Pub. L. No. 781, 76th Cong., 3rd Sess. (Sept. 9, 1940) Tit. I, § 103 authorizes War Department advance payments not exceeding 30% of contract price.


\(^5\)Where the contract is for the construction, alteration or repair of any public work, and is in excess of $2,000 in amount, the Act of August 24, 1935, requires the contractor to give a performance bond satisfactory in amount and as to surety for the protection of the United States in case of default of the contractor, and a payment bond with a surety or sureties satisfactory to the contracting officer for the protection of all persons applying labor and material in the prosecution of the work. 49 Stat. 794 (1935), 40 U. S. C. § 270b (Supp. 1939). Although Pub. L. No. 781, 76th Cong., 3rd Sess. (Sept. 9, 1940) authorizes the Secretary of War to waive these bond requirements on cost-plus-a-fixed-fee contracts for public works for the Military Establishment such a practice will probably not be generally followed.

There are no general legal requirements that a contractor for the delivery of supplies and material shall give a performance bond and no requirement that such a contractor shall give a payment bond, there being a distinction in this respect between the legal requirements relative to public work and the legal requirements relative to supply contracts. However, by administrative provisions in the advertised specifications the bidders for the delivery of supplies are frequently required to submit a bid bond with their bids and the contractor is required to furnish a performance bond. The law relative to Navy purchases of supplies requires both a bid bond and a performance bond. Rev. Stat. § 3719 (1875), 34 U. S. C. A. § 562.” McGuire, *Matters of Procedure under Government Contracts* (Dec. 1, 1939) 76.

\(^6\)See note 3 *supra*. The spokesman for the surety companies at the hearing contended that the proposed legislation should either require consent of the surety companies as a prerequisite to the right to assign “moneys due or to become due”, or permit such assignments to surety companies, rather than limiting assignments to “a bank, trust company, or other financial institutions, including any Federal lending agency.” *Hearings before Subcommittee of House Committee on the Judiciary on H. R. 10365, and H. R. 10341*, 76th Cong., 3rd Sess. (Aug. 28, 1940), testimony of Howard M. Starling, representing the Association of Casualty and Surety Executives. As to justification for requiring consent of the surety company, it has been suggested that it is not entirely inconceivable that the courts
Surety companies are vitally concerned with protecting themselves in case of failure of performance by the contractor; hence, it is the effect of this new legislation on their position in case of default that attracts the attention of the surety men.\footnote{43}

As to procedure in case of a failure of performance, the Government first declares the contractor in default and serves notice on the surety company. Then between the Government and the surety company representative one of three alternatives is adopted, the final choice being with the Government, \textit{viz.}: (1) Payment by the surety company of the face value of the bond. (2) Performance of the contract by the surety company. (3) With permission of the Government the surety company will readvertise for bids on the uncompleted portion of the contract, let the contract to the lowest bidder, and then pay the difference between the contract price of the original contract, and the second price. (This is the preferred alternative from the standpoint of the surety company and usually from the standpoint of the Government, since the former is not organized to perform contracts, and the latter is usually primarily interested in getting the work contracted for done.)

Surety companies have generally protected themselves against default may hold that the surety bond to which a principal, obligee, and surety are parties, is actually a part of the original contract, and pursuant to this reasoning, that the contract may not be amended by an assignment of "moneys due or to become due" without the consent of the surety. One of the arguments for the latter alternative advanced was that surety companies, although not organized as financial institutions, frequently make a practice of advancing funds to a contractor for whom they have written a bond in order to guarantee performance of the contract. \textit{Hearings before Subcommittee of House Committee on the Judiciary on H. R. 10365, and H. R. 10341, 76th Cong., 3rd Sess. (Aug. 28, 1940)} testimony of Howard M. Starling, representing the Association of Casualty and Surety Executives. Proponents of the legislation argue, however, that if surety companies may be assigned such Government claims most surety companies would require an assignment in their agreement with the contractor for security purposes, thus vitiating the objectives of the legislation. Since the law fails to include surety companies within those authorized as assignees to the old case which held that an assignment by contractors for public work to the surety on their bond of any sums which might become due them from the Government under the contract to indemnify the surety for liability it might incur on the bond is void under \textit{Rev. Stat. § 3477 (1875)}, 31 U. S. C. § 203 (1934), is still good law. \textit{London, \&c. Indemnity Co. v. Endres, 290 Fed. 98 (C. C. A. 8th, 1923)}.

\footnote{43}The new law is favorable to the sureties in that it facilitates borrowing by their principals, but unfavorable in that it will probably, under certain conditions of default or near-default by their principals, deprive the sureties of salvage available to them heretofore." Howard C. Lunt, Vice President, Great American Indemnity Company, New York, \textit{Bonding Lines Give Promise of Yielding a Normal Profit, N. Y. JOUR. OF COMM., Dec. 26, 1940}, special business review section, p. 1, col. 1, p. 9A.
by the contractor by requiring the applicant for a bond to agree to pledge all his assets as a condition precedent to issuing of the bond in order to indemnify the surety company in case of non-performance. Also, by what is termed a joint-control agreement, the surety company may stipulate that the contractor may not disburse progress payments without consent of the surety—this to prevent dissipation. Such an agreement, of course, may not tie up "moneys due or to become due" before they are received,\textsuperscript{44} but only applies to funds in the possession of the contractor; thus, an assignment of "moneys due or to become due" pursuant to the Assignment of Claims Act of 1940 is not precluded.\textsuperscript{45}

In what respect is there a cause for alarm, if any? Certainly, the surety company would not object to an assignment of "moneys due or to become due" as security for a loan which is then put into the contract, \textit{i.e.}, the borrowed funds used in completing the contract on which the surety has written a bond. It is the possibility of dissipation of funds procured in this manner that concerns the surety company.

There can be no question that in the average case the surety company will have prior claim on the pledged assets of the corporation over the assignee, in case of default. As to the payments by the Government on the contract, it is difficult to draw a generalization. Where there is a failure to complete performance at a point when the contractor, who has assigned all the "moneys due or to become due", has performed 90% of the contract, and progress payments have been paid over to the bank in proportion to the work performed, the question arises as to who is entitled to the balance of the contract price—the bank, or the surety company who is required to complete performance. Obviously, the surety company has prior claim; the bank has no better claim than its assignor who has defaulted as to a portion of the contract; the Government will pay the balance of the contract price to the surety company.\textsuperscript{46} Only to the extent that the contractor has dissipated the

\textsuperscript{44} If this were done the net result would be an assignment of "moneys due or to become due" to a surety company, which is not permitted under the act.

\textsuperscript{45} The surety company, of course, may bar such assignment by contractual agreement.

\textsuperscript{46} The right of the surety company, grounded in the equitable doctrine of subrogation (Aetna Life Insurance Co. \textit{v.} Middleport, 124 U. S. 534, 1888) arises upon the consummation of the surety agreement required by the Government as a condition of the contract, and does not date from the inception of performance by the surety necessitated by default of the contractor. Henningsen \textit{v.} United States Fidelity and Guaranty Co., 208 U. S. 404 (1907); Prairie State Bank \textit{v.} United States; United States \textit{v.} Hitchcock,
funds which he borrowed from the bank is the position of the surety company prejudiced. And, as a matter of fact, there would appear to be no reason why the customary joint-control agreement could not be revised to provide for joint control of all funds borrowed by the contractor by means of assigning "moneys due or to become due" as collateral security.  

Finally, as to the position of the subcontractors and materialmen, who, of course, are not in privity with the Government, a brief statement will suffice. Since a payment bond protects subcontractors and materialmen only in those cases where no payment bond is required by law or by contractual provision, is the position of the subcontractors and materialmen even remotely affected? Where the prime contractor has assigned "moneys due or to become due" this may affect the ability of the subcontractors or materialmen to obtain credit, for a bank may not then consider their claim against the prime contractor good collateral.

The benefits of the act, on the other hand, are being extended to subcontractors who as suppliers have entered into "emergency plant facilities contracts" with the Government, since such contracts make the reimbursements assignable.

CONCLUSION

The Assignment of Claims Act of 1940 is obviously of vital interest to those directly affected by it, the United States Government, the bankers and Government contractors. It is undoubtedly of incidental interest to the general public because of its national defense rôle. It should be of primary significance, however, because its legislative history is indicative of an ability on the part of Congress to adopt legislative procedure to the exigencies of the emergency. It may well be that the Congress of the United States is in the process of developing a unique

164 U. S. 227 (1896). Previous to the passage of the Assignment of Claims Act, where, upon default by the contractor, the assignee of the claims arising out of the contract asserted an equitable lien on the fund constituted by the unpaid portion of the contract price it was held, in the Prairie State Bank case, that the surety's right was prior over the equity of the assignee, if any such equity existed. The priority of the surety's claim does not appear to be affected by the subject act which merely renders the assignment legal.

47See note 44 supra.
48See note 41 supra.
50See notes 32 and 33 supra.
“national defense legislative technique” that will effectively grind out the necessary emergency legislation.

The Assignment of Claims Act of 1940 was a co-operative effort of the sundry departments of the Government, the Advisory Commission to the Council of National Defense, representatives of business, and the United States Congress. The Congress short-circuited legislative red-tape and attained “legislative quality.”

“Accelerated efficiency” must be required of Congress as well as of industry.

CHARLES W. STEWART, JR.
NOTES

THE ENFORCEABILITY OF RESTRICTIVE COVENANTS ON LAND IN THE DISTRICT OF COLUMBIA

HAND in hand with the increasing power of the national government in the last two decades, there has been a proportionate growth and expansion of the national capital. On many neighborhoods in the District of Columbia this expansion has worked a revolutionary change. What were once fine residential areas have, with the influx of hordes of government employees and the gradual encroachment of new government offices, given way to apartments, rowhouses, and shopping districts. Accordingly in such altered vicinages profit-minded property owners have attempted to escape the effect of old restrictive covenants on their properties. It is the purpose of this study to appraise the attitude of the courts of the District of Columbia toward these restrictive covenants, or so-called equitable servitudes, and toward the efforts of property owners to avoid their force.

HISTORICAL BACKGROUND OF RESTRICTIVE COVENANTS

The early use of restrictive covenants or equitable servitudes on land grew from a recognition by the courts of the need of property owners for some method of town planning and general control of property. In the classic English case on this subject, "Lord Cottenham considered that he was enforcing against C a contract made between A and B and that he was doing so to prevent unjust enrichment." Since this case


2See, Lloyd, Enforcement of the Affirmative Agreement Respecting the Use of Land (1928) 14 Va. L. Rev. 419, 420.

3Tulk v. Moxhay, 2 Phillips 744 (Ch. 1848). The case involved a covenant to maintain a garden for the use and pleasure of surrounding tenants. A party not in privity to the original covenant, but a successor in title, sought enforcement against another who was likewise merely a successor in title to the covenantor. It was held that the covenant would be enforced against a party purchasing with notice of it; for if an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from that of the party from whom he purchased.

4See Pound, Progress of the Law (1920) 33 Harv. L. Rev. 813, et seq. Therein it is urged that the attachment of an equitable servitude is the basis for allowing equity to enforce the covenants.
the courts adopting its methods have urged widely varied theories to account for equity's enforcement of these covenants.\(^5\) Generally they have come to be recognized as valid and enforceable in equity unless contrary to public policy.\(^6\) Many types of restrictive covenants have been upheld, \(e.g.,\) prohibitions against commercial uses or maintenance of liquor stores; building line restrictions; stipulations concerning single-family dwellings, minimum cost for dwelling, negroes, and many others.\(^7\) Regardless of these conflicting reasons for upholding these covenants ordinarily the equity courts will enforce them.\(^8\)

**GROUNDS FOR REFUSAL TO ENFORCE THE COVENANT**

No sooner had the courts granted an effective protection to the property owner than changing times and conditions began to urge the emasculation of this laboriously constructed rule. As a lever to pry loose the covenants the courts found two eminent authorities. In an early case,\(^9\) Lord Eldon had recognized that changing circumstances might render the continued enforcement of a covenant inequitable.

\(^5\)Some of the theories advanced are: (1) that it is a covenant running with the land; (2) that it constitutes a legal right for which damages alone are inadequate; (3) that it amounts to an equitable easement or servitude put on the land to be enforced by the dominant property owner; (4) that it is a burden of conscience on the parties and their successors; (5) that it would countenance an unjust enrichment to refuse enforcement; (6) that it establishes an equitable property right which is passed on to successors and enforceable against parties with notice; (7) that equity imposes, as in a trust, a duty of refraining from conduct which aids the failure of trustee (or in this instance the covenantor) to perform his obligation to the *cestui* (in this case to the covenantee or his successors). Stone, *Equitable Rights and Liabilities of Strangers to a Contract* (1918) 18 Col. L. Rev. 291, 296-297, 300-302. The last theory is supported by Mr. Justice Stone. See also Lloyd, *supra* note 2, at 419 *et seq.;* Ames, *Specific Performance For and Against Strangers to the Contract* (1904) 17 Harv. L. Rev. 174; Leesman, *Covenants Running With the Land in Illinois* (1920) 14 Ill. L. Rev. 480; Pound, *supra* note 4, at 813 *et seq.;* Note (1932) 20 *The Georgetown Law Journal* 538.

\(^6\)Cowell v. Spring Co., 100 U. S. 55 (1879); Corrigan v. Buckley, 299 Fed. 899 (App. D. C. 1924), *aff'd* 271 U. S. 323 (1926); and many other cases.

\(^7\)See Note (1933) 85 A. L. R. 988; Note (1928) 54 A. L. R. 813. See also *Chafee and Simpson, Cases on Equity Jurisprudence* (1934) Cases 704-870.


\(^9\)Duke of Bedford *v.* Trustees of British Museum, 2 Myl & K. 552 (Ch. 1822). The case concerned a covenant to build a dwelling on the land. Subsequently property is almost surrounded by British Museum. This is bill in equity to prevent use of property by museum. *Held,* that where the object of one party is defeated, equity will not enforce the balance of the covenant in favor of the party who is no longer bound thereby. He is left to his remedy at law.
Characteristically, the Chancellor achieved this holding by giving established principles of equity new application, stressing the asserted adequacy of the legal remedy of damages for breach of covenant and the estoppel of the complaining party because of his own breach. Basically the refusal to intervene was conditioned upon the changed condition of the premises, making enforcement a hardship on the party. To this unique precedent was added the weight of Mr. Justice Story:

“If, in fact, the character and conditions of the property, to which the contract is attached, have been so altered, that the terms and restrictions of it are no longer applicable to the state of things, in such cases courts of equity will not grant any remedy.”

With these as authorities the New York Court, in Trustees of Columbia College v. Thatcher, held that in the case of such a change in the character of the surrounding neighborhood as to render the purpose of the covenant unattainable, and its enforcement inequitable, equity would not interfere. This was an important departure from the former rule permitting enforcement of covenants unless in contravention of public policy. It was based on proof that the property was so surrounded by commercial establishments as to render its use for a residence unprofitable, thus defeating the intention of the covenant. It is important to understand the attitude of the New York court in refusing its aid. The test for enforcement was a balance of the conveniences of the opposing parties to decide whether equity should grant the injunction.

This decision has been paid “lip service” by courts in every jurisdiction but its actual result has seldom been adopted. Rather the approach of the courts has been through two other tests. Can the purpose of the covenant still be achieved? Will enforcement be of some benefits to the

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10 Story, Equity Jurisprudence (Bigelow’s 13th ed. 1886) § 750.
11 87 N. Y. 311 (1882).
12 This view is enlarged in later cases, quoting Ewertsen v. Gertsenberg, 186 Ill. 344, 57 N. E. 1051 (1900), “Equity will not, as a rule, enforce a restriction where by acts of the grantor who imposed it, or of those who delivered title under him, the property and that in the vicinage, has so changed in its character and environment and in the uses to which it may be put, as to make it unfit or unprofitable for use if the restriction be enforced, or where complainant has waived or abandoned the restriction; or, in short, it may be said where, from all the evidence, it appears that it would be against equity to enforce the restriction by injunction, relief will be denied.” This is quoted with approval in Castleman v. Avignone, 12 F. (2d) 326 (App. D. C. 1926) supra note 1. See also Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); Starkey v. Gardner, 194 N. C. 74, 138 S. E. 408 (1927); Deeves v. Constable, 87 App. Div. 352, 84 N. Y. S. 592 (1st Dep’t 1903).
The possible greater hardship on the party against whom the covenant will be enforced disappears in the face of these questions.

**VALIDITY OF RESTRICTIVE COVENANTS IN THE DISTRICT OF COLUMBIA**

Following the general view, the courts of the District of Columbia have upheld the validity of restrictive covenants. So long as they “are reasonable and not against public policy, they will be enforced.” In the case of *McNeil v. Gary*, the enforcement of a covenant requiring only single-family dwellings and fixing a minimum cost of the residence constructed on the property was permitted. The court found that the covenants were intended to inure to the benefit of subsequent owners. Each purchaser bought his lot with notice of the scheme. Answering the problem of no privity between the complainant and the original grantor, the court said:

“Equity enforces contracts and covenants in regard to property entered into between prior grantors and grantees, in regard to the use of property, especially if common property or property descending from a common source, against subsequent owners affected with actual or constructive notice of such contracts or covenants.”

In two later cases, *Chevy Chase Land Company v. Poole* and *Corrigan v. Buckley*, restrictive covenants were enforced. The court reasoned that the purchaser with notice, having submitted to a burden on his property, with the understanding of a similar burden on remaining land, should be protected from efforts of a third party (who had taken notice of the restriction) to depart from the general scheme. The exact theory on which these covenants are enforced is not clear. In the case

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16Id. at 400.

1744 App. D. C. 400 (1919). The case involved a covenant against apartment houses and commercial uses.

18299 Fed. 899 (App. D. C. 1924), aff’d, 271 U. S. 323 (1926). A covenant against use by negroes was attacked. *Held*, that a landowner has the power to restrict any use of the land by his successors, and the constitutional protections of the 14th amendment do not limit this right.

19See note 5 *supra*. 
of *Castleman v. Avignone*,\(^{20}\) the court advanced the equitable servitude or easement theory as the basis of enforcement. It is clear that a showing of a general scheme, of intent to benefit all the property owners, of notice of the scheme to the defendant, entitles the covenantee to enforcement in the equity courts unless public policy is contravened.

**CASES INVOLVING CHANGED CONDITIONS OF NEIGHBORHOOD**

As in other jurisdictions, once the use of restrictive covenants have been approved by the courts, efforts to avoid them have commenced. These efforts have been accelerated by the growth of the national capital previously mentioned. The courts of the District of Columbia have not looked with much favor on these efforts.\(^{21}\)

In the case of *Castleman v. Avignone*,\(^{22}\) *supra*, the defendant urged in answer to a bill for an injunction against breach of the covenant that, admitting the original validity of the covenant and the right of a third party to enforce it, the condition of the neighborhood had so changed as to render enforcement inequitable. The case involved a building line restriction which was designed primarily for residential property. The defendants showed a general change to commercial property, widening of sidewalks to extend up to front of buildings, and general minor violations of the restriction. The court, citing the *Columbia College case*, *supra*, granted the injunction emphasizing that the purpose of the covenant could still be achieved regardless of the transition to commercial property,\(^{23}\) emphasizing also that the enforcement would be a benefit to the complainant more essential than the increased value of the defendant’s property resulting from the breach.\(^{24}\) This decision exemplifies

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\(^{20}\)12 F. (2d) 326 (App. D. C. 1926). This case seems to follow the equitable servitude theory, quoting from the case, *id.* at 329, “... in order to give effect (to the covenant) it may be construed by equity as creating an incorporeal heridament (in the form of an easement) out of the unconveyed estate ... and when this is the case, subsequent assignees will have the right and be subject to the obligation which the title or liability to such an easement creates.” For an enlargement of this theory see, Ames, *loc. cit.* *supra* note 5; cf. Chafee, *Equitable Servitudes on Chattels* (1928) 41 Harv. L. Rev. 495.

\(^{21}\)See note 1 *supra*.


\(^{23}\)This view is supported by the authorities. Codman v. Bradley, 201 Mass. 361, 87 N. E. 591 (1909); Zipp v. Barker, 6 App. Div. 609, 40 N. Y. S. 325 (2nd Dep’t 1896); *contra*, Batchelor v. Hinkle, 210 N. Y. 243, 104 N. E. 629 (1914).

\(^{24}\)Cf. Trustees of Columbia College v. Thatcher, 87 N. Y. 311 (1882).
the attitude that where enforcement will still be of some benefit to the complainant, it will be granted.\textsuperscript{25}

In \textit{Kenealy v. Chevy Chase},\textsuperscript{26} considering a covenant against commercial use and apartments, the court granted an injunction enforcing the covenant. There was a showing on trial that traffic on Chevy Chase Circle had increased considerably,\textsuperscript{27} that commercial enterprise extended to the very edge of the tract, and that the refusal to enforce would enhance fivefold the value of the land. The court found that there was no showing that enforcement would be of no advantage to the complainant,\textsuperscript{28} no showing of any changes inside the tract itself, but changes only in the surrounding property.\textsuperscript{29} Accordingly the court enforced the covenant, saying,

"It is apparent that the enhancement in value of appellant’s holdings would be at the expense of all those who bought their homes in reliance upon the general plan."\textsuperscript{30}

In this case the changes proven were held to be entirely inadequate, but the court, by rejecting the force of changes outside the tract, prepared the way for a closer case.

On a petition to remove a cloud on title, \textit{i.e.}, a covenant against use by negroes, the court in \textit{Grady v. Garland}\textsuperscript{31} denied the petition. The bill

\textsuperscript{25}See note 13 supra.

\textsuperscript{26}72 F. (2d) 378 (App. D. C. 1934).

\textsuperscript{27}Cf. Hurd v. Albert, 214 Cal. 15, 3 P. (2d) 545 (1931).

\textsuperscript{28}See notes 12, 13 supra.

\textsuperscript{29}Cases holding that changes outside the tract do not bar enforcement: Bickell v. Moraico, 117 Conn. 176, 167 Atl. 722 (1933); Evans v. Foss, 194 Mass. 513, 80 N. E. 587 (1907); Swan v. Mitshkun, 207 Mich. 70, 173 N. W. 529 (1919); Thompson v. Langan, 172 Mo. App. 64, 154 S. W. 808 (1913); Ward v. Prospect Manor Co., 188 Wis. 534, 206 N. W. 856 (1926); see note 13 supra. Cases holding that changes outside the tract do bar enforcement: Hurd v. Albert, 214 Cal. 15, 3 P. (2d) 545 (1931); Downs v. Kroeger, 200 Cal. 743, 254 Pac. 1101 (1927); Barton v. Moline Properties, 121 Fla. 683, 164 So. 551 (1935); Gilmore v. Keogh, 241 Ill. App. 28 (1926); Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); Starkey v. Gardner, 194 N. C. 74, 138 S. E. 408 (1927); Deaves v. Constable, 87 App. Div. 352, 84 N. Y. S. 592 (1st Dep’t 1903); Trustees of Columbia College v. Thatcher, 87 N. Y. 311 (1882); see note 15 supra.


\textsuperscript{31}89 F. (2d) 817 (App. D. C. 1937); see Note (1937) 25 \textsc{The Georgetown Law Journal} 1040. This was a petition to remove a cloud on title. Therefore a greater burden of proving equity was on the property owner than if he were defending against a bill for an injunction. There have been cases granting such removal on the ground of changed conditions. Barton v. Moline Properties, 121 Fla. 683, 164 So. 551 (1935); Gilmore v. Keogh, 241 Ill. App. 28 (1926).
alleged that properties lying one block north, one block south, and many blocks west of their premises were occupied by negroes. The court pointed out weaknesses in the bill. There were no averments that "... the property had been rendered less valuable, ... or that the character of the environment would make it ... unprofitable for use by enforcement ... , or that a material change had occurred since plaintiffs acquired title to their respective properties."^32

Much weight was placed on the fact that all changes shown were outside the tract itself,^33 and that the enforcement would still be of some benefit to the defendants by raising a barrier to further influx of negroes. In his dissent,^34 Mr. Justice Stephens urged that this ruling amounted to the establishment as a condition precedent to any refusal of equitable enforcement a change occurring in the very properties protected by the covenant. This would mean that some property owner must breach before there is a possibility of avoiding the covenant.

A recent case involving this matter is *Jameson v. Brown.*^35 The property involved was burdened with a covenant against maintenance of liquor stores. Certain property owners in the tract sought an injunction against parties who were violating the covenant. In answer the defendants proved that the property surrounding theirs inside and outside the tract was now devoted almost exclusively to commercial purposes, that across 14th Street outside the tract there were numerous liquor stores, that the sale of liquor in a drugstore for medicinal use had been permitted to go unchallenged, and that the removal of the covenant would work no real harm on the complainants since there were liquor stores outside the tract at an equal distance from complainants as those inside the tract. The court stated that the property was not shown to have been rendered unfit or unprofitable by enforcement of the covenant; nor did it appear that enforcement would impose great hardship on the defendants; nor was it shown that enforcement would be of no benefit to the complaining property owners.^36 There was a further defense of waiver raised in the case,^37 which in effect was a claim that the com-

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^32 Id. at 819.

^33 The court said, *ibid.*, "The restriction is for the protection of the property to which it applies and is not affected by similar conditions which may arise on adjoining property."

See note 29 *supra*.

^34 Id. at 820.


^36 Id. at 831.

^37 Id. at 832.
plaintiffs had acquiesced in changes inside the tract which breached the
covention. But it was not shown that the parties actually knew of the breach, or that defendants had acted in reliance on that past breach. Accordingly the court granted the injunction enforcing the
covenant.38

It is possible to deduce from these cases39 some of the matters that
must be shown before the courts of the District of Columbia will refuse
to enforce a restrictive covenant. The breaching party must show that the
purpose for which the covenant was intended can no longer be achieved regardless of enforcement40 and that enforcement would be of no benefit to the parties seeking it.41 It must appear that there has been a complete and substantial change in the entire neighborhood sur-
rrounding the property and that these changes are found inside as well as outside the tract protected by the restriction.42 The defendants to the
injunction bill must show that the property is rendered unprofitable and unfit for the use intended by the covenant43 and that great hardships will be imposed on the party who is seeking to bar enforcement of the cov-


38The injunction was limited to the sale of spirituous liquors, and defendants selling malt liquors were not restrained on the principle of a strict construction of a restrictive covenant. Id. at 833. See Moses v. Hazen, 69 F. (2d) 842 (App. D. C. 1934).


40See notes 13, 25, 28, 29 supra.

41In Jameson v. Brown, 109 F. (2d) 830 (App. D. C. 1939), the court said at 832: “(it is)
42nor shown that enforcement would be of no benefit to the appellants.” Grady v. Gar-

land, 89 F. (2d) 817 (App. D. C. 1937), at 819: “Their personal use and enjoyment would
43be seriously impaired as a result” of refusal to enforce; Kenealy v. Chevy Chase Land Co.,

72 F. (2d) 378 (App. D. C. 1934) at 380: “Enhancement would be at the expense of all

those who bought their homes in reliance on the covention.”

44See Grady v. Garland, supra at 505.

to be unfit or unprofitable”; Grady v. Garland, 89 F. (2d) 817 (App. D. C. 1937), at 818:
46“There are no averments that the character of the environment would make it unfit or

unprofitable.”

47“IT does not appear that the enforcement of the covention will impose great hardship
The attitude of the District of Columbia courts, then, requires more than a showing of changed conditions rendering the restriction inequitable from the point of view of the balanced convenience of the parties. It requires proof that no benefit shall accrue to the party seeking enforcement and that the purpose intended by the covenant is rendered impossible of attainment by the changed conditions.

CONCLUSION

The original reason and need for restrictive covenants is disappearing. Their use was due largely to a lack of systematic town planning or any other rational scheme of development and control of real property.\(^\text{46}\) The method enabled the owner and his successors to prevent subsequent undesirable use of his property by purchasers. It was especially effective in the enforcement of a general scheme by the property owners of a neighborhood. Today "... zoning systems in part take this function from the individual and confer it on the state."\(^\text{46}\) Zoning prevents commercial uses in a residential section. Apartments are prohibited in neighborhoods devoted entirely to single-family residences. Workable building line restrictions are laid down. These very zoning laws have been urged in defense to the enforcement of a restrictive covenant.\(^\text{47}\)

The courts have overruled the defense. Since (the courts have held) the covenant was not in conflict with the zoning, it could be enforced. That is, even though it prevented a use which the zoning permitted, it would survive unless it forced a use which the zone prohibited.\(^\text{48}\) Despite this sound legal objection to zoning as a defense, it is suggested that zone changes should be given considerable weight. Zoning as an answer to these problems has its limitations. It seldom covers suburban residential developments. Some uses which can be prevented by covenants will never be prohibited by the zoning board. But especially in the case of commercial restrictions, zoning the area as commercial points to a time when the covenant's purpose will be unattainable. Most perpetual restrictions seem useless and undesirable in the face of the inexorable force of a zoning rule. Perhaps the courts should look more harshly

\(^{46}\)See Lloyd, *supra* note 2, at 420.

\(^{46}\)Id. at 430. See Von Hickle, *Zoning Ordinances and Restrictions in Deeds* (1928) 37 Yale L. J. 407; Young, *City Planning and Restrictions on the Use of Property* (1925) 9 Minn. L. Rev. 518, 593.


on restrictive covenants and refuse to enforce them in equity when enforcement has begun to work a real hardship on the parties affected. This would constitute a return to the original test of the validity of the covenants, that is, their consistency with the public interest.

LEWIS R. DONELSON III
RECENT DECISIONS

CONTRACT—Consideration for second agreement after breach of first

Defendant, under contract to erect a building for the United States, entered into an agreement with the plaintiff for the construction of a laundry chute in the building. Due to delay and negligence in examining the specifications, plaintiff misunderstood the requirements and informed the defendant that the cost would be greater than anticipated. Two months after the plaintiff was obligated to make delivery under the contract, a new contract was formed which provided for greater compensation and some minor changes. When the work was completed the defendant made payment according to the terms of the original contract. Plaintiff sues on the second contract. Held, there is sufficient consideration to support the second contract and plaintiff may recover on it. United States v. Lange, 35 F. Supp. 17 (D. Md. 1940).

It is well established that a promise to do that which one is legally bound to do is not good consideration. Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578, 15 S. W. 844 (1890); Vanderbilt v. Schreyer, 91 N. Y. 392 (1883). On the other hand a promise to do anything beyond what one is already bound to do though of the same kind and in the same transaction, is valid consideration. Hercules Powder Co. v. Campbell, 156 Md. 346 (1928). In building contracts containing a promise of additional consideration to induce the contractor to complete the work, some courts have permitted the enforcement of the second contract when the work is completed in reliance thereon. Munroe v. Perkins, 9 Pick. 298 (Mass. 1830); Evans v. Oregon and Wash. Ry., 58 Wash. 429 (1910). This is based on the theory that the principal contractor has an election to hold the subcontractor answerable in damages or make a new contract with him. The better rule, however, is to the contrary and the above doctrine was criticized at some length in King v. Duluth, 61 Minn. 482 (1895).

In the instant case it was decided that the new elements in the subsequent contract were sufficient to bring it within the rule in the Hercules case, supra. The court rests its decision on two points; first, the time for delivery of the drawings was reduced and second, the plaintiff was required to furnish an entire new set of drawings. These two elements, it was held, constituted a detriment to the plaintiff sufficient to support the new promise. The general rule followed by the court is: "A subsequent contract completely covering the same subject matter and made by the same parties as an earlier agreement, but containing terms inconsistent with the former contract so that the two cannot stand together, rescinds, substitutes and is substituted for the earlier agreement of the parties on the subject." Williston's Wald's Pollock, Contracts (3d ed. 1906). The problem then resolves itself into a question of whether the two contracts can stand together. The additional consideration may consist in anything which might be a burden to the one party or a benefit to the other. Maddux v. Bevan, 39 Md. 485 (1873). Here there is certainly no added benefit to the defendant in the subsequent agreement. He gets nothing over and above what he originally bargained for. Great stress is laid by the court on the detriment to the plaintiff, especially the furnishing of a new set of drawings. Yet this is the self-same set of drawings that would have been fur-
nished under the original contract had the plaintiff been reasonably prompt and diligent in his examination of the specifications. The plaintiff is also obliged by the subsequent contract to furnish the drawings in five days as compared to the ten allowed by the prior contract. This, however, is also a duty which should have already been performed under the original agreement. The two contracts, it seems, would have no difficulty in standing together. The later one calls for the same performance as the first but at a later time. It is well settled that a promise to do work obligated by a prior contract is no consideration for a subsequent contract postponing the time and changing the compensation. Pleasant v. Arizona Storage Co., 34 Ariz. 68 (1928). Although the courts as a rule are willing to go a long way to find consideration in a contract, the interpretation in the instant case imports consideration in a mere rephrasing of the agreement and makes the defendant's own concessions, given under the press of circumstances, the ties which bind him to a distasteful agreement. The adequacy of the consideration is not in issue since the courts look only to the reality. This application, however, extends the reality test almost to the vanishing point.

Where one party refuses to complete his contract because of substantial difficulties not contemplated by either party and the other party promises additional compensation, such a promise is valid and enforceable. Linz v. Schuck, 106 Md. 220, 67 Atl. 286 (1907); Dickinson & Tweeddale v. Fowler, 114 Md. 344 (1911). A promise to accept reduced compensation because of the changed financial condition of the other party is also enforceable. In re Bate's Will, 225 Wisc. 564, 275 N. W. 450 (1937). A consideration of this issue was considered unnecessary in the instant case since it was decided on the previous point. The court, however, observed that the case might have been decided favorably to the plaintiff on this point also. It is true that the difficulties may never have arisen had the plaintiff been reasonably diligent. Yet the defendant recognized these difficulties and the fact that no one else would do the work for the same price evidently convinced him that there was some justice in the plaintiff's contention. It seems that on these considerations the court would have had little difficulty in finding a valid contract, and it would have been a more secure prop on which to rest the court's enforcement of the contract.

DAVID A. WILSON

CORPORATIONS—Dissolution by Judicial Proceedings or Official Action

Plaintiff instituted an action in a court of the State of Missouri joining as parties defendant, an alleged corporation, domiciled in such state, and a non-resident corporation. The action was subsequently removed to a federal district court of the state and, upon motion to remand to the state court, the question was raised whether the alleged corporate domiciliary had been dissolved so that it could be disregarded in considering whether there was complete diversity of citizenship between the plaintiff and the non-resident defendant. The evidence submitted in the matter disclosed that the alleged corporate domiciliary had failed to file on January 1, 1939, its annual registration report and anti-trust affidavit as required by the laws of Missouri; that on January 1st, 1939, the secretary of state, pursuant to a Missouri statute, cancelled the certificate of incorporation of such defendant by an appropriate entry on
the margin of the record of the issuance of the certificate; that he notified the corporation by mail that its corporate existence and rights in the state had been forfeited and cancelled and that the corporation was dissolved subject to rescission as provided by law; and that corporate reorganization proceedings against such defendant had been pending in the above district court since June, 1938. Held, motion to remand overruled on the ground that the alleged corporate domiciliary was non-existent, and hence could be disregarded in determining the question of complete diversity of citizenship between the plaintiff and the non-resident defendant. Missouri ex rel. and to Use of Darr v. A. B. Collins & Co., Inc., 34 F. Supp. 550 (W. D. Mo. 1940).

In a companion case involving the plaintiff and the alleged corporate domiciliary of the principal case and a factual situation substantially similar to that case, it was held (by a different judge) that the corporate domiciliary was a corporate entity and subject to suit, notwithstanding that the secretary of state had made a notation in his office forfeiting the charter of the corporate domiciliary for failure to file its annual registration report and anti-trust affidavit, especially where such domiciliary was in bankruptcy in the district court at the time of the forfeiture. State of Missouri ex rel. and to Use of Darr v. A. B. Collins & Co., Inc., 34 F. Supp. 549 (W. D. Mo. 1940).

Statutes governing the dissolution of corporations for failure to comply with certain requirements relating to the filing of reports and payment of franchise taxes are classified generally as those under which a judicial proceeding is necessary for a valid dissolution of a corporation and those under which administrative action alone is sufficient. A thorough understanding of what is comprehended by a particular statute may, therefore, be considered as the first essential for a determination of the validity of a corporate dissolution.

In the case of the Ohio National Bank of Washington v. Central Construction Co., 17 App. D. C. 524 (1901), it was claimed that the defendant had forfeited its charter for failure to pay an annual license tax. In holding that the charter had not been forfeited the court said, "Under the decisions of the courts of West Virginia which may well be taken as a guide in this regard, and which are in accord with the general tenor of judicial decisions on the point, a charter of incorporation is not ipso facto abrogated or annulled by failure to pay a license tax, notwithstanding that the statute may provide that such failure may work a forfeiture. Such failure, of course, will afford ground for a legal proceeding to vacate a charter; but it requires a legal proceeding, by way of quo warranto or other equivalent process, to vacate a charter of incorporation. Mere proclamation by an executive officer will not accomplish the result." A similar holding is also set forth in Jedediah Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71 (1884), and in The New York and Long Island Bridge Co. v. Lenox Smith, 148 N. Y. 540, 42 N. E. 1088 (1896).

On the other hand it has been held that it is perfectly competent for the legislature in granting a charter to provide that a corporation shall lose its existence by acts or omissions, the forfeiture to be declared by administrative officers without the intervention of the courts. If the corporation violates the statutory conditions by acts or omissions which the legislature has in plain terms declared shall operate as a forfeiture upon a declaration of a board of ministerial officers, the forfeiture is complete when the declaration is made. The A. R. Young Construction Co. v.

It must be recognized that the language of a statute or of a forfeiture clause of a charter must be strong and unmistakable to authorize the court to hold that it was the intention of the legislature to dispense with judicial proceedings in the dissolution of a corporation. The New York and Long Island Bridge Co. v. Lenox Smith, supra. Thus, where a statute only declares that, on failure to perform the condition, the corporation shall be dissolved or shall forfeit its charter, or that failure to comply shall work a forfeiture, it is taken to mean that the corporation shall be dissolved in the regular legal manner on the institution and prosecution of the established course of proceedings in such cases. Where, however, a statute provides, as in the instant case, that on failure to perform a condition a corporation shall forfeit its corporate rights, that the secretary of state shall thereupon cancel its certificate, and that all corporate powers and franchises shall thenceforth cease and determine, the cumulative effect of such language is strongly indicative of the legislature's intent that a dissolution of a corporation shall be affected ipso facto without regard to a judicial proceeding. The usual rule is that unless there are some statutory provisions clearly requiring it, on the happening of an event giving rise to a right of forfeiture, the event does not itself operate, ipso facto, as a dissolution but simply affords grounds on which the state may maintain judicial proceedings therefor. The Four-S-Razor Co. v. E. T. Guymon, 110 Kan. 745, 205 Pac. 635 (1922). The fact that a corporation is involved in a bankruptcy proceeding under a federal bankruptcy law is immaterial in determining the validity of a state's action in dissolving such corporation. State ex rel. McCoy v. Farmer's Co-op. Packing Co., 50 S. D. 627, 211 N. W. 602 (1926); In re 211 East Delaware Place Bldg. Corporation, 76 F. (2d) 834 (C. C. A. 7th, 1935).

FRANCIS E. MC KAY.

COURTS—Injunctions—Federal Court Enjoins State Proceeding

The defendants instituted suit in a state court of California against agents of the Secretary of Agriculture to stay execution of an order of the Secretary made under authority of the Agricultural Adjustment Act of 1933, 7 U. S. C. § 601 (1934); 5 U. S. C. § 511 (1934). Pursuant to certain jurisdictional sections of these Acts, 7 U. S. C. §§ 608a (6, 7), 608c, a suit for an injunction was filed by the United States in the federal district court to enjoin the proceeding in the state court. The defendants moved to dismiss the federal action on the ground that § 265 of the Judicial Code, 36 Stat. 1162 (1911), 28 U. S. C. § 379 (1934), precluded United States courts from staying proceedings in state courts. Held, a federal court may enjoin proceedings in a state court where necessary to protect its own jurisdiction despite § 265 of the Federal Code, supra. United States v. Western Fruit Growers, Inc., 34 F. Supp. 794 (S. D. Calif. 1940).

Section 265 of the Federal Code, supra, provides that: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." This is merely a revision of
an earlier provision enacted March 2, 1793, stating that an injunction shall not be "granted to stay proceedings in any court of a state." 1 Stat. 334 (1793).

This statute grew from the constitutional concept that a dual form of government should never be used by federal or state governments to obstruct the operation of the other's processes, whether political or judicial. Mr. Justice Van Devanter in *Wells Fargo and Company v. Taylor*, 254 U. S. 175 (1920), indicated that this statute was within the orbit of such a principle when he stated that, "It is intended to give effect to a familiar rule of comity and like that rule is limited in its field of operation," and a brief review of a few court decisions reveals that it operates not as a limitation upon the jurisdiction of the federal courts but merely as an occasional restriction on its scope. *Cf. Warren, Federal and State Court Interference* (1929) 43 Harv. L. Rev. 345.

Although there are many cases in which federal courts have enjoined state proceedings irrespective of the statute, four general classes appear to be outstanding: (1) cases held not to fall within the statute, (a) because the state court in the particular proceeding was not exercising a judicial function, or (b) because the state action enjoined by the federal court was not considered a "proceeding" in a state court within the apparent meaning of the statute; (2) cases in which the federal court, having federal and equity jurisdiction, enjoined the enforcement by state courts of local statutes repugnant to the Federal Constitution; (3) cases holding that a party cannot be deprived of federal injunctive relief restraining the enforcement of a state court judgment under circumstances contrary to recognized principles of equity and standards of good conscience; and (4) cases holding that a federal court may enjoin proceedings in a state court to protect its own jurisdiction.

Generally whether a judicial body of a state falls within the purview of the statute depends upon the nature of the particular function which it is exercising. In *Western Union Tel. Co. v. Myatt*, 98 Fed. 335 (D. Kan. 1899), it was held that the statute only applies to the courts of the state which are exercising a judicial function in connection with the particular proceedings enjoined; it does not apply to courts exercising quasi-judicial functions, *Mississippi Ry. Commission v. Illinois Central Ry.*, 203 U. S. 335 (1905); nor does it apply to the exercise of a ministrerial function of a county court. *August Busch & Co. v. Webb*, 122 Fed. 655 (C. C. Tex. 1903). Although the Corporation Commission of Virginia has judicial as well as legislative powers, nevertheless, it is exercising legislative rather than judicial functions in a proceeding to establish rates of railway passengers; consequently, § 265 supra is inapplicable. *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210 (1908).

In considering the type of "proceedings" in a state court which are within the meaning of the statute, the decisions are not entirely consistent. It has been held that the term "proceedings" extends to both original and appellate proceedings, *Watson v. Jones*, 13 Wall. 679 (1872); *Hill v. Martin*, 296 U. S. 393 (1935); and also to supplementary proceedings, *Mutual Reserve v. Phelps*, 190 U. S. 147 (1903). See *Toucey v. New York Life Ins. Co.*, 102 F. (2d) 16 (C. C. A. 8th, 1939), for comparison of rationale of *Equitable Life Assur. Society of U. S. v. Wert*, 102 F. (2d) 10 (C. C. A. 8th, 1939, and *Di Giovanni v. Camden Ins. Ass’n*, 296 U. S. 64 (1935). An injunction issued by a federal court restraining parties in a state proceeding from applying for a writ of error will not operate to prevent its issuance by the presiding judge of such state court, *In re Chetwood*, 165 U. S. 443 (1897); nor may a federal court enjoin proceedings
in the state courts because of errors committed by their judges, *Carl Laemmle Music Co. v. Stern*, 209 Fed. 129 (S. D. N. Y. 1913). It extends to all proceedings in the state court from the commencement of the action until judgment and execution issued thereon. *Dorrance v. Martin*, 12 F. Supp. 746 (D. N. J. 1935). This holding is to be compared to the court’s holding in *Simon v. Southern Ry.*, 236 U. S. 115 (1915), that the statute does not prevent the federal courts from enjoining the enforcement of a void judgment obtained in a state court. If a conclusion could be reached in these cases, it would be to the effect that the statute only applies to “proceedings” of a state court from the commencement of the action up to and including the judgment, but not to its execution. But see *Madisonville Traction Co. v. Bernard Mining Co.*, 196 U. S. 239 (1905), which refused to apply the statute to a state proceeding prior to judgment.

Under the second class of cases, the Supreme Court has repeatedly held that the statute does not preclude a federal court from enjoining the enforcement by state courts of local statutes repugnant to the Federal Constitution. *Missouri v. Chicago, Burlington and Quincy Ry.*, 241 U. S. 533 (1916); *Truax v. Raich*, 239 U. S. 33 (1915); *Ex parte Young*, 209 U. S. 123 (1908). However, a federal court will not restrain a criminal prosecution under an unconstitutional enactment unless there exists great and immediate danger of irreparable loss of property rights. *Pughe v. Patton*, 21 F. Supp. 182 (N. D. Tex. 1937).

The third general class of cases hold that the statute may not be invoked to deprive a party of an injunction from a federal court to enjoin the enforcement of a judgment obtained in a state court under circumstances where its enforcement will be contrary to “recognized principles of equity and standards of good conscience”. *Wells Fargo & Co. v. Taylor*, supra. Among the cases most frequently cited in support of this principle is *Marshall v. Holmes*, 141 U. S. 589 (1891), in which Mr. Justice Harlan stated that a suit in the federal court is proper to enjoin the enforcement of a judgment obtained in a state court by fraud. The reason given in support of the decision was that the injunction was not directed against the state court but only against the party who had obtained a judgment by fraud and consequently was an original and independent suit. However, in a recent case, Mr. Justice Frankfurter inferred that if the actual effect of the federal court’s injunction was to stay the continuance of an action in a state court, it was within the interdiction of Section 265, supra, notwithstanding the fact that the injunction was directed against the parties of such action. *Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.*, 309 U. S. 4 (1940); rev’d, 100 F. (2d) 770 (C. C. A. 10th, 1938). As early as 1807, it was held that a federal court is without jurisdiction to restrain the prosecution of a suit pending in a state court. *Diggs v. Wolcott*, 4 Cranch 179 (U. S. 1807).

The instant case falls under the fourth general class of cases in which the statute has no application. The principle exemplified by these cases is to the effect that a federal court may enjoin proceedings in a state court to protect its own jurisdiction. In referring to § 265, supra, the court explained in the instant case that it is not jurisdictional, and “the inhibition it imposes would never be applied in a manner to hinder or defeat the District Court’s own jurisdiction” (p. 796). This principle has been stated by the Supreme Court in numerous cases. See *Smith v. Apple*, 264 U. S. 274 (1924); *American Optometric Ass’n v. Ritholz*, 101 F. (2d) 883 (C. C. A. 7th, 1939), cert. denied, 307 U. S. 647 (1939); *Patton v. Marshall*,

A corollary to this class of cases found its way into our jurisprudence as a result of the Removal Statutes embodied in the Judiciary Act of 1789, 1 Stat. 73, 79 (1789), 28 U. S. C. § 73 (1934). In these cases the federal courts were permitted, notwithstanding § 265, supra, to enjoin proceedings in a state court in cases lawfully removed to the federal courts. See French v. Hay, 89 U. S. 231 (1874); also Chesapeake and O. Ry. v. Cockrell, 232 U. S. 146 (1914); and recently, Equitable Life Assur. Soc. of U. S. v. Wert, supra.

It is a well recognized principle in our system of constitutional government that the functions of the federal and state governments should remain separate and distinct from each other. Where there is an overlapping, the doctrine of comity doubtless should be applied. The necessity for this doctrine can perhaps be considered the reason for the act restricting the use of the federal injunction in enjoining state proceedings. In a very recent case, Mr. Justice Frankfurter commented briefly on the historical concept of § 265, supra, stating that it "is an historical mechanism for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject matter". Hale v. Bimco Trading, Inc., 306 U. S. 375, 378 (1939). This theory admits that the statute has a place in our "complicated federalism", but as the cases have indicated, it commands but little respect in our courts. Obviously, it is subject to a narrow interpretation and is given legal significance only when the court deems it necessary, convenient, or desirable. Perhaps the way out of the dilemma should be through legislative clarification of the principles on which the statute was founded, thereby expressly defining the so-called "rule of comity" which seems almost non-existent between federal and state courts.

JOHN B. OLVERSON, JR.

EVIDENCE—Privilege Against Self-Incrimination—When Does Question Tend to Criminate?

In a grand jury proceeding, questions pertaining to the importation of narcotics were objected to by a witness who asserted his privilege under the Fifth Amendment. The two questions were whether he had received any cables at a certain restaurant in New York, and whether he knew anyone who lived in, stayed at, or visited Shanghai in the years 1934 to 1939. Held, in their setting, including the other questions and information of which the prosecution may reasonably be inferred to have possession, the question must fall within the constitutional privilege. United States v. Weisman, 111 F. (2d) 260 (C. C. A. 2d, 1940).

A witness who claims his privilege in a grand jury proceeding is, according to the
modern rule, referred to the trial court, where the question is again presented; the court then determines whether, in law, under all the circumstances, the witness should be accorded the privileges. \textit{United States v. Herron}, 28 F. (2d) 122 (N. D. Cal. 1928); \textit{Wycoff v. Wagner Typewriter Co.}, 99 F. 158 (S. D. N. Y. 1899); \textit{Ex parte Irvine}, 74 F. 954 (S. D. Ohio 1896); \textit{United States v. Miller}, 26 Fed. Cas. No. 15772, at 1254 (C. C. D. C. 1821). Should the witness continue in his refusal to answer after being denied the privilege, he is subject to a criminal contempt proceeding. The failure to obey the court's order before the grand jury is considered a contempt “in the presence of the court or so near thereto as to obstruct the administration of justice.” 36 STAT. 1163 (1911), 28 U. S. C. § 385; \textit{Camarota v. United States}, 111 F. (2d) 243 (C. C. A. 3rd, 1940).

Every practical situation cannot be solved by the simplicity of a legal syllogism. In cases involving the privilege against self-incrimination the rules of law are clear but the rights of an interrogated litigant must in many cases depend upon a sound exercise of judicial discretion. The outcome will depend upon the nature of the question and the circumstances under which it is asked. The problem of privilege is not difficult when the question on its face involves an incriminatory answer, as where it directly inquires into the commission of a crime. In this situation there is no necessity for judicial discretion. The witness being obviously in danger, great latitude is allowed him in judging for himself the effect of his answer. \textit{Foot v. Buchanan}, 113 F. 156 (N. D. Miss. 1902); \textit{In Re Hess}, 134 F. 109 (C. C. E. D. Penn. 1905); \textit{Ex parte Boscowitz}, 84 Ala. 463 (1887). If upon oath he swears that an answer to the question propounded would incriminate him, his stand is conclusive, cf. \textit{United States v. Burr}, 25 Fed. Cas. No. 14692e, at 38 (C. C. Va. 1807); \textit{Foot v. Buchanan}, supra; \textit{Ex parte Parke}, 37 Tex. Crim. Rep. 590, 40 S. W. 300 (1897); and no further questions can be pressed, \textit{Wallace v. State}, 41 Fla. 547, 26 So. 713 (1899); \textit{Freiss v. New York Cent. & H. R. R.}, 67 Hun. 205, 22 N. Y. Supp. 104 (1893); and he cannot be compelled to explain how his answer may tend to criminate him, \textit{Russell v. United States}, 12 F. (2d) 683 (C. C. A. 6th, 1926); for to compel a witness would probably result in his disclosing information which it is his privilege to conceal, \textit{Merluzzi v. Gleeson}, 59 Md. 214 (1882); see Notes (1909) 24 L. R. A. (n.s.) 165 as to the conclusiveness of the witness' answer.

The great mass of judicial controversy is not so much concerned with those questions which are obviously incriminatory as with those which are doubtful. It is here that the court's discretion comes into play. The general rule is that if in the sound discretion of the court a true or responsive answer to the question propounded can or might implicate the witness or subject him to criminal prosecution, the trial court has the right and duty to sustain the privilege. Cf. \textit{Mason v. United States}, 244 U. S. 362 (1917); \textit{United States v. Doyle}, 47 F. (2d) 1086 (C. C. A. 2d, 1931); \textit{Elwell v. United States}, 275 F. 775 (C. C. A. 7th, 1921); \textit{United States v. Herron}, 28 F. (2d) 122 (N. D. Cal. 1928); \textit{Woolson Spice Co. v. Columbia Trust Co.}, 193 App. Div. 346, 183 N. Y. Supp. 400 (1st Dep't 1920). When the court can see that a witness might be implicated, he will not be compelled to answer since he, the witness, is the sole judge as to whether the answer will implicate him. \textit{Sanderson's Case}, 21 Fed. Cas. No. 12297, at 326 (C. C. D. C. 1829); \textit{Ex parte Butt}, 78 Ark. 262 (1906). Because of this rule the \textit{Mason Case}, supra, has been a subject of academic controversy. A witness was interrogated before a grand jury investigating a charge of gambling against others. After admitting his presence when the others
were arrested, he was asked whether or not a game of cards was being played at his table or any other table. The court denied his claim of privilege saying "no suggestion is made (by the laws of Alaska) that it is criminal to sit at a table where a game of cards are being played or to join in such a game unless played for something of value." This situation presents a close problem when it is considered that the affirmative answer to the question would have been an admission of one of the three elements of which the witness's guilt would be composed: a game of cards, a money stake, and the witness' hand in the game. The finding therefore must be understood as holding that "not even answers which directly 'tend' to prove a crime are inevitably protected." (p. 263.) The danger of incrimination must be real and substantial.

The guarantee against self-incrimination presents a problem to both the witness and the court. The witness must disclose just enough information for the court to perceive his danger while the court must exercise a sound discretion upon a minimum of evidence. In view of this dilemma there has been some suggestion that a useful expedient would be to compel the witness to disclose his answer to the judge, the jury having been waived, and allow the judge to decide upon the danger of incrimination. For all its superficial practicability the suggestion has been rejected by eminent authority. For "none the less the disclosure [would be] by judicial compulsion so that this expedient which is adequate to solve other questions of privilege seems inappropriate here, and has never found favor." 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2271.

The ultimate test as to whether any question will fall within the ambit protected by the Constitution is the criminal materiality of the answer which the witness has been called upon to give. Cf. Miller v. United States, 95 F. (2d) 492 (C. C. A. 9th, 1938). The cases at best present a legal frame of reference to guide the court's discretion. Some courts have defined the periphery of the privilege by limiting it to situations where the danger is "real and appreciable," such that a reasonable man would suffer it to influence his conduct. State v. Thaden, 43 Minn. 253 (1890). Others have described it as "not extending to remote possibilities" out of the ordinary course of law. Heike v. United States, 227 U. S. 131 (1913); Brown v. Walker, 161 U. S. 591 (1896); Ex parte Irvine, supra. Text writers have limited it to questions, the answers to which would disclose a "necessary and essential part of a crime." 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2261. Yet, as stated in the instant case, "all crimes are composed of definite elements and nobody supposes that the privilege is confined to answers which directly admit of one of these; it covers also such as logically though mediately lead to any of them, such as are rungs of the rational ladder by which they may be reached." (p. 262.) "In the end perhaps we should say no more than that the chase must not get too hot, nor the scent too fresh." (p. 263.)

The scope of the privilege guaranteed by the Fifth Amendment is limited, it must be remembered to federal proceedings and federal crimes. In United States v. Murdock, 290 U. S. 389 (1933), a witness refused to furnish information on his income tax with a bona fide belief that the Fifth Amendment protected him from admissions which would render him liable to state prosecution. Denying him the benefit of the privilege the court ruled that the Fifth Amendment did not protect him from admissions which would render him liable to state prosecution. Cf. Gra-
MUNICIPAL CORPORATIONS—Municipal Indebtedness—What is Included in Constitutional Limit?

Action on promissory note given by municipality in 1926 in anticipation of current tax receipts. Defendant claims that as the note was not paid in 1926 its status as a temporary loan was lost and as the municipality had already reached its constitutional debt limit the note is therefore unenforceable at the present time. Held, a note in anticipation of taxes does not create a debt within the meaning of the constitutional limitations and the status of a note valid at its inception can not be changed because of non payment. *Wakem v. Inhabitants of the Town of Van Buren, 13 A. (2d) 873* (Me. 1940).

Nearly every municipality in the country is limited as to the amount of debts it may incur either by statute or by state constitution. The purpose of such restriction is to prevent the present municipal government from imposing too great a burden upon its successors in office and the tax payers at large. The limitations seek to place the municipality on a pay-as-you-go basis. However, such regulations relate only to those debts which are to be paid in the future and for which special assessments must be made. The courts have been consistent in their rulings that debts contracted in anticipation of current revenues do not come within the purview of these statutory limitations, which they have defined as being, “the pecuniary obligations imposed by contract except those obligations to be satisfied out of the current revenues.” *Schieber v. City of Mohall, 66 N. D. 593, 268 N. W. 445* (1936); *City of Fort Worth v. Bobbitt, 121 Tex. 14, 36 S. W. (2d) 470* (1931). The theory which underlies this definition is that after taxes have been assessed their payment is regarded as legally certain and they must therefore be included among the liquid assets of the municipality. *Brown v. Gay-Padgett Hardware Co., 188 Ala. 423, 66 So. 161* (1914); *Hubbell v. Hening, 216 Iowa 728, 249 N. W. 430* (1933); *State ex rel. Umatilla County v. Davis, 161 Ore. 127, 85 P. (2d) 379* (1938).

Some jurisdictions have gone so far as to permit delinquent taxes to be included within the current assets of the municipality. *Billeter v. State Highway Commission, 203 Ky. 15, 262 S. W. 855* (1924); *Georges Township v. Union Trust Co., 293 Pa. 364, 143 Atl. 10* (1928). The holdings of the courts are not all consistent on this point. *French v. City of Burlington, 42 Iowa 614* (1876); *Mansville Consolidated School District No. 7 v. Williamson, 174 Okl. 18, 49 P. (2d) 749* (1935). There is, however, no disagreement as to the general proposition that liability incurred in anticipation of current taxes does not fall within the constitutional limitation.

The second point considered in the instant case is of even greater practical importance. Here the court decided that a loan which is temporary at its inception, as is a loan in anticipation of assessed taxes, could not be invalidated for any reason whatsoever. Whether the funds were misapplied, misappropriated, or merely not
collected, the nature of the loan may not be effected. *Riley v. Johnson*, 219 Cal. 513, 27 P. (2d) 760 (1933); *State ex rel. Clark County v. Hackmann*, 280 Mo. 686, 218 S. W. 318 (1929); *Athens National Bank v. Ridgeway Township*, 303 Pa. 479, 154 Atl. 791 (1931). To hold otherwise would necessitate any person contracting with a municipality to stand guard over the officers and funds of the municipality to see that they were properly collected and applied to the debts. Under such circumstances no business man could be induced to contract with a public corporation. In order that the corporation affairs may be carried out in an efficient manner the courts must and always will presume that the municipal officers will perform their duties as required by them by law and no extra surveillance is necessary. *City of Georgetown v. Elliott*, 95 F. (2d) 774 (C. C. A. 4th, 1938); *Scranton Electric Co. v. Old Forge*, 309 Pa. 73, 163 Atl. 154 (1932); *Sullivan v. City Council of Charleston*, 133 S. C. 189, 133 S. E. 340 (1925).

To hold that a temporary loan becomes a part of the fixed debt of the municipality if not paid within the required time so as to bring it under the limitation of indebtedness as defined by statute would virtually defeat the ends of the corporation. It would so bind the municipality, because of the unwillingness of business to contract under such circumstances, that the municipality would be unable to carry on its normal functions. It would require the municipality to wait until actual receipt of taxes before contracting any liabilities, and while the general purpose of constitutional limitations is to put the municipality on a pay-as-you-go basis, such an interpretation is clearly not within the spirit of the constitutional requirements. *Cedar Rapids v. Bechtel*, 100 Iowa 196, 81 N. W. 468 (1900); *Sharmon v. Huron*, 9 S. D. 356, 69 N. W. 598 (1898).

In rubricating the doctrine of the instant case as supported by the cases cited, we may say that liabilities, whether they be on a note, warrant, certificate or contract, which are for any purpose within the power of the municipality to incur and against which the current taxes are pledged, are temporary loans and as such do not come within the limitation of indebtedness as imposed upon municipalities by state constitutions or statutes. Moreover, if such liabilities are not paid off within the year because the taxes pledged have been misappropriated, misapplied, or not collected, the debt retains its temporary nature and may not be included in the bonded debt of the municipality. The debt retains the status it had at its inception. In such event the debt must be paid from subsequent taxes and an action by the holder of the liability will be enforced against the municipality for this purpose.

**QUENTIN O. YOUNG.**

**RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS—Scope and Use of the Bill of Particulars under Rule 12(e)**

Plaintiff files petition against defendant in course of bankruptcy proceeding. Under rule 12(e) of Federal Rules of Civil Procedure defendant moves to have complaining creditors aver with definiteness or particularity certain matters referred to in the petition. *Held*, where defendant's motion for bill of particulars fails to point out defects complained of in the petition and
fails to give details desired by defendant and does not show that defendant cannot, without more, prepare responsive pleading or prepare for trial, such motion will be denied. *Tatum v. Acadian Production Corp. of Louisiana*, 35 F. Supp. 40 (E. D. La. 1940).

Rule 12(e) of the Federal Rules of Civil Procedure authorizes a defendant to call "for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare for trial." But the defendant’s motion shall "point out the defects complained of and the details desired." *Fed. Rules Civ. Proc., Rule 12(e).* The purpose of the New Rules is to expedite and simplify proceedings in the federal courts, and it should be the aim of the various courts to interpret them so as to work substantial justice in all cases. It is not the purpose of Rule 12(e) to permit either party to put the other to such delay and expense as to make the seeking of justice a profitless thing. *E. I. Du Pont De Nemours and Co. v. Dupont Textile Mills, Inc.*, 26 F. Supp. 236 (M. D. Pa. 1939).


The greatest difficulty the courts have with Rule 12(e) is to prevent misuse and excessive use of motions for a bill of particulars. In view of the broad provisions for discovery under Rules 26-36 a bill of particulars or more definite statement should be allowed only where the complaint is stated in such general terms that the defendant cannot understand the general nature of the charges made so as generally to prepare for trial. *Zoller v. Smith, Levin and Harris, Inc.*, 1 F. R. D. 182 (M. D. Pa. 1940); *Folly Amusement Holding Corp. v. Randforce Amusement Corp.*, 32 F. Supp. 361 (S. D. N. Y. 1939). But in view of the greatly expanded machinery of discovery, it will be a rare occasion when the defendant will need a bill of particulars to prepare his case for trial. *Securities and Exchange Commission v. Timetrust, Inc.*, 28 F. Supp. 34 (N. D. Cal., S. D. 1939); *Fried v.
Warner Bros. Circuit Management Corp., 26 F. Supp. 603 (E. D. Pa. 1939). Defendant’s motion for a bill of particulars will be denied, where any necessary information desired can better be obtained by interrogatories; thus, in federal courts, a motion for particulars cannot serve as an interrogatory. Alabama Independent Service Station Ass’n, Inc. v. Shell Petroleum Corp., 28 F. Supp. 386 (N. D. Ala., S. D. 1939); Mulloney v. Federal Reserve Bank of Boston, 26 F. Supp. 148 (D. Mass. 1938). To allow discovery under Rule 12(e) would seem an unnecessary and cumbersome duplicity in view of the extensive discovery machinery of Rules 26-37. It is unlikely that another much less effective method of discovery would be tucked away in Rule 12(e). Since the bill of particulars becomes a part of the pleading which it supplements [Sheehan v. Municipal Light and Power Co., 1 F. R. D. 256 (S. D. N. Y. 1940); Michelson v. Shell Union Oil Corp., 1 F. R. D. 183 (D. Mass. 1940)] any wide use of bills of particulars for discovery purposes in evidence matters would in large degree nullify the function and advantage of the brief “notice pleading” (Rule 8), and would in effect punish the party for compliance therewith.

Whenever a motion for a bill of particulars of matters alleged in the complaint is requested, it should state the ambiguities of the complaint and set out the additional information necessary for their answer. Rosenblum v. Dingfelder, 1 F. R. D. 179 (S. D. N. Y. 1939); Tager v. Goodstein, 29 F. Supp. 42 (E. D. N. Y. 1939). It should be added that the requirement to point out the defects of the complaint and the details desired must be and usually is construed liberally. McKenna v. United States Lines, Inc., 26 F. Supp. 558 (S. D. N. Y. 1939).

No hard and fast test can be applied to the judicial interpretation of the Rules; but the matter must be regarded from the standpoint of convenience and clarity. The court in the instant case comes as near as possible to achieving a general standard for Rule 12(e) when it said: “Just why mover (defendant) cannot prepare its responsive pleading is not set out” (p. 50).

These cases indicate a judicial trend toward limiting the use of a bill of particulars to those instances wherein it is clearly necessary to “prepare a responsive pleading” and not to extend its use to matters necessary to “prepare for trial.” Is this the beginning of the crystallization process of the New Rules?

J. Lea Ward

TAXATION—Mandamus to Compel Equalization

The defendants are members of the Iowa State Tax Commission which was created to assess originally the property of all public service companies each year and to adjust the valuation of all other property assessed by local assessors. In 1939 the Commission instructed the local assessors to value the property assigned to them at 60 per cent of its actual value. The Commission itself assessed the property of the public service companies at percentages of true value ranging from 22 to 30 per cent. This was done despite the requirement of the state constitution that all laws of a general nature have a uniform operation, and the demand of the Iowa Code that all property subject to taxation be assessed at its actual value. The plaintiff’s land was assessed at 60 per cent of its real value but at a hearing the Commission refused to correct the tax situation. He applied for a writ of mandamus on
the ground that the undervaluation of the public service companies' property caused him to pay more than his share of taxes. The Iowa district court dismissed the petition and the plaintiff appealed to the Iowa Supreme Court. Held, reversed and remanded; mandamus was the proper remedy to compel the Commission to convene and assess the utilities and also adjust the local assessments so that all property would be assessed at what is, in the Commission's best judgment, the actual value. *Pierce v. Green*, 294 N. W. 237 (Iowa 1940).

The complaint of the plaintiff in the instant case discloses a fact situation which exists in many states. See *Peninsular Power Co. v. Wisconsin Tax Commission*, 195 Wis. 231, 218 N. W. 371 (1928). Whether done inadvertently because of inefficiency and antiquated assessment methods, or intentionally to minimize complaints and obviate the necessity for adjustment in a period of declining property values, it is common knowledge that many officials assess property at a lower level than is required by law. See Nelson, *The Problem of Assessment Administration* (1931) 9 Tax Mag. 173. Yet where all taxpayers are equally under-assessed one of them cannot be heard to complain of the refusal of the assessor to comply with the statute since he himself has suffered no injury. See *Folsom v. Bank of Greenwood*, 97 Fla. 426, 120 So. 317 (1929); 4 Cooley, *Taxation* (4th ed. 1924) § 1655. But the assessor is not always consistent in his refusal, or inability, to obey the statute. Then the court is presented with a case in which the property of the complaining taxpayer has been assessed at its actual value, or even less than its actual value, but the property of the remaining taxpayers, similarly situated, is valued at a lower percentage of its true value. A few isolated cases reject the complaint of such a taxpayer on the ground that there can be no injury until the property is over-assessed. *City of Lowell v. Commissioners of Middlesex*, 152 Mass. 372, 25 N. E. 469 (1890); *Paducah St. Ry. v. McCracken County*, 105 Ky. 472, 49 S. W. 178 (1899). These cases disregard the guaranty of equal protection of the laws as provided by the Fourteenth Amendment to the Federal Constitution and by most state constitutions in some form or other. There may be unlawful discrimination, violating this guaranty, even though no property is assessed at more than full value, or even if all properties are assessed at less than full value. *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20 (1907).

In the usual case of discrimination through undervaluation the one discriminated against is concerned with having his own assessment reduced rather than the lower assessments raised, as the plaintiff in the principal case requested. Where the plaintiff does ask for a reduction the courts are overwhelmingly in favor of granting the relief if no other is available, and such is usually the case. *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441 (1923); *City of Moultrie v. Moultrie Banking Co.*, 177 Ga. 714, 171 S. E. 131 (1933); *People ex rel. McDonough v. Schmuhl*, 359 Ill. 446, 194 N. E. 731 (1935); In re *Harleigh Realty Co.*, 299 Pa. 385, 149 Atl. 653 (1930). This reduction in assessment is granted, despite the usual statutory command of assessment at full value, on the theory that that order is designed primarily to achieve equality of assessment through the establishment of a definite standard. See *Hawkeye Portland Cement Co. v. Board of Review*, 205 Iowa 161, 217 N. W. 837 (1928). The statute, therefore, is no bar to the decree of the court if such decree will achieve uniformity. *Taylor v. Louisville & N. R. R.*, 88 Fed. 350 (C. C. A. 6th, 1898); *Washington County v. First National Bank of Weiser*, 35 Idaho 438, 206 Pac. 1054 (1922). Especially is this true when it is considered that enforcement
of the statute would result in further preventing, rather than achieving, uniformity. To obtain relief, however, the plaintiff must have exhausted his administrative remedies, *People* ex rel. *McDonough* v. *Cesar*, 349 Ill. 372, 182 N. E. 448 (1932); and must prove that the discrimination is an intentional and systematic one, *National Bank* v. *Kimball*, 103 U. S. 732 (1881). Where an appeal lies from the action of the taxing authorities the court will reduce the valuation of the property, for the year complained of, to the same proportion of its value as the other property had been valued, *Greene* v. *Louisville & I. R. R.*, 244 U. S. 499 (1917); and, in the absence of such an adequate legal remedy, relief may take the form of an injunction of the collection of so much of the taxes assessed as were more than the complaining party's just proportion of taxes, *Boonville National Bank* v. *Schlotzhauer*, 317 Mo. 1298, 298 S. W. 732 (1937).

The plaintiff in the principal case, however, did not seek a reduction in his assessment. Why he should ask for the writ of mandamus to raise all future assessments on all property, when it is apparent that the court would have granted him a refund for the past discrimination if he had asked for a reduction, see *Talbot* v. *City of Des Moines*, 218 Iowa 1397, 257 N. W. 393 (1934), is not disclosed in the report. Perhaps he felt that the court would deny relief because of a fancied inability to find the average percentage of under-assessment. This difficulty is encountered where large amounts of property are assessed at widely varying levels. In such cases there is a substantial group discriminated against and the difference between the plaintiff's assessment and the average one is an active variable, increasing with every reduction. See Note (1933) 46 HARV. L. REV. 1000. And usually the courts do not possess the power to become assessing agencies. *People* ex rel. *New York* v. *Keeler*, 237 N. Y. 332, 143 N. E. 211 (1924). But a more probable reason for the plaintiff's action may be found in the fact that the lowest assessed properties were owned by public service companies. Whatever the reason for the plaintiff's election of remedy it is a popular one in the solution of tax problems. The writ of mandamus has been used to compel the levy of a general tax up to the constitutional limit, *Pitt County* v. *MacDonald, McKoy & Co.*, 148 N. C. 125, 61 S. E. 643 (1908); to compel the collection of taxes, *Graham* v. *Folsom*, 200 U. S. 248 (1906); to compel the examination, revision and correction of an assessment list, *Cooper* v. *Cape May Point*, 72 N. J. L. 164, 60 Atl. 516 (Sup. Ct. 1905); and it also lies to compel assessors to assess and value omitted or under-assessed property, *United States* ex rel. *Falls City Construction Co.* v. *Jimmerson*, 222 Fed. 489 (C. C. A. 8th, 1915) cert. denied, 239 U. S. 641 (1915). The request for its issuance may be made by any interested party, usually either a creditor, such as a bondholder or contractor, or a taxpayer, who can show a clear and undoubted right to the relief. *People* ex rel. *Koester* v. *Board of Review*, 351 Ill. 301, 184 N. E. 325 (1932). Since mandamus is either an extraordinary legal remedy or an equitable one, according to the particular jurisdiction, the plaintiff must also show that there is no other remedy available to him in the law court. *Lehman* v. *Morrissett*, 162 Va. 463, 174 S. E. 867 (1934).

To appreciate the scope of the writ of mandamus it must be remembered that it is not employed solely in the enforcement of a purely ministerial duty. It is no objection to the issuance of the writ to show that the defendant is being compelled to act in matters involving judgment and discretion. *Richmond County* v. *Steed*, 150 Ga. 229, 103 S. E. 253 (1920). The writ can compel the due exercise of a dis-
cretory duty, when refused, as long as it does not interfere with the exercise of the discretion. See Wilbur v. United States, 281 U. S. 206, 218 (1930). Thus the writ is available to the plaintiff in the instant case even though the defendant members of the Commission must exercise their discretion in assessing the property at what they believe to be the true value. Not only is the writ available but courts should find its use advantageous since it avoids budgetary disturbances caused by reducing a large number of assessments with the consequent decline in revenue.

CHARLES J. PETERS.

TAXATION—State Sales Taxes on Goods Moving in Interstate Commerce

Dravo Contracting Company, a Pennsylvania corporation, held four contracts with the United States Government for construction in West Virginia of locks and dams in navigable streams. These contracts provided for payment of unit prices for the work to be done in construction of the locks and dams, and, with the exception hereafter noted, progress payments were made upon delivery of materials at the dam sites or upon incorporation of these materials in the locks and dams. The exception was that certain payments were made in Pennsylvania for some material fabricated and pre-assembled at the company's plant near Pittsburgh. Title to this material passed immediately to the United States in Pennsylvania, upon inspection, acceptance and payment there. The Dravo Company sued to enjoin the state tax commissioner from collection of the state's gross sales tax, which takes the form of a tax on the privilege of engaging in the business taxed, measured by a fixed percentage of gross income therefrom. W. Va. Code Ann. (1931) §§ 11-13-1, 11-13-2, as amended by Acts W. Va. 1933, 1st Ex. Sess., c. 33. A three-judge statutory court granted a permanent injunction against collection of the tax. Dravo Contracting Co. v. Fox, 16 F. Supp. 527 (S. D. W. Va. 1936). Upon appeal, the Supreme Court reversed, holding that the business privilege tax was not an unconstitutional burden upon the functions of the Federal Government, and that West Virginia had territorial jurisdiction to impose the tax except as to the work delivered and paid for in Pennsylvania, and indicated that as to this an apportionment of the tax would be necessary. James v. Dravo Contracting Company, 302 U. S. 134 (1937). The case was remanded to the district court for determination of the proper apportionment of the tax. That court held that the Commissioner could not collect the tax upon any of the various materials purchased outside of the state, whether for the purpose of fabrication or not, and whether or not payment from the Government for them was received in West Virginia. Both parties appealed to the Circuit Court of Appeals for the Fourth Circuit. Held, that the Tax Commissioner might levy upon the gross receipts derived from all the activities of the Dravo Company under the contracts, except for payments received for certain material which was fabricated, pre-assembled, paid for and transferred outside the state. Decree reversed. Soper, C. J., concurred in the result. Dravo Contracting Co. v. James, 114 F. (2d) 242 (C. C. A. 4th, 1940), cert. denied, Jan. 13, 1941.

The Court ostensibly based its decision on a rather tenuous distinction between "apportionment" and exclusion from the tax base of income from certain activities.
Under an "apportionment" scheme, which was what the district court had attempted, there would be an allocation of income on the basis of the cost of activities involved in earning the income within and without the state. In *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939), it was held that where no provision for apportionment appears in a taxing statute and the tax is not in its nature divisible and some part thereof is beyond the taxing power of the state, the whole tax is void. The Circuit Court of Appeals in the instant case held that since the statute provided no method of apportionment, the Supreme Court had not intended to direct an apportionment, but instead had meant a "separation" for purposes of taxation under the statute of the portion of the income received within and therefore subject to the taxing power of the state, from income for goods and services delivered and paid for out of the state. Compare *Ford Motor Co. v. Beauchamp*, 308 U. S. 331 (1939), (1940) 53 Harv. L. Rev. 672 (sustaining a franchise tax measured by the proportion of total capital which the taxpayer's gross receipts in Texas bore to its total gross receipts).

The instant case presents another step taken by the courts in extending the power of a state to tax activities affecting more than one state. The most recent participation by the Supreme Court in this process is *Wisconsin v. J. C. Penney Co.*, U. S. Sup. Ct., Dec. 16, 1940. The court, speaking through Mr. Justice Frankfurter, there sustained a Wisconsin tax on corporate dividends paid out of income earned within the state, as applied to a foreign corporation which had declared dividends outside of the state payable by checks on out-of-state banks. The evolution of "sales taxes" as a major item in many states' income is a depression phenomenon. See *Haig and Shoup, The Sales Tax in the American States* (1934). At first, where the tax was restricted to a levy on the seller in passages of title entirely within the state, it had the effect of driving business transactions outside its borders and partially failed as a revenue measure. To remedy this, states resorted to the "business privilege" tax, measured by gross income. Most of such statutes were modeled after the West Virginia Act. See *Legis.* (1934) 47 Harv. L. Rev. 860. Another alternative employed was that of supplemental "use" taxes, levied on the value of goods brought into and consumed within the state. See Shoup and Haimoff, *The Sales Tax* (1934) 34 Col. L. Rev. 809. Payment of such taxes was resisted primarily in two situations. In the first, where a taxpayer had contracted with the Federal government, payment was resisted on a claim of exemption under the "inter-immunities" doctrine, which found its inception in *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819). In the second, where the transactions were not clearly intra-state, the tax was attacked as an unconstitutional burden on interstate commerce. Both of these arguments were advanced by the Dravo Company. The Supreme Court in the earlier Dravo decision refused to hold the contractor a Federal instrumentality which was exempt from the tax by reason of the inter-immunity of dual sovereignties. *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937), (1938) 26 Georgetown Law Journal 370; (1938) 23 Iowa L. Rev. 422; (1938) 24 Va. L. Rev. 455; (1938) 44 W. Va. L. Q. 215. The Court failed, however, to formulate any understandable test which would resolve or clarify the hopeless conflicts existing as to when an instrumentality serving the Federal government must or need not pay state taxes. See Philipsborn and Cantrill, *Immunity from Taxation of Governmental Instrumentalities* (1938) 26 Georgetown Law Journal 543; Hervey, *Judicial Limitations of the Exemption of Federal Instru-
mentals from State Taxation (1938) 12 Temp. L. Rev. 291, 325; Notes (1937) 51 Harv. L. Rev. 130, (1937) 23 Va. L. Rev. 922. Upon the interstate commerce questions, the Court sustained the constitutionality of the tax, but in limiting its imposition to gross income from “activities within the state,” failed to indicate a clear basis of separation.

Recent decisions have clarified the confusion as to the validity of various state taxes, directly or indirectly affecting interstate commerce. There is apparent an inclination to follow the thought that “interstate commerce must pay its own way,” stated by Mr. Justice Holmes in a dissenting opinion in New Jersey Bell Telephone Company v. State Board, 280 U. S. 338, 351 (1930), (1931) 44 Harv. L. Rev. 1302. In Western Livestock v. Bureau of Revenue, 303 U. S. 250 (1938), the Court upheld a New Mexico statute which levied on all engaged within the state in publishing newspapers or magazines, a tax of 2 per cent measured on the gross receipts from the sale of advertising. N. Mex. Sp. Sess. L. of 1934 c. 7, § 201. Despite the contention of appellants that since part of the receipts from advertising were derived from contracts with advertisers out of the state, the tax was not invalidated as a burden on interstate commerce. Mr. Justice Stone made a distinction between cases in which taxes were merely an incidental added expense to the cost of doing business and where they placed “burdens of such nature as to be capable, in point of substance of being imposed . . . with equal right by every state which the consumer touches, merely because interstate commerce is being done, so that without protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.” Western Livestock Co. v. Bureau of Revenue, supra, at 255. See Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harv. L. Rev. 617; Note (1939) 52 Harv. L. Rev. 502. In Adams Manufacturing Co. v. Storen, 304 U. S. 307 (1938) the Court invalidated the Indiana “gross receipts” tax [Ind. Acts 1933, c. 50; IND. STAT. ANN. (Burns, 1933) § 64-2601 ff.] because it was measured on gross income, defined as gross receipts from commerce without provision for exclusion of receipts derived from activities extra-state or in interstate commerce. The Indiana tax was said to be clearly distinguishable from “an excise on the privilege of producing or manufacturing within the state, measured by volume of production or the amount of sales”—such as is West Virginia’s “sale’s tax”. 304 U. S. at 310. See note (1938) 117 A. L. R. 444. The decision in McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940) further limited the exemption that may be claimed because activities are in “interstate commerce”. The taxpayer in New York had purchased coal then in Pennsylvania for delivery in New York. A tax upon the sale was upheld on the theory that “local delivery” is an activity which, apart from its effect on commerce, is subject to the state taxing power. The Court said at p. 58: “The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce.” One may wonder what this decision has done to Mr. Justice Stone’s “multiple burden” test in the Western Livestock case, supra.

Sales and business privilege taxes, apart from their legality, appear all to have the effect of increasing ultimate costs to consumers, and as such have longer range unfavorable implications. See Lockhart, State Tax Barriers to Interstate Trade (1940) 53 Harv. L. Rev. 1253; Powell, New Light on Gross Receipts Taxes (1940)
53 Harv. L. Rev. 909; Note (1940) 128 A. L. R. 893, 906. The refusal of the court to review the decision in the instant case indicates that the power of a state to tax is now extended so that the only income that need be excluded from the base upon which a business privilege tax can be levied is that accruing from a separable out-of-state transaction. The acceptance by the courts of a responsibility to help increase state revenues becomes increasingly apparent.

William Blum, Jr.

TRUSTS—Tracing Proceeds of Converted Stocks—Subrogation to Lien of Pledgee on Other Securities

Proceedings in the matter of the Franklin Saving & Loan Co., bankrupt, to establish a trust in the proceeds of shares of stock which belonged to the petitioner. The bankrupt wrongfully got possession of the stock, endorsed in blank, and pledged it along with certain notes as security for a loan. For a considerable time after the insolvency of the bankrupt, collections were made on the pledged notes and credited by pledgee on its indebtedness; when the debt had in this manner been reduced to $3745.26, petitioner's stock was sold and $4945.40 realized. Out of this the balance of the indebtedness to pledgee was paid, and the remainder—$1200.14—was turned over to the trustee, along with thirty-seven of the pledged notes which had belonged to the bankrupt. The case was first tried before a referee, who issued an order, denying petitioner's claim as a priority, on the ground that the trust fund was not properly identified, thus relegating petitioner to the rank of a general creditor. On petition to review the order, held, the petitioner was entitled to recover the residue of the sum received from the sale of the stock and returned to the trustee ($1200.14), and that she was further entitled to be subrogated to the right of lien which the pledgee had on the other thirty-seven notes had it sold these notes first and protected petitioner's stock. In re Franklin Saving & Loan Co., 34 F. Supp. 585 (E. D. Tenn. 1940).

In reaching its decision, the court reversed the order of the referee, who had decided that the trust fund had not been identified because the trust property had been pledged along with other property and thereafter sold. The conclusion of the referee was in the main based upon the case of McDowell v. McDowell, 144 Tenn. 452, 234 S. W. 319 (1921). In that case the pledgor hypothecated ten bonds for a loan of $10,000 and died leaving an insolvent estate; the bonds were sold by the pledgee for $7,000 and held to apply on the loan. Other persons claimed to own a portion of the bonds and undertook to set up a trust in the amount of their interest. This was declined on the theory that the effort amounted to an undertaking to impress the general fund of the estate. In reconciling this case with the principal case, the court said, p. 587: "The material and controlling distinction between the McDowell case and the case at bar is that in the McDowell case the pledged property was necessarily consumed in the payment of the debt, and in the case at bar the pledged property was not necessary to be consumed in the payment of the debt."

There are four possible views as to the right of the owner of misappropriated property over the general creditors of the wrongdoer. It might be held, (1) that the claimant is entitled to priority in all the assets of the wrongdoer regardless of
the disposition made by him of the claimant's property; (2) that the claimant is entitled to priority if the wrongdoer's estate was once augmented by the claimant's property regardless of its subsequent disposition; (3) that the claimant is entitled to priority to the extent that the wrongdoer's estate is augmented at the time when the claimant seeks to enforce his claim; and (4) that the claimant is entitled to priority to the extent to which he can trace his property in the hands of the wrongdoer at the time when the claimant seeks to enforce his claim. (Italics supplied.)

Scott, Trusts (1939) § 521.

The rule applied in the principal case, in so far as the residue of the sum received from the sale of petitioner's stock and returned to the trustee is concerned, is that laid down in the fourth classification. This view, which permits the claimant to trace his property, is the one which is accepted by the stronger courts, including the Supreme Court of the United States. First National Bank v. Littlefield, 226 U. S. 110 (1912); Dixon v. Hopkins, 56 F. (2d) 783 (C. C. A. 5th, 1932); Kenedy v. Carter, 217 Ala. 573, 117 So. 182 (1938); In re Petrosemolo's Estate, 273 N. Y. S. 718, 152 Misc. 419 (1934); Appeal of Mehler, 310 Pa. 25, 164 Atl. 319 (1933). The remedy of tracing or following trust property or its proceeds or substitute is based on a real identification of the trust property or its avails in the hands of the trustee, or of a third person not a bona fide purchaser. The cestui que trust is held entitled to the property which he can identify as that dedicated to the trust because he is equitably the owner of it. Bogert, Trusts and Trustees (1935) § 930. Most American courts will allow recovery where the cestui can show that the property which he seeks to recover is either part or all of the original trust res, or is property which has been produced by it through sale, barter, reinvestment or some other process. In re Brown, 193 Fed. 24 (C. C. A. 2nd, 1912); aff'd sub nom., First National Bank v. Littlefield, supra; Lummas Cotton Gin Co. v. Walker, 195 Ala. 552, 70 So. 754 (1916); Hawk v. Van Ingen, 196 Ill. 20, 63 N. E. 705 (1902); Watts v. Newberry, 107 Va. 233, 57 S. E. 657 (1907). Recovery will usually be denied where the cestui claimant shows merely the receipt of trust property by the trustee defendant, and makes no case as to its subsequent history or existence among the present assets of the defendant. St. Louis Ry. v. Spiller, 274 U. S. 304 (1927); Winston v. Miller, 139 Ala. 259, 35 So. 853 (1904); Howard v. Fay, 138 Mass. 104 (1884). The same rule will be applied where the evidence shows that the trust property has been disposed of in such a way as to leave no product. Leach v. Farmer's Bank, 204 Iowa, 1343, 217 N. W. 445 (1928). And if it can be shown that the trust funds were used by the trustee to purchase assets which now remain in his hands, but which are worthless, if the cestui desires to use the tracing remedy, he must accept such worthless property. Smith v. Montgomery, 209 Ala. 100, 95 So. 290 (1923); Cheney v. Johnson, 135 Kan. 521, 11 P. (2d) 709 (1932).

An attempt to discuss and apply the doctrine of subrogation, particularly as laid down in the principal case, tends somewhat to lead one into the realm of the nebulous. The term "subrogation" may be defined as the placing of a third person who has paid a debt into the position of the creditor to whom he has paid it, in order that he may exercise against the debtor all the rights which the creditor, if unpaid might have exercised. Page Trust Co. v. Godwin, 190 N. C. 512, 130 S. E. 323, 326 (1925); Gerseta Corp. v. Equitable Trust Co., 241 N. Y. 418, 150 N. E. 501, 504 (1926). It is generally understood that the doctrine is an equitable one and is used by the
courts in order to work out a just result. Bldg. & Saving Ass'n v. Rifner, 88 Ind. App. 580, 163 N. E. 236 (1928).

In the instant case, while it would not be safe to say that the case is one of first impression, yet it is one upon which there appears to be a dearth of authority. It is to be distinguished from the great majority of cases in that here the broker, in the beginning, has wrongfully converted the stock, while ordinarily he comes by possession rightfully, as by bailment or pledge, and the conversion, in the form of the unauthorized repledge, comes afterward. When a broker rightfully pledges securities of some customers and wrongfully pledges those of others for the same debt, the loss which results must be borne primarily by the customers whose securities were rightfully pledged. Scott, Trusts (1939) § 520.1. Where, as in the principal case, some of the proceeds of the sale of the wrongfully pledged stock are returned to the trustee, and he also recovers other securities which had been rightfully pledged with such stock, it is generally held that the person whose securities were wrongfully pledged is entitled to the whole after the pledge is discharged, since the loss is to be thrown primarily on the securities rightfully pledged. Levien v. Norman, 55 F. (2d) 91 (C. C. A. 1st, 1932); Blackenham Co. v. Thayer, 199 Cal. 90, 247 Pac. 1088 (1926); Matter of Mills, 125 App. Div. 730, 110 N. Y. S. 314 (1908). Whether, however, this priority over the owner of the rightfully pledged securities has been extended to general creditors, it is difficult to say. Certainly the sole case cited by the court in support of its holding in the principal case does not appear to be authority on the point. In that case, Gwynne, Adm'r., v. Estes, 14 Lea 661 (Tenn. 1885), a debtor, in order to secure one of his creditors, took insurance on his life, payable to the creditor at his death for the amount of the debt, with any residue over to his wife. Upon his death, the debtor's wife and the secured creditor sought to recover as much as possible of the debt owing to the latter from the general estate, in order that the creditor might have its whole debt paid from the inadequate fund of the general estate and the balance from the policy, thus leaving a portion for the widow. In refusing to permit this procedure, the court held that the question was one of contract, and that the creditor should be required to apply the full amount due on the policy to its debt, and to file its claim for any balance against the estate along with general creditors. Wherein this case may be cited as authority for the holding in the principal case, it is difficult to see.

Though the ruling of the court may not be in strict accord with legal theory, the result attained does seem to be most just and equitable under the circumstances. In permitting petitioner to trace her property it followed what clearly appears to be the majority rule in this country. In subrogating her to the lien of the pledgee, it certainly worked equity. No one was injured by its action, for without the wrongful act of the bankrupt, the stock would never have been in its possession.

JOHN R. HIGGINS.
BOOK REVIEWS


In the reviewer's opinion Professors Durfee and Dawson have set a standard of excellence in casebook production seldom equalled. They fully acknowledge the extent of their indebtedness to the previous work of "Ames, Woodruff, Thurston, Laube, Patterson, and especially Cook."¹ It is to their own credit exclusively, however, that in a volume by no means of unwieldy size they have achieved a synthesis of the best features of predecessor casebooks and supplied their gaps.

Within 955 pages of case, textual, and footnote material there are approximately 220 reported cases drawn from the English and federal courts and those of some 35 American states.² These are carefully, yet not too severely, edited, and average not over 3 pages in length. Within limits an instructor is justified in desiring a representation of his own jurisdiction in a casebook, for I have yet to see a student who has not greater than average interest in the cases of the jurisdiction in which he intends to practice. If the Minnesota cases reported, with which I am more familiar than with most of those from other jurisdictions, are typical of the rest, the case selection has been most admirable throughout; for within the allowable limits resulting from proportionate respect to other jurisdictions, I do not see how a better sampling could have been made of Minnesota law including its aberrations. A fair proportion of the better cases of previous collections are included in this one also. But in line with the editors' premise that "the emergence of a group of substantive doctrines and remedial devices concerned with restitution" has been a major phenomenon of the last fifty years in American law,³ approximately three-fourths of the reported cases postdate the turn of the century. Only 6 antedate 1850.

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¹Preface, v.

²Only 6 of the reported cases are of English origin; 22 were decided by the United States Supreme or lower federal courts. New York, with 36 of the reported cases, has the greatest representation among the states. Massachusetts follows with 17; Michigan and Wisconsin with 12 each; Maine and Minnesota with 9 each; Rhode Island with 8; Kansas with 7; Illinois with 6; California, Connecticut, Indiana, Nebraska, New Hampshire, and Kentucky with 5 each.

³Preface, iii.
There are approximately 240 pages of textual notes, which are the product of the editors themselves rather than a culling of the writings of others. These develop historical background and fill lacunae in a manner that puts directly before the student some of the best work of legal scholarship that has been done so far in the field of Restitution, at the same time effecting a decided saving of class-room time and collateral citation. Among the ones out of many that appear to me as particularly helpful in the light of my own class-room experience are those dealing with the early history of quasi-contract,4 equitable accounting with respect to claims normally cognizable at law,5 reformation at law,6 and mistakes as to acreage in sales of land.7 Such textual notes, together with further footnote material aggregating an unestimated number of pages, contain citations to approximately 2,000 cases representing doctrinal, factual, or remedial variants that have arisen in connection with the major problems of the reported cases. A brief but adequate statement of the essential facts of a cited case is usually provided. Problem cases are used rather sparingly. Thought-provoking inquiries are occasionally left unanswered, but rarely without adequate keys to their solution. In short, a student’s disregard of the textual and footnote material contained in this casebook will never be invited by their own inadequacy. Textual and law review literature, seldom quoted, is likewise not cited as extensively as are case materials, and apparently no attempt has been made to annotate even the reported cases with all their law review discussions. The exhaustiveness of the editors’ own researches into the original judicial materials easily offsets this omission, if it be considered by anyone to be a defect. In the light of the editors’ recognition that the Restatement of Restitution “has helped to clarify the whole subject and has already made an impression on judicial decisions,”8 one is rather surprised, however, at the infrequency of reference to the Restatement. While the index is not extensive, it is rendered entirely adequate by the all-around excellence of the casebook’s organization. The table of cases includes citations. The printing is well spaced in readable type on a good grade of paper, with no discovered errors. One who has experienced the difficulty of finding restitutionary cases scattered throughout a wide variety of digest headings will recognize in this casebook a utilitarian tool for the active practitioner as well

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4P. 1.
5P. 61.
6P. 521.
7Pp. 704, 710.
8Preface, iii.
as the teacher and student—one that the student should carry with him into practice.

A more specific appraisal of a casebook as a teaching tool involves an analysis of its contents and organization in relation to the type of course, in a fairly stereotyped law curricula, in which its editors may have hope of its being used. By and large the adaptation must be by the casebook to the curricular arrangement, rather than the other way about. A good many casebooks seem based upon the supposition that law schools exist for the single principal purpose of teaching the editors’ particular subject. If, as Professor Patterson seems to suggest, the contents and organization of the one under review require that Restitution be made one of the most important and extensive courses, in point of class-room time, in a law school’s curriculum, certainly as a teacher of the subject I would have no objection to that consequence being realized. I do not predict its happening at Minnesota. I nevertheless regard this casebook as admirably suited to my present course in Equity III of approximately 30 class-room hours.

Professors Durfee and Dawson have divided the subject-matter of Restitution into seven major parts. Part 1, entitled Restitution as an Alternative Remedy for Tort, contains 83 pages dealing with the general nature and extent of the quasi-contractual remedy and of remedies by way of equitable accounting, constructive trust, and equitable lien, together with their interrelation, respective pre-requisites such as tracing, and the reasons for and effect of the choice of a particular one. Part 2, entitled Misrepresentation, contains 178 pages dealing successively with legal and equitable remedies on rescission for fraud, restitution as a requirement for rescission, election between remedies, and substantive elements of misrepresentation. The materials here contained are substantially adequate for the teaching of the entire subject of fraud and misrepresentation, including the deceit action, as a unit. There is much to be said for so doing, wherever Torts instructors may be persuaded to relinquish that part of their subject and adequate additional time can be found for their relinquishee. Even without it, the substantive elements and measures of damages in the tort action are so neatly pre-

8See Mechem, (Book Review) Future Interests Uber Alles (1933) 19 IOWA L. REV. 146, 149.
10(1940) 7 U. OF CHI. L. REV. 577.
11The editors have chosen not to follow the distinction of terminology made by the Restatement between restitution and restoration.
sent in brief space that the instructor in Restitution may begin where the Tort course ended, with appropriate recognition that the substantive elements of the tort will normally sustain a restitutionary action, though the converse be not so generally true. Part 3, entitled Benefits Conferred under Agreements that Have Been Wholly or Partly Performed, contains 148 pages dealing successively with restitutionary rights in connection with enforceable and unenforceable agreements, depending upon which party is in default thereunder, and in connection with contracts rendered impossible of performance. Part 4, entitled Mistake, contains 374 pages and is the largest single major division. The subject of mistake is subdivided into misunderstanding, mistake in integration (herein of reformation), mistake as to basic assumptions of one or both parties in connection with gifts and with bargain transactions, mistake in performance, mistake as to existence of contract, and mistake as to ownership of property. Distinctions such as those some courts and other casebook editors have made between instrinsic and collateral fact, or more frequently between mistake of fact and mistake of law, are appropriately recognized in the case and note material but are not made a basis of repetition of substantially similar problems in different categories frequently arriving at no substantial differences in results. Compromises of disputed claims are treated in connection with mistake in performance, and problems arising from a would-be agent’s lack of authority in connection with mistake as to the existence of a contract. In short none of Cook’s categories is wholly omitted. The remaining Parts 5, 6, and 7 deal successively with Illegality, Defective Capacity, and Duress. Undue influence is grouped with insanity as a subdivision of the chapter on Defective Capacity. No separate divisional treatment is given to problems arising from corporate incapacity, but their existence and methods of solution are sufficiently suggested in case materials in other sections. The final chapter on Duress concludes with a substantial division dealing with various forms of economic pressure. Throughout their casebook the editors have recognized the existence of

12This may not be true of a suit for rescission in a jurisdiction such as Minnesota that follows the “out of pocket loss” measure of damages in the tort action and allows it for innocent misrepresentation. In such a situation the tort action may be less onerous to the innocent misrepresentor than rescission. Compare Labar v. Lindstrom, 158 Minn. 453, 197 N. W. 756 (1924), and Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915 (1916), at pages 259-261 of the Casebook.

13See, for example, Nuveen v. Board of Public Instruction, 88 F. (2d) 175 (C. C. A. 5th, 1937), at page 609 of the Casebook.
other courses in a law curriculum, such as Suretyship and Insurance, by dealing only scantily with subrogation and not at all with restitutionary rights by way of indemnity and contribution. Defenses to restitutionary rights are nowhere separately treated, but the whole emphasis of this casebook throughout is so much upon the remedial processes through which the substance of restitutionary rights has developed that their respective limitations are kept constantly in the forefront of the case and note material. The defenses of bona fide purchase and change of position are introduced early and recur in greater detail in the later subdivisions of the chapter on Mistake.

Professor Patterson has concluded that "Professors Durfee and Dawson have not, as far as I can see, shown us the way in which the conception of restitution as an adaptable intellectual tool can be made available to the same extent as are the basic conceptions of contracts and torts." I do not believe that has been their purpose, nor do I believe that Restitution should rank with Contracts and Torts as a basic legal subject. But without subscribing to the school of thought that everything should be postponed until the final year in order that the student may be properly prepared for it, I nevertheless believe that there is a vital need of a senior division course that attempts to tie together the loose threads of a dozen other courses suggesting restitutionary problems that are seldom adequately treated therein. In this respect the design of the present casebook is better adapted to the curricular arrangement of most law schools than is Professor Patterson's thesis that the best place to introduce the concept of restitution is in the context of the law of contracts. Professors Durfee and Dawson have provided a teaching tool for the type of course to which I refer that will not soon be surpassed. Reasonably adequate coverage, even in a single-semester course, should be attainable by judicious selectivity on the part of the individual instructor aided by the fullness and excellence of the editors' textual notes. On no count have I fault to find with this casebook.

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14(1940) 7 U. OF CHI. L. REV. 577, 578.
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"This text", the Preface advises, "is designed for those who prefer to instruct by the textbook method rather than by casebook."1 It is thus both alternative and supplementary to Mr. Gerald O. Dykstra's Casebook, previously reviewed in this JOURNAL and elsewhere.2 Unfortunately, a hiatus between title and subject matter, already pointed out in regard to the Casebook,3 recurs in the present volume. The consumer is most emphatically warned that this textbook is primarily concerned neither with government nor business, but with appellate court review of selected aspects of governmental regulation and taxation. With this in mind, a listing of the chapter headings gives a fair indication of content: The Judiciary, Constitutional Law Principles, Federal Regulation of Interstate Commerce, State Regulation of Interstate Commerce, Federal Police Power, State Police Power, Federal Power of Taxation, State Power of Taxation, Delegation of Power, and four chapters covering the Sherman and Clayton Acts, the Robinson-Patman Act and the Federal Trade Commission Act.

What Dykstra and Dykstra have accomplished is a short, handy little Introduction. By generous quotation, especially in Parts II and III,4 they have preserved some of the flavor of a Casebook, and by simple exposition, they have pre-cooked the student's briefing and lecture notetaking. The conclusion of each chapter by a series of questions and problems places a ready method of self-help in the hands of both student and teacher. However, except for citation of illustrative cases, of Dykstra's Casebook, of statutes, and of such venerable classics as the Federalist, the textbook is virtually barren of outside references.

In a recent review by Gerald O. Dykstra of "The Law of Business", by James L. Dohr,5 Mr. Dykstra regrets the absence of preliminary "background material" in most business law textbooks on the ground that the unwary instructor may plunge the student directly into text or case material without adequate preparation. Perhaps the most valuable

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1Preface, p. iv.


3Particularly by E. W. Carter, supra note 2.

4"Federal and State Regulation"; "Federal Regulation by Anti-Trust Legislation."

preparation for the student of Public Law is an invitation to a critical attitude and a lead to the underlying economic conflicts. Such preparation is not given, even by suggested outside reference, in Mr. Dykstra's textbook.

The Preface flatly declares that the authors have adopted an "objective approach". Although it seems unlikely that many will be misled by this assertion, attention is directed to their controlling assumption that "the approach of the courts in passing upon the constitutionality of laws by which Government regulates Business has been merely to judge of the power of the legislative body to enact the statute in issue but never to question the wisdom of the law, since to do so would encroach on the legislative domain. . . ." Moreover, if brief writing, neglect of minority opinions, and uncritical acceptance of the doctrines of separation of powers, judicial supremacy, and delegation of power constitute "objectivity", Part I of this textbook indeed fulfills the promise of its Preface. The alert student, it may be hoped, will find some difficulty in reconciling these accepted postulates with the kaleidoscopic view of the activities of federal administrative agencies to be glimpsed in Parts II and III.

Indeed the difference in treatment and interest of the three Parts of the book is quite striking. The authors progress from the method of ritualistic mumbling in Part I, to that of blackletter and illustration in II, and reach their stride in III with an historically integrated development of case and statutory material bearing on a closely related group of economic problems. Whether or not this evolution is intentional, it is doubtful if the student stands to gain by being forced into the traces of Parts I and II.

Each case- or textbook published represents a pragmatic answer to the actual needs of some group of teachers and students, and will find its vindication in fulfilling those needs. The most the reviewer can do is to point out a few needs that he believes are, or are not, going to be met. In the case of Dykstra and Dykstra's Textbook, the student of government, of business organization, or of economic theory will find very lean pickings. The student of Constitutional and Anti-Trust Law

Preface, p. iii.
'Mr. Dykstra is also the author of debater's piece: "A Belated Rebuttal of Russia" (1928), which presents the youthful author in defense of the Russian foreign policy of that era and in favor of "Recognition."
'It is not, of course, complete neglect. See, e.g., pp. 15-16.
'"The Judiciary and Constitutional Law Principles".
will have a well-done set of canned briefs, a handy exposition of traditional doctrines, and some valuable informative matter about the time and way in which particular leading cases arose. It is in its emphasis upon the latter material that the present book rises above the level of a collection of legal maxims and quotation toward the Never-Never Land of textbook perfection, where everything that everyone wants is assembled with perfect organization and commendable brevity.

CHARLES RUNYON*


Professor George Grafton Wilson’s Handbook of International Law whose third edition is here under review is undoubtedly one of the leading modern one volume treatises on international law in the United States. It has kept this dominant position in American literature ever since its first edition in 1910. Professor Hershey’s Essentials of International Law and Organization (2d ed. 1927) and Professor Fenwick’s International Law (2d ed. 1934) are its only serious and, at best, equal rivals in the United States. It is also beyond question that Professor Wilson’s book holds a respected place in the world literature of international law.

Professor Wilson’s presentation of his subject is lucid, well organized and well proportioned. Slightly more than one half of the book is devoted to the international law of peace and peaceful settlement of differences, the rest deals with the law of war and neutrality. This arrangement corresponds to the traditional allotment of space in other works.

International law, whose collapse the world is just witnessing, has been a very complex sociological phenomenon, being the law of a society of sixty-odd very unequal members. Its rules have always been somewhat vague and shifting and extremely hard to ascertain. Covering

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*Even in the Constitutional Law field coverage is far from complete and emphasis not unobjectionable. Constitutional doctrine has been projected in the regulatory field without correlation with its use in civil liberties cases or a sufficient key to the roots of judicial policy. Administrative Law aspects of Due Process, and the methods of administrative determination, which one would imagine would most keenly interest the businessman, for whom at least in part, this book was written, receive scant attention.

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relations in which practical necessities and political expediences have
cannot be reconciled with the ideals of an administration and
preservation of international order and justice, international law never
really crystallized into one harmonious legal system but remained
amorphous and indefinite. The presentation of the true picture in a
one volume book is therefore an almost impossible task.
Professor Wilson has tried to state in clear and slightly dogmatic pro-
positions what he conceives the rules of international law to be. His
main sources for the formulation of these principles are, of course,
treaties, international correspondence and decisions of international
tribunals and national courts. He pays paramount attention to the
holdings and dicta of the American courts, particularly of the Federal
Supreme Court.
The virtues of the book are, of course, in a certain fashion also its
faults. The simplicity and clearness of the presentation conceals the
difficulties and troubles which the application of the principles offers
in practice; the positiveness with which the single propositions are stated
does not reveal that most of them are highly controversial and doubtful;
the great emphasis which is laid upon the Supreme Court cases obscures
the fact that the highest courts of other countries have held frequently
quite differently; the almost complete disregard of theoretical and juris-
prudential discussions leaves the reader uninformed on the fact that the
whole nature, sources and force of international legal rules and their
relationship to, and effect upon, national law as well as their application
in municipal courts is one of the most disputed problems in legal litera-
ture.
Yet, as said before, this way of treatment might have been necessary
in order to keep the discussion of the tremendous field within the com-
pass of one volume. And above all, this fashion of presentation is the
characteristic mode of Professor Wilson, his weakness and his strength.
He is inclined to look at international law as a set of more or less well
defined unchanging legal principles (he says so himself in the preface)
and at their American interpretation as their legitimate definition. The
author happily gives constant attention to diplomatic practice and his-
torical incidents of legal significance. He thereby achieves a vivid and
interesting picture which differs in a refreshing way from the somewhat
pale and academic speculations of the post war theorists on the conti-
nent, particularly the Viennese School.
Of course in a field as controversial as international law there are in-
numerable instances where one might disagree with the author. In the chapter on the Sources of International Law, for instance, it might be more accurate to distinguish between custom as a source of international law and the factors which form or evidence such custom, such as opinions of text writers and diplomatic papers, instead of listing them all as different sources. Some suggestions for improvement might be valuable: Certain recent conventions of general significance are missing, e.g., the Brussels Convention on the immunity of government vessels which has been ratified by thirteen states and went into force in 1937. Important recent decisions of the Supreme Court are neither discussed nor cited. The doctrine of hot pursuit is nowhere mentioned. It would further be helpful, if the author, who has incorporated the text of the Hague Conventions of 1907 in an appendix to the book, would list the conventions which have been actually ratified or acceded to by some of the nations, and the powers which have done so, and would also include, at least, a brief comment on the application or perhaps rather non-application of these conventions during the last war. It would also be advisable to correct the numerous misspellings of the names of cases and other minor inaccuracies.

As a whole, however, the reviewer is confident that the book will retain its many friends and will continue to be useful to students and practitioners in the field.

STEFAN A. RIESENFELD*

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1 For instance to name a few, Berizzi Bros. v. Pesero, 271 U. S. 569 (1926); United States v. Flores, 289 U. S. 137 (1933); United States v. Belmont, 301 U. S. 324 (1937); Shepleigh v. Mier, 299 U. S. 468 (1937); Guaranty Trust Co. v. United States, 304 U. S. 126 (1938).

2 The whole question of protective jurisdiction is not dealt with. Even so familiar a case as Church v. Hubbart, 2 Cranch. 187 (U. S. 1804), is not mentioned.

3 For instance the case of the Cristina [1938] A. C. 485 is persistently misspelled as Christina.

4 The case of The Athol, 1 Wm. Robs. Adm. 374 (1842), for instance, which is discussed in the chapter dealing with the immunity of foreign governments, their officials and property (pp. 155, 157) involved in reality the suability of British officers of the crown in British courts by reason of a collision caused by a British troop ship. Incidentally, the case is not included in the Table of Cases Cited.

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