TIME, SPACE, AND ESTATE TAX

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"Those who maintain the absolute reality of time and space, whether as essentially subsisting, or only inhereing as modifications in things, must find themselves at utter variance with the principles of experience itself."

Kant—Critique of Pure Reason.

OUT of the void and formless, man creates his universe of time and space. So too the law fastens upon the stuff of property relations, to shape it and give it locale and order. Where sequence does not inhere, where the facts own no domicile, the courts confer sequence, domicile, and their import. In the law of estate taxation, this process has been filled with struggle,—the creators have often repented of their creation. We witness a continuing genesis, in which the clay resists the hand of the potter.

The federal estate tax is about to round out its first twenty-five years. For a quarter of a century since 1916, Congress and the Supreme Court have been at work, embellishing, polishing, refining,—all on a single mold. It is profitable to appreciate that mold, to measure its scope and effectuality. We may even find that there were revelations before 1916.

Some five years ago, the President of the United States, in a revenue message to Congress, attacked the accumulation of great wealth through inheritance. He termed the perpetuation of fortunes "not consistent with the ideals and sentiments of the American people . . . as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our government."¹ This address is the latest important thrust of a move-

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ment which dates back to Revolutionary times. For nearly two centuries Americans have been preoccupied with inherited economic power. The attacks have been irregular, sporadic, but the vein of resentment can be traced in each generation. The younger Jefferson urged inheritance taxes to insure small proprietorships, and Thomas Paine saw in them a means by which old-age pensions and grants to youth might be financed. These ideas were bubbling in Europe also, where however there has always been some fear that estates might be parcelled out until they became uneconomically small. The natural limitations there upon available land would account for this difference of approach.

In America, the movement had its first success in Jefferson's legislation against entail. It may be found in virtually every democratic or populistic program of the 19th and 20th centuries. One of Lincoln's favorite parables was that, if you put the smallest gold coin over any verse of the Bible, you could not read that verse. In this generation, Theodore Roosevelt, John N. Garner and Cordell Hull have helped to push these concepts. The movement had been long-lived and popular. By exploiting it, Huey P. Long was able to draw great political profit. He will no doubt have successors as numerous as his predecessors.

No approach to estate tax legislation or jurisprudence which fails to take full account of this movement can claim either objectivity or adequacy. The estate tax is not simply a statute, an ordained levy. It is that plus the implementation of this deeply persistent tradition. In the tax is to be found an outlet for the envies, resentments and ideals attached to that tradition. If there were no such legislation, the government would lose not only revenue but, more important, the capacity to release and satisfy the demands of its citizenry. It would not be healthful to pen up those demands.

This egalitarian movement, despite steady and partially successful resistance, shapes the form and scope of estate tax statutes and leaves its impress upon the decisions of the courts. Judges have usually been

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2See COHEN, LAW AND THE SOCIAL ORDER (1933) 27 et seq., 58; FRANKFURTER, LAW AND POLITICS (1939) 50, 54; MYERS, THE END OF HEREDITARY AMERICAN FORTUNES (1939).
5See Dainow, Forced Heirship in French Law (1940) 2 LA. L. REV. 669, 687; ADAM SMITH, WEALTH OF NATIONS; VOLTAIRE, L'HOMME AUX QUARANTE ECUS.
loath to acknowledge the *raison d'être* of the tax,—for reasons which we shall see later. What they have done, as distinguished from what they have said, discloses their full awareness of its purpose. The tax comes into court with a singular weapon, available to no other levy. It alone can say that no one pays it. The former owner is dead and will not suffer, and the new owner is entitled to the balance only after it is satisfied. Manna, though shared, remains manna. In the strange interregnum twixt master and master, which the technical rules of tenure have endeavored to ignore, the Government takes its toll.

In terms of practical accomplishments, the cogence of the inheritance tax movement has grown progressively. Although the levies date back to 1797, those antecedent to 1916 were short-lived, born out of extraordinary needs for revenue, expiring with the respective needs. But a short life can be a significant one, and the chief significance of these earlier imposts is their contrast in form. Without rehearsing the history of the successive acts, suffice it to underline these interesting morphological variations: 1797 Act—*a* stamp tax on receipts for legacies or distributive shares of personalty; 1862 Act—*a* probate stamp duty on the amount of the estate, a tax on legacies or distributive shares of personalty, and (1864 Act) an added duty upon the passing of real estate; 1894 Act—an income tax, including in annual income "money and the value of all personal property acquired by gift or inheritance"; 1898 Act—a tax on legacies and distributive shares of personalty, not affected by the quantum of the entire estate; and 1916 Act—an estate tax upon the entire estate, real and personal, including transfers in contemplation of death. The subsequent statutes are mere proliferations of that of 1916 which, not being a war revenue act, has persisted and, in fundamental structure, is still with us. This classification should fairly include the gift tax enactments of 1924 and 1932, ancillary to the estate tax.

Of course, State legislation has followed much the same course and has learned from the federal experience, even to the extent of adopting the estate tax method and the collateral gift tax. It would be strange indeed, if the impulses which found recurrent voice in Congress had not

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1 Stat. 527 (1797).
2 12 Stat. 485 (1862).
3 14 Stat. 140 (1866).
4 28 Stat. 509 (1894).
pressed up and forward in the local legislatures. The results have been interesting to a remarkable degree, laying in the lap of the Supreme Court some of the subtlest and most delicate problems of the federal structure.

I

At some point in his article, the writer is supposed to let the reader into the secret of why he wrote it. Our thesis is that Congress and the Supreme Court have, on balance, adopted an absolutistic or monistic technique in levying, interpreting and describing the scope of estate taxes. In the Supreme Court, this monistic technique has also governed the application of the 14th Amendment to State inheritance taxation. We propose to consider that technique reflectively and to test its set of assumptions. We shall eventually find that these assumptions are best exposed in cases of two specific varieties. As to federal taxation, the absolutism is most evident where time is the catalytic factor. As to State taxation, where space performs that function. Hence we must ultimately run into the assumed definitions of time and space, overlying the statutes and the decisions.

All of this sounds highly abstruse, and in part it is. What compensates, however, is the possibility of bringing error to light. The concepts of time and space inhere in the subject, and can hardly be ignored in the interest of mere naïveté. If analysis in such terms will push back the narrow walls that presently enclose the tax, it will be well rewarded.

We begin with Congress and the revenue act itself, and then pass to the Supreme Court, for reasons of convenience rather than logic. It is not true that the statute is necessarily the point of beginning, antecedent to its application by the Court. On the contrary, the Court has donated its conceptions to Congress and has, in considerable part, influenced the form and direction of all subsequent enactments.¹² There has been a continual interaction between the legislative and the judicial, the former contributing most of the ingenuity in technique, and the latter most of the basic theorization. As to the structure of the statute, a good form was found in 1916 and whatever early mistakes appeared were rather promptly corrected.¹³ What puzzles the observer is that Congress was content to adhere to that form. In corporate taxation, it has resorted to an interesting pluralism of devices. At present writing,

there are a corporate income tax, a capital stock tax, an excess-profits tax, a special tax on various types of holding companies, a special tax on improper accumulation of surplus, and the various social-security levies. An experiment with an undistributed profits surtax was tried in 1936, and a war excess-profits tax has come into being in 1940. Special forms of tax have also been adopted to apply to corporations engaged in certain unusual categories of business, such as banks, insurance companies, China Trade corporations. All of this came out of the appreciation that there is more than one way to skin a cat, and that all cats are not alike, though they may look uniformly gray at night. A variety of economic arrangements calls for a variety of taxing techniques.

True, Congress adopted a gift tax in 1924, and again in 1932, and thus began to retreat from its fixed monism. But the 1924 act was short-lived and that of 1932 was engendered by a peculiarly tough decision of the Supreme Court. Heiner v. Donnan (holding unconstitutional an absolute presumption that gifts within two years of death had been made in contemplation thereof) virtually provoked Congress into action. And even this action proved fitful and impulsive. No scientific coordination yet exists between our gift and estate tax levies, despite occasional attempts to link the two. As matters now stand, the gift tax, with its unlimited exclusions, its added exemption, its lower rates, and its invitation to double enjoyment of each successive bracket, is the weakest sort of auxiliary to the estate tax, a well-meant but feeble gesture. The obvious remedy is combination of the two taxes, with a single exemption and a single set of progressive rates, the estate at death to be taxed in those brackets which would have been reached had there been no taxable gifts. The same result could be reached by leaving the taxes separate and amending the estate tax to reflect the reduction of the total quantum through *inter vivos* transfers. The dissenting opinion in *Heiner v. Donnan* is probably sufficient constitutional sanction, at least in the view of the present Court.

The inheritance taxes prior to 1916 have been briefly listed, and their interesting variety has been noted. These successive experiments have taught nothing to Congress. An attempt was made in 1935 to enact a legacy tax—a levy on the privilege of receiving an inheritance in

15See C. L. Harris, *Legislative History of Federal Gift Taxation* (1940) 18 TAXES 531.
addition to the current excise on the privilege of leaving one. This attempt failed, largely because a Senate Committee feared the tax might break the family control of the Ford Motor Co.\textsuperscript{17} It has not been revived.

The 1894 act included inheritances in annual income and taxed them as such. This provision was never held unconstitutional, but fell along with the rest of the tax in the second Pollock decision.\textsuperscript{18} No similar experiment has followed.

The utility of these techniques can be illustrated by any of the current methods of tax avoidance. For example, there are the numerous loopholes afforded by life-insurance, many of which could be closed through use of the inheritance tax or the income tax.\textsuperscript{19} As long as the method remains monistic in a pluralistic economy, it will fail. A successful carpenter needs a whole chest of tools.

The policy of Congress has been interestingly paralleled by that of the Supreme Court. At first there too \textit{ali} was simple and serene, until the spirit which everlastingly denies and contradicts entered the study. The earliest cases all involved questions of State inheritance taxation, and thus established a peculiar background for the federal tax. The ascertainment of a dependable gravamen seemed easy. The States had

\textsuperscript{17}Hearings before Senate Finance Committee on \textit{H. R. 8974}, 74th Cong., 1st Sess. (1935). Some astute social scientist will eventually make out of the history of this bill a fascinating chapter in democratic processes. He will note, among other things, seven columns of items under the heading of Senator Huey P. Long in the \textit{N. Y. Times} Index for 1935, consisting of attacks on the administration, demands for impeachment and the like; Long's gratification over the Presidential Message, \textit{N. Y. Times}, June 20, 1935, p. 2; the confusion in Congress as to the President's purpose and the element of timing for early adjournment, \textit{id}, June 26, 1935, p. 1, June 28, 1935, p. 20; the article of Arthur Krock describing the disastrous effect of the bill upon the Mellon bank and the Ford plant, \textit{id}, June 21, 1935, p. 18; the interesting absence of the Mellon example from all subsequent discussion; the uncertainties of the Secretary of the Treasury, \textit{Hearings}, \textit{supra}, at 100 et seq.; the phrase of the Nat'l Ind. Conf. Bd. "a well-to-do business man with a net estate of $100,000,000" and the gibe of Asst. Gen. Counsel Jackson of the Treasury, "What size estate does a man need to be considered really rich?"; the bulk of figures submitted, analyzed and attacked to show that the proposed inheritance tax could or could not be paid out of Mr. Ford's income, including the general assumption that it should not fall upon his capital; the majority and minority reports, dated Aug. 12, showing that hearings began July 30 and were completed Aug. 8 at 11:55 A.M.; the assassination of Senator Long on Sept. 28, 1935.

\textsuperscript{18}Pollock \textit{v. Farmers'} Loan & Trust Co., 158 U. S. 601, 637 (1895).

the power to regulate the inheritance, perhaps even to the extent of ordaining universal escheat. Estates could be distributed in intestacy, wills could be probated, only because the State law permitted. What the State could so thoroughly control, it could surely tax. Hence the gravamen of inheritance taxation was the right or power to regulate the inheritance.20

All of this clicked suspiciously well. It is the kind of law we seek successfully in hornbooks and vainly in advance sheets. It was too easy, too good to last. The Court might have suspected that it was letting itself in for trouble. Every tax is, in greater or less degree, a form of regulation, promoting this activity, deterring that. The power to tax is inevitably coupled with the power to destroy, or at very least to discourage, modify, divert.21 A link between jurisdiction to tax and jurisdiction to regulate was found to fray, for in a profoundly real sense, the link was a petitio principii. In so far as taxation is regulation (whether accidental or deliberate), the court was saying that jurisdiction to regulate depended upon jurisdiction to regulate.

Along came the federal tax of 1898, and exposed the dilemma which the Court had created for itself. This was, however, not without notice, for the Civil War Act had clearly pointed the way.22 Power to regulate the inheritance was the gravamen of the tax, and the federal government did not even claim that power. Procrustes was invited to lie in his own bed. An exit simply had to be found, and of course it was.

Knowlton v. Moore23 created, virtually out of thin air, the “ordinary excise” theory. Inheritance taxes were an ancient, pandemic method of raising revenue, familiar to governments and statesmen of every time and place. They bore all sorts of different names, but, whatever the label, death was the generating source of the taxable transaction. Of course, the federal government could not regulate inheritances, but that did not preclude its power to levy this tax. It was a sovereign, and enjoyed the customary prerogatives of a sovereign. This excise was customary; ergo it was constitutional. The

21Sunshine Coal Co. v. Adkins, 310 U. S. 381 (1940); following the Sonsinsky case, 300 U. S. 506 (1937).
22Scholey v. Rew, 23 Wall. 331 (U. S. 1875).
23178 U. S. 111 (1900).
Knowlton opinion was as long on common sense as it was short on scholastic logic.

One cannot fail to wonder why, having squirmed out of what must have been a rather uncomfortable dilemma, the Court did not learn its lesson. Despite all that had been brought to light in the Knowlton case, the Court continued to predicate State jurisdiction upon the right to regulate the inheritance, while adhering to the "ordinary excise" doctrine for the federal tax. This tenacity was carried to the extreme when Mr. Justice Holmes, in Chanler v. Kelsey,24 said that, unless the State could utterly destroy the inheritance, it had no constitutional right to tax it. The "ordinary excise" gravamen was quite broad enough for the sovereign States as well as for the federal government, and the Knowlton opinion had at least hinted the wisdom of extending it to them. The earlier doctrine was tough, however, and would not down.

The consequence has been a growing stream of contradictions. Federal estate tax rates are now so high that they effectually regulate the larger inheritances to a degree never attempted by any State.25 Yet the Court feels compelled to treat the federal tax as a mere revenue measure, while reiterating the regulatory significance of the State levies. The Congressional Record and the House and Senate Committee reports must make difficult reading. They are replete with the philosophy of control, regulation, social distribution, opposition to perpetuated accumulation.

Nor is it necessary to employ State power to regulate the inheritance as a technique of federalism. When the Court must delimit the taxing jurisdiction of a State, it can do so as effectually by the criterion of "ordinary excise". A taxable incident or transaction can be found where power to regulate is either lacking or shared with another sovereign. This particular phase of the difficulty is a "space problem" which we shall consider later.

What is perhaps worst in the accepted gravamen of State jurisdiction is the atmosphere of unreality it creates. Justice, though blind, must be candid. The Supreme Court seems to sense the contradiction between this theory and the unmistakable facts, but perhaps feels it is better left unsaid. But facts are unruly and will out.

Wherever the motifs of the tax do not call for extended explication,

24205 U. S. 466 (1907).
the Supreme Court has been more at ease, hence more successful. It early marked the distinction between the estate or inheritance excise and a direct tax on the property itself, and, following this distinction, afforded full liberty to tax governmental securities.\(^{26}\) It dealt generously with legislative classifications in inheritance tax acts, and declined to interfere with statutory rates, deductions and exemptions.\(^{27}\) If a State chose to tax the non-exercise of a special power of appointment, the Court modestly permitted it to do so.\(^{28}\) And in construing the federal act, pragmatic limitations were accepted as to the applicability of State law.\(^{29}\) These matters were gratefully free of the embarrassments we have been discussing. They could be decided without exposing the controlling motives of the tax, and were disposed of courageously and with common sense.

When it came to the construction of the federal act, the Court passed the borderline and entered into the region of social purposes. At first, the change in climate was ignored. The language of the estate tax statute is to be interpreted in terms of its ordinary legal effects and this, like other tax statutes, is to be narrowly construed.\(^{30}\) If a tax is levied on the "passing" of property under exercise of a power of appointment, there is no liability where, by a shrewd use of local law, the property can be shown to "pass" in some other fashion.\(^{31}\) An unfortunate example of this trend (since reversed) could be found in Helvering v. St. Louis Union Trust Company,\(^{32}\) where conveyancer's metaphysics won a temporary victory.

But there had long been rumblings in this blue sky of tax avoidance. As early as Plummer v. Coler,\(^{33}\) the Court had spoken of the inheritance...
tax as "a debt exacted by the state for protection afforded during the lifetime of the decedent,"\textsuperscript{33}\textsuperscript{a} a settlement of the citizen's "final account" with his government. And, in \textit{Watson v. State Comptroller of New York},\textsuperscript{34} an additional inheritance tax on investments which had not contributed to the government treasury during their owner's life, was upheld. The power to classify extended not only to the things classified, but also, said Mr. Justice Brandeis, to "the purposes and policy of taxation."\textsuperscript{33}\textsuperscript{a}\textsuperscript{b} This was heady stuff.

Soon thereafter, the same Justice presented, in its primitive form, a technique of construction which has since won and occupied the field. The test, in interpreting and applying federal inheritance tax statutes, "is a practical, not a technical one." Earlier cases, seemingly in conflict as to principle, are distinguished because "the facts were different."\textsuperscript{35} This boldness, which would never pass in academic discussion, sounded the tonic note. When cases can be distinguished on the facts, the Court has finally come to grips with economic realities, and theories must follow, not lead.

These apparently radical expressions have become the bywords of estate taxation. In Mr. Justice Stone's polished phrase, "the shifting of the economic benefits of property"\textsuperscript{36} is the accepted gravamen of the tax. The Court has said that Congress too, presumably familiar with judicial opinions, has accepted this criterion.\textsuperscript{37} The consequences have been profound. In the construction of the act, the courts have rudely disregarded the nicest and neatest technicalities of tenure, and have returned conveyancers' hair white. The cleverest device has lost its magic and we have almost reached the extreme point where a man has actually to give his property away before he can claim that he no longer owns it.\textsuperscript{38}

Recent cases have revealed interesting ramifications of this revolu-

\textsuperscript{33}\textsuperscript{a}178 U. S. 115, 138 (1900).
\textsuperscript{34}254 U. S. 122 (1920).
\textsuperscript{34}Id. at 125.
\textsuperscript{35}Kahn \textit{v.} United States, 257 U. S. 244, 245 (1921).
\textsuperscript{36}In \textit{Saltonstall v. Saltonstall}, 276 U. S. 260, 271 (1928), the phrase began as "the shifting of the economic benefits and burdens of property." In later cases the "burdens" were not referred to, probably because no one could be found too weak to carry them.
\textsuperscript{37}See note 12 supra.
\textsuperscript{38}Whitney \textit{v.} State Tax Commissioner of New York, 309 U. S. 530 (1940); Helvering \textit{v.} Hallock, 309 U. S. 106 (1940); \textit{Burnet v. Guggenheim}, 288 U. S. 280 (1933); Tyler \textit{v.} United States, 281 U. S. 497 (1930).
tion. In *Higgins v. Smith*, the Court approved, as the basis of constitutional classification, the fairness or unfairness of the exaction in relation to other taxpayers and their shares of the public burden. And, in the *Hallock* and *Whitney* decisions, Mr. Justice Frankfurter dug out the realities of estate distribution with unprecedented success. Here, in clear daylight, was shown the nexus, in the interests of the decedent and the heirs, between property in the estate and property theoretically outside of it. That such a relation exists is commonplace knowledge; that it should be baldly displayed in a Supreme Court decision is extraordinary.

Even in *Helvering v. Hallock*, there remained a partly closed door, a vague twilight in which figures were darkly visible. The results of earlier cases, it was said, were to be "judged by the controlling purposes of the estate tax." What those purposes are was not declared at this juncture. In the *Whitney case*, a thin shaft of illumination was admitted. "Presumably the policy . . . is the diversion to the purposes of the community of a portion of the total current of wealth released by death." The phrase is a heavy one, and can mean much or little. Contrasted with the realism evinced by the balance of the opinion, it would seem rather opaque.

Why the economic test? If the estate tax is a mere revenue measure, like the stock transfer tax, for example, there appears no plausible reason to ignore technicalities of title and to predicate the levy upon so sordid a base. "Possession or enjoyment at or after death" are words that evoke pictures. We imagine the heirs counting up the bonds, figuring rates of return and coupon dates, the widow adding and subtracting through the dark hours of the night to determine whether she must seek a less expensive home, the employees speculating upon discharges and promotions, the in-laws getting ready to make a "touch". This is what Congress visualized. The difference between a defeasible remainder and a possibility of reverter looks like Lincoln's "soup made by boiling the shadow of a pigeon that had starved to death."

Finally, no other criterion of the tax could satisfy its essential purpose. Out of the unschooled clamor against great wealth this levy emerged, to reduce the top peaks in our economic landscape, to bring some of the soil down into the valleys and the deltas. The complaint was economic, earthy—formulated in terms of daily bread. It could not be

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308 U. S. 473 (1940).
309 U. S. 530 (1940).
309 U. S. 106 (1940).
31 Id. at 538.
satisfied by the best of devices for mere collection of governmental revenue. Only some sort of regulation would serve. So it was enacted that those who came into "possession or enjoyment" gratuitously and without the sweat of labor, must bear a progressive tax, a palliating contribution. "Possession" meant something you could use or spend; "enjoyment" an unearned windfall. The law used those terms and the Supreme Court, without wishing to draw the veil of the statute, knew just what they meant.

Consequently, within the strait limits accepted by both the legislature and the court, the social demands were effectually implemented, but only within those limits. What was lacking has become evident in the course of daily administration, that is, a thoroughly pragmatic, relativistic methodology. This lack, corollary to stubborn monism, is best exposed in problems of time and space. There we shall see that blinders are not so good for the driver as they are for the horse.

II

We begin cautiously, and shall avoid the traps and springes of metaphysics. To attempt an exact definition of time and space is as sensible an undertaking as sitting on the limb of a tree while you saw it off. For these are complex notions, arising late in our intellectual development and exceedingly volatile, not to be imprisoned. Association is refined out of experience and strained off by abstraction before one even starts speaking of time and space.

This is exemplified by our technique for measuring time. We do it by means of a spatial metaphor. We watch the movement, in space, of the hand of a clock, or the shadow of a sun-dial to assess the passage of hours. The dizzy spin of the earth on its axis, or its tedious revolution around the sun, these give us our day and year. Time is measured in terms of space traversed, a subtle analogue. But that is not all: we sometimes reverse the process. We can measure space in terms of time elapsed, as anyone knows who ever sat in a train and looked at his watch to see how far he had gone. These forms, space and time, are flimsy as cobwebs, and yet they hold the universe. As James said, "The

42 The perception of space-relations appears very late in the development of a human being, the perception of time even later. Preyer, Die Seele des Kindes (8th ed. 1912) 319. The relativity of subjective time has been noted by many seers, e.g. Psalm xc, 4, and the familiar passage in As You Like It, Act III, Sc. 2, beginning "Time travels in divers paces with divers persons."
great majority of the human race never use these notions, but live in plural times and spaces, interpenetrant and durcheinander.\footnote{\textit{Pragmatism} (1931) 178.}

There is a healthy discipline in such thoughts. One learns to grow wary of artificial structures, to be on the lookout for simplifications however inviting. In the grand sweep of the cosmos, there may well be times but not time, spaces but not space. Such abstractions take us a large step away from the noumenal realm. If we insist on thinking of them monistically, that is, in terms of a single isolated point, we take another large step away. It is this implicit monism, this compression of a plurality of temporal and spatial data into one dot of time, one spot of space, that lies at the heart of the difficulty. Let us start with time, and see.

Our estate tax statutes offer a profitable illustration. Fixing upon the moment of death as the decisive criterion of economic shift, they were at first quite impotent to reach transfers before and after that moment. Through taxation of transfers in contemplation of death and of transfers in which enjoyment for life or power of control was reserved, this automatism has been partially cured. The gaps in the area before death are now fewer and smaller. But the same cannot be said of transfers or shifts after that moment. The use of life estates, legal or equitable, still remains entirely exempt, and is, of course, the most popular device for avoiding the tax. If there is a policy of “one generation, at least one tax,” it is sadly ineffectual. The shift at decedent’s death is noted but the equally significant shift at the death of the life-tenant is ignored.

It may be said that the Supreme Court, at least in its earlier decisions, sketched the outlines of a tax upon transfers after the moment of death. It held that a State inheritance tax could apply to an estate in administration, though decedent had died before the tax was enacted.\footnote{\textit{Cohen v. Brewster}, 203 U. S. 543 (1906); \textit{Carpenter v. Pennsylvania}, 17 How. 456 (U. S. 1854). See also \textit{Patton v. Brady}, 184 U. S. 608 (1902).} And in \textit{Keeney v. New York},\footnote{\textit{Id.} at 525 (1912).} the Court wrote at length on the difference “in law as well as in practical effect”\footnote{\textit{Id.} at 535.} between inheritance in fee and the privilege of creating life-interests, a privilege which involved withdrawing property from the channels of trade and “evading the inheritance tax.”\footnote{\textit{Id.} at 536.} Congress did not take these hints. Its eyes were focussed upon that infinitesimal dot of time, the decedent’s expiring heart-beat. The
later cases in the Supreme Court, disposing of problems of so-called "retroactivity", locked the legislation in that focus.\textsuperscript{46}

The "retroactivity" decisions are excellent examples of judicial monism. They rest upon the axiom that a transfer can occur only once, at one moment in the endless line of time, a moment at which that line is intersected by the direct path of a legal transaction. These lines intersect only once in all eternity. They are straight by definition and will never meet again. Hence a transfer can be taxed only if the statute precedes that utterly unique point.

Now, that the line of time is anything but straight I dare not urge, whatever my private doubts. But that it can be intersected only once by a legal transaction is arrant nonsense. Lawyers could not pay their rent if transactions did not bounce back and up again. The very purpose of any testamentary or quasi-testamentary transfer is that, at selected points of time, it should shift and leap and turn about, weaving a pre-determined pattern. When \( A \) dies, when \( B \) marries, when \( C \) exercises a power, when \( D \) reaches 35, these are all explosive points of intersection. Legal relations, in fine, are conceptual. Whatever the limitations on other categories of cause, concepts can and do operate at plural points of time.

There is still another assumption in the Supreme Court's treatment of the subject. It might be called "the analogy to \textit{Scott v. Shepard},"\textsuperscript{47} the famous squib case. Now, the Court has reasoned somewhat along the following lines: Suppose that immediately after the squib was first thrown in \textit{Scott v. Shepard}, and before it was picked up and thrown again, Parliament had enacted an excise tax on the throwing of squibs. Such a tax should clearly not apply to the first throw because that had already taken place when the tax became law. And as all the subsequent throws were the inevitable outcome of the first, the throwers exercising no free and independent election, they too should not be within the tax. The initial throw set into operation, as a moving cause, all that subsequently occurred, no matter how extensive in time or consequence. If, at


that moment, there was no tax, then the balance of the transaction was scot-free. A man must know about the tax, at least as part of the general revenue system of his government, before it can reach his acts.\textsuperscript{48} That is to say, he must have time in which to order his affairs in terms of their tax significance. If he has irrevocably acted, if he has thrown the squib before the enactment of the tax, then all that follows will share in the exempt character of the initial impulse.

By the same token, if an irrevocable transfer takes place, as by deed of trust, then a subsequent tax cannot reach even those shifts and changes which follow it. More than that, the Court will presume that Congress intended that result, intended to exempt transactions which, though later than the tax, stemmed from solemn instruments antecedent to it. If the legislature, in its careless fashion, should enact a tax upon such transfers “at any time” created, then “at any time” was not intended to mean “at any time,” but “hereafter” instead.\textsuperscript{49} And Congress has accepted that holding with the resigned smile of a husband whose wife explains what he meant to say.

This analogy to \textit{Scott v. Shepard} still permeates the decisions. Even in the \textit{Hallock case},\textsuperscript{50} Mr. Justice Frankfurter found it necessary to remark that the settlors had died before the \textit{St. Louis Union Trust Company decision}, which \textit{Helvering v. Hallock} reversed. This was a rather extreme example, a kind of judicial sport. Retroactivity in the objectionable sense is a term used of legislative action only. The Court has wisely abstained from applying the same criterion to its own conduct, for every judicial decision is largely retroactive, \textit{ex post facto} in its operation.\textsuperscript{51} That is why men come into court,—to determine the legal effect of a long series of acts, after those acts have been completed. Even in equitable proceedings, the acts have been initiated, the squib has had at least its first throw. Who relies on precedent bets on the drift of tomorrow’s wind.

On reflection, the \textit{Scott v. Shepard} analogy and the moralistic attitude it engenders cannot stand. Every tax falls upon the economic scene which it finds, and touches the pockets of those who then have pockets and contents of pockets. No one is entitled to warning of the visit. If taxes and death are inevitable, they are also inherently unpredictable.


\textsuperscript{49}Hassett v. Welch, 303 U. S. 303 (1938).

\textsuperscript{50}309 U. S. 106, 119 (1940).

\textsuperscript{51}Guaranty Trust Co. v. Blodgett, 287 U. S. 509 (1933).
True, a government should, in the exercise of higher politics, so order its revenue measures that citizens may most conveniently plan and execute their affairs. This is an elementary rule of public finance, but it is not a canon of constitutional law.

The doctrine of these cases contains its own refutation. The Court has sensed a weakness, and has freely permitted "retroactive" taxation in more important fields of revenue, such as the income tax. It has never suggested that a tax on land could not be levied until everyone who owned land at the time had a fair chance to sell, or that a capital stock tax must remain impotent as to corporations which already had some capital stock. The concept has been confined to gift and estate tax cases. The rule there is "once exempt, forever exempt."

In this connection, the events following May v. Heiner\(^52\) are highly instructive. They bring our synopsis into sharp relief. It will be remembered that on March 2nd, 1931 the Supreme Court reaffirmed its holding, in the case last mentioned, that mere reservation of enjoyment for life, in an irrevocable trust, did not subject the trust to inclusion in the settlor's gross estate. On the following day, Congress being about to adjourn suspended its rules and by joint resolution reversed this decision. The amendment affected section 302(c) of the Revenue Act of 1926,\(^52a\) which included transfers "at any time made." Then the scope of this resolution came up for determination in Hassett v. Welch.\(^53\) The Court was asked to decide whether it governed a trust created before but whose settlor died after its enactment. Decision of the constitutional question would be neatly sidestepped if a negative answer could be found. It was found.

The Court determined that "at any time" was an ambiguous sort of phrase, sufficiently so to warrant examination of the debates and reports in Congress as indicants of the legislative intent. These debates and reports seemed to show that Congress sought a "prospective" amendment only. Hence the statute applied solely to future trusts, and a constitutional dilemma was avoided.

Now, the superficial criticism of this decision lies in the finding that the Congressional language was ambiguous. We are, however, concerned with deeper things. If the Court found ambiguity where there was none, it at least resolved the question in realistic terms. It sought the intent

\(^{52}\) 281 U. S. 238 (1930).
\(^{52a}\) 44 STAT. 70 (1926).
\(^{53}\) 303 U. S. 303 (1938).
of Congress as best it could, and the latter’s subsequent acquiescence implies that the quest was successful. If a fault was committed, that fault lies far beneath the surface of the statute and has its roots as well in Congress as in the Court. The legislature had learned its lesson of temporal monism too well.

Where did Congress obtain the power to include such transfers in a decedent’s gross estate? The trusts here are assumed to be irrevocable, complete in all respects when created, not made in contemplation of death. All this had been said in *May v. Heiner*, yet the Joint Resolution of 1931 was held constitutional. The nub of the matter is that there is a shift of economic benefits and enjoyments at the death of the settlor, a second shift substantially more significant than the first. When the settlor dies, economic goods pass from one hand to another. It is not the creation of the trust, but this transfer, this shift, this springing up of a new interest, that acts as the gravamen of the tax. If this be so, then we see that both Congress and the Supreme Court fixed their attention on the wrong dot of time. They kept it there because they assumed that only one moment could control, that it all depended on the first throw of the squib, and that “prospective” taxation was to be judged by this sole point of reference.

The fallacy appears stranger when analogous transfers are considered. In dealing with revocable trusts, life insurance policies, gifts in contemplation of death and joint tenancies, the Court’s record has been commendably empirical. True, on occasion, it treated a State tax on an extant trust as impairing the obligation of a contract, but such aberrations have an exceedingly short life-expectancy. On balance, the Court has seemed to recognize the clearer cases of operation at plural moments of time. It has appreciated at least those property-arrangements which we think of as “ambulatory”, as patent substitutes for testamentary disposition. In such instances, the opinions read as though nothing definitive precedes the moment of death, thus preserving the philosophy of temporal monism. On the contrary, though irrevoca-

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56See note 54 *supra*. 
ble action be taken at one moment, consequential shifts at other moments should sufficiently support the tax. If, after the effective date of the statute, any such shift should occur, an excise applicable to it cannot be considered retroactive. Plural points of economic result offer plural points of tax liability. Who chooses the former invites the latter.

Time, as we have seen, does not inhere in legal transactions, but is conferred upon them by legislatures and courts. If the tax-meaning of a transaction flows from its economic incidents, then the time-pattern must rationally follow the same lines. Where transfers involve subordinate or conditional estates, each resultant event constitutes a new point on the temporal graph. The area of a multilateral figure cannot be comprised within a straight line.

III

When we come to problems of space, we encounter an equally friable notion. Here again it is dangerous to attempt definition, to assume that the whole of the concept can be taken in. Even the glorious light of the sun, after travelling its path 93,000,000 miles, can be stopped two miles from the earth by a moist cloud.

To the empiricist, space continues to bear its genetic connotation, a connotation that is strictly motor. Space to him, as to the infant, is something to be traversed, something that lies between him and what he desires, something to be used and subdued. The empiricist thinks of space as beginning where he stands or where his eye holds or his intellect comprehends. So anthropocentric a concept is, of course, bound to be pluralistic. Spaces are as numerous as the satisfactions they promise. Things can be seen to occur in many points at one time, if reflection and utility so direct. On the other hand, the rational absolutist admits only one space, defined in the static fashion familiar to philosophic refrigeration. Space is extension, pure extension cleansed of reference to the thing extended. Our absolutist looks down on it from above and sees only an infinite oneness of which his vision is at the eternal center. These antitheses have appeared clearly in the law of inheritance taxation.\textsuperscript{57}

Here, of course, the Supreme Court has faced a great federal problem, the problem of State jurisdiction to levy inheritance taxes. The attempt to demark the lines of this jurisdiction still continues and involves, now

\textsuperscript{57}Aviation law and socialistic developments in the field of mineral and other subsurface resources have already modified our vertical space concepts.
as formerly, the Court's conception of the nature of space. For the States are divisions of space and legal transactions touching them are operations in space.

We need not rehearse here the history of this topic. The Court has struggled hard to find an acceptable solution, and in its struggles has occasionally borne a close resemblance to Laocoon. There are the three familiar periods, that is, (1) the earlier cases typified by Blackstone v. Miller,\(^{58}\) (2) the cases forbidding all double inheritance taxation, introduced by Wachovia Bank & Trust Company v. Doughton,\(^{59}\) and (3) the present relativistic jurisprudence enunciated in Currey v. McCanless.\(^{60}\) This history is still very much in the making.

The fundamental conflict here has concerned assumptions as to the nature of space. The majority of the Court had become impatient with the series of adjustments culminating in the Frick case\(^{61}\) and sought a capital remedy. Some technique must be hit upon, to subsume double inheritance taxation to the prohibitions of the Fourteenth Amendment and thus to bar it. A technique was discovered, in terms of an axiom as to space. It was this axiom which prevailed for a few short years and finally collapsed under the unremitting attack of brilliant dissenting opinions. It is written, the words of the wise are as goads.

The Court’s majority had adopted a simple thesis. An inheritance tax is an excise on the transfer of property, or on the privilege of transferring it. Now, as a matter of definition, a single transfer can occur in only one place, one spot of space. (The minor premise can be abbreviated into the word “situs”.) Ergo, that alone is the place of jurisdiction to tax. The minority, however, persisted in reacting to all this like Alice, when the White Queen told her something that was simply impossible:

“I can’t believe that!” said Alice.

“Can’t you?” the Queen said in a pitying tone. “Try again: draw a long breath, and shut your eyes.”

Of course, that is just the rub: you do have to close your eyes to believe the impossible, and the dissenting minority would not. With perfectly clear vision, it saw that a man’s death operates upon his property with seismic force. If his property touches upon manifold points of

\(^{58}\)188 U. S. 189 (1903).
\(^{59}\)272 U. S. 567 (1926); Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930).
\(^{61}\)268 U. S. 473 (1925).
space, the eruption can be felt in each of them. And, if the law ordains a transfer from the dead to the living, that transfer is no simple event with a fixed local habitation, but a compound of contributing causes. To pin that transfer down to a single point in space, involves closing one's eyes to all the economic and juridic multiplicity of the operation. A rumble at the domicile may augur explosions all over the nation.

We need to appreciate how thoroughly this question was obfuscated by the Court's general conceptions. The accepted gravamen of State jurisdiction to levy inheritance taxes was (and is) the right or power to regulate the inheritance. If jurisdiction rested on that basis, then the State which could regulate the inheritance was the only State which could tax; and, once you nailed the property down to one spot in the former respect, you had it fixed and tight in the other. The property, it was assumed, had a home of its own. It might wander into other States, it might even enjoy protection in many different places at one and the same time. Nevertheless, it had its anchorage, its single domicile (which might be quite different from that of its owner). This home was called its "situs", simply in order "to clothe a foregone conclusion with a fiction." 82

Now it is clear that for purposes of regulating the inheritance of an item of property, the law of a single jurisdiction should be applied. This is quite necessary as a matter of practical convenience. Under accepted principles, courts do make a choice of pertinent bodies of law and, having selected that of one sovereign, administer and distribute accordingly. What confusion would follow any other course is sufficiently evident in problems of renvoi. Fortunately, the principles are much the same in their application throughout the United States. But these are principles of conflict of laws, not of constitutional law. They are guides for the expression of that comity which sister States owe one another. They are not constrictions upon the inherent force of sovereignty.

Obviously, the fiction of situs may have its utility in matters of conflicts, and may assist courts in the process of selecting applicable law. It pertains to the mechanics of regulating inheritances and whatever justification it may enjoy is in that area. But taxation is an attribute of sovereigns. In collecting revenue, one State may use a scissors, another a razor, and a third may apply leeches. They are all willing to let who will regulate the inheritance, or what remains of it. A sovereign may safeguard the owner, his remedial rights against his debtor, or some

82 Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 98 (1929).
tangible and current symbol thereof. Mr. Justice Holmes thought that the right avenue was through the person of the owner, but there is nothing inherently impassible in the others. The States whose several protection has been sought are entitled to their several taxes. What Curry v. McCanless made clear is that complex intangible rights, spreading their roots into many separate sovereignties, must pay for what they draw up. This, though only one body of law will be employed to regulate the inheritance.

Patently, the Court has at last succeeded in throwing off its access of spatial monism. At least as to multiplicity of property relations, it has abandoned the attempt to compress many spaces into one spot. This emancipation has been excessively hampered by the survival of an early doctrine, one which we have earnestly questioned, to wit: the acceptance of the right to regulate the inheritance as the gravamen of State taxing jurisdiction. The trend is all to the good.

But another type of monism in relation to space still persists. That is the fiction of unique domicile, the doctrine "one man, one home." This concept has been worn to transparency, not by a series of theoretical attacks, but by the steady impact of realities. Persons of wealth have in their mode of living eroded it away. Two, three or four homes, each with equal claim to fealty, can be discerned in the biographies of many rich individuals. The circumstances of Texas v. Florida led to a finding of one home only because the singleness of domicile was accepted as a premise. That so arbitrary an assumption still survives may be a tribute to its utility, or may reflect the general disposition of courts to follow social change at a poltroon's distance. The law, like a man in a rowboat, faces backward and steers its course by its view of what lies behind.

In any event, the federal structure will not be supported by factitious pillars. If limitations are to be imposed upon the taxing powers of the States, they must be induced from the conflicts and concomitances of inter-sovereign relations, seen truthfully and nakedly. A working rule demands an empirical method. That method will remain a mere hope, so long as vision here is obscured by the three fallacies we have seen: first, the fallacy that State jurisdiction must rest upon power to regulate the inheritance; second, the fallacy of attributing a unique situs to each item of wealth; third, the fallacy of single domicile where the facts

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*Safed Deposit & Trust Co. v. Virginia, 280 U. S. 83 (1929).
prove plurality. These errors have often been entwined, one employed to eke out the sleaziness of the other. Perhaps in the future, courts will be readier to envisage the brute facts of a multiple economy.

It is not easy to substitute the many for the one, to face in all their variations and eccentric curvatures those familiar notions of time and space. Singleness has such a comforting overtone, whether accepted in the simple intuitions of childhood or the imposing dogmas of metaphysics. There is plenty of repose in being absolute. It is the "Do not disturb" sign of the intellect. We know that we owe an apology for knocking. The auguries and portents of recent decisions are, however, so encouraging that a commentary on axioms seemed peculiarly appropriate. To those whose serenity may be disturbed, the only answer is that an awakening had to come, sooner or later.
IN RECENT years the problem of company-dominated unions has assumed great importance in the field of industrial relationships. These unions are company-sponsored organizations with definite characteristics that differentiate them from labor organizations sponsored exclusively by the employees. Important characteristics or earmarks of these company-influenced unions are (1) they seldom extend beyond a single plant or business enterprise, (2) they are approved and dominated by management, (3) employees become members automatically when they are given employment and their membership ceases when that employment is terminated, (4) generally no membership dues or fees are assessed, and (5) the rank and file do not have the power of referendum or a voice in such important problems as wages and hours determination.¹

It is generally recognized that this type of unionism first started in 1898 in the William Filene Sons Company. These organizations developed slowly until after the World War when a few companies inaugurated various types of employee representation plans. With the adoption of the National Industrial Recovery Act,² a statute legalizing collective bargaining, company-dominated unions spread very rapidly. In fact, about 70% of these unions in existence in America in 1937 originated since the passing of this important legislation. Particularly did these organizations spring up in the large companies where collective bargaining had been weak and where management had taken a hostile attitude toward union organization. In many cases the trade union was not desirable to management so the company-dominated union offered itself as a substitute with the hope that the federal powers would accept it as a legitimate bargaining agency. This makes these organizations function largely as defense mechanisms.

Undoubtedly this rapid growth of company-controlled unions in the

¹B.A., 1925, M.A., 1926, Ph.D., 1930, State University of Iowa; Assistant Professor of Commerce at University of Iowa; Author: The Employer's Right to Discharge under the Wagner Act (1939) 24 IOWA L. REV. 660; Interstate Commerce as Defined in the National Labor Relations Act (1939) 19 B. U. L. REV. 586; and numerous other articles in various periodicals.
last six or seven years has caused the Federal government to pass laws to encourage self-organization of the workers and to curb the use of company-dominated unions as collective bargaining agencies. For example, Section 2 of the Railroad Labor Act of 1934⁸ makes it unlawful for a carrier to interfere with the organization of employees and to use the funds of the company to maintain a company union. Section 903 (a) of the Social Security Act⁴ allows the idle worker, without jeopardizing his unemployment compensation benefits, to refuse to accept a job with a concern that demands membership in a company union. A similar idea is expressed in Section 7 (a) of the National Industrial Recovery Act which states:

"No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing. . . ."⁵

The National Labor Board,⁶ developing out of the National Industrial Recovery Act to settle industrial disputes arising out of the President's Reemployment Agreement and the codes, spent much of its time dealing with the problem of company-dominated unionism. This Board considered such practices of management as the sponsoring of a union plan, barring outside representation, demanding that representatives for employees in collective bargaining agencies be chosen only from workers who have been in the employ of the company for at least one year, insisting upon possessing voting and veto power, drafting by-laws for the organization, and attending union meetings⁷ as violations of Section 7 (a) of the National Industrial Recovery Act because they frustrated legitimate collective bargaining. The old National Labor Relations Board⁸ in adjudicating labor disputes arising out of the 7 (a) clause interpreted this section to be violated if the union plan was formulated by the employer, if employers participated in the union activities, if employees were not given adequate time to study the plan upon which they were voting, if the plan was not simplified or fully explained to the employees,

⁶The National Labor Board was created by President Roosevelt by virtue of authority under Title I, National Industrial Recovery Act, cited supra note 2.
⁷Chicago Motor Coach Co., 2 N.L.B. 74 (1934); Union Overall Mfg. Co., 2 N.L.B. 29 (1934); Dresner & Son, 2 N.L.B. 26 (1934); Bee Line Bus Co., 2 N.L.B. 24 (1934); Cleveland Worsted Mills, 2 N.L.B. 17 (1934).
and if employees were instructed how to vote. In cases of employer domination this Board held that the association might be disqualified from functioning as an instrumentality of collective bargaining. Frequently this first National Labor Relations Board attempted to solve the company-union problem by ordering an election within the plant and by allowing the company-dominated union a place on the ballot. The matter of whether the union was good or bad was left to the discretion of the employees and if the employees voluntarily accepted the company-sponsored union it could still be a collective bargaining agent. The power of enforcement of the National Labor Board and the old National Labor Relations Board was limited to petitions and references to the Compliance Division of the National Industry Recovery Act and the Department of Justice to initiate legal proceedings against the industrial concern that refused to recognize their orders. Neither of these law-enforcing agencies regarded the cases of these Boards very seriously; therefore, their work was largely nullified.

The National Labor Relations Act places more rigid limitations upon the use of company-dominated unions. In this Act the government adopted a more positive policy toward collective bargaining by recognizing the need for organization to protect the interests of the workers, mainly by equalizing the bargaining power of the employers and employees. This was to be accomplished by giving the workers the right to self-organization without any interferences by management and by listing five categories of unfair labor practices on the part of employers. Section 8 (2) of the Act, which sets forth the second group of unfair labor practices on the part of the employer, forbids management "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." While this section of the National Labor Relations Act outlawed financial and other types of support from the company as unfair pressures because company-paid agents of unions frequently do not receive a wholesome reception


from the employees, and therefore the right of self-organization is curbed, yet the committee on Education and Labor, in its report May 2, 1935, attached a proviso to the second unfair labor practice permitting employees to confer with management during working hours without any loss of either time or pay. This proviso was included so that the negotiations necessary to collective bargaining would in no way be impeded.

An analysis of the cases arising out of Section 8 (2) indicates the attitude of the National Labor Relations Board, created under the National Labor Relations Act, toward company-directed unions. The Board has repeatedly held that there is nothing in the Wagner Act that outlaws the creation of an inside union, independent union, or a union confined to a particular plant provided that these are organized by the workers on their own volition or that they result from the free activity of the employees. The Board only demands that such organizations be free from managerial interference and support. In fact, in the *Aeolian-American Corporation* case the Board ruled that the plant union established was legal because it was not aided by management and that the closed shop agreement with the independent union was valid. This was also true in the *Solvay Process Company* case and the *Uxbridge Worsted Company, Inc.* case where the evidence indicated that the companies involved had not interfered with the workers’ councils in their respective plants. The Board has also ruled that an employee representation plan could not be considered company dominated if the employees may choose between joining it or an outside union as long as the company did not interfere with the outside union. When management issues an order, in good faith, and makes this order effective, that supervisory officers are to refrain from participating in union activity in any way, then the independent union formed is recognized as a legitimate bargaining agency by the Board.

Section 2 (5) of the National Labor Relations Act defines the term “labor organization” as “any organization of any kind, or any agency or employee representation committee or plan, in which employees par-

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ticipate which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." Under this broad definition the Board has included various types of organizations as labor organizations regardless of the form they assume. For example, employee representation plans,\(^{18}\) good-will clubs,\(^{19}\) friendly associations,\(^{20}\) departmental councils,\(^{21}\) shop unions,\(^{22}\) and mutual benefit associations\(^{23}\) have been considered labor unions within the meaning of the Act. However, the Board does not approve of these organizations where they are company-dominated and invade the field of collective bargaining, but recognizes them as labor organizations in order to make Section 8 (2) all inclusive and to bring them under the jurisdiction of the Board. If these associations were not so treated it would be more difficult for the Board to control them and the purpose of the law may be frustrated.

In adjudicating the cases violating Section 8 (2) of the Act brought before it, the Board has been concerned with the forms of interference with legitimate collective bargaining, or with the problem of when a labor organization is company-influenced within the meaning of the Act. In attempting to perform these functions the Board has established definite principles relative to company-dominated unions. Even an unsuccessful or abortive attempt on the part of management to organize a union is considered by the Board to constitute an unfair labor practice because Section 8 (2) forbids domination of unions by management even when the efforts fail.\(^{24}\) Indirect or subtle encouragement of unions or indirect coercion of laborers into joining a preferred union by threatening to move the plant away or by threatening to close the place of business has been ruled to be interference by the Board.\(^{25}\)

The giving of financial support to unions by the company is barred by the Board’s interpretation of the Wagner Act.\(^{26}\) This activity, the


\(^{19}\)Atlanta Woolen Mills, 1 N.L.R.B. 316 (1936).

\(^{20}\)Clinton Woolen Mills, 1 N.L.R.B. 97 (1935).

\(^{21}\)Wheeling Steel Corp., 1 N.L.R.B. 699 (1936).


\(^{23}\)Oregon Worsted Co., 1 N.L.R.B. 915 (1936).


\(^{25}\) Lion Shoe Co., 2 N.L.R.B. 819 (1937); Ansin Shoe Mfg. Co., 1 N.L.R.B. 929 (1936).

\(^{26}\)Servel, Inc., 11 N.L.R.B. 1295 (1939); H. E. Fletcher Co., 5 N.L.R.B. 729 (1938); The Hoover Co., 6 N.L.R.B. 688 (1938); Eagle Mfg. Co., 6 N.L.R.B. 492 (1938); Amer-
Board argues, gives management undue advantages because it thereby can shape the working policies of both the company and the union. The financing of unionism by the company by paying extra salaries to representatives of employees under the plan or by allowing employees or representatives to conduct organizing activities on company time and property without any deduction from their pay, violates the principles of collective bargaining. For example, in the *Iowa Packing Company case*\(^27\) the Board ruled that paying regular wages for union members spending about forty per cent of their time on union business was domination or interference. Also the payment of salaries to employees spending their entire time in handling grievances implies domination.\(^28\) Furthermore, to allow the holding of meetings on company time and property without wage deductions and rental for the meeting place and without granting the rival union the same right is held by the Board to be contributing financial support.\(^29\) Aside from the matter of the company’s giving financial support to unions, the Board has considered other special privileges granted to these organizations as unfair and sufficient to bar them from being collective bargaining agencies within the meaning of the law. Management has been restrained from supervising elections, holding elections in booths made by the company on its property,\(^30\) providing a meeting hall for the union, and granting free use of company property for organizing purposes, such as the use of the company’s secretarial staff, use of company bulletin boards, the company safe and time clock, use of the company automobile, furnishing free bus service to the meetings and the free mimeographing by the company of ballots for election purposes.\(^31\)


\(^2\)Armour & Co., 8 N.L.R.B. 1100 (1938) ; The Cudahy Packing Co., 5 N.L.R.B. 472 (1938) .


\(^4\)Wheeling Steel Corp., 1 N.L.R.B. 699 (1936) .

The National Labor Relations Board has attempted to prevent management from in any way interfering with the starting of a labor union. This includes such practices as "inspiring" the idea for company unionism and preparing the field for company unions by attacks upon legitimate unions.\textsuperscript{32} If, for instance, a plant union is formed to block the Congress of Industrial Organizations or as a buffer union rather than for collective bargaining purposes it is not recognized by the Board as a legitimate organization and therefore can be ordered disestablished.\textsuperscript{33} In the \textit{Stackpole Carbon Company case}\textsuperscript{34} the Board declared a contract invalid which was made with an organization fostered by the company to defeat a bona-fide trade union. An organization resulting from suggestions of management as to the advantages of inside unions over outside unions is company-dominated and cannot function for collective bargaining purposes.\textsuperscript{35} Other forms of interference with the organizing of outside unions include such behavior as endorsing an independent union as the only labor organization that the company will recognize,\textsuperscript{36} the discharge of employees who refuse to join a company-sponsored association,\textsuperscript{37} company solicitation of membership in an inside union,\textsuperscript{38} meetings called by employers on company time and premises to discuss organizing an independent union,\textsuperscript{39} and giving preferential treatment to inside unions\textsuperscript{40} as by circulating petitions and making speeches favoring inside unions.


\textsuperscript{33}Link-Belt Co., 12 N.L.R.B. 854 (1939); Western Felt Works, 10 N.L.R.B. 407 (1938); Hamilton-Brown Shoe Co., 9 N.L.R.B. 1073 (1938).

\textsuperscript{34}Stackpole Carbon Co., 6 N.L.R.B. 171 (1938).

\textsuperscript{35}Maryland Bolt & Nut Co., 14 N.L.R.B. 707 (1939).


\textsuperscript{39}Schwab & Schwab, 10 N.L.R.B. 1455 (1939); U. S. Potash Co., 10 N.L.R.B. 1248 (1939).

\textsuperscript{40}David Kahn, Inc., 14 N.L.R.B. 299 (1939); Coldwell Lawnmower Co., 14 N.L.R.B. 38 (1939); Trenton-Philadelphia Coach Co., 6 N.L.R.B. 112 (1938); G. Sommers & Co., 5 N.L.R.B. 992 (1938); The Triplett Electrical Instrument Co., 5 N.L.R.B. 835 (1938); Botany Worsted Mills, 4 N.L.R.B. 292 (1937).
In several cases the question of the speed with which the management has accepted an association which it favors has been used by the Board as evidential value in determining interference. The Board has insisted that employee representation plans must be carefully and adequately explained to the workers before they are asked to accept them. In the *McKaig-Hatch, Inc. case* evidence indicated that the company had misrepresented the purposes of the organization by claiming that the association was to function as a social and athletic club and not as a collective bargaining agency. The Board has also decided that recognizing a plant union without any effort to determine whether it is agreeable to the majority of the employees in the plant indicates domination, and that rapid negotiations with a company-sponsored union following a refusal to deal with an outside union is unfair. This behavior was considered unfair in the *Hamilton-Brown Shoe Company, Inc. case* when the respondent signed a closed shop agreement with a company-dominated union and then immediately discharged all non-members.

Frequently the Board has discovered an intimate connection between the employer and outside organizers of company-restrained unions and where such a relationship exists it is adjudged to be a violation of the Act. The activities of the police, the mayor, the city attorney, the respondent’s attorney, or the Chamber of Commerce, if encouraged by management, are considered acts of the company because of the collusion involved. For example, in the *Union Drawn Steel Company case* a private police officer participated in the formation of an inside union, and the Board ruled that this was domination because this officer was in close association with the company. Also in the *International Shoe Company case* the non-union activity of prominent business men was

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sanctioned by the company. These citizens advised workers against affiliating with labor unions and advocated the creation of an inside union. The acts of these business men were considered acts of the company because of the mutual interests involved. Generally associations which are creatures of the mayor and influential citizens result from the fear that the company will move away if a bona-fide union enters the plant. So attempts are made to establish an organization that will please the employer and keep the legitimate union out of town. Persistently has the Board rejected such unionism on the grounds that the objective of Section 8 (2) is to protect employees from being "hamstrung" by an organization developed in response to the will of the employer.

The Board has been very cautious about independent organizations arising out of a union that was formerly company-dominated. Particularly has it held that there must be a breathing spell between the dissolution of the company-dominated union and the formation of a new independent union. However, the Circuit Court of Appeals for the Fifth Circuit ruled that the Board had no power to make such demands, and postulated that the employees could immediately organize a new independent union. The factor of interference with union organization is more important than the time element. The independent union, the Board has ruled, is under the power of management if the employer fails to remove all traces of domination after the Act becomes effective. In the Elkland Leather Company, Inc. case incorporation of an independent union would not relieve the employer of liability for his actions in the same, even though the respondent argued that incorporation made the union a new entity. Reorganization of a company-dominated union where the officers, the charter, and the name remain the same is insufficient to legalize such an organization as a collective bargaining agency. Employee representation plans, previously fostered by employers, have not been given legal recognition in some instances even after the employers have withdrawn their support.

50General Motors Corp., 14 N.L.R.B. 113 (1939).
51E. I. DuPont de Nemours & Co., 24 N.L.R.B. No. 98 (June 22, 1940); Bethlehem Steel Corp., 14 N.L.R.B. 539 (1939).
Actual employer participation in drafting by-laws or the constitutions of employee representation plans, and demands that changes in the by-laws can only be made with the consent of the employer are condemned by the Board and are treated as interferences. On numerous occasions independent unions have been ordered disestablished because supervisory officers, foremen, or other company officials either completely drafted the by-laws or assisted in drawing them up. The Board has been insistent that if the constitution and by-laws are not favorable to the interest of the employee then domination is evident. This was true in the American Scale Company case when the Board discovered that the by-laws outlawed strikes and contained a specific statement that employees were organizing voluntarily, two items that seldom appear in trade agreements. The Board has required that the constitution of independent unions contain provisions for effective collective bargaining; that is, not just for the settling of minor disputes but for the discussion of such major problems as hours and wages which have been considered problems of management.

Not only are supervisory officers prohibited from assisting in the drafting of union by-laws and constitutions but the rulings of the Board have barred them from participation in the formation of the plant union in any sense, from holding office in the union, and in many instances from membership in the organization formed. Supervisory officers have been defined as those directing the work of certain departments in the plant and receiving higher wages than the production workers. These supervisory officers are barred from soliciting members for an inside union, from circulating petitions favoring such a union, from even suggesting the value to workers of employee representation programs, or urging inside unionism by discouraging other labor unions.

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54International Harvester Co., 11 N.L.R.B. 471 (1939).


56Ballston-Stillwater Knitting Co., 6 N.L.R.B. 470 (1938).


formed by supervisory employees have frequently been refused a place on the ballot,\textsuperscript{60} and if organized by personnel managers or plant managers they are ordered disestablished.\textsuperscript{61} Independent unions that admit foremen and sub-foremen to membership are in most instances considered dominated by management.\textsuperscript{61} In the Pacific Greyhound Lines, Inc. case\textsuperscript{62} the Board ruled that the attendance of company officials at a union meeting and their participating in the discussion and taking notes were sufficient to indicate interference with the self-organization of the workers. Holding office in a union by important supervisory officers, such as foremen and the secretary to the company president is considered by the Board to defeat the purpose of the Act and is therefore an unfair labor practice.\textsuperscript{63} This behavior according to the decisions is contrary to all collective bargaining policies because it allows the company to be represented on both sides of the conference table.

On the matter relative to the activity of supervisory employees in the formation of a union and their participation in the internal affairs of such a union, the following statement from the Circuit Court of Appeals decision in the Virginia Ferry Corporation case\textsuperscript{64} is pertinent.

“One of the chief purposes of the National Labor Relations Act is to insure that the bargaining agency of employees shall be free of domination or influence by their employer so that in bargaining it shall represent their interests with singleness of mind; and this purpose would be entirely nullified if representatives of the employees should be chosen from among their superior officers, whose interest and duty it is to protect the interest of the employer. We are told on high authority that ‘no man can serve two masters.’ . . . The employer cannot be permitted, directly or indirectly, to sit on both sides of the bargaining table.”\textsuperscript{64a}

From this analysis of the decisions rendered by the Board it is clear that this body has concerned itself with the discovery of characteristics that would be useful in determining whether the organization formed in a plant was a “dummy” union or one that possessed real bargaining

\textsuperscript{60} Kansas City Power & Light Co., 12 N.L.R.B. 1461 (1939); Continental Oil Co., 12 N.L.R.B. 789 (1939); American Petroleum Co., 12 N.L.R.B. 688 (1939); Bethlehem Shipbuilding Corp., Ltd., 11 N.L.R.B. 105 (1939).

\textsuperscript{61} Swift & Co., 10 N.L.R.B. 991 (1939); The Serrick Corp., 8 N.L.R.B. 621 (1938).

\textsuperscript{62} Dow Chemical Co., 13 N.L.R.B. 993 (1939); Hemp & Co. of Illinois, 9 N.L.R.B. 449 (1938); Tiny Town Togs, Inc., 7 N.L.R.B. 54 (1938).


\textsuperscript{64} Western Garment Mfg. Co., 10 N.L.R.B. 567 (1938); Hemp & Co. of Illinois, 9 N.L.R.B. 449 (1938); C. A. Lund Co., 6 N.L.R.B. 423 (1938); Idaho-Maryland Mines Corp., 4 N.L.R.B. 784 (1938).

\textsuperscript{64a} Virginia Ferry Corp. v. N.L.R.B., 101 F. (2d) 103 (C. C. A. 4th, 1939).

\textsuperscript{64b} Id. at 105.
power free from any company domination. Unions are impotent as collective bargaining agencies and are company-dominated in the opinion of the Board (1) if membership in such an organization is automatic, that is, beginning at the time of employment and ceasing when employment ends, (2) if no outside representation is allowed even though the plant employees in the association have made known their lack of experience in the collective bargaining process, (3) if management retains the veto power and can either alter or abolish the plan at any time it sees fit, (4) if there are no membership cards or dues, (5) if no provision for regular meetings of all employees are made so that union representatives can receive instructions and make reports, and (6) if there are no provisions made in the by-laws for actual collective bargaining; that is for discussion relative to the major problems of industry and not only the settling of minor differences.65 This indicates that the Board is in almost complete accord with the current definition of company-swayed unionism.

The National Labor Relations Act not only makes provision for determining company domination of unionism but Section 10 (c) of this Act empowers the Board to issue cease and desist orders and to take such affirmative action as is deemed necessary to effectuate the policies of the Act. The decisions of the Board abound with cases where the company is ordered to cease and desist from interfering with the employees' right to self-organization and from dominating the union structure and from giving financial support to union organizations. The Board is granted legal authority to take affirmative action and order the disestablishment of the company-dominated union.66 The usual procedure of the Board is to order management to withdraw all recognition from such an association as representative of its employees as a bargaining agency for such activities as labor disputes, rates of pay, wages, hours of employment, and other conditions of employment and to post notices accord-


ingly. However, company dominated unions when disestablished as collective bargaining agencies, may continue to perform other functions such as social clubs or organizations for group insurance plans but cannot function as labor organizations. Welfare associations of employees with no power to act as labor organizations are sanctioned by the Board. In the *Titan Metal Manufacturing Company case* the company was ordered to disestablish a management-controlled association as a representative of its employees for the purpose of negotiating with the company in matters of pay, hours and other conditions of employment, but the association could exist as an agency to facilitate a group insurance plan provided that such a plan was not administered to encourage or discourage membership in a labor organization. After the disestablishing order the Board generally calls an election to determine the appropriate bargaining unit but the disestablished union is refused a place on the ballot.

Usually the Board destroys the power of the company union by ordering the management to cease giving effect to any collective bargaining contract entered into by the company-sponsored union and management, or any individual contracts made between individual members of the company-controlled union and management. The Board justifies its invalidation of these contracts on the grounds that they are either tainted with unfair practices or the result of unfair practices; therefore, such contracts thwart the purposes of the Act. In event the Board issues no such order, it disregards the contracts made with a company-dominated union in case of elections.

On a few occasions the Board has ruled that the company should

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*Milne Chair Co., 18 N.L.R.B. No. 10 (1939); Serrick Corp., 8 N.L.R.B. 621 (1938).*

*Utah Copper Co., Inc., & Kennecott Copper Corp., 7 N.L.R.B. 928 (1938); Titan Metal Mfg. Co., 5 N.L.R.B. 577 (1938); Electric Boat Co., 7 N.L.R.B. 572 (1938).*

return dues and initiation fees collected from its employees for the maintenance of a company-dominated union organization because the dues perpetuate the results of unfair labor practices and the employees give part of their wages to provide instrumentalities to frustrate their rights under the Act. The check-off is generally recognized by the Board as a legal method of collecting union dues, but when this device is used to support a company-dominated union it violates Section 8 (2) of the Act.\(^7\) In the *Heller Brothers Company case*,\(^7\) the company argued that dues for the company-dominated association involved were checked off by authorization secured from its employees. Evidence showed that this was true in the majority of instances, but it also indicated that dues were taken from some employees even though they had not given permission. However, the Board concluded that authorization by an employee for the check-off for an organization dominated by the management could not be voluntary because employees must acquiesce or be placed in a position of opposing the desires of the company. Therefore, no free choice could be exercised by employees under such circumstances. On these grounds the company was ordered to not only disestablish the company-influenced union but also to reimburse the employees for the amounts deducted from their pay checks as dues for membership in the organization resulting from company interference. The same reasoning is apparent in the *West Kentucky Coal Company case*.\(^7\) Here the employer was ordered to reimburse employees, individually and in full, for the amounts deducted from their wages, salaries, and other earnings since July 5, 1935, as dues and assessments, for the maintenance of the company-influenced union in question. The records reveal that the company checked off $2,200 per month in dues and assessments for this purpose. Two Circuit Courts of Appeals have denied the Board's right to order the reimbursement of dues collected for company unions on

\(^7\)J. Greenbaum Tanning Co., 25 N.L.R.B. No. 75 (July 19, 1940); Donnelly Garment Co., 21 N.L.R.B. No. 24 (Mar. 6, 1940); Blossom Products Corp., 20 N.L.R.B. No. 35 (Feb. 10, 1940); Titan Metal Mfg. Co., 5 N.L.R.B. 577 (1938).  
\(^7\)Heller Bros. Co., 7 N.L.R.B. 646 (1938).  
\(^7\)Western Union Telegraph, Inc., 17 N.L.R.B. 34 (1939); Corning Glass Works, Macheth-Evans Div., 15 N.L.R.B. 598 (1939); Laird, Schober Co., Inc., 14 N.L.R.B. 1152 (1939);  
West Kentucky Coal Co., 10 N.L.R.B. 88 (1938); Lone Star Bag & Bagging Co., 8 N.L.R.B. 244 (1938).
the basis that such action is punitive and not remedial.\textsuperscript{73}

The Board has also used its affirmative power by not only denying the employers the right to make joining a company-dominated union\textsuperscript{74} a condition of employment but by ordering those workers reinstated with back pay who have been discharged or denied employment for refusal to join a company-influenced union.\textsuperscript{75} The reinstatement order provides that the worker discriminated against be returned to his old position or an equivalent position without injuring his seniority rights or other rights bestowed upon the employees in the plant.

The Board’s treatment of company-dominated unions has been a matter of controversy in the decisions of the federal circuit courts of appeals. Particularly has the right of the Board to disestablish these unions evoked numerous contradictory decisions from these courts. Some of these judicial bodies have held that any domination, even though it be slight, is sufficient to uphold the Board’s disestablishment order.\textsuperscript{76} For example, in the \textit{National Labor Relations Board v. Stackpole Carbon Company case}\textsuperscript{77} the Circuit Court of Appeals for the Third Circuit sustained the Board’s power to invalidate a contract or to order a company to cease giving effect to a contract signed with a company-dominated union. Also the order of the Board for disestablishment of the association, involved in this case, as a collective bargaining agency was sanctioned on the grounds that such action was remedial and not punitive. In another decision\textsuperscript{78} the Board’s order was affirmed even though the company-swayed union had been modified to meet the requirements of the National Labor Relations Act largely on the basis that the modifications still left the union subservient to its creator.

\textsuperscript{73}Kansas City Power & Light Co. v. N.L.R.B., 111 F. (2d) 340 (C. C. A. 8th, 1940); N.L.R.B. v. J. Greenebaum Tanning Co., 110 F. (2d) 984 (C. C. A. 7th, 1940).
\textsuperscript{74}Highway Trailer Co., 3 N.L.R.B. 591 (1937); Lion Shoe Co., 2 N.L.R.B. 819 (1937).
\textsuperscript{75}General Shoe Corp., 5 N.L.R.B. 1005 (1938); The Triplet Electrical Instrument Co., 5 N.L.R.B. 835 (1938); Cudahy Packing Co., 5 N.L.R.B. 472 (1938); Hill Bus Co., Inc., 2 N.L.R.B. 781 (1937).
On several occasions the federal circuit courts of appeals have denied the Board’s right to disestablish a company-sponsored union and have vacated the Board’s findings on the basis that the claims were unsupported by evidence. 79 This scintilla rule has been used against the Board in order to prevent the substitution of opinion for fact and to force conclusions of the Board to be supported by a sufficient amount of relevant and substantial evidence. In Cupples Company Manufacturers v. National Labor Relations Board 80 the Circuit Court of Appeals for the Eighth Circuit ruled that the Board was exceeding its jurisdiction in ordering the disestablishment of an independent association simply because the employer showed preference for an unaffiliated union and hastily recognized the same. These actions on the part of the management, according to the court, taken alone were not indicative of domination. Also one of these courts 81 reversed the Board’s decision ordering the withdrawal of recognition from an association accused of being company-dominated because the company gave advice to the employees. The court here contended that the giving of advice was within the employer’s right of free speech.

The federal circuit courts of appeals have been concerned with the meaning of disestablishment as contained in the Board’s orders. For example, in Cudahy Packing Company v. National Labor Relations Board 82 the Circuit Court of Appeals for the Eighth Circuit found only slight interference by the company with the organization of its workers but considered the evidence used sufficient to uphold the cease and desist order of the Board. However, the disestablishment order was amended so that employees would be assured that they could form an independent union if they so desired. This court undertook to clarify the term “disestablish” so that the employer could understand its meaning and so that the court could enforce the order if the occasion arose. “Disestablish,” according to this court, means “requiring the company not to recognize, support, or encourage the further existence of this particular independent union for any purpose or in any manner.” In National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc. 83 the Circuit

82 Cudahy Packing Co. v. N.L.R.B., 102 F. (2d) 745 (C. C. A. 8th, 1939).
Court of Appeals for the Third Circuit decided that disestablishment was accomplished when the company withdrew its face and financial support from the independent union in question and posted notice to such an effect. Here the company was not required to take any other affirmative action. In *National Labor Relations Board v. A. S. Abell Company*\(^8\) the Circuit Court of Appeals for the Fourth Circuit agreed that the Board had an adequate basis for ordering a company to cease and desist from interfering with the self-organization of its employees, but refused to order the disestablishment of the company-directed union. The court insisted that to force the employer to publish that he would cease and desist from specified prohibited actions would be tantamount to compelling him to admit infractions of the law or that he was guilty of violating these practices in the past. Also the Circuit Court of Appeals for the Sixth Circuit\(^9\) ruled that the Board had no legal power to force a company to admit guilt by posting notices. Instead of being required to post these notices that it would cease and desist, the company was ordered to post notices of the Board's findings together with a statement that the court sustained them. In another case\(^10\) the Circuit Court of Appeals for the Second Circuit resented the Board's statement that the company should withdraw all recognition from the company association because such action would stigmatize the union. The order of the court would not contain such a provision.

The cases relative to company interference with the organization activities of employees finding their way to the United States Supreme Court have been decided in favor of the National Labor Relations Board. In *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*\(^11\) the main questions before the Court were whether the evidence showed that the employer had fostered a labor organization of employees and dominated it in violation of Section 8 (2) of the Act, and whether the Board was empowered to order the company to cease and desist from these practices and to withdraw all recognition of the organization as the representative of its employees and to post notices advising its workers of such action. The Circuit Court of Appeals for the Third Circuit removed from the Board's order the provision demanding withdrawal

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of recognition of the company-dominated union as a collective bargaining agent and the posting of notice of the withdrawal. In sustaining the Board’s ruling in this case, the Supreme Court stated:

"We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of the employer recognition of an existing union before an election by employees under section 9 (c) . . . even though it had ordered the employer to cease unfair labor practices but here respondents, by unfair labor practices, have succeeded in establishing a company union so organized that it is incapable of functioning as a bargaining representative of employees. With no procedure for meeting of members or for instructing employee representatives, and with no power to bring grievances before the Joint Reviewing Committee without employer consent, the Association could not without amendment of its by-laws be used as a means of collective bargaining contemplated by section 7; and amendment could not be had without the employer’s approval.

“In view of all the circumstances the Board could have thought that continued recognition of the Association would serve as a means of thwarting the policy of collective bargaining by enabling the employer to induce adherence of the employees to the Association in the mistaken belief that it was truly representative and afforded an agency for collective bargaining, and thus to prevent self-organization." \(^{87}\)

The Supreme Court reasoned similarly in National Labor Relations Board v. Pacific Greyhound Lines, Inc. \(^{88}\) The Circuit Court of Appeals had refused to enforce the Board’s order that the company withdraw all recognition from the company-restrained union. The Supreme Court, on the other hand, stated that the mere cease and desist order would not be adequate and that unless the company-dominated union was completely dissolved so that no recognition could be involved, the employer may be so situated to nullify an order of the Board. In National Labor Relations Board v. Fansteel Metallurgical Corporation \(^{89}\) the Supreme Court sustained the Board’s order that the company completely disestablish an independent union for the purpose of dealing with the employer on labor questions on the grounds that substantial evidence proved that an independent union resulted from company promotion.

In National Labor Relations Board v. Newport News Shipbuilding and Dry Dock Company \(^{90}\) the Supreme Court of the United States up-

\(^{87}\) Id. at 270-271.


\(^{89}\) N.L.R.B. v. Fansteel Metallurgical Corp., 306 U. S. 240 (1939), rev’d, 98 F. (2d) 211 (C. C. A. 7th, 1938), and aff’d, 5 N.L.R.B. 930 (1938).

\(^{90}\) N.L.R.B. v. Newport News Shipbuilding & Dry Dock Co., 308 U. S. 241 (1939), rev’d
held the Board’s reasoning that the joint revision of a union plan, organized in 1927, by management and the employees to meet the requirements of the National Labor Relations Act was not adequate because the company still had to approve amendments to the plan and this was domination. Further the Supreme Court agreed with the Board in its reasoning that if the plan did meet the requirements of the Act, the history and administration of the association stigmatized it and made it a barrier to self-organization. Therefore, the plan should be disestablished and the slate wiped clean in order to avoid any semblance of interference with free unionization. The following excerpt taken from this case indicates that the Board is justified in dissolving company-influenced unions even if the company interferes incidentally and with good intentions:

“In applying the statutory test of independence it is immaterial that the plan had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives."  

Recently the United States Supreme Court, in National Labor Relations Board v. The Falk Corporation,91 further strengthened the power of the Board over company-dominated unions. The Circuit Court of Appeals for the Seventh Circuit92 partially upheld the disestablishing order of the Board but reversed the Board’s decision which ordered the company to post a notice that it would cease and desist dominating a union by just permitting the company to post notice of the Board’s decree. Also this court denied the Board’s jurisdiction to prevent the placing of the disestablished union on the ballot on the grounds that if this privilege was denied the employees by eliminating the independent union from the election, even though purged of company influence, Section 7 of the Act granting employees the right of self-organization would be violated. The following excerpt from the decision of the Circuit Court of Appeals for the Seventh Circuit is significant.

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the modifying order of, 101 F. (2d) 841 (C. C. A. 4th, 1939), and aff'g, 8 N.L.R.B. 866 (1938).
904Id. at 251.
"It may be true, and the Labor Board has so found and we have approved of its finding, that the employer exerted improper influence in favor of the Independent Union as the employees’ bargaining agency and for that reason the selection of that body is, by this order, set aside. This, however, does not justify our refusing to the employees the right to freely select their bargaining agency,—even though their selection be the same one as was chosen before, when there was improper influence by the employer." ⑨2a

The United States Supreme Court reversed the lower court’s decision and upheld the Board’s ruling that the independent union involved was used by the company "as a convenient weapon to prevent the exercise of its employees’ rights to self-organization and collective bargaining," and therefore should be completely disestablished and refused a place on the ballot in the proposed election. The United States Supreme Court stated that the plant union should not be permitted on the ballot because even if it had been purged of company domination it could never entirely free itself from being subservient to its creator. The implication of the lower court was that the company-influenced union had been disestablished temporarily but could still be selected by the workers as a collective bargaining unit. This reasoning did not meet the approval of the Supreme Court. In regard to the company’s posting a cease and desist notice this highest tribunal ruled that the mere posting of the Board’s decree was insufficient to inform the employees that they could choose the union of their own liking.

The foregoing discussion indicates that while the Board assumes that the independent union or the company union can be a helpful instrumentality of collective bargaining and industrial cooperation, it also recognizes that company-sponsored labor organizations are potential evils to legitimate bargaining activities. The Board does not condemn company unionism as such because some are free from company interference, but it has severely handled illegitimate independent unions and has persistently demanded that the independence given to workers in their organizing campaigns be genuine and not illusory. Implied in the rulings of the Board is the intimation that while inside unions are legitimate they are not as valuable to the laborer as the national unions because the latter have skilled organizers, experienced negotiators of trade agreements, and sufficient funds for extensive operations. It is clear that the Board’s decisions, which have received the sanction of the United States Supreme Court, relative to company-dominated unions, virtually destroys the employers’ power to bargain with a minority group of workers in the plant and increases greatly the Board’s regulatory power in the field of employee and employer activities.

⑨2a Id. at 456.
THE UNITED STATES COURT OF CLAIMS

E. E. NAYLOR*

SINCE immunity from suit is one of the attributes of sovereignty, and the Federal Government is a sovereign, it is axiomatic that the Federal Government cannot be sued without its consent.

It is the purpose of this article to discuss the Court of Claims which was created in order to give persons having claims of certain designated types or classes against the government the opportunity of litigating these claims.

History and Development—Prior to 1855

From the ratification of the Federal Constitution to the establishment of the Court of Claims in 1855 there was no procedure whereby a person could bring suit against the Government. Since the beginning of our Government many claims have arisen against it, which could not be enforced by suit. The only avenue of redress was to petition Congress for relief, since it was vested with the absolute power of determining the conditions under which money could be withdrawn from the Federal Treasury. ¹

The act ² establishing the Treasury Department provided for the consideration of claims against the United States, and in 1817 ³ it was provided that all claims and demands by or against the Government were to be settled by the Treasury Department. If the Treasury rejected the claim, the claimant’s only recourse was to petition Congress. Not infrequently claimants with meritorious claims abandoned their efforts to obtain relief from Congress because of the great length of time involved while other persons with doubtful or fictitious claims, by log-rolling and pressure tactics, succeeded in coercing Congress to pass “relief bills”. Obviously, the whole procedure was very unsatisfactory both to Congress and to honest petitioners.


¹U. S. Const., Art. I, § 9, cl. 7.


Creation of the Court of Claims

Finally in 1855, Congress established a forum called the Court of Claims. This court was established to hear and determine claims against the United States brought before it by a petition of the claimant and based, (1) upon any law of Congress, (2) upon any regulation of an executive department, or (3) upon an express or implied contract with the Government. It was also to hear and determine claims which might be referred to it by either House of Congress. The court was not given the power to enforce its findings but only had authority to hear and determine the merits of claims within its jurisdiction which were presented to it by claimants or forwarded to it by Congress. Its conclusions were embodied in reports to the Congress, and this body determined whether funds should be appropriated for the payment of such claims. The court possessed little more power than a committee of investigation, its power extending only to the preparation and submission of bills to Congress. As stated in the case of United States v. Klien, "The court (Court of Claims) was established in 1855 for the triple purpose of relieving Congress, and of protecting the Government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims."

Realizing the shortcomings of the court as originally established, Congress passed an act in 1863, which conferred upon the court real judicial powers. Section 2 of the act provided that the court could render judgments and Section 3 of the act provided that such judgments were to be final except in certain cases, however, Section 14 of the act made provision for the Secretary of the Treasury to estimate for appropriations before judgments were paid. The Supreme Court held that Section 14, by implication, gave the Secretary of the Treasury the power to revise decisions of the Court of Claims because payment of such judgments depended upon his willingness to include an amount in his estimates for the payment of such judgments, and therefore dismissed an appeal from a judgment of the Court of Claims. This action of the

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5United States v. Klien, 3 Wall. 128, 144 (U. S. 1871).
7Gordon v. United States 1 Ct. Cl. 1 (1863). The decision was stated by the court reporter in 2 Wall. 561 (U. S. 1864), but the opinion is found in 7 Ct. Cl. 1. See the opinion (same case) written by Chief Justice Taney, reported in 117 U. S. 697. See also Pocono Pines Hotel Co. v. United States, 73 Ct. Cl. 471 (1932).
Supreme Court clearly indicated that an appeal could not be taken to that court from the Court of Claims so long as Section 14 of the Act of 1863, *supra*, remained in force.

Three years later Congress repealed Section 14 of the Act of 1863, *supra*, and specifically provided that, "... an appeal shall be allowed to the Supreme Court of the United States, at any time within ninety days after the passage of this act, except in cases where the amounts found due by said court have been paid at the Treasury."

The most important and far-reaching law relative to the Court of Claims enacted since the organic act was the Tucker Act.

The concurrent jurisdiction of the Federal District Courts with the Court of Claims is derived from this act.

The laws of the United States relating to the judiciary were codified, revised and amended by the Act of March 3, 1911, since known as the Judicial Code, and Chapter 7 of this Code relates to the Court of Claims. These were the principal statutory enactments and stages which marked the growth and development of the powers, duties and functions of the Court of Claims from the time of its creation in 1855 to the present time.

**Status of the Court of Claims**

The uniqueness of the Court of Claims has raised the question as to whether the court is a legislative or a constitutional court. This question was thoroughly considered in *Williams v. United States*.

In this case one of the judges of the Court of Claims sought to recover a reduction in his salary which had been made pursuant to a ruling by the Comptroller General that the Act of June 30, 1932, applied to the Court of

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*22 Stat. 485 (1883), 28 U. S. C. § 254 (1934), known as the Bowman Act, provided for reference to the Court of Claims by congress or the executive departments of claims involving controverted questions of law or facts. In connection with references by executive departments see also Rev. Stat. § 1063 (1878), 28 U. S. C. 254 (1934).*

*24 Stat. 505 (1887), 28 U. S. C. §§ 250 (1) and (2), 251 (1934). A careful reading of this Act is required to appreciate the far reaching effect of the amendment.*

*The Judiciary Act of March 3, 1911, 36 Stat. 1167 (1911), 28 U. S. C. § 430 (1934), abolished the federal circuit courts and transferred their powers and duties to the federal district courts, and consequently the district courts now also have the jurisdiction conferred on the circuit courts by the Tucker Act.*

*36 Stat. 1087 (1911), 28 U. S. C. § 1 et seq. (1934).*


*Williams v. United States, 289 U. S. 553 (1933).*

*47 Stat. 382, 402 (1932).*
Claims. The Supreme Court in deciding that the Court of Claims was a legislative court, and not a court established under the judicial power in Article III, Section 2 of the U. S. Constitution, stated:

"From whatever point of view the question be regarded, the conclusion is inevitable that the Court of Claims receives no authority and its judges no rights from the judicial article of the Constitution, but that the court derives its being and its powers and the judges their rights from the act of Congress passed in pursuance of other and distinct Constitutional provisions."15a

Justice Van Devanter, in Ex parte Bakelite Corp., indicating that the Court of Claims is a legislative court, stated:

"It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies."

Work of the Court of Claims—Jurisdiction Co-extensive with "Consent Given"

All of the suits brought in the Court of Claims are against the United States and the jurisdiction of the court is co-extensive with the consent which Congress has given. The court exists only because the Government has consented to be sued in certain specified situations17 and this consent may be withdrawn by the Congress at any time.18 Moreover, suit in the Court of Claims is not a common law right but rather a grant, and "he who would avail himself of the grant must use it as it has been given."19 The court may not extend its jurisdiction beyond the letter of the consent given by statute, even though an extended jurisdiction would appear to be desirable both in fact and in the eyes of the court.20

Thus, it is clear that the court does not have a general jurisdiction extending to all claims against the Federal government, but only to those specifically designated by Congress.21 Pleading in the Court of Claims is not bound by narrow, technical rules,22 and jurisdictional re-

16Ex parte Bakelite Corporation, 279 U. S. 438, 451, 452 (1928).
17Schillinger v. United States, 155 U. S. 163 (1894).
19McElrath v. United States, 12 Ct. Cl. 312 (1876).
22Thomas v. United States, 15 Ct. Cl. 335 (1879).
requirements which a claimant must meet can not be set up by the court since only Congress has that power.\textsuperscript{23}

Neither the Court of Claims, nor a Federal District Court sitting as a Court of Claims, has jurisdiction of claims based on violation of treaties.\textsuperscript{24} Although Congress has specifically provided that the court shall not have jurisdiction of claims against the Government arising out of treaties with Indian Tribes,\textsuperscript{25} Congress may, by a special act, confer such jurisdiction upon the court.

\textit{Claims Founded Upon Any Law of Congress}

The provisions of law which give the Court of Claims jurisdiction of claims founded upon any law of Congress\textsuperscript{26} appear to be exceedingly broad and all inclusive. Many exceptions to this jurisdiction, and exceptions to the exceptions, are discernible in the cases. These were classified by Chief Justice Nott, in \textit{Foster v. United States}\textsuperscript{27} substantially as follows:

"1. Where Congress creates a class of claims and provides a jurisdiction for the ascertainment and allowance of such claims, the jurisdiction thus established is exclusive.

"2. The Court of Claims has jurisdiction of a case referred to it for a determination of a question of law by an officer having authority to allow the claim.

"3. The Court of Claims has jurisdiction where the accounting officers refuse to give effect to an award made by a duly authorized official.

"4. Where a class of claims is created by Congress and the claims are referred to the accounting officers for investigation and settlement, the determinations of the accounting officers are not final, and the Court of Claims has jurisdiction of the claims.

"5. Where a class of claims is created by Congress with directions to the Secretary of the Treasury to pay amounts found due, no special jurisdiction is created and an action will lie in the Court of Claims.

"6. Where the faith of the United States is pledged by Congress in consideration of a person doing some act, action of the Secretary of the Treasury and the revenue officers is not conclusive and an action will lie in the Court of Claims upon the statutory obligation of the Government."

"As generally stated", said the Court of Claims in \textit{N. Y. Central R. R.}

\textsuperscript{23}Clyde v. United States, 13 Wall. 35 (U. S. 1871).
\textsuperscript{24}George E. Warren Corp. v. United States, 94 F. (2d) 597 (1938).
\textsuperscript{27}Foster v. United States, 32 Ct. Cl. 170, 184 (1897).
v. *United States*,\textsuperscript{28} "the rule is that where the statute creates a right against the United States, but does not furnish the remedy, it may be found in the Court of Claims." Thus, an officer, who has performed certain services and whose pay is fixed by law, is not precluded from obtaining relief in the Court of Claims by reason of the fact that Congress has made no appropriation for his pay, for while the Treasury is not authorized to make the payment in the absence of an appropriation act, the Government is liable for the amount regardless of whether an appropriation act has been passed and the officer may sue in the Court of Claims for the amount due.\textsuperscript{29} The fact that an appropriation available for the purchase of equipment has lapsed, does not bar the contractor from recovering in the Court of Claims.\textsuperscript{30}

**Money Claims**

The jurisdiction of the Court of Claims is limited to claims against the United States for the payment of money,\textsuperscript{31} but such claims may be forever defeated if fraud is practiced.\textsuperscript{32}

**Contracts, Express and Implied**

The Court of Claims has jurisdiction to hear and determine all claims, except pensions, founded "... upon any contract, express or implied, with the Government of the United States,"\textsuperscript{33} and it is this type of claim which the court is chiefly called upon to adjudicate. A claimant who seeks to recover upon an implied contract with the Government must show that there has been a meeting of the minds.\textsuperscript{34} Contracts implied in fact may be the basis of actions against the Government in the Court of Claims, but contracts implied in law may not.\textsuperscript{35} When prop-

\textsuperscript{28}N. Y. Central R. R. v. United States, 65 Ct. Cl. 115, 122 (1928).
\textsuperscript{29}Danford v. United States, 62 Ct. Cl. 285 (1926); Strong v. United States, 60 Ct. Cl. 627 (1925); Collins v. United States, 15 Ct. Cl. 22, 35 (1879); Wood v. United States, 15 Ct. Cl. 151 (1879).
\textsuperscript{30}Whitlock Coil Pipe v. United States, 71 Ct. Cl. 759 (1931).
\textsuperscript{31}United States v. Alire, 6 Wall. 573 (U. S. 1867).
\textsuperscript{32}36 STAT. 1141 (1911), 28 U. S. C. § 279 (1934).
\textsuperscript{34}Russell v. United States, 182 U. S. 516 (1901).
\textsuperscript{35}Alabama v. United States, 282 U. S. 502 (1931); Goodyear Tire and Rubber Co. v. United States, 276 U. S. 287 (1928).
property to which the Government asserts no title is taken for public use, an implied contract to pay just compensation for the property arises;\(^6\) on the other hand, where the Government takes, under claim of title, and denies superior title in anyone else, the officers of the Government who take the property will be guilty of a tort if in fact the property is actually private property, but no implied contract to pay will arise and thus, the Court of Claims would not have jurisdiction in such a case.\(^7\)

**Tort Claims**

Although Congress, by special statute, may confer jurisdiction upon the Court of Claims to hear and determine a tort claim against the Government\(^8\) the general jurisdiction of the court does not extend to tort claims against the United States.\(^9\) The Tucker Act provided that the court would have jurisdiction of claims “for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable…”\(^10\) (Italics supplied)

In Schillinger v. United States,\(^11\) the Supreme Court stated that Governments are not liable for “unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties.” Congress has reserved to itself the power to give or withhold relief where claims are founded upon the wrongful proceeding of a Governmental officer,\(^12\) and a plaintiff cannot evade the settled dis-

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\(^{(1)}\)United States v. Lynah, 188 U. S. 445 (1903). A distinction is made between “damage” and “taking” in Bradford v. United States, 192 U. S. 217 (1904), where claimants were denied recovery because the land had been “damaged” rather than “taken”.  
\(^{(2)}\)Langford v. United States, 101 U. S. 341 (1879).  
\(^{(4)}\)Harley v. United States, 198 U. S. 229 (1905); Russell v. United States, 182 U. S. 516 (1901). The Act of May 24, 1938, 52 Stat. 438 (1938), 28 U. S. C. A. § 729 (Supp. 1940), conferred general jurisdiction upon the Court of Claims to hear claims for damages sustained by persons who had been wrongfully convicted and imprisoned for alleged crimes against the United States. The act limited the amount of damages to $5,000.  
\(^{(6)}\)Schillinger v. United States, 155 U. S. 163 (1894).  
\(^{(7)}\)Morgan v. United States, 14 Wall. 531, 534 (U. S. 1872); Gibbons v. United States, 8 Wall. 269, 275 (U. S. 1869).
tinction between an action in contract and an action in tort by disguising the claim so that it appears to be upon an implied contract.42

Equity Jurisdiction

The Court of Claims has equity powers,43 but the jurisdiction of the court in this field is limited.44 The jurisdiction of the court is limited to judgments for money in equity cases,46 as in other cases, nevertheless, the court does have power to reform contracts in certain situations. As stated in Olympia Shipping Corp. v. United States,46 the Court of Claims "has equitable jurisdiction to reform a written instrument but the only rule of equity upon which this court might invoke such jurisdiction is the doctrine of mutual mistake and this principle has been applied in all of the decided cases." The equity jurisdiction of the Court of Claims to reform a contract as a basis for a judgment of money damages was upheld by the Supreme Court in the case of United States v. Milliken Imprinting Co.47 Section 3744, Revised Statutes, provides that contracts made by the Secretaries of War, Navy, and Interior Departments must be reduced to writing and signed by the contracting parties, but this section will not prevent the reformation of a contract by the Court of Claims in a proper case against the United States. In like manner, reformation of a contract will be allowed notwithstanding the Statute of Frauds.48

Foreign Claims and Claims by Aliens

Section 155 of the Judicial Code,49 provides that "Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims whereof such court, by reason of their subject matter and character, might take jurisdiction."50 This section of the Judicial Code was construed by the Court of Claims in

46Olympia Shipping Corp. v. United States, 71 Ct. Cl. 251, 262 (1930).
50For two early cases applying this provision, see Dauphin v. United States, 6 Ct. Cl. 221 (1870), and De Give's Case 7 Ct. Cl. 517 (1871).
Brodie v. United States,51 to be a "reciprocity provision". In rejecting
the claim filed by a British subject for damages for infringement of a
patent, the court stated:

"The true test is not whether a citizen of the United States may prosecute an
action of a particular nature in a British court, but whether the doors of the
British courts are open to American citizens for the prosecution of "claims"
against the crown, but necessarily only such claims as might be prosecuted by
British subjects, for there, as here, there are classes of actions as to which the
sovereign has not consented to be sued."

Relations with Government Employees and Governmental Units
Section 24 of the Judicial Code,52 which gives the United States
District Courts concurrent jurisdiction with the Court of Claims, speci-
fically provides that the District Courts shall not have "jurisdiction of
cases brought to recover fees, salary, or compensation for official services
of officers of the United States. . . ." In the case of Scully v. United
States,53 the court stated that "By the term 'official services,' as used in
the statute, we are to understand only those services which are peculiar
to the office of an 'officer of the United States,' and which such officers
are by law authorized, or required to perform." The salaries of em-
ployees of the Federal Government for services rendered by them is
under the control of Congress with the exception of salaries for the
President and judges of the Federal Courts,54 and claims for compensa-
tion for salary and mileage by Congressmen come within the jurisdic-
tion of the Court of Claims since such claims are founded upon "a law
of Congress".55 However, where the right to a Government office is dis-
puted, the Court of Claims does not have jurisdiction to hear and deter-
mine a claim for back salary until the right to such office has been
determined by a court of competent jurisdiction.56

Concurrent Actions on the Same Claims

The Judicial Code provides that a person may not sue the United
States in the Court of Claims, or on appeal therefrom in the Supreme

51Brodie v. United States, 62 Ct. Cl. 29, 46 (1926).
54United States v. McDonald, 128 U. S. 471 (1888). See Williams v. United States, 289
U. S. 553 (1932), relative to whether the Court of Claims is a "legislative" or a "constitutional"
-court, and holding that salaries of its judges may be reduced by act of Congress.
56Goodwin v. United States, 76 Ct. Cl. 218 (1932).
Court, for a claim for which he is already suing the person, who acted as agent for the United States in the transaction out of which the claim arose, in another court. 57 The fact that the Statute of Limitations is about to bar the action does not save the case from this provision of the Judicial Code. 58 This provision of the Judicial Code does not apply where the United States, instead of an agent is defendant in the suit pending in another court, the purpose of the section not being merely to prevent two suits at the same time but rather, as stated in Matson Navigating Co. v. United States, 59 "to require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be res adjudicata in the suit pending in the Court of Claims." (Italics supplied)

Relations With the Comptroller General 60

When Congress makes an appropriation for the payment of particular claims which the accounting officers of the Government may certify as entitled to payment but does not give exclusive jurisdiction to the accounting officers, the Court of Claims would still have jurisdiction to hear such claims. 61 On the other hand, where Congress, by statutory enactment, vests "in the Comptroller General complete and exclusive discretion in the factual determination of what would be a fair and equitable settlement," the Court of Claims does not have jurisdiction to review the Comptroller General's decision. 62 In many cases, contracts with the Government provide that the findings of the contracting officer or some other official on certain matters which may arise under the contract are to be final and conclusive upon both parties. In such cases, neither the courts nor the Comptroller General can go behind the findings of fact of the designated official, unless there is fraud or bad faith. 63 The decision of the Comptroller General cannot be substituted for that of the contracting officer, 64 in such cases and if "the contracting officer

58 Corona Coal Co. v. United States, 263 U. S. 537 (1924).
61 Sowle v. United States, 38 Ct. Cl. 525, 533 (1903).
62 John B. Kelley Inc. v. United States, 87 Ct. Cl. 271 (1938).
63 McShain Company Inc. v. United States, 83 Ct. Cl. 405 (1936).
fails to perform the duties imposed upon him by the contract, it is the duty of the court to perform this service and pass on the legal rights of the plaintiff."

In the case of Stewart & Co. v. United States, the Court of Claims indicated that the findings of a designated officer under a contract would not be accepted as conclusive where there was fraud, "such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment." In a situation of this type the plaintiff must prove bad faith and that the loss was directly occasioned by this bad faith. The General Accounting Office may not prevent a claimant from bringing suit in the Court of Claims for the difference between the amount of a check forwarded to him and the amount which is admitted to be due and owing to the claimant. In the case of Briggs & Turivas v. United States, the court said: "The defendant may not discharge an indebtedness to the plaintiff by mailing or tendering a check for a sum much less than is admittedly due and imposing obligations upon acceptance thereof which foreclose the plaintiff from thereafter asserting its lawful claim," and where it appears that the accounting officers made a mistake in stating the claimant's account, the Court of Claims has jurisdiction to render judgment for the proper amount.

Referred Questions and Claims

Questions and Claims which are referred to the Court of Claims are from two general sources, namely, (1) from Congress, and (2) from the Executive Departments.

Congressional References

Section 151 of the Judicial Code provides certain conditions under which either House of Congress may refer bills to the court for the investigation and determination of facts. Since in such cases the findings are merely advisory and not binding on either party, and no judgment of the court is given, it follows that the rule of "res adjudicata" does not

Ct. Cl. 714 (1934); Sun Shipbuilding Co. v. United States, 76 Ct. Cl. 154 (1933). See also Voucher Examination Memorandum No. 236, Commission of Accounts and Deposits (Feb. 8, 1940).

Karno-Smith Co. v. United States, 84 Ct. Cl. 110, 124 (1936).

Stewart & Co. v. United States, 71 Ct. Cl. 126 (1930).

Miller v. United States, 53 Ct. Cl. 1 (1917).

Briggs & Turivas Inc. v. United States, 72 Ct. Cl. 674, 678 (1931).

Gove v. United States, 49 Ct. Cl. 251 (1914).

apply.\textsuperscript{71} The findings are merely to aid Congress in performing its legislative functions,\textsuperscript{72} and such reports should contain everything which is necessary so that Congress may readily understand the case,\textsuperscript{73} but should not include conclusions of law.\textsuperscript{74} In addition to these advisory opinions Section 151 of the Judicial Code also gives the Court of Claims jurisdiction to render judgment on claims referred to it by Congress for a report, where the claimant could have brought the claim to the court without Congressional reference under the court’s general jurisdiction.\textsuperscript{75} Congress by special act may confer jurisdiction upon the Court of Claims to hear and determine a type of claim which is not within the general jurisdiction of the court.\textsuperscript{76}

\textit{Reference by Heads of Executive Departments}

The heads of the executive departments under Section 148 of the Judicial Code\textsuperscript{77} may refer claims to the Court of Claims. The circumstances under which a claim may be transmitted by the head of an executive department are very well set forth by the Supreme Court in the case of \textit{United States v. New York},\textsuperscript{78} as follows:

\begin{quote}
"First, any claim made against an Executive Department, ‘involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case or where any authority, right, privilege or exemption is claimed or denied under the constitution of the United States’, may be transmitted to the Court of Claims by the head of such department under Section 1063 of the Revised Statutes (Section 148, Judicial Code) for final adjudication; provided, such claim be not barred by limitation, and be one of which, by reason of its subject matter and character, that court could take judicial cognizance at the voluntary suit of the claimant.

"Second, any claim embraced by Section 1063 of the Revised Statutes (Section 148, Judicial Code) without regard to its amount, and whether the claimant consents or not, may be transmitted under the Bowman Act to the Court of
\end{quote}

\textsuperscript{71}Hunt \textit{v. United States}, 45 Ct. Cl. 566 (1910).

\textsuperscript{72}Wilkes \textit{v. United States}, 43 Ct. Cl. 152 (1908).

\textsuperscript{73}The Friendship, 49 Ct. Cl. 204 (1914).

\textsuperscript{74}Ayres \textit{v. United States}, 44 Ct. Cl. 110 (1908); Guttormsen \textit{v. United States}, 43 Ct. Cl. 299 (1908).

\textsuperscript{75}Post \textit{v. United States}, 49 Ct. Cl. 105 (1913).

\textsuperscript{76}See, for example, Butler Lumber Co. \textit{v. United States}, 73 Ct. Cl. 270 (1931); Harbor Springs \textit{v. United States}, 72 Ct. Cl. 32 (1930).

\textsuperscript{77}36 STAT. 1137 (1911), 28 U. S. C. § 254 (1934). See also REV. STAT. § 1063 (1875).

Claims by the head of the Executive Department in which it is pending for a report to such department of facts and conclusions of law for "its guidance and action".

"Third, any claim embraced by that section, may, in the discretion of the Executive Department in which it is pending, and with the expressed consent of the plaintiff, be transmitted to the Court of Claims, under the Tucker Act, without regard to the amount involved, for a report, merely advisory in its character, of facts of conclusions of law.

"Fourth, in every case, involving a claim of money, transmitted by the head of an Executive Department to the Court of Claims under the Bowman Act, a final judgment or decree may be rendered when it appears to the satisfaction of the court, upon the facts established, that the case is one of which the court, at the time such claim was filed in the department, could have taken jurisdiction, at the voluntary suit of the claimant, for purposes of final adjudication."

The head of a department does not have to obtain the consent of the claimant in order to transmit the claim or matter to the Court of Claims, but where the consent of the claimant has been obtained "and the court has jurisdiction, it shall proceed to judgment."\(^79\) A claim is "pending" in a department and transferable to the Court of Claims when it is presented to the department for payment,\(^80\) but a claim which a department has no jurisdiction to settle is not a claim "pending" in the department within the meaning of the Tucker Act, \textit{supra}.\(^81\) After a claim has been settled by the accounting offices, the claim is no longer "pending" in the department and the head of the department cannot confer jurisdiction upon the Court of Claims by referring the claim to it, since the balances certified by the accounting officers are conclusive upon the executive department.\(^82\)

The decision by the head of a department finally adjudicating a claim, the claimant having been given an opportunity to be heard is "res adjudicata,"\(^83\) and a succeeding head of the department is precluded from transmitting such claim to the Court of Claims.\(^84\) The fact that a claim is referred to the Court of Claims after the statutory period has run will not bar the claim, if it was presented to the proper department

\(^79\)\textit{In re} White Earth Roll, 50 Ct. Cl. 19 (1914).
\(^80\)\textit{Jackson} v. United States, 19 Ct. Cl. 504 (1884).
\(^81\)\textit{Cantua} v. United States, 43 Ct. Cl. 569 (1908).
\(^83\)\textit{Day} v. United States, 21 Ct. Cl. 262 (1886).
\(^84\)\textit{Jayne} v. United States, 21 Ct. Cl. 311 (1886).
within the statutory period, that is to the department which had jurisdiction to allow and settle the claim.\textsuperscript{85}

\textit{Defenses}

The Government, when sued in the Court of Claims, may take advantage of offsets and counterclaims against the claimant and may plead the Statute of Limitations.

\textit{Offsets and Counterclaims}\textsuperscript{86}

Under the provisions of Section 145, Part 2 of the Judicial Code,\textsuperscript{87} the jurisdiction of the Court of Claims is extended to "all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court . . ." while Section 146 of the Judicial Code,\textsuperscript{88} provides in part that: "Upon the trial of any cause in which any set-off, counterclaim, claim for damages, or other demand is set-up on the part of the Government against any person making claim against the Government in said court, the court shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided by law." Thus, whenever the claimant avails himself of the right to sue the Government for compensation, the claim is subject to offsets or counterclaims which may be entered by the Government to reduce or completely wipe out the Government's indebtedness. If the counterclaim for the Government is larger than the claim of the plaintiff, the court, upon proof of such counterclaim, may render judgment for the Government for the amount by which the counterclaim exceeds the plaintiff's claim.\textsuperscript{89} When suit is brought against the Government for an amount alleged to be due under one contract, the Government may offset an amount due it by

\textsuperscript{86}In this connection see Naylor, \textit{Legal Basis for the Recovery of Loans Made by Government Agencies} (1940) 26 VA. L. REV. 302.
\textsuperscript{87}36 Stat. § 1136 (1911), 28 U. S. C. 250 (2) (1934).
\textsuperscript{89}Gulf Refining Co. v. United States, 58 Ct. Cl. 559 (1923); Johnson v. District of Columbia, 49 Ct. Cl. 8 (1913).
that contractor under another contract. A counterclaim by the Government in an action brought against it by a claimant must be supported by proof of the type which the claimant must offer to prove his claim, and if a counterclaim in favor of the Government is proved and undisputed, the court will permit it even though it was not formally pleaded.

**Statute of Limitations**

Section 156 of the Judicial Code bars all claims where the petition is not filed, as provided by law, within six years after the claim first accrues. While the Court of Claims does not have jurisdiction to render judgment on a claim so barred an advisory opinion may be rendered to Congress on a claim submitted by that body. Where a petition is filed in the Court of Claims before the end of the statutory period, and an amendment thereof is sought to be made after the period has run, the Statute of Limitations will apply if the amendment would have the effect of introducing a new cause of action. Where Congress appropriates money to pay claims barred by the statute, the claimant may sue for the money which is due him under the appropriation act and not for what is due him under the contract, and such an action would not be within the bar of the statute. An act appropriating money for the payment of a class of barred claims is a new promise to pay based on the old consideration and the statute is no longer a bar. Similarly, where Congress refers a claim to the Court of Claims by a special act which specifically provides that the Statute of Limitations shall not apply, the court is given jurisdiction to adjudicate the claim in the same manner as if the claim, otherwise barred, had been brought within the statutory period.

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90 Barry v. United States, 229 U. S. 47 (1913); Keith v. United States, 72 Ct. Cl. 236 (1931).
91 Bethlehem Steel Co. v. United States, 75 Ct. Cl. 845 (1932).
92 Wisconsin Central Ry. v. United States, 164 U. S. 190 (1896); Vulcanite Cement Co. v. United States, 74 Ct. Cl. 692, 717 (1932); Huske v. United States, 46 Ct. Cl. 35 (1910).
94 Wales Island Packing Co. v. United States, 73 Ct. Cl. 615 (1932).
95 Colton, Trustee v. United States, 71 Ct. Cl. 138, 148 (1930).
96 Wray v. United States, 19 Ct. Cl. 154 (1884); George v. United States, 18 Ct. Cl. 432 (1883).
97 Sanderson v. United States, 41 Ct. Cl. 230 (1906).
98 Bishop v. United States, 38 Ct. Cl. 473 (1903), aff’d, 197 U. S. 334 (1905).
Disposition of Cases—Judgment of the Court

Matters dealing with the disposition of the cases coming before the court will now be discussed. Final judgments and awards rendered by the Court of Claims against the United States are paid under appropriations made by Congress upon settlements by the General Accounting Office, and the payment of such judgment, together with any interest allowed by law, fully discharges the United States. A final judgment rendered by the court on any claim prosecuted as provided in Chapter 7 of Title 28 of the U. S. Code is final and forever bars any further claims against the United States arising out of the same controversy. The Comptroller General will withhold payment of an amount of a judgment recovered by a claimant who is indebted to the United States sufficient to cover the amount of the indebtedness. If the claimant denies the indebtedness or will not consent to the deduction and a suit by the United States is necessary to determine the issue of the indebtedness, an additional sum must be withheld to cover cost of suit and such suit, if not already commenced, must be instituted immediately and carried on with all reasonable dispatch. If judgment in this suit is against the United States, or against the claimant but the amount recovered for debt and costs is less than the amount withheld, the balance must be paid to the claimant with interest at 6% from the time it was withheld.

Payment of Interest

Although the Court of Claims is generally precluded from allowing interest on claims in rendering judgment, when Congress passes an appropriation act providing for payment of a judgment against the United States and provides that interest may be paid in accordance with the judgment, a claim for such interest may be reduced to judgment by an action in the Court of Claims, cognizable as a claim founded on a law of Congress. This is true even though the original judgment was rendered in another court on a cause of action outside the jurisdiction of the Court of Claims, and the original judgment itself is "res adjudicata" and cannot be reviewed by the Court of Claims. In Standard

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Dredging Co. v. United States,\textsuperscript{104} the court said, "On the question of interest, this court (Court of Claims) has jurisdiction of a suit to recover interest on an unpaid balance of judgments against the United States, whether rendered by this or another court; ..." When a suit originates in the Court of Claims that court is generally precluded from allowing interest. In the case of Booth & Co. v. United States,\textsuperscript{105} the Court stated, "In no case finally determined and brought to our attention has interest been allowed against the United States where the suit originated in the Court of Claims or in a district court exercising concurrent jurisdiction with it unless it be a case brought under some one of the statutes enacted during the World War and treated as a proceeding in condemnation."

\textit{Certification of Questions of Law to the Supreme Court}

In 1925 an act of Congress\textsuperscript{106} provided for certification by the Court of Claims to the Supreme Court of "any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the cause; and thereupon the Supreme Court may give appropriate instructions on the questions certified and transmit the same to the Court of Claims for its guidance in the further progress of the cause." This authority to certify questions to the Supreme Court is limited to definite and distinct questions of law. The whole case may not be referred, prior to judgment, to the Supreme Court because a certification embracing the entire case would do violence to the express words of the statute and would also cause the Supreme Court to exercise original jurisdiction and thus violate Article III, Section 2, Clause 2 of the United States Constitution. The Supreme Court will not entertain a certification of questions of fact, or of mixed questions of fact and law, or hypothetical question, but it will not refuse to accept certification of proper questions merely because its answer of the questions may prove decisive of the case.\textsuperscript{107}

\textsuperscript{104}Standard Dredging Co. v. United States, 71 Ct. Cl. 218, 243 (1930).
\textsuperscript{107}Wheeler Lumber Co. v. United States, 281 U. S. 572 (1930). See also O’Donoghue v. United States, 289 U. S. 516 (1933), wherein the Court of Claims certified questions as to whether the salaries of judges of courts of the District of Columbia could be reduced during their tenure in office and Williams v. United States, 289 U. S. 553 (1933), where questions were certified as to whether the salaries of judges of the Court of Claims could be reduced during tenure of office. The constitutional status of these courts was discussed in these two decisions of the Supreme Court.
New Trial

The provisions for the granting of a new trial on motion of the claimant, are embodied in Section 174 of the Judicial Code\textsuperscript{108} while Section 175 embodies the right of the United States to move for a new trial.\textsuperscript{109} A claimant who seeks a new trial on the ground of newly discovered evidence, must have evidence which could not have been discovered before the trial by the exercise of due diligence,\textsuperscript{110} but the Government is not bound by the due diligence rule in relation to the discovery of new evidence as the basis for a new trial.\textsuperscript{111} In Electric Boat Co. v. United States,\textsuperscript{112} the court said, “Where it appears that the new facts relied upon to establish fraud, wrong, or injustice were unknown to the Attorney General or the attorneys for the Government controlling the defense of the suit, though such facts were known to other officials of the Government not connected with the case, a motion for a new trial under Section 175 of the Judicial Code may be allowed.” The burden of proving fraud, wrong or injustice is upon the Government when it moves for a new trial.\textsuperscript{113} The Court of Claims stated, in Bramhall v. United States,\textsuperscript{114} that “Newly-discovered law by a party, or his ignorance of the law, has not heretofore been deemed, either at common law or chancery, as a sufficient reason for granting a new trial.” Section 175 of the Judicial Code, supra, “Contemplates a new trial in respect to matters of fact and does not authorize the granting of a motion predicated solely upon errors of law. The latter may be corrected upon appeal”, and the Court of Claims has exclusive jurisdiction to decide such a question.\textsuperscript{115}

Review by Supreme Court

The procedure for obtaining review of judgments of the Court of Claims was changed by the Act of 1925,\textsuperscript{116} which abolished appeals from the Court of Claims to the United States Supreme Court and sub-

\textsuperscript{110}Payan v. United States, 15 Ct. Cl. 56 (1879).
\textsuperscript{111}Ford v. United States, 18 Ct. Cl. 62 (1883).
\textsuperscript{112}Electric Boat Co. v. United States, 55 Ct. Cl. 497, 499 (1920).
\textsuperscript{113}Missouri Ry. v. United States, 55 Ct. Cl. 485 (1920).
\textsuperscript{114}Bramhall v. United States, 6 Ct. Cl. 238, 240 (1871).
\textsuperscript{115}Volk v. United States, 56 Ct. Cl. 395 (1921).
stituted writs of certiorari. Section 3(b) of the Act of 1925,\textsuperscript{117} provides for petition to the Supreme Court for a writ of certiorari to review a decision of the Court of Claims, and Section 8(a)\textsuperscript{118} provides that such petition must be filed within three months after the entry of judgment or decree. While judgments and decrees of the Court of Claims are now subject to review by the Supreme Court only upon granting of certiorari, it must be kept in mind that questions of law may still be certified to the Supreme Court as described previously in this article. Ordinarily, when a cause is taken from the Court of Claims to the Supreme Court for review, the findings of fact of the court are conclusive upon the Supreme Court,\textsuperscript{119} and only questions of law are reviewable. As was said by the Supreme Court in the case of United States v. Wells,\textsuperscript{120} "The findings of fact of the Court of Claims are to be treated like the verdict of a jury. We cannot add to them, or modify them, but the absence of the finding of an ultimate fact does not require a reversal of the judgment if the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference."

\textit{Summary and Conclusion}

It has been the purpose of this article to give a description of the history, jurisdiction and work of the Court of Claims of the United States. As a general summary of the jurisdiction of the Court of Claims it may be said that, under proper circumstances and when not barred by other law, the Court of Claims has jurisdiction of money claims against the United States, under the following broad classifications:\textsuperscript{121}

1. Claims founded upon the Constitution of the United States.
2. Claims founded upon any law of Congress, unless such jurisdiction is precluded by other law or the grant of exclusive jurisdiction to another tribunal.
3. Claims based upon any regulation of an executive department.
4. Claims founded upon any expressed or implied contract with the Government.
5. Claims for damages, liquidated or unliquidated, in cases not sounding in tort, where the party would be entitled to redress against the United States in a court of law, equity or admiralty if the United States were suable.

\textsuperscript{119}Niles Bement Pond Co. v. United States, 281 U. S. 357 (1930); Luckenbach Steamship Co. v. United States, 272 U. S. 533 (1926).
\textsuperscript{120}United States v. Wells, 283 U. S. 102, 120 (1931).
6. Suits by Government employees or officers for fees and salary.
7. Suits by Disbursing Officers for relief on account of loss of Government funds or documents.
8. Petitions by persons indebted to the United States whose accounts have remained unsettled for 3 years.
9. Claims or matters involving controverted questions of fact or law referred by head of an executive department.
10. Bills referred by Congress.
11. Claims filed by aliens, where the Court of Claims has jurisdiction of the subject matter, provided Americans are permitted to prosecute claims against the Government of the alien in its courts.

The foregoing, without being all inclusive or exhaustive, constitutes a broad classification of the statutory grants of jurisdiction to the Court of Claims. The subject of jurisdiction of the court is extremely important since petitioners have the burden of proving that their cause of action is within the jurisdiction of the court, and moreover, where the jurisdiction of the Court of Claims over the subject matter is lacking, the case may be disposed of on this ground at any stage of the proceedings, either in the Court of Claims, or when the case is up for review in the Supreme Court.\(^{122}\)

Viewing the subject as a whole it may be said that the Court of Claims is a very important institution in the structure of our Federal Government. While the sovereign is immune from suit without its consent the right of seeking redress directly from the sovereign is an ancient right and was often resorted to before the Court of Claims was set up; so much so in fact, that Congress was flooded with claims which could not be handled properly or expeditiously. The Court of Claims perpetuates and revitalizes the ancient right of petition and assures an orderly and systematic handling of claims. Thus, Congress is relieved of an unnecessary and stifling burden while claimants are assured of greater justice and equity.

\(^{122}\text{Matson Navigation Co. v. United States, 284 U. S. 352, 359 (1932).}\)
THE COURTS AND ADMINISTRATIVE AGENCIES

ABUSE OF ADMINISTRATIVE DISCRETION—ESTABLISHMENT OF SEWER DISTRICT

A STATE may, so far as the Federal Constitution is concerned, create tax districts for special improvements and define their boundaries, or may delegate such authority to local administrative bodies; and such action unless palpably arbitrary and a plain abuse, does not violate the due process clause of the Fourteenth Amendment.¹

Under Ohio Statute, boards of county commissioners have authority to establish sewer districts where such sanitary districts are required for the purpose of promoting public health and safety.² Acting under the sanction of this law, the Board of Commissioners of Montgomery County established the Riverside Sewer District on May 28, 1926. This District was bounded on the west by the eastern corporation line of the city of Dayton, Ohio, and on the north and east by the United States Government experimental air station known as Wright Field. No part of either lies within the district. The proposed erection of a sewage disposal plant by the United States Government at Wright Field threatened contamination of the water supply of the City of Dayton. As an alternative the United States Government offered to pay twenty-five thousand dollars ($25,000) toward the construction of a main sewer along Springfield Pike, near the extreme northern boundary of the Riverside District, and for an outlet into the main sewers of the city of Dayton. The Board of Commissioners, in a spirit of generous cooperation,³ caused the construction of the main sewer along Springfield Pike and levied its cost by way of special assessments upon the lands within the district.

One Lizzie J. Coblentz, owner of land within the district, which land is at no point closer than approximately one mile to the sewer, brought suit⁴ in the District Court of the United States for the Southern District

¹Houck v. Little River Drainage District, 239 U. S. 254 (1915).
³In the resolution establishing the Riverside Sewer District adopted by the Board of County Commissioners on May 28, 1926 it is stated, inter alia, that “the members of this Board are of the opinion that there is an actual need of such improvement in all that territory immediately adjacent to the Springfield Pike, and that it is extremely desirable to cooperate with the City of Dayton, United States Government, and, if possible, the Village of Riverside so as to protect the water supply for the whole community.” Coblentz v. Sparks, 35 F. Supp. 605, 613 (S. D. Ohio 1940).
⁴The original bill of complaint was filed on March 8, 1929, but several continuances and procedures delayed the decision. Briefs were filed and the case finally submitted on April 6, 1940.

740
of Ohio to enjoin the levy and collection of the assessment on the ground that the County Commissioners exceeded the authority and abused the discretion conferred upon them by law, and that the result of such excess and abuse was the taking of complainant’s property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States. The complainant’s contention was upheld by the district court in *Coblentz v. Sparks*,\(^5\) decided on October 5, 1940.

In the case at hand, the defendants relied largely on the case of *Valley Farms Company v. Westchester County*,\(^6\) where the Supreme Court held that a state legislature may without notice to property owners establish a sewer district and direct that the cost of the sewer be assessed upon the real property within the district in proportion to its value as ascertained for purposes of general taxation. And the Court added that, under the Fourteenth Amendment, it is not a valid objection to such an assessment that the property assessed can receive no benefit, where it ultimately may be benefited by future extensions of the sewer. In the *Valley Farms case*, the court was influenced by its earlier holding in *Miller and Lux, Inc. v. Sacramento and San Joaquin Drainage District*.\(^7\) In the latter case the Court said, in an opinion by Mr. Justice McReynolds,

> “Since Houck v. Little River Drainage Dist. (1915) 239 U. S. 254 ... the doctrine has been definitely settled that, in the absence of flagrant abuse or purely arbitrary action, a State may establish drainage districts and tax lands therein for local improvements, and that none of such lands may escape liability solely because they will not receive direct benefits. The allegations of the original complaint are wholly insufficient to raise the issue in respect of arbitrary legislative action presented by Myles Salt Co. v. Iberia Drainage Dist., 239 U. S. 478. ...”\(^8\)

The *Myles Salt Company case*\(^9\) involved the validity, under the due process clause of the Fourteenth Amendment, of the action of a Police Jury in Louisiana in establishing a drainage district and including property therein not benefited by the drainage system.\(^10\) The inclusion was shown to have been made, not for the purpose of benefiting the land but for the purpose of obtaining revenue therefrom.\(^11\) The Court decided

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\(^{5}\)35 F. Supp. 605 (S. D. Ohio 1940).
\(^{6}\)261 U. S. 155 (1923).
\(^{7}\)256 U. S. 129 (1921).
\(^{8}\)Id. at 130.
\(^{9}\)239 U. S. 478 (1916).
\(^{10}\)In the words of Mr. Justice McKenna: “It is true the law of the state as written is not attacked, but the law as administered. ...” Id. at 484.
\(^{11}\)And again: “We are not dealing with motives alone but as well with their resultant
that such inclusion amounts to a deprivation of property without due process of law.

In the instant case, counsel on both sides attempted to define the character of the act creating the sanitary district. Defendants contended that the Board of County Commissioners was a duly elected public body with legislative power granted to it under the General Code of Ohio and that the passing of the resolution creating and establishing the district in question was "a legislative act". Complainant submitted that the Board of Commissioners is merely an administrative body and that it had been clearly shown that they were not exercising legislative, but only administrative authority. In answering this contention, District Judge Nevin replied "The court does not deem it necessary to determine this question nor to dwell on the arguments presented for the reasons that it is well settled that even the legislature is not so supreme as that its authority cannot be questioned. The courts will interfere when it is manifest that the legislative authority has been abused." The court then cited in support of its decision the historic case of Village of Norwood v. Baker.

Up to the time of this decision, in 1898, it had appeared that so long as the assessments were apportioned according to benefits, they were not necessarily limited in absolute amount by the benefits received. In Norwood v. Baker, the language of the Court seemed to imply that the assessment could not be levied until it had been determined, after hearing, that it would not impose upon any particular piece of property a tax in substantial excess of the benefit conferred by the improvement upon that property. However, in French v. Barber Asphalt Paving action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of the plaintiff's property but solely of the improvement of the property of others . . . power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind." Id. at 485.

172 U. S. 269 (1898).
16In Village of Norwood v. Baker, 172 U. S. 269, 277-279 (1898), the Supreme Court said: "... The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the fourteenth amendment, providing that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, as well as of the bill of rights of the Constitution of Ohio. . . . But the assessment of the abutting property for the cost and expense incurred by the village was an exercise of the power of taxation. . . . And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and
Company, the Court said that such was not the necessary legal import of the decision but rather that its legal effect was only to prevent the enforcement of the particular assessment in question. In the language of Mr. Justice Shiras:

"It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty, or property, without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of Norwood v. Baker."

In Roberts v. Richland Irrigation District, decided by the Supreme Court on March 27, 1933, it was stated that the principle applied in Norwood v. Baker has no application to an assessment to pay the general indebtedness of an irrigation district, even though in excess of the benefits derived. It was pointed out by the Court that a State has power to create irrigation districts with authority to lay taxes, distributed in accordance with estimated benefits, on the lands in the districts, in order to pay the general bonded indebtedness incurred by the districts in the making of the irrigation improvements. An assessment for this purpose, made necessary by the delinquencies of some of the landowners and permitted by the statute governing the district, is not confiscatory and unconstitutional as applied to another of the landowners, even though, when added to prior assessments paid by him, it exceeds the amount in which his land was actually benefited by the improvement. There is a valid distinction between such a case as this one and Norwood v. Baker, however; and it is safe to say that the latter is still good law at least to the extent that it sets up a point beyond which the legislative department, exercising its tax powers, may not go, consistently with the individual's right of property.

Applying the formula of reasonable discretion to the facts of the

instant case, the federal court was justified in finding that the apportionment and levy of assessments to pay the cost of said improvement was so disproportionate to benefits as to be entirely arbitrary and to disclose clearly a gross abuse of discretion. The court found that complainant's farm of 141 acres was assessed over three thousand dollars for supposed potential benefits estimated by the commissioners to accrete to her at a time 15 to 20 years in the future and after an additional expenditure by her for additional main sewers and laterals; on the other hand, the United States Government was given immediate use of sewer and water facilities for Wright Field, and with an acreage of 5,000 acres and with 10,000 estimated employees, for the sum of twenty-five thousand dollars ($25,000). On this evidence, the court concluded that complainant's potential benefits are wholly illusory and not secured in any binding form; that the Board of Commissioners of Montgomery County was guilty of a gross abuse of discretion in establishing the Riverside Sewer District and including plaintiff's lands in the absence of any substantial menace to health; and that the act of the Board in levying special assessments on complainant's land was an unconstitutional exercise of the powers vested in said Board in that it constituted a taking of property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

Coblentz v. Sparks, therefore, is a timely illustration of the judicial process in its role of protector of the "inexorable safeguards"^{20} and "rudiments of fair play"^{21}

GORDON F. HARRISON

RECONSIDERATION BY PATENT OFFICE FORECLOSED BY NOTICE OF APPEAL

THE Court of Customs and Patent Appeals in the recent case of

In re Allen rendered a decision which it had apparently chosen to avoid for some time. In this case, the applicant for a patent appealed to the Court of Customs and Patent Appeals from a decision of the Board of Appeals of the United States Patent Office, which had affirmed a decision of the examiner rejecting certain claims. However, before the

(1) Is the action of the respondents authorized by law?
(2) Is it reasonable exercise of discretion, or is it, on the other hand, arbitrary and without foundation in the policy established by the Statute?"

Id. at 504.


notice of appeal was filed, the appellant moved for a reconsideration stating that one of his claims had been inadvertently overlooked by the board. On the day after the notice of appeal was filed, the Board of Appeals rendered a decision on the petition for consideration. On appeal, the court was confronted with the question of the jurisdiction of the Patent Office to consider a petition for reconsideration (made before notice of appeal) of an appealable decision after a proper notice of appeal to the Court of Customs and Patent Appeals had been filed with the Commissioner of Patents.\(^1\) It was held that upon filing a proper notice of appeal with the commissioner, the subject matter of the appeal was transferred to the Court of Customs and Patent Appeals, and that thereafter until the appeal was disposed of, the Patent Office had no jurisdiction to reconsider the decision appealed from, even though the motion for reconsideration was made before filing of the notice of appeal.\(^2\)

The holding was in strict conformity with the general rules that (1) when an appeal has been taken which transfers jurisdiction of the cause to the appellate court, the lower court can proceed no further with the subject matter on appeal until the appeal is completed;\(^3\) and (2) an appeal will not be dismissed without leave of the appellate court, particularly if the applicant intends to bring another appeal.\(^4\) But in the instant case the situation was novel in that the petition for reconsideration was made before the notice of appeal had been filed. Only one year prior, this court confirmed the Board of Appeals’ refusal to hear a motion for reconsideration made after a proper notice of appeal had been filed, on the ground that it no longer had jurisdiction of the cause.\(^5\)

In the ordinary case there is room for much judicial discussion as to exactly when an appeal is “taken” and “perfected”, but where the prescription is by statute and the statutory requirement is met, the line of demarcation is narrowed. An appeal is “taken” to the Court of Customs and Patent Appeals when statutory notice is served within the statutory time upon the Commission of Patents.\(^6\) Other steps may be necessary

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\(^{1}\) In accordance with Rev. Stat. § 4912 (1875), 35 U. S. C. § 60 (1934), “When an appeal is taken to the United States Court of Customs and Patent Appeals, the appellant shall give notice thereof to the commissioner, and file in the Patent Office, within such time as the commissioner shall appoint, his reasons of appeal, specifically set forth in writing.”

\(^{2}\) In re Allen, 115 F. (2d) 936 (C. C. P. A., 1940).

\(^{3}\) Cf. 4 C. J. S., Appeal and Error § 607.

\(^{4}\) United States v. Minn. & N’Western R.R., 18 How. 241 (U. S. 1856).

\(^{5}\) Raiche v. Foley, 103 F. (2d) 920 (C. C. P. A., 1939).

in the Court of Appeals "to perfect" the appeal;\textsuperscript{7} but so far as the Patent Office is concerned, the appeal has been taken.\textsuperscript{8}

Indicative of this conclusion is the supporting decision of this court\textsuperscript{9} in holding that where an appellant had filed with the commissioner a proper notice of appeal, the commissioner had no authority under Section 4911,\textsuperscript{10} to dismiss the appeal and that this court alone had jurisdiction to dismiss the appeal. In the \textit{White case}\textsuperscript{11} the United States Court of Appeals for the District of Columbia adhered to this stand, as it had before in the \textit{Jensen case},\textsuperscript{12} and as the Circuit Court of Appeals for the Second Circuit had held in the \textit{Bakelite case}\textsuperscript{13} when it denied a writ of mandamus to compel the commissioner to dismiss a notice of appeal to the Court of Customs and Patent Appeals previously filed with the commissioner.

Associate Judge Lenroot, in his opinion in the principal case, recognizes the possible difficulty which may be encountered by litigants in the Patent Office, \textit{viz.}, that a motion for reconsideration or modification may be nullified if followed by an appeal. Under the Patent Office rules an appeal from a decision and petition for reconsideration or modifica-

\textsuperscript{7}Court Rules on Appeals from the Patent Office to the Court of Customs and Patent Appeals, \textit{e.g.}, Rule XXV merely gives the commissioner authority to "take such further proceedings in the case as may be necessary to dispose of the same as though no notice of appeal had ever been given" in case the appeal is not perfected.

\textsuperscript{8}In \textit{Walther v. Vanderveer}, 64 F. (2d) 540 (C. C. P. A., 1933) it was held that an applicant could not dismiss his appeal (after transcript in the court had been filed) in order to confer jurisdiction on the District Court of the U. S. for the District of Columbia under Section 4915 of the Revised Statutes as amended. Since neither the statute nor the court rules confer the power to dismiss an appeal upon the commissioner, there is no basis for the assumption of authority. For the general rule, \textit{cf.} \textit{Preston v. White}, 92 F. (2d) 813 (C. C. P. A., 1937).


\textsuperscript{11}Rev. Stat. \textsection 4911 (1875), 35 U. S. C. \textsection 59a (1934) provides that "if any applicant is dissatisfied with the decision of the Board of Appeals, he may appeal to the United States Court of Customs and Patent Appeals, in which case he waives his right to proceed under Section 4915, cited \textit{supra} note 6.


\textsuperscript{13}See \textit{supra} note 8.

\textsuperscript{14}\textit{Ibid.}
tion must be made within the same 40 business days. Further, a liti-
gant may be placed in the position of having to make two active motions
within the same statutory period.

The opinion suggests that an amendment of the present rules could
ameliorate this "unsatisfactory situation by fixing one time within which
an appeal shall be filed where no motion for reconsideration has been
filed, and a different time where such a motion has been filed; or a period
running from the decision of the Patent Office disposing of a motion for
reconsideration." This suggestion has been intermittently proposed to
the Patent Office by interested parties but as yet the amendment can
only be anticipated.

ARNOLD B. CHRISTEN


FEDERAL LEGISLATION

THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940

GENERAL PROVISIONS

THE Soldiers' and Sailors' Civil Relief Act of 1940\(^1\) is virtually a reenactment of The Soldiers' and Sailors' Civil Relief Act of 1918.\(^2\) Its purpose evidences the concern of congress in the financial problems of the members of the armed forces, and the realization on its part that the type of relief provided is necessary in order to maintain the morale of the army and navy.\(^3\)

The constitutionality of the 1918 Act was on several occasions affirmed by the courts on the ground that it was a lawful exercise either of the war powers of the congress\(^4\) or of the power to raise and maintain an army and navy. Men on active duty in all branches of the military service and persons having rights of action or obligations against them are affected by the legislation's moratory provisions.\(^5\) The Soldiers' and Sailors' Civil Relief Act of 1940 provides for stays of suits and of execution as in attachment and garnishment, prevents defaults, relieves against fines and penalties accruing, and requires court proceedings in certain cases where not required by local law.\(^6\) It restricts the right of

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\(^2\)40 Stat. 440 (1918). See for discussion of the 1940 Act: Notes (1940) 50 Col. L. Rev. 1374-1429; (1940) 54 Harv. L. Rev. 278-329; (1940) 50 Yale L. J. 200-305. (These three notes were prepared jointly by the editors of the three periodicals); Note (1940) 27 Va. L. Rev. 207-216; (1940) 27 A. B. A. J. 23-24; Baldwin and Clark, Legal Effects of Military Service (1940); (1940) 9 L. S. J. 310-326.

See for discussion of the 1918 Act: (1920) 33 Harv. L. Rev. 987; Ferry, Rosenbaum, and Wigmore, The Soldiers' and Sailors' Civil Rights Bill (1918) 12 Ill. L. Rev. 449.

\(^3\)54 Stat. 1179, 50 U. S. C. A. § 510 (Supp. 1940) "... in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force."


eviction by landlords, the right to rescind or terminate contracts for nonperformance and the right to foreclose mortgages. The Act grants relief from sales for taxes and protection in such matters as insurance, homesteads and irrigation and mining laws. Under the Act when, pursuant to its provisions, the enforcement of any obligation, the prosecution of any suit and the performance of any act may be stayed, such stay, may in the discretion of the court, be also granted to those secondarily liable. Likewise, when a judgment is vacated pursuant to the Act, the same may be set aside as to any one secondarily liable upon the contract or liability for the enforcement of which the judgment was entered.

GENERAL RELIEF

Should a defendant in an action default by nonappearance, the plaintiff must, before entering judgment, file in the court an affidavit containing facts showing that defendant is not in the military service. If unable to do this the plaintiff must file an affidavit setting forth that the defendant is in the military service or that plaintiff lacks knowledge of the matter. If an affidavit that defendant is not in the military service is not filed no judgment shall be entered without an order of the court.

In any action or proceeding in which a person in military service is a party and should he not be represented by counsel, the court shall appoint such counsel, but the latter does not have any power to waive any right of his client or bind him. The court may also stay any action

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11Ibid.
13The failure on the part of the plaintiff to file such an affidavit is not jurisdictional where in fact the defendant was not in the military service. State ex rel. Smith v. District Court, 179 Pac. 831 (Mont. 1919); Alzugaray v. Onzurez, 23 N. M. 662, 187 Pac. 549 (1920).
14See note 12 supra.
15It has been held that no compensation can be allowed to an attorney thus appointed. Davison v. Lynch, 103 Misc. 311, 171 N. Y. Supp. 46 (1918). See address by Hon. Jacob M. Lashley (President of the American Bar Association) (1941) 27 A. B. A. J. —.
16See note 12 supra.
in which a person in military service is a party during the period of such military service.\textsuperscript{17}

As a further safeguard it is provided, that if any judgment shall be rendered against the soldier in any action governed by this section of the Act and it appears that he was prejudiced in making his defense because of his military service, such judgment may be re-opened if it is made to appear that the defendant has a meritorious or legal defense, but the vacating of any judgment shall not impair any right or title acquired by any \textit{bona fide} purchaser for value under such judgment.\textsuperscript{18}

The 1940 Act provides that:

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued \textit{prior} to or \textit{during} the period of such service."\textsuperscript{19}

\textbf{RENT, INSTALLMENT CONTRACTS, MORTGAGES}

It is provided in the 1940 Act that no lessor can evict the wife, children, or other dependents of a lessee in the military service whose rent for dwelling does not exceed eighty dollars a month, without first obtaining permission of the court.\textsuperscript{20} Any attempt by a lessor to secure a waiver of this clause in a lease will undoubtedly be futile since the penal clause of the Act would render such a provision unenforcible.\textsuperscript{21} Under the 1940

\textsuperscript{17}54 Stat. 1181, 50 U. S. C. A. § 521 (Supp. 1940).

\textsuperscript{18}See note 12 \textit{supra}.

\textsuperscript{19}54 Stat. 1181, 50 U. S. C. A. § 525 (Supp. 1940) (the italics supplied). In Clark v. Mechanics’ Amer. Nat. Bank, 282 Fed. 589 (C. C. A. 8th, 1922), appellant claimed a lien under a state statute which provided that the lien would be effective only if suit was brought within a certain time. The question involved was the applicability of a section of the 1918 Act identical to that quoted above. The appellee claimed that it was inapplicable because it was only intended to modify those statutes properly called statutes of limitation, and that it was not intended to cover a statute creating a right of action which did not exist independently of the statute. The court rejected this assertion emphasizing that congress had not used the words “statute of limitation” and that the act should be liberally construed. Cf. Ebert v. Poston, 266 U. S. 548 (1925) wherein the question for determination was whether in measuring the period of redemption from foreclosure by advertisement the period of military service should be excluded. It was held that the section quoted above had no application to transactions which are effected without judicial action. The statutory right to redeem from a sale by advertisement is not a right of action. It is a primary right as distinguished from a remedy.


Act no vendor, who prior to the approval of the Act has received, or whose assigns have received, under a contract for purchase of property an installment of the purchase price from a person or from the assignor of a person, who after payment of the installment has entered military service, can cancel such contract or repossess property sold under such contract for nonpayment of any installment falling due during the period of such service without resorting to the courts.\textsuperscript{22} The court may order the repayment of prior installments or deposits as a condition of permitting cancellation or repossession, or it may order a stay of proceedings.\textsuperscript{23} Within this legislation a court may stay proceedings commenced against a person in the military service for breach of an obligation which originated\textsuperscript{24} prior to the approval of the Act and which is secured by a mortgage upon property owned\textsuperscript{25} by such a person at the beginning of his period of military service and which is still owned by him. And no sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in an obligation shall be valid if made during the period of military service unless upon an order of the court.\textsuperscript{26} This provision applies only if the obligation originated prior to the Act.\textsuperscript{27}

\textsuperscript{23}Ibid.
\textsuperscript{25}Hoffman \textit{v.} Charlestown Five Cents Savings Bank, 231 Mass. 324, 121 N. E. 15 (1918), bill in equity by a soldier against mortgagee who had foreclosed without observing the 1918 Act. The soldier was not the record owner, but claimed to be an equitable owner and was given relief.
\textsuperscript{26}See Bell \textit{v.} Buffinton, 244 Mass. 294, 137 N. E. 287 (1923). The Massachusetts statute involved in this case provided that on breach of condition in mortgage, mortgagee had the right to recover possession by entry and if possession continued for three years it would foreclose the right of redemption. \textit{Held}, under the 1918 Act [which section was identical with the 1940 Act, 54 Stat. 1182, 50 U. S. C. A. § 532 (Supp. 1940)] there was a restriction under powers and under warrants to confess judgment, but the section has no application to mortgage foreclosures by entry and possession under the laws of Massachusetts.
\textsuperscript{27}54 Stat. 1182, 50 U. S. C. A. § 532 (Supp. 1940): “(1) The provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him.”
INSURANCE

A person in military service may apply to the Veterans Administration28 for aid with respect to life insurance29 and the administrator will guarantee payment on premiums up to a face value of $5,000.30 The Act only covers life insurance on the level premium or legal reserve plan, which was taken out and a premium paid thereon before October 17, 1940, or not less than thirty days before entering military service.31

The Act does not cover a policy on which premiums are due and unpaid for more than one year at the time application is made for their protection.32 Neither does the legislative provision cover a policy upon which there is an outstanding loan of 50% or more on the cash surrender value.33

In seeking the insurance benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 one must use a form provided by the Government. This form should be sent by the applicant to the insurer, who in turn approves or rejects the application.34 If the application is approved the Government becomes the guarantor on the policy for the period stipulated in this Act and the policyholder is released from liability.35 The Government pays the premiums in default and obtains a first lien on the policy as surety.36 Written consent of the Veterans Administration must be obtained before any dividend is paid or any loan or settlement is made.37 If within one year after the termination of his military service

2854 STAT. 1183, 50 U. S. C. A. § 541 (Supp. 1940). Under the 1918 Act this was administered by the Treasury Department.
2954 STAT. 1183, 50 U. S. C. A. § 541 (Supp. 1940). Under the 1940 Act a life insurance policy includes any benefit in the nature of life insurance arising out of membership in a fraternal or beneficial association, and therefore the Government guarantee of premiums includes membership dues or assessments in such associations.
31Ibid.
3254 STAT. 1186, 50 U. S. C. A. § 553 (Supp. 1940): "This article shall not apply to any policy which is void or which may at the option of the insured be voidable, if the insured is in military service, either in this country or abroad, nor to any policy which as a result of being in military service, either in this country or abroad, provides for the payment of any sum less than the face thereof or for the payment of an additional amount as premium."
37Ibid.
the insured does not pay all past due premiums with interest thereon, the policy shall at the end of such year lapse and become void.\textsuperscript{38}

**TAXES AND PUBLIC LANDS**

A person in the military service may invoke the provisions of the Act with respect to the staying of proceedings for the sale of property to collect taxes falling due during the period of military service where the tax is upon real property owned and occupied for dwelling, agricultural or business purposes by him or a dependent of his at the time of his entrance into the service and which is still occupied by his dependents or employees.\textsuperscript{39} Where such conditions are present the person in the military service may file with the collector of the taxes an affidavit showing that by reason of his service in the military forces his ability to pay the taxes is materially affected. After the filing of such an affidavit leave of court must be granted before property can be sold. When the property is sold for taxes the person may redeem not later than six months after the termination of his military service.\textsuperscript{40} The collection from a person in the military service of any tax on his income, whether falling due prior to or during his period of military service shall be deferred for a period not exceeding six months after the termination of his period of service.\textsuperscript{41} The Act also grants privileges to those who have commenced or acquired claims to government-owned or controlled lands under federal homestead, mining leases, etc. laws, and are now precluded by military obligations from full opportunity to protect their interests from prejudice and forfeiture.\textsuperscript{42}

**ADMINISTRATIVE REMEDIES**

Where any interest, property or contract is transferred to a person who is in the military service with intent to delay the enforcement of any preexisting civil right the remedial provisions of the Act are not applicable.\textsuperscript{43} Here the legislature attempts to close the loophole of fraud to those who would make the Act an instrument for unwarranted advantage. The Act is to remain in operation until May 15, 1945, or if we are then at war, until six months after a proclamation of a treaty

\textsuperscript{40}\textit{Ibid}.
of peace. However, “certain sections” shall be deemed to continue in full force and effect so long as may be necessary “to grant the full relief intended by the Act.”

CONCLUSION

The purpose of this Act is the temporary suspension of legal proceedings which would otherwise prejudice the civil rights of persons in the military service. The legislation covers a sufficient number of subjects but perhaps could go further in giving more adequate protection to its intended beneficiaries.

A longer extension of the moratorium period has been suggested as a means of allowing the trainee a real opportunity to reestablish himself after discharge from the military forces. As presently drawn the legislation presupposes that it is a matter of but a few months until the soldier resumes his former position and status in civilian life. Experience has shown that such is not the case. It would seem advisable to broaden the scope of the act and extend its benefits for a longer period after the person seeking relief has been discharged from the military service.

CHARLES F. ROGERS

NOTES

FEDERAL SUPREMACY AND THE DAVIDOWITZ CASE

THE growth of federal supremacy in the United States has been perhaps the most interesting phenomenon of our constitutional development. In 1789 the founding fathers made federal laws and treaties supreme over state laws, if these federal enactments were within the scope of the delegated powers of the national government.1 Despite the constant protests of the states rights advocates our constitutional history has been one of continual expansion of the limits of this federal supremacy. The recently decided case of Hines v. Davidowitz2 constitutes another victory for the federal supremacy exponents. The Supreme Court held in that case that the Federal Alien Registration Act of 19403 precluded any state acts in the field of alien registration. The "single, integrated and all embracing system"4 of alien registration provided in the federal act occupied the field. The Pennsylvania Alien Registration Act,5 which was attacked, covered the same field as the federal enactment. It was not directly conflicting, but, nonetheless, it was rendered invalid. The Court examined the legislative history of the federal act, the seeming policy of its restrictions, the statement of the President on signing it, and from these findings discerned an intent by congress to preclude state action on the matter.6

1U. S. Const. Art. VI, Cl. 2. "This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." See also Ableman v. Booth 21 How. 506, 517 (U. S. 1859).
261 Sup. Ct. 399 (Jan. 20, 1941).
4Hines v. Davidowitz, 61 Sup. Ct. 399, 408 (1941).
6Hines v. Davidowitz, note 2 supra. The case arose as follows: The state of Pennsylvania passed in June, 1939, an Alienation Registration Act requiring the registration of certain aliens and prescribing that these aliens carry registration cards at all times. The petitioner, an alien coming within the class specified by the act, sought an injunction in the federal district court to restrain the enforcement of the state act. The three judge lower court granted the injunction on the grounds that the act was in violation of the constitutional guarantee of equal protection of the laws to all persons and that it invaded a field reserved.
THE PROBLEM

The task of settling conflicts of federal and state authority has been fraught with difficulties for the Supreme Court. It usually involves weighing the respective interests of the two sovereigns and deciding in favor of one. Consequently each case presenting such a conflict is decided on its particular facts. This result leaves many varied doctrines by which the Court can resolve any federal and state conflict which arises.\(^7\)

In most instances this problem has arisen over the federal exercise of the interstate commerce power. The earliest rule for such cases, implied in *Gibbons v. Ogden*,\(^8\) considered the grant to congress of the power to be exclusive, thereby prohibiting all state regulation or taxation in that field. This rule was applied by Chief Justice Marshall in other cases.\(^9\) His successor, Chief Justice Taney, espoused another view holding that the states could regulate until expressly stopped by congressional action.\(^10\) The Court soon recognized that neither of these views was entirely adequate. A new doctrine was evolved comprising the two. In the case of *Cooley v. Board of Wardens*\(^11\) the Court laid down the principle that where the matter was one of local concern the states could regulate in the absence of congressional action. This distinction between congressional power in national as contrasted to local matters has continued to this day.\(^12\) The implica-

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\(^7\)For an excellent discussion of these doctrines see Dowling, *Interstate Commerce and State Power* (1940) 27 Va. L. Rev. 1 et seq. The writer is greatly indebted to this article for the views presented in this note.

\(^8\)9 Wheat. 1, 211 (U. S. 1824).


\(^10\)License Cases, 5 How. 504 (U. S. 1847).

\(^11\)12 How. 299 (U. S. 1851). The case enunciated the rule that the silence of congress could imply its consent to state action.

tion of this rule was that in national matters states were precluded in
the absence of federal action.\textsuperscript{13} Meanwhile, another group of cases, in-
volving state prohibition acts, had brought forth a new theory. This view
found nothing in the commerce clause itself which prohibited state action,
but held that an impediment on the states might arise from the express
or implied will of congress.\textsuperscript{14} These cases required the express consent of
congress to permit state action on such a matter. Congress has given its
consent in several instances and the Court has upheld this procedure.\textsuperscript{15}

Faced with this hodge-podge of doctrines\textsuperscript{16} the present court is divided
as to which one shall determine the conflict.\textsuperscript{17} One rule expounded by
Mr. Justice Stone sets up the Court as arbiter of the conflict. The test
of national and local matters is preserved, but state acts invading
the national field or those directly conflicting with federal statutes are struck
down.\textsuperscript{18} State regulations of local matters in a field where there is no
direct and positive conflict with a federal statute are allowed to prevail.\textsuperscript{19}
In contrast, Mr. Justice Black considers congress, not the Court, as the

These recent cases included a finding that the matter was of local concern as a prerequisite
to validating the state act. See also (1939) 52 Harv. L. Rev. 841; (1939) 38 Mich. L. Rev.
92.
\textsuperscript{13}Southern Ry. v. Reid, 222 U. S. 424 (1912); Mobile County v. Kimball, 102 U. S. 691
(1881); Henderson v. Mayor of the City of New York, 92 U. S. 259 (1876); and many others.
\textsuperscript{14}Loisy v. Hardin, 135 U. S. 100 (1890), enlarged in Clark Distilling Co. v. Western M.
Ry., 242 U. S. 311 (1917); In re Rahrer, 140 U. S. 545 (1891).
\textsuperscript{15}Consent to regulate liquor was given and the Court upheld a state statute based on this
consent. In re Rahrer, 140 U. S. 545 (1891). The same procedure has been used by con-
gress in other matters. Kentucky Whip & Collar Co. v. Illinois Central RR., 299 U. S.
334 (1937); Seaboard Airline RR v. North Carolina, 245 U. S. 298 (1917); Adams Ex-
\textsuperscript{16}In the Davidowitz case Mr. Justice Black clearly states the confusion in the field, quoting
from the opinion: “This Court, in considering the validity of state laws in the light of
treaties or federal laws touching the same subject, has made use of the following expres-
sions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability;
inconsistency; violation; curtailment; and interference.” To this list he would add another,
coincidence. (P. 404).
\textsuperscript{17}See Dowling, supra note 7, at 8, 19.
\textsuperscript{18}McCarrill v. Dixie Greyhound Bus Lines, 309 U. S. 176 (1940); Gwin, White & Price
Co. v. Henneford, 305 U. S. 434 (1939); Adams Mfg. Co. v. Storen, 304 U. S. 307 (1937);
voiding state acts. Cf. South Carolina Highway Dep't v. Barnwell Bros., 303 U. S. 177
(1938).
\textsuperscript{19}Maurer v. Hamilton, 309 U. S. 598 (1940); H. P. Welch Co. v. New Hampshire, 306
Baldwin, 289 U. S. 346 (1933).
proper arbiter of such conflicts. His doctrine would not invalidate any state law in the absence of congressional action unless it is discriminatory against interstate commerce. The remedy to the problem created by such state statutes should be left to the federal and state legislatures. The Court should not act as arbiter. Mr. Justice Black has not up to this case expressed his opinion on the effect of congressional action on a state act.

This was the status of the problem prior to the Davidowitz case. The court could have resolved the issue presented therein by several methods. It is hoped that by analyzing the possible results and comparing these to the actual decision the full implications of the case will be revealed. The case is important for its adaptability as a precedent for future federal expansion in many directions. To reveal these implications, the possible solutions available to the Court must first be suggested. These solutions fall into four general groups, (1) that the matter of alien registration was exclusively federal, (2) that the state act was in direct conflict with existing federal legislation, (3) that the state act was ineffectively coincident with the federal enactments, (4) that the federal statutes had occupied the field precluding any state action.

(1) THAT THE MATTER WAS EXCLUSIVELY FEDERAL

Governmental powers in the United States are ordinarily grouped as follows, those exclusive to the federal government, those wherein the federal power is supreme but not exclusive, those concurrent to federal and state governments, and those exclusive to the states. When the matter is exclusively federal, no state action thereon is permitted regardless of congressional inaction. Federal powers which are inherent in sovereignty are usually considered to be exclusive of the states, i.e., foreign relations, war, coinage, and naturalization. The control of aliens is usually considered to be such a sovereign power. The Court has said:

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2161 Sup. Ct. 399, notes 2, 4, 6 supra.
22All these contentions were urged by counsel in briefs or by the government in amicus curiae brief. Docket No. 22, Supreme Court Term 1940.
23Cooley, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 4.
24Legal Tender Case, 12 Wall. 457, 545 (U. S. 1871) (coinage); Chirac v. Chirac, 2 Wheat. 259, 269 (U. S. 1817) (naturalization).
25Fong Yue Ting v. United States, 149 U. S. 698, 705, 712 (1893); see also Mahler v.
"It is an accepted maxim of international law, that every sovereign nation has
the power inherent in sovereignty, and essential to self-preservation, to forbid
the entrance of foreigners within its dominions, or to admit them only in such
cases and upon such conditions as it may see fit to prescribe. In the United States
this power is vested in the national government. . . . Congress having the right,
as it may see fit, to expel aliens of a particular class, or to permit them to re-
main has undoubtedly the right to provide a system of registration and identifica-
tion of the members of that class within the country and to take all proper means
to carry out the system which it provides."26

Such a matter if regulated by the states could affect the conduct of
foreign affairs. The Court (and state courts) has previously struck down
state alien registration acts on the ground that they infringe a field
wherein congress alone could act.27 This reasoning would preclude all
state legislation directly on aliens regardless of congressional silence.28

The principal obstacles to this solution were the cases upholding vari-
ous state statutes regulating aliens as a class under some police power
measure.29 An outstanding example is the case of Ohio ex rel. Clarke v.

Eby, 264 U. S. 32, 39 (1924); Tiaco v. Forbes, 288 U. S. 549, 556, 557 (1913); Wong
Wing v. United States, 163 U. S. 228, 231 (1896); Chae Chan Ping v. United States, 130
U. S. 581, 603-609 (1889). There are other possible sources of the power to regulate
the admission and residence of aliens: power over foreign commerce, Henderson v. Mayor of
the City of New York, 92 U. S. 259, 270-274 (1876); Head Money Cases, 112 U. S. 580,
591 (1884); power to conduct foreign relations, Nishimura Ekio v. United States, 142
U. S. 651, 657, 659 (1892); Fong Yue Ting v. United States, 149 U. S. 698, 711, 712 (1893);
Chy Lung v. Freeman, 92 U. S. 275, 279, 280 (1876).

*Fong Yue Ting v. United States, 149 U. S. 698, 705, 714 (1893).

*Henderson v. Mayor of the City of New York, 92 U. S. 259, 273 (1876); see United
1840); and lower courts, Arrowsmith v. Voorhees, 55 F. (2d) 310 (E. D. Mich., 1931); and
state courts, Ex parte Ah Cue, '101 Cal. 197, 35 Pac. 556 (1894); cf. Truax v. Raich,
239 U. S. 33 (1915), which held that, once admitted, an alien's living conditions could not
be materially altered by the state.

*This was the reasoning of the court below in the instant case. Davidowitz v. Hines,
30 F. Supp. 470 (M. D. Pa. 1939). For a discussion of the Pennsylvania statute and
the decision of the court below see Note (1940) 17 N. Y. U. L. Q. 242, 252; Note (1939)
39 Col. L. Rev. 1207, 1222; Note (1939) 53 Harv. L. Rev. 149; (1940) 26 Va. L. Rev. 815.

On this theory whether Congress has kept silent or in speaking has fully occupied the
field, the states are wholly without power to interfere. Sanitary District v. Chicago, 266
U. S. 405, 426 (1925); The Minnesota Rate Cases, 230 U. S. 352, 399, 400 (1913);
Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204, 212 (1894); Bowman v.
Chicago & Northwestern Ry., 125 U. S. 465, 481, 485 (1888); County of Mobile v. Kim-
bhall, 102 U. S. 691, 697 (1881); Hall v. De Cuyx, 95 U. S. 485, 490 (1877); Henderson
v. Mayor of the City of New York, 92 U. S. 259 (1876); Welton v. Missouri, 91 U. S.
275, 282 (1876).

*The usual technique of these statutes is to prohibit issuance of licenses to aliens to
Deckebach\textsuperscript{30} wherein a state statute prohibiting the issuance of licenses to aliens to operate pool halls was sustained.

It is suggested, however, that these cases might be distinguished from the present under the old direct-and-indirect test of the effects of state action.\textsuperscript{31} State statutes classifying aliens for purposes of police power measures, control aliens only by indirection in the process of regulating some other matter affecting the state welfare. Here the state’s regulation of aliens is direct.

(2) THAT THE STATE STATUTE CONFLICTED WITH THE FEDERAL

Because of the clearly stated supremacy of federal laws, the Court has invariably struck down state statutes which were directly conflicting with an existing federal law.\textsuperscript{32} The conflict should be direct and positive; it should be revealed from the terms of the acts themselves. The test becomes that of coexistence. Can the two statutes stand together?\textsuperscript{33}

In the Davidowitz case a conflict might be revealed between the existing federal laws on the subject\textsuperscript{34} and the Pennsylvania Act.\textsuperscript{35} This conflict would include any repugnance with the Alien Registration Act of 1940,\textsuperscript{36} since the effect of a federal statute on state laws must be considered even though the federal law is adopted subsequent to the decision


\textsuperscript{30} 274 U. S. 392 (1927).

\textsuperscript{31} This was first laid down in Gibbons \textit{v.} Ogden, 9 Wheat. 1 (U. S. 1824), as testing a state burden on interstate commerce. See note 9 \textit{supra}.\asespace

\textsuperscript{32} See note 31 \textit{supra}. See also Escanaba & L. M. Transportation Co. \textit{v.} Chicago, 107 U. S. 678, 683 (1883); Gilman \textit{v.} Philadelphia, 3 Wall. 713 (U. S. 1866); Wilson \textit{v.} The Blackbird Creek Marsh Co., 2 Pet. 245 (U. S. 1829); and others.


\textsuperscript{34} Congress has provided an extensive system of alien immigration and control. See note 3 \textit{supra}.

\textsuperscript{35} See note 5 \textit{supra}.

\textsuperscript{36} See note 3 \textit{supra}.
of the court below, the date the appeal was taken, or the date that probable jurisdiction was noted. Though perhaps a direct conflict of the express terms of the statutes might be difficult to show, the Court has voided state laws whose policy conflicted with the policy of the federal legislation in the field. The actual conflict revealed in these cases can be discerned only by reference to the historical background of the respective national and federal laws. The federal act is hedged about with restrictions and every effort is made so that the act will not be too stringent. This policy is contrasted with the avowed purpose of the Pennsylvania Act to curb alien activity:

"If he (the alien) is a member of a subversive group, then we want to know where he is so that we can put a finger on him, when we want him."

From this comparison, a case of direct and positive conflict between the statutes might be worked out.

(3) THAT THE STATE ACT IS COINCIDENT

Whereas the voiding of a state act which is in conflict with a federal one, is compulsory under the Constitution's federal supremacy clause, this doctrine has not ordinarily included state acts which are merely co-

\[ ^39 \text{People v. Compagnie General Transatlantique, 107 U. S. 59 (1882); see also Carpenter v. Wabash Ry., 309 U. S. 23, 26, 27 (1940); Watts & Co. Ltd. v. Unione Austrica de' Navigazione, 248 U. S. 9, 21 (1918); Gulf, Colorado & Santa Fe Ry. v. Dennis, 224 U. S. 503, 505, 506 (1912); Crozier v. Fried, Krupp Aktungsellschaft, 224 U. S. 290, 302, 303 (1912); Dinsmore v. Southern Express Co., 183 U. S. 115, 120 (1901); United States v. Schooner Peggy, 1 Cranch 102, 110 (U. S. 1801).} \]


\[ ^41 \text{Alien Registration Act of 1940, see note 3, supra. For the legislative intent see Cong. Rec. June 15, 1940, pp. 12620-12621, 13468-13469; Hearings before the Subcommittee of Senate Committee on Immigration on S. 1364, 75th Cong., 1st Sess. (1937) et seq; Hearings before the Subcommittee of Senate Committee on the Judiciary on H. R. 5138, 76th Cong., 3d Sess. (1940).} \]

\[ ^42 \text{This statement of Mr. Taylor, principal sponsor of the bill in the Pennsylvania House of Representatives, was made to explain its purpose. PA. LEGIS. JOUR. 1339, and see pp. 751, 807, 4709, 5189.} \]

\[ ^43 \text{U. S. CONST. Art. VI, Cl. 2.} \]
incident. Thus the action of a state in passing a law identical with a federal law would seem permissible under the test of a direct and positive conflict. But the Court has realized that the actual test is not conflict in the ordinary sense, but the feasibility of enforcing both acts.\(^42\) The Court has expressly held that a state act ineffectively coincident with the federal law could not be enforced.\(^43\) This test of coincidence has not been widely used by the Court.\(^44\) The easier rule in application is that the laws cannot stand together. Basically the test of coincidence is not incompatible with that of coexistence. The very coincidence of a state law renders its enforcement unnecessary, or, at least, throws a double burden on those affected thereby. Reasonably, both laws should not be enforced; the federal must prevail. How far the test of coincidence is limited by that of coexistence is as yet uncertain.\(^45\) Practically any co-incident statute will hinder the enforcement of the federal act so that the coexistence test will be satisfied.

Certainly the Court could have found the Pennsylvania statute\(^46\) in the Davidowitz case coincident with the federal statute.\(^47\) Their terms are almost identical as to the information sought by the registration, the use of identification cards, and other details. The Supreme Court has

\(^{42}\)Following Mr. Justice Black's restatement of the tests which have been used by the court, see note 16 supra, he continues: "But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."


\(^{44}\)It is not mentioned in Mr. Justice Black's enumeration. See notes 6, 42 supra. Most of the cases in support of it actually used the coexistence test.

\(^{45}\)See note 44 supra. In Charleston & Western Carolina RR. v. Varnville Furniture Co., 237 U. S. 597 (1912), and People v. Compagnie General Transatlantique, 92 U. S. 276 (1876), the test of standing together was the ultimate basis of the decision.

\(^{46}\)Pennsylvania Alien Registration Act of June, 1939. See note 5 supra.

\(^{47}\)Alien Registration Act of 1940, see note 3 supra.
expressly held that an act concerning aliens which was coincident with a federal act cannot be enforced: 48

"Since the decision of this case in the Circuit Court, congress has undertaken to do what this Court has repeatedly said it alone could do, 'to regulate immigration'. . . . This legislation covers the same ground as the New York statute, and they cannot coexist." 49

The substantial coincidence of the two acts in question might be sufficient to void the state act without any direct conflict.

(4) THAT THE FEDERAL ACT PRECLUDED STATE ACTION

In view of the supremacy of federal laws, the earliest cases recognized that congress might expressly preclude state action on a matter even though it did not regulate thereon itself. 50 This silence on the matter might indicate a congressional intent to leave the subject free of all regulation. 51 Further, a limited regulation by congress might indicate an intent to permit no further regulation. This would constitute a finding that congress had "occupied the field." 52 Thus an extensive and sweeping federal enactment would supersede all existing state legislation and prevent further state action in that field. 53 In the face of this preclusion

48 People v. Compagnie General Transatlantique, 107 U. S. 59 (1882). The case involved a tax or fee laid on incoming aliens by means of a personal inspection procedure. The federal government subsequently levied a fee on incoming aliens without the inspection feature. This was held to supersede the state action.

49 Id. at 63.

50 Robbins v. Shelby County Taxing District, 120 U. S. 489, 493 (1887); Wabash Ry. v. Illinois, 118 U. S. 557 (1886); Pickard v. Pullman Southern Car Co., 117 U. S. 34 (1886); Walling v. Michigan, 116 U. S. 446, 455 (1886); County of Mobile v. Kimball, 102 U. S. 691, 697 (1881); Welton v. Missouri, 91 U. S. 275, 282 (1876); State Freight Tax Cases, 15 Wall. 232, 279 (U. S. 1872); Passenger Cases, 7 How. 283, 462 (U. S. 1849); Gibbons v. Ogden, 9 Wheat. 1,222 (U. S. 1824). See notes 8, 9 supra.


53 In the following cases, federal laws have been held not to be sufficiently extensive to occupy the field: Armour & Co. v. North Dakota, 240 U. S. 510 (1916); Sleigh v. Kirkwood, 237 U. S. 52 (1915); Savage v. Jones, 225 U. S. 501 (1912) (Food and Drug Act);
even state statutes which are not conflicting or coincident are invalid. The congressional occupation of a field depends principally on the intent to preclude state action. This is usually manifested from the terms of the act itself.\textsuperscript{54} But when the intent to occupy the field is not obvious from the face of the act, the Court will examine its legislative history to see if such intent is clearly revealed therein.\textsuperscript{55} The first requisite, therefore, for occupation of the field is an extensive enactment which provides a nationwide system of regulation of the matter.\textsuperscript{56} Second, there must be some federal legislation from which the congressional intent to occupy the field may be clearly discerned.\textsuperscript{57}

In applying the doctrine of occupation of the field, the Supreme Court has again resorted to the distinction between federal action on national

Minn. \textit{ex rel.} Whipple \textit{v.} Martenson, 256 U. S. 41 (1921); Corey \textit{v.} South Dakota, 250 U. S. 118 (1919) (Game Preservation Laws); Mintz \textit{v.} Baldwin, 289 U. S. 346 (1933); Reid \textit{v.} Colorado, 187 U. S. 137 (1902) (Quarantine Laws); Townsend \textit{v.} Yoemans, 301 U. S. 441 (1937); Merchants Exchange of St. Louis \textit{v.} Missouri \textit{ex rel.} Burke, 248 U. S. 365 (1919) (Warehousing Regulations).

In contrast most federal statutes as to railroad regulations have been considered exclusive: Southern Ry. \textit{v.} RR. Comm. of Indiana, 236 U. S. 439 (1915) (Safety Appliance Act); Adams Express Co. \textit{v.} Croninger, 226 U. S. 491 (1913) (Liability of Carriers Act); Charleston & Western Carolina RR. \textit{v.} Varnville Furniture Co., 237 U. S. 597 (1915) (Cormack amendment); Second Employer's Liability Cases, 223 U. S. 1 (1912) (Employers' Liability Act); Southern Ry. \textit{v.} Reid, 222 U. S. 424, 442 (1912) (Interstate Railroad Rates); see also Western Union Tel. Co. \textit{v.} Bocgli, 251 U. S. 315 (1920) (Telegraph Company Liability).

\textsuperscript{64}Southern Ry. \textit{v.} RR. Comm. of Indiana, 236 U. S. 439 (1915). Where intent is not found in the terms of the act, state act may prevail: Maurer \textit{v.} Hamilton, 309 U. S. 598 (1940); Mintz \textit{v.} Baldwin, 289 U. S. 346, 350 (1933); Savage \textit{v.} Jones, 225 U. S. 533 (1912); Reid \textit{v.} Colorado, 187 U. S. 137 (1902); Sinnott \textit{v.} Davenport, 22 How. 227 (U. S. 1859).

\textsuperscript{65}Thus, when conflict was lacking from the terms of the statutes, see note 54 \textit{supra}, the Court examined the legislative history and found intent to preclude state action. Chicago, Rock Island & Pacific RR. \textit{v.} Hardwick Farmers Elev. Co., 226 U. S. 426, 435; \textit{cf.} South Carolina Highway Dep't \textit{v.} Barnwell Bros., 303 U. S. 177 (1938) (intent not found in legislative history).

\textsuperscript{66}See note 53 \textit{supra}. Congress has been held not to occupy the field: (1) where the federal law is invalid, Chicago, Illinois & L. Ry. \textit{v.} Hackett, 228 U. S. 559, 566 (1913); Employers Liability Cases, 207 U. S. 463 (1908); (2) where the federal statute expires or is repealed, Missouri Pacific RR. \textit{v.} Boone, 270 U. S. 466 (1926); (3) when there has been only sporadic federal legislation, Kelly \textit{v.} Washington \textit{ex rel.} Foss, 302 U. S. 1 (1937); Atlantic Coast Line RR. \textit{v.} Georgia, 234 U. S. 280 (1914); (4) when act only intends to investigate the matter, Maurer \textit{v.} Hamilton, 309 U. S. 598 (1940); H. P. Welch Co. \textit{v.} New Hampshire, 306 U. S. 79, 85 (1939); South Carolina Highway Dep't \textit{v.} Barnwell Bros., 303 U. S. 177 (1938).

\textsuperscript{67}See notes 54, 55 \textit{supra}.
and on local matters. Where the subject is essentially national in character, the Court requires less evidence to show an intent to occupy the field. Though certain points may be omitted by the terms of the act, the entire field is considered occupied. One striking example of this easier burden to show intent can be found in the cases involving federal treaties which preclude state action. The treaties are liberally construed, and any state statute, infringing or breaching their terms, is struck down. The Court has shown a readiness to examine the policy underlying the treaty in order to indicate state preclusion, and has resorted to the diplomatic history of the treaty to determine this policy. In one case the Court stated:

“That it was the purpose of the high contracting parties to prohibit discriminatory taxes of this nature appears clearly from the diplomatic correspondence preceding the treaty.”

The very nature of treaties being so clearly national, it is easy to discern therefrom an intent to prohibit any possible state interference therewith. However, as the clear national interest declines, the requirements to show preclusion increase.

Where the matter has been historically left to state control and the congressional act regulates only a limited portion of the entire field, state regulation of the remaining matters is not prevented. In such circumstances, only where the repugnance is “so direct and positive that the two acts cannot be reconciled or consistently stand together” will the state act be superseded. Into this group falls a great class of statutes involving the regulation of matters found by the Court to be of local

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58 See Cooley v. Board of Wardens, 12 How. 299 (U. S. 1851); see notes 11, 12 supra.
59 Napier v. Atlantic Coast Line RR., 272 U. S. 605 (1926); see note 53 supra.
61 See cases cited supra note 60, wherein the diplomatic transfers preceding the formal signing of the treaty were examined to indicate the purpose of the treaty.
62 Nielson v. Johnson, 279 U. S. 47, 52 (1928); the opinion is by Mr. Justice Stone.
concern.\textsuperscript{65} As yet the expanding octupi of federal laws has not touched the majority of these police power regulations.

The Alien Registration Act of 1940\textsuperscript{66} provides a uniform system of registration for all aliens in this country. Its intent is not clearly revealed by the terms of the act, but its careful restraints of the policy of registration indicate a desire that no more stringent state statute should be passed.\textsuperscript{67} It clearly involves a matter which is national in character. Thus in the Davidowitz case the Court might have found occupation of the field. But it has been shown that under the facts presented a less sweeping conclusion could have been reached, still resulting in the over-turn of the state statute. The Court could have found federal exclusion, conflict, or coincidence. It is now our purpose to examine the actual ruling and suggest its implication relative to the doctrine of federal supremacy.

**THE DECISION IN THE DAVIDOWITZ CASE**

Confronted with these manifold pegs on which to hang its conclusion, the Court first found the matter of alien registration to be a national one. The opinion states:

"Our conclusion is . . . that the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law."\textsuperscript{68}

Thus alien control is not an exclusive federal power, but one wherein it is supreme when congress has acted. The Court pointed to a possible conflict in policy between the federal and the state act, and indicated that at best the Pennsylvania statute was merely coincident with the federal registration law.\textsuperscript{69} But the opinion goes further and implies from the background of the federal act a\textsuperscript{70} congressional intent to occupy the field and preclude state action. The Court says:

"When it made this addition to its uniform naturalization and immigration laws, it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law abiding aliens through one uniform national registration


\textsuperscript{66}Alien Registration Act of 1940, see note 3, \textit{supra}.

\textsuperscript{67}Ibid.

\textsuperscript{68}Hines \textit{v.} Davidowitz, 61 Sup. Ct. 399, 405 (Jan. 20, 1941).

\textsuperscript{69}Id. at 406, 407.

\textsuperscript{70}Id. at 407.
The system, and to leave them free from the possibilities of inquisitorial practices and police surveillances. . . . Under these circumstances the Pennsylvania Act cannot be enforced.\textsuperscript{771}

But the process by which an intent to occupy the field was inferred, is a new one to the Court. The terms of the Act indicate no such intention. The congressional debate did not consider the matter of preclusion of existing state laws\textsuperscript{72} which were known to be in existence at the time of the passage of the bill.\textsuperscript{73} Yet the terms of the Act and the legislative debate thereon are the principal sources from which the Court finds preclusion.

The Court pointed out "that congress might validly conclude that such a uniformity is desirable\textsuperscript{774} as to necessitate exclusive federal control of the field. This means simply that the field is one susceptible of exclusive federal action. In discussing the intent manifested from the debate, the Court concluded "that the legislative history of the Act indicates that congress was trying to steer a middle path."\textsuperscript{776} Since this was in reference to the stringency of their own act, it is a long step to infer from this intent to make its own registration system limited in its scope, a congressional determination that no state law on the matter should be passed. This is not a clearly manifested intent to occupy the field; the old approach to this problem is absent. The Court is deciding the controversy either on the basis of its own conception of congress' policy,\textsuperscript{76} or is establishing from the very fact of congressional action in such a national field a presumption of intent to preclude. The "one crystal clear formula\textsuperscript{777} thus appears. Congressional action in itself precludes state action. No longer need intent to preclude appear from the history of the act. Congressional action raises a presumption of such intent which will govern the Court.

\textsuperscript{771}Id. at 408.
\textsuperscript{772}Several states have statutes passed during 1917-18, which require registration when a state of war exists or when public necessity requires. E.g. CONN. GEN. STAT. (1930) § 6042; FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 2078; IOWA CODE (1939) § 503; LA. GEN. STAT. (Dart, 1939) § 282; ME. REV. STAT. (1930) c. 34, § 3; N. H. PUB. LAW (1926) c. 154, § 1 et seq.; N. Y. CONS. LAWS (executive LAW) § 10. Others have passed statutes recently. E.g. N. C. CODE (1939) § 193 (a)-(h); S. C. CODE (1940) No. 1014, § 9. In several states municipalities have recently undertaken local alien registration.
\textsuperscript{773}Hearings before the Subcommittee of the Senate Committee of the Judiciary on H. R. 5138, 76th Cong., 3d Sess. (1940).
\textsuperscript{774}Hines v. Davidowitz, 61 Sup. Ct. 399, 407 (1941).
\textsuperscript{775}Ibid.
\textsuperscript{776}Id. at 408; the dissent of Mr. Justice Stone.
\textsuperscript{777}Id. at 404.
THE POSSIBLE IMPLICATIONS

This easy preclusion of state action by a finding that congress had occupied the field of alien registration brought a vigorous dissent.78 For the minority, Mr. Justice Stone complains:

"It is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what congress might have intended if it had considered the matter, or by reference to our own conceptions of a policy which congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted."79

This doctrine was majority law in Maurer v. Hamilton80 wherein the Court found from the Federal Motor Carrier Act81 no intent to preclude the states from highway safety measures. But this decision was based on a primary finding that the matter was of local concern.82 In the Davidowitz case the majority might be said to have established a presumption from congressional action of the intent to occupy the entire field. Thus the elusive problem of settling a conflict of federal and state statutes is removed from the Court and placed in congress which may overcome the presumption by giving express consent to state regulation.83

Mr. Justice Black has previously expounded this theory in his dissents in Adams Manufacturing Company v. Storen,84 Gwin, White & Price v. Henneford,85 and McCarroll v. Dixie Greyhound Bus Lines.86 He stated in the latter dissent:

"This Court has but a limited responsibility in that state legislation may here be challenged only if it discriminates against interstate commerce, or is hostile to the congressional grant of authority... We think the remedy (of this problem) is within ample reach of congress."87

These cases involved state action in the absence of federal legislation and

78Id. at 408. The decision was 6-3 with Mr. Justice Stone, Mr. Justice McReynolds, and Chief Justice Hughes dissenting.
79Ibid.
80309 U. S. 598 (1940). This was a unanimous opinion.
83See Dowling, supra note 7, at 20; Traynor, supra note 9, at 179.
84304 U. S. 307, 316 (1938).
85305 U. S. 434, 442 (1939).
86309 U. S. 176, 183 (1940). This was an anonymous dissent by Justices Black, Douglas, and Frankfurter.
87Id. at 184, 189.
Mr. Justice Black urged the Court to refrain from entering the dispute. The solution of the problem properly lay in congress, and the Court should void only state statutes discriminatory as to interstate commerce. When congress enacted legislation, this judicial restraint reaches another result. Rather than weigh the conflicting interest expressed by the two statutes, the Court will presume that congress intends thereby to occupy the field. This presumption may be overcome by Congress at its pleasure.

If this be the implication of the decision of the Davidowitz case, the lines of federal supremacy are tremendously broadened. There are certain questions which it leaves unanswered. Is there still left to the Court's arbitration, the question of determining whether the matter is of national or local concern? Or does congressional action raise a presumption of national interest as well? Most important, will the new presumption be applied to interstate commerce matters wherein regulation has been historically left to the states? These questions the writer does not attempt to answer. But it is suggested that the broad words of this opinion could be used as a future precedent to preclude state action in any field wherein congress chose to act.

LEWIS R. DONELSON III
LABOR PROVISIONS OF THE CLAYTON ACT REVIVED

ON FEBRUARY 3, 1941, the Supreme Court presented labor with a sweeping victory. The decision, United States v. Hutcheson,¹ was the culmination of a controversy arising between rival craft unions in St. Louis. The Anheuser-Busch Company had contracted with one construction company for the erection of an additional brewing facility in St. Louis, and the Gaylord Corporation, which leased adjoining land from Anheuser-Busch, contracted with another construction company for the erection of an office building. A dispute developed as to whether the United Brotherhood of Carpenters and Joiners of America or the International Association of Machinists should do the work on the new brewing facility. Anheuser-Busch awarded the work to the Machinists. The results were:

"... a strike of the Carpenters, called by the defendants against Anheuser-Busch and the construction companies, a picketing of Anheuser-Busch and its tenant, and a request through circular letters and the official publication of the Carpenters that union members and their families refrain from buying Anheuser-Busch beer."²

In line with the Department of Justice’s announced³ policy of including restraints of all types which create log jams in the building industry, either by employers or employees, in its enforcement program, the United States obtained an indictment against the president and certain other members of the Carpenters’ Union charging violation of Section 1 of the Sherman Act.⁴ Their demurrers were sustained in the district court⁵ and, on direct appeal, the United States Supreme Court, through Mr. Justice Frankfurter, affirmed this decision on the ground that the activities carried on were immunized from criminal prosecution under the Sherman Act, "by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct."⁶

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¹61 Sup. Ct. 463 (1941).
²Id. at 464.
⁶61 Sup. Ct. 464, 467 (1941).
Whether or not the conduct alleged in the indictment should be properly called a “secondary boycott” is an indeterminate question with which it is futile to wrestle. Among the acts alleged as offensive, the most extreme appearing in the indictment was that the defendants “instigated, promoted and brought about a boycott of beer brewed by Anheuser-Busch, Inc., and of dealers in said beer throughout the United States. . . .” The question before the Court was not one of mere terminology but whether this specific conduct violated any criminal law in the United States.

The specific conduct in the present case, had it arisen prior to the success in 1914 of Woodrow Wilson’s campaign for legislation to “put

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An important distinction is made in Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910 (1937), where a “picketing” of the product was held legal and seemingly distinguished from the Duplex case, infra note 18, where a picketing of the third party handling the product was outlawed. See Note (1938) 116 A. L. R. 484; Smith, Secondary Boycott (1939) 1 L. A. L. Rev. 277; Hellerstein, Secondary Boycotts in Labor Disputes (1938) 47 Yale L. J. 341; the Restatement, Torts, §§ 45-47, adopts the distinction.

From the indictment found in the “Record” at page 10. Note that the majority opinion seems to ignore the last clause of this allegation and treated the case as a plain “product boycott.”

There has been much conflict over the terminology of labor conduct. When congress came to describe the acts which might not be enjoined in the Norris-LaGuardia Act, it was particularly careful to avoid terms, the meaning of which had long been obscure and the subject of diffusive legal controversy. In a recent decision the Supreme Court declared: “The vague contours of the term ‘picketing’ are nowhere delineated . . . ,” and quotes from a commentator who described seven different forms of picketing with numerous variations in many of those forms. Thornhill v. Alabama, 310 U. S. 88, 100 (1940), 29 The Georgetown Law Journal 379. The terms “boycott” and “secondary boycott” are even more vague. Some courts, as a matter of definition, consider that violence and other coercive conduct are necessarily included (American Steel Foundries v. Tri-City Council, 257 U. S. 184, 207 (1921)), while to other courts these words are descriptive of peaceful and lawful acts. Exchange Bakery and Restaurant, Inc. v. Rifkin, 245 N. Y. 260, 263, 157 N. E. 130, 133 (1927); Gill Engraving Co. v. Doerr, 214 Fed. 111, 118 (S. D. N. Y., 1914). See also, the dissenting opinion of Mr. Justice Brandeis, in which Mr. Justice Holmes and Mr. Justice Clarke concurred in Duplex Printing Press Co. v. Deering, 254 U. S. 443, 479 (1921). The differences of opinion among courts in their adjudication of questions of “boycotting” and “picketing” rested less upon differences as to the legality of specific courses of conduct than upon differences as to the meaning of these words. Thus the Restatement, Torts, 28, Topic 4, states: “Some conduct of the kind dealt with in this topic . . . is frequently called ‘secondary boycott.’ That phrase has such an uncertain meaning and is so frequently applied to such diverse situations that it is not used in the restatement of this subject. Instead, specific conduct is described and its legality discussed.”
teeth in the anti-trust laws";10 would certainly have been held in violation of the Sherman Act. In 1908 the Act was held clearly applicable to labor conduct in Loewe v. Lawlor11 (the Danbury Hatters case), when the Supreme Court sustained an award of triple damages in favor of an employer for injuries from activities which it branded a "secondary boycott". This behavior, a picketing of dealers retailing the "unfair" product, from which the injury arose, was spoken of as an act "which essentially obstructs the free flow of commerce between States, or restricts, in that regard, the liberty of a trader to engage in business."12 Thus at a time when employers were enjoying a period of unprecedented expansion and combination of business, labor's rights were relatively restricted13—even those classic rights to unionize and to strike which had been generally recognized within that quarter of a century.14

10See 2 Beard, America in Mid-Passage (1940) c. 1.
12208 U. S. 274, 293 (1908).

13As to whether or not, in fact, on its creation, congress ever intended the Sherman Act to apply to labor is a question on which commentators have differed widely. For all practical purposes it must now be considered "moot," although Mr. Justice Stone suggested that some labor conduct might be embraced by the Act in the recent case of Apex Hosiery Co. v. Leader, 310 U. S. 469, 487-488 (1940), 29 The Georgetown Law Journal 120.


As illustrative of the restriction of American labor rights in the period to 1914, see In re Debs, 158 U. S. 564 (1895). The background of the issue of the injunction, the Government's reliance on the Sherman Act, and the Supreme Court's denial of habeas corpus in the contempt proceedings following the Pullman strike is interestingly described in JOSEPHISON, THE POLITICS (1938) 578. Another setback occurred when in Adair v. United States, 208 U. S. 161 (1908), the Court held unconstitutional an act (30 Stat. 424 (1898)) against exaction by railroad companies of "yellow dog contracts."

The limitation placed on labor in connection with conduct generally termed "secondary boycott" by the Danbury Hatters case, supra note 11, under the Sherman Act was extended by the Gompers case (though not arising under the Sherman Act), infra note 16. For discussion of decisions restricting right, termed "boycott," see FRANKFURTER AND GREEN, THE LABOR INJUNCTION (1930) 42-46. For a useful discussion of the evolution of labor's rights
There followed much agitation to make the anti-trust laws more effective with respect to business combinations which in 1914 culminated in the passage of the Clayton Act.\(^{15}\) Public revulsion to the *Danbury Hatters case* and *Gompers v. Bucks Stove and Range Co.*,\(^{16}\) coupled with a desire to safeguard labor’s rights, forced the inclusion in the Act of an immunity for their activities in legal combination.

Section 20 of the Clayton Act sets out peaceful and lawful conduct which is not to be enjoinable and not to be "considered or held to be violations of any law of the United States."\(^{17}\) This enumeration refers to *bona fide* labor activities, that is, such activities as constitute part of a *bona fide* labor dispute. In applying the Act, the Court has been faced with the problem as to whether or not the given activity is really part of such a *bona fide* labor dispute.

One approaching the problem anew finds that the *Hutcheson indictment* sets out the offensive conduct as follows: That the defendants "instigated, promoted and brought about a boycott of beer brewed by Anheuser-Busch, Inc., and of dealers in said beer throughout the United States." He is impressed that it refers to the same physical acts contemplated by the Clayton Act, where workmen are given free scope for "ceasing to patronize . . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do." Such conduct, by Section 20, is not to be "considered or held to be violations of any law of the United States."

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\(^{16}\) 221 U. S. 418 (1911).

\(^{17}\) Section 20, Clayton Act, called by Taft in the *Address of the President of the American Bar Association* (1914) 39 A. B. A. Rep. 359, 380, "the charter of liberty of labor," the more important provisions of which are: "And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, from recommending, advising, or persuading others by peaceful and lawful means so to do; . . . nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." 38 Stat. 738 (1914), 29 U. S. C. § 52 (1934). See Note (1917) 30 Harv. L. Rev. 632, 635.
How, then, could there be any question about the applicability of the immunity of Section 20? In 1921, the Supreme Court was presented with a case in which, as in the Hutcheson case, the conduct asserted to be a violation of the Sherman Act similarly appeared to fall squarely within the definition of Section 20. In Duplex Printing Press Co. v. Deering, an injunction was sustained, restraining peaceful picketing of a New York installation of machinery manufactured in a Michigan plant whose unionization was sought. The Court held (Justices Brandeis, Holmes and Clarke dissenting) that Section 20 of the Clayton Act, being a relaxation of the provisions of the anti-trust laws, in the nature of a "special privilege to a particular class" must be confined to those and may be exerted only against those "who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present or future."19

The exclusion of third parties from the protection of Section 20 was even more extreme in Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n.20 In that case the "restraint of interstate commerce" condemned as "unreasonable" by the Supreme Court (Justices Brandeis, Holmes and Stone dissenting) was merely the refusal of a national union of stone cutters, fighting for its life against a hostile employers' association, to work upon stone that had been "planed, turned, cut, or semi-finished, by men working in opposition to our organization."21 This is comparable to the refusal of the defendants in the Hutcheson case to permit members of the Brotherhood of Carpenters to work for corporations which had contractual relations with the Anheuser-Busch Company. In essence, therefore, in the Duplex and Bedford decisions, and in a host of subsequent cases which rely on this pair, the Supreme Court limited the "labor dispute" to which the immunities of Section 20 applied to those disputes between parties standing in the proximate relationship of employer and employees. Since part of the activities in the Hutcheson case were directed against "innocent people far remote

18254 U. S. 443 (1921); for place of this case in history of labor injunctions see Simpson, Fifty Years of American Equity (1936) 50 Harv. L. Rev. 171, 196. Compare Chief Justice Taft's opinion delivered the same year at the next term of court in American Foundries Company v. Tri-City Council, 257 U. S. 184, 203 (1921).
20274 U. S. 37 (1927).
21Magruder, supra note 14, at 1080.
from any connection with or control over the original and actual dispute,"22 the Clayton Act, as heretofore interpreted by the Court, would seem to lend no immunity to the conduct involved. As an interpretation of what Congress intended behind Section 20 in 1914,23 these earlier cases would seem erroneous—witness the vigorous dissents of three of the ablest judges on the Court in both cases. The result was to diminish the immunity granted labor to such an extent that Section 20 of the Act was substantially emasculated.

In 1932, Congress enacted the Norris-LaGuardia Anti-Injunction Act.24 The definition of "labor dispute" was long and very carefully drawn.25 Congress plainly repudiated the concept that a "labor dispute" is limited to the proximate relationship of employer and employee and committee reports cited the Duplex and Bedford cases with express disapproval.26

When the Hutcheson case reached the Supreme Court, therefore, it posed two fundamental questions. First: Was the conduct described a violation of the Sherman Act as presently interpreted quite apart from the Clayton Act? And the second: Should the Clayton Act be now construed as immunizing the conduct in spite of the Duplex and Bedford decisions?

The first question the majority of the Court passed without consideration, Mr. Justice Stone specially concurring on the ground that no violation of the Sherman Act was alleged. Intimation in the recent case, Apex Hosiery Co. v. Leader,27 that conduct such as this might be held not even a violation of the Sherman Act must await further clarification.28

28 The Sherman Act made all combinations running from fraud and violence at one extreme to peaceful associations at the other, that restrained interstate commerce illegal, enjoinable and the subject of triple damages. The Clayton Act, by Section 20, immunized certain labor conduct from injunction or being declared illegal as in violation of "any law
As to the second question, Mr. Justice Frankfurter in essence overruled the Duplex and Bedford cases and extended the immunity of Section 20 to the limits to which they were probably intended. In reliance on congress'28 statement as to what a "labor dispute" is he rejected the restrictive interpretation of the Duplex and Bedford cases and leaned on that set out in the Norris-LaGuardia Act.30

Because the Norris-LaGuardia Act deals only with procedural matters,31 Mr. Justice Frankfurter might be criticized for his technique in deciding the case.32 His approach may perhaps be explained as an

of the United States," including the Anti-Trust laws. That the door is left open for prosecution of labor conduct despite this immunity where fraud and violence is present seems indicated by the decision of the Supreme Court in the Milk Wagon Drivers' Union of Chicago v. Meadowmoor Dairies, Inc., 61 Sup. Ct. 552 (1941). It was there held that even peaceful picketing might be enjoined when it was "enmeshed with contemporaneously violent conduct which is conceded outlawed." Cf. Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., 61 Sup. Ct. 122 (1940), 29 The Georgetown Law Journal 658, where, despite evidence that "violence was frequent," the conduct was considered to be immunized.

Of interest is the attitude of the minority (Justice Black, Douglas and Reed) in the former (1941) case that the majority decision, though it cites Thornhill v. Alabama, 310 U. S. 88 (1940), and Carlson v. California, 310 U. S. 106 (1940), and says it does not qualify them, "struck directly at the heart of our constitutional government" by infringing constitutional guarantees of free speech.


29See, concerning federal courts' expanding concept of "labor dispute," Note (1938) 26 The Georgetown Law Journal 1026. One may add that the Supreme Court's interpretation was much less restrictive than the lower court decisions. See (1938) 27 The Georgetown Law Journal 189. For further broadening of the term, see American Federation of Labor v. Swing, 61 Sup. Ct. 568 (1941), 29 The Georgetown Law Journal 796 infra.

30See detailed discussion in a Note, The Norris-La Guardia Act: Cases involving or growing out of a Labor Dispute (1937) 50 Harv. L. Rev. 1295. See Mr. Justice Roberts dissent in the Hutcheson case ending: "No court has ever undertaken so radically to legislate where congress has refused to do so." 61 Sup. Ct. 463, 471, 472 (1941).

31The technique by which Mr. Justice Frankfurter deems the allowable area for labor activities specified in Section 20 of the Clayton Act coterminous with the scope of "labor dispute" as defined in sections 13 (b) and (c) of the Norris-La Guardia Act is suggestive of the approach of the courts under the Continental systems, where judges are more inclined to keep their decisions abreast of the intentions of the legislature, reasoning by analogy from the general tenor of bills passed on the subject. See Landis, Statutes and the Sources of Law (1934) in Harvard Legal Essays (1934) 213, written in honor of Beale and Williston, edited by Frankfurter and Pound. The rule always heretofore followed in respect of implied repeal was recently expounded in an analogous situation in United States v. Borden Co., 308 U. S. 188, 198 (1939). Note concurring opinion of Mr. Justice Stone in United States v. Hutcheson, 61 Sup. Ct. 463, 468, and cf., Stone, The Common Law in the United States (1936) 50 Harv. L. Rev. 4, 9.
articulate means of avoiding the Court's well-settled canon of statutory construction that previous statutory interpretations of long standing will not be overthrown without some sort of congressional disapproval. Ordinarily, this disapproval must be by congress legislating directly upon the point.\(^\text{33}\) In effect, Mr. Justice Frankfurter and the majority of the Court agree that the Norris-LaGuardia Act is the necessary expression of congressional disapproval, and that "labor dispute"\(^\text{34}\) as defined by the Norris-LaGuardia Act is "labor dispute" for the purposes of the Clayton Act as well.

The *Hutcheson case* thus establishes labor's right to the unrestricted use of its legitimate weapons of industrial warfare, those forms of peaceful\(^\text{35}\) conduct generally known as "strike," "picketing" and "boycott". That the conflict is a jurisdictional dispute between rival unions does not affect the immunity granted by the specific terms of the Clayton Act.\(^\text{36}\) If this results in devastating losses from unrestrained interruptions of business, it is to congress,\(^\text{37}\) not to the courts, that the employer must turn.

WILLIAM BLUM, JR.

\(^{\text{33}}\)But see Mr. Justice Frankfurter's opinion in Helvering v. Hallock, 309 U. S. 106 (1940), (1940) 53 HARV. L. REV. 884.

\(^{\text{34}}\)That the N.L.R.A., 49 STAT. 449 (1935), 29 U. S. C. A. § 151 et seq. (Supp. 1940), embodied the same concept of "labor dispute" and by it congress expressed disapproval of the more limited concept, see Fed. Legis. (1935) 23 THE GEORGETOWN LAW JOURNAL 826, 831; cf. (1939) 27 THE GEORGETOWN LAW JOURNAL 639.

\(^{\text{35}}\)Conduct involving fraud and violence such as in the *Apex case*, supra note 27, immunized under federal laws may, however, be subject for damages under state laws.

\(^{\text{36}}\)According to Ass't Att'y Gen. Thurman Arnold's recent testimony before the T.N.E.C., as reported Feb. 16, 1941, in U. S. L. WEEK, 1135, 2485, he was dismissing only one pending indictment (that against the longshoremen—whose conduct in an inter-union dispute was thought in restraint of trade) on the basis of the *Hutcheson case*. He then enumerated the situations deemed not to have been immunized by the Clayton Act as so interpreted and in which they would prosecute violations: 1. Strike of one union against another certified by the N.L.R.B. as exclusive bargaining representative; 2. strike to erect a tariff wall around a locality; 3. exclusion of efficient methods or prefabricated materials from building construction; 4. forcing small independent firms out of business; 5. activities of unions in imposing artificially fixed prices to consumers; and 6. the "make-work" system.

\(^{\text{37}}\)The strikes in defense industries in the weeks prior to Feb. 20, 1941, caused the House Judiciary Committee to call Mr. Sidney Hillman and Mr. William Knudsen, Co-Chairmen of the Office of Production Management, before them to ask their opinion as to the desirability of altering labor legislation and they both recommended no change. In the next week, following the Bethlehem Steel strike, Mr. Knudsen announced that he would seek legislation by congress to institute a program of "reasonable compulsory arbitration and a cooling period."
ATTORNEY AND CLIENT—Right of Counsel—Can Court Force Payment of Counsel by the State?

The relators were appointed by the county court of Pike County, Indiana, to defend a pauper charged with murder. The case was later sent to Knox County on a change of venue. The Knox County circuit court made allowances to the relators for their services in representing the defendant. Action was brought by relators to mandate the auditor of Knox County to issue warrants, which when issued were not paid, because of a lack of funds. The present action seeks a mandamus writ on the county council to appropriate sufficient funds to meet the warrants. Held, a court trying a criminal case has power to appoint counsel for pauper defendant and order compensation of such counsel, and the right to provide compensation cannot be made to depend on the will of the legislature or county council. Knox County Council v. State ex rel. McCormick, 29 N. E. (2d) 405 (Ind. 1940).

The right of a defendant charged with a criminal offense to be represented by counsel is expressly provided in the Federal Constitution and in the constitutions of all but four of the states. Cf. Constitutions of the United States (1938—compilation prepared for New York State Constitutional Convention). In the three states wherein this provision is not expressly set forth it is held to be an implied right under their due process clauses. With this particular phase of the decision of the court there can be no cavil. Johnson v. Zerbst, Warden, 304 U. S. 458 (1938); Powell v. Alabama, 287 U. S. 45 (1932). However, in promulgating the doctrine that the court has the right summarily to grant compensation, without the aid of an enabling statute, this decision brings forth a definitely minority view.

In reaching its decision in the instant case the court found the basis for its conclusion in two constitutional provisions of the Indiana constitution; that granting every person charged with a criminal offense the right to be heard by counsel, and that holding involuntary servitude unconstitutional.

This conclusion is especially interesting in view of the fact that of the forty-eight states, only two other states, Iowa and Wisconsin, have arrived at the same conclusion arguing from the same premises. Webb v. Baird, 6 Ind. 13 (1854); Blythe v. State, 4 Ind. 525 (1853); Hyatt v. Hamilton County, 121 Iowa 292, 96 N. W. 855 (1903); Davis v. Linn County, 24 Iowa 508 (1868); Dane County v. Smith, 15 Wis. 580 (1862).

The argument used by the various courts in these cases can be simplified to the following syllogism: Every man has the constitutional right to a speedy trial and to be heard by counsel. But no man may be compelled, without just compensation to work for another. Therefore, it is within the power of the court to order compensation when the interest of justice demands counsel for a pauper. As it was phrased in Webb v. Baird, supra, at p. 15, "That any class should be paid for the particular services in empty honors is an obsolete idea belonging to another age and to a state of society hostile to liberty and equal rights."

At common law, service as assigned counsel, was without pay. Matter of Reilly v. Perry, 250 N. Y. 456, 166 N. E. 165 (1929). In all other states, except the aforementioned minority of Indiana, Iowa, and Wisconsin, the courts have adopted the
view that membership in the bar is a privilege, burdened with conditions, that the attorney becomes an officer of the bar upon its admission, and as such he is as much an agent for the advance of the ends of justice as the court itself. Arkansas County v. Freeman, 31 Ark. 266 (1876); Elam v. Johnson, 48 Ga. 348 (1873); Johnson v. Whiteside County, 110 Ill. 22 (1884); People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 484 (1928). While such services should be compensated by the state because of the quasi-official status of the attorney, such service must be given when sought whether there is present a possibility of compensation or not. Powell v. Alabama, supra. In the ultimate analysis, the power to provide compensation under such circumstances rests with the legislature and not with the courts. Pardee v. Salt Lake County, 39 Utah 482, 118 Pac. 122 (1911). In most states holding this majority doctrine, statutes have been enacted providing for compensation to counsel appointed by the court.

The fallacy and the impracticality of the Indiana court’s view and that of the sister states of Iowa and Wisconsin becomes apparent upon analysis. Under the Constitutional form of government which exists in the States, dividing the power between the legislative, executive and judicial branches, it is inconceivable that a court have such power and control over the legislature, whether it be state, county or municipal, that it could dictate the nature and amount of its fiscal appropriations. Acts of legislative bodies appropriating the taxpayer’s money are of a purely legislative nature and can in no conceivable manner be held to be ministerial. It is a tenet of the constitutional form of government that ministerial acts are the only ones which may be enforced by a writ of mandamus. Decatur v. Paulding, Sec. of the Navy, 14 Pet. 497 (U. S. 1840); Kendall v. United States, 12 Pet. 524 (U. S. 1837).

The effect of such an order is to grant the appointed counsel a judgment against the government to which it is directed, a judgment in which the government was no party to the action. The courts base their holding on the right of the individual to liberty and property with due process of law, yet in the same breath they deny this right to the government. The circle is completely vicious.

In Webb v. Baird, supra, the court upheld the theory that to compel a man to serve another without compensation was unconstitutional, regardless of whether life or liberty was at stake. What would the courts of these renegade states say to a physician who refused his services to one in dire need, who, because of financial distress, was unable to pay for the medical care necessary? If the medical profession is required to serve the public in this manner, there is no reason why an attorney should not also be required to do so. As one eminent counsel put it: “... when no provision is made it is a duty which counsel so designated owes to his profession, to the court engaged in trial, and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions, in the defense of one who has the double misfortune to be struck by poverty and accused of crime. No one is at liberty to decline such an appointment, and few, it is to be hoped, would be disposed to do so.” Cooley, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 408.

The logical doctrine would appear to be that which has been adopted in most of the other states of the Union, logical both from the practical and ethical point of view. In these states statutes have been passed providing for compensation to attorneys appointed by the court. Such compensation is thus limited to the
manner and extent laid down by the statute, and services rendered outside these limits are held to be gratuitous, in the cause of humanity and justice.

Another solution, which is rapidly advancing in the eyes of the public and the profession is that of the public defender. But in order to bring this system about, statutory enactment will be necessary. See Note (1940) 28 GEORGETOWN LAW JOURNAL, 937; Goldman, Public Defenders, (1940) 26 VA. L. REV. 275. Despite the arguments which have been raised against it, the plan does present a very formidable solution to the problem at hand.

QUENTIN Q. YOUNG

CONSTITUTIONAL LAW—Price-Fixing—Theater Ticket Brokerage Charges

A statute of the State of New York, N. Y. GEN. BUS. LAW § 169 c, as amended by Laws 1940, c. 614, § 1, fixing at seventy-five cents the maximum premium at which ticket brokers may resell tickets for admission to places of entertainment, was attacked as depriving the plaintiffs of their property without due process of law and as being arbitrary and confiscatory. The evils in the conduct of the business which motivated the legislation were not detailed, but it is clearly evinced from the decision that exaction of exorbitant prices was the chief one. There was no dispute as to this evil. Evidence showed that under an agreement with an organization of theatrical producers and theater operators, most of the ticket brokers in the city of New York, where this suit was brought, had been reselling theater tickets, constituting ninety-five per cent of their aggregate sales, at a maximum advance premium of seventy-five cents per ticket. Held, in denying a temporary injunction against enforcing officers, that the conditions existing in connection with the resale of tickets reasonably warranted the intervention of the legislature in the public interest, and that the remedy adopted had not been shown to be arbitrary, discriminatory, or confiscatory. Kelly-Sullivan, Inc. v. Moss, 22 N. Y. S. (2d) 491 (Sup. Ct. 1940).

This decision is directly opposed to that of the Supreme Court in Tyson v. Banton, 273 U. S. 418 (1927). In that case a similar statute of New York, covering the same subject matter, was held to transgress the legitimate orbit of police power and contravene the Fourteenth Amendment. There has been no direct reversal of this position, but in the principal case it was held that new concepts of price-fixing regulations had been promulgated in Nebbia v. New York, 291 U. S. 502 (1934), and in later cases, compelling the conclusion reached.

What is and what is not unconstitutional fixing of prices is an elusive question. A brief comment on the judicial history of modern price-fixing regulations in the United States may be found in (1940) 29 THE GEORGETOWN LAW JOURNAL 110. Four justices dissented from the decision in Tyson v. Banton, supra. In the dissenting opinion of Mr. Justice Stone he referred to the phrase "business affected with a public interest" as vague and illusory, and serving only as a convenient expression for describing those businesses regulation of which had been permitted. A year after this strong condemnation of the time-honored rule it was again applied by a majority of the court to a law requiring state approval of fees of employment agencies, and it was held that, employment agencies not having risen to be a public
business, the law was in violation of the due process clause. *Ribnik v. McBride*, 277 U. S. 350 (1928). In Mr. Justice Stone's dissenting opinion in this case he stated, at page 373: "To me it seems equally obvious that the Constitution does not require us to hold that a business, subject to every other form of reasonable regulation, is immune from the requirement of reasonable prices, where that requirement is the only remedy appropriate to the evils encountered." This view was adopted by the majority in the *Nebbia case, supra*.

A marked change in the attitude of the court seems discernable between the *Tyson case* and the *Nebbia case*. In the former case the remark is made at the outset, that the first principle of ownership is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself; whereas in the latter case the decision is orientated by the assertion that equally fundamental with the private right is that of the public to regulate it in the common interest. *Nebbia v. New York, supra*, at p. 523. Holding a regulation fixing the price of milk to be consistent with the equal protection clause of the Fourteenth Amendment, the court declared that the judicial function is to determine in each case whether the regulation is a reasonable exercise of governmental authority. Regulation of prices is no different from other types of regulation. "But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle." *Nebbia v. New York, supra*, at 531. The Fifth and Fourteenth Amendments merely condition the exercise of this power. Due process demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. The requirement of due process bars no state from adopting an economic policy which may reasonably be deemed to promote the public welfare.

In the principal case the *Nebbia decision* is said to rest on the rule that price-fixing is just another form of regulation to be gauged by its relation to the common good, and this rule was relied upon to sustain the law regulating the price of tickets for admission to amusement places. Contrary to this interpretive freedom is the view of the Supreme Court of Nebraska which, in holding unconstitutional a law fixing fees to be charged by employment agencies, declared that irrespective of recent cases enlarging the orbit of the police power respecting price-fixing legislation it was bound by the decision in *Ribnik v. McBride, supra*, because this was a decision squarely on the same issue and had not been reversed: "In view of all argument, the pertinent legal conception is that the Supreme Court of the United States has not expressly overruled the case of *Ribnik v. McBride, supra*, and our research confirms this fact." *State v. Kinney*, 293 N. W. 393, 398 (Neb. 1940), 29 THE GEORGETOWN LAW JOURNAL 110. However, the *Nebbia doctrine* appears well established in view of subsequent cases. In *Townsend v. Yeomans*, 301 U. S. 441 (1937), the Court sustained a statute fixing maximum charges that could be made by warehousmen for handling and selling leaf tobacco. *United States v. Rock Royal Co-operative*, 307 U. S. 533 (1939), upheld an order by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, 50 STAT. 246 (1937), 7 U. S. C. 601 et seq. (Supp. 1939), fixing and equalizing minimum prices to be paid producers of milk by dealers. In *Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310 (1940), involving a statute fixing prices to be paid to citrus fruit
growers, the court said, at p. 318, "The mere fact that the act fixes prices is, in itself, insufficient to invalidate it; and allegation of that fact does not raise substantial federal questions."

With no clear comprehensive standard to conform to, the field of price regulation was under a cloud of constitutional prohibition, dependent wholly upon the variable attitude of the courts. But the enlargement of the police power in this field by the decisions of the Supreme Court in recent years has been so substantial that it is submitted that the principal case represents a more realistic view of the present attitude of the Court than does the viewpoint expressed in State v. Kinney, supra.

GILBERT RAMIREZ.

CORPORATIONS—Authority of President to Execute Negotiable Instruments

The plaintiff sued upon two promissory notes under seal payable on demand, alleged to have been executed and delivered by the defendant corporation to its manager. The notes were signed by the corporation's president and attested by its assistant secretary. The assignments of the notes by the payee to the plaintiff were under seal and acknowledged before a notary public. The defendant corporation put in issue the authority of its president to make these notes. From a directed verdict for the plaintiff in the trial court the defendant appeals. Held, where one sues a corporation on a note purporting to have been executed by its authority, relying on presumptive authority of the president to execute the instrument, the character of the transaction, the course of conduct on the part of the president and the corporation with respect to like matters, ratification or acceptance of benefits by the corporation or other facts in the nature of an estoppel sufficient to overcome the defense of want of authority, are all proper subjects of inquiry. Italo-Petroleum Corp. of America v. Hannigan, 14 A. (2d) 401 (Del. 1940).

The rule that the president has no authority merely by virtue of his office, that he has no powers other than those delegated to him by the board of directors or otherwise expressly conferred upon him, is gradually being supplanted. The more reasonable view is that he has certain limited powers by virtue of his office, or, at least, that there is a presumption that such authority exists in the ordinary routine business of the corporation. Atlantic Refining Co. v. Ingalls & Co., Inc., 7 Harr. 503, 185 Atl. 885 (Del. Super. Ct. 1936).

With regard to the presumption of authority to execute or indorse negotiable instruments the authorities are in conflict. There is one line of cases which support the doctrine that by virtue of his office the presiding officer of a corporation has implied authority to execute or indorse legal papers binding upon the corporate body. This theory was promulgated in Dexter Sav. Bank v. Friend, 90 Fed. 703 (C. C. S. D. Ohio, 1898), which held that an officer empowered to issue notes for a particular purpose might issue notes for any purpose, and in Iowa Nat. Bank v. Sherman, 17 S. D. 396, 97 N. W. 12 (1903), where it was stated that, since the president was authorized to receive promissory notes in behalf of the company, he might execute or indorse commercial papers. This presumption is granted only where the notes are executed or indorsed for the benefit of the corporation in the ordinary course of business and not otherwise. State v. Lynch, 52 S. D. 321, 217 N. W. 391
Where the president of a corporation executes a note for commissions to be earned by selling corporation stock, any presumptive or implied authority that the president may have to issue such notes in the ordinary course of business is not available to a payee who knew the paper was given for an unauthorized purpose. In re Continental Engine Co., 234 Fed. 58 (C. C. A. 7th, 1916). In some jurisdictions this presumption of implied authority in an officer to execute notes binding upon the corporation, solely by reason of his position, is limited to business corporations. Thus the presumption would not be applicable where a non-trading corporate body, such as a university, is involved. St. Vincent College v. Hallett, 201 Fed. 471 (C. C. A. 7th, 1912).

The minority doctrine, that there is a presumption of implied authority to negotiate instruments solely by reason of the office held, is criticized and decreed unsound in City Electric St. Ry. v. First Nat. Exch. Bank, 62 Ark. 33, 34 S. W. 89 (1896). This case is representative of the weight of authority and illustrates what seems to be the better rule. The court held that the railway corporation was not liable upon the notes executed by its president nor could any presumption of authority be imputed to its officer by reason of his relationship to the corporation. It has been held in numerous cases that the president of a corporate enterprise has no inherent power or implied authority to execute notes on its behalf. Lewis, Hubbard & Co. v. Pugh, 115 W. Va. 232, 174 S. E. 880 (1934); Eastern Oil Corp. v. Strauss, 52 S. W. (2d) 336 (Tex. Civ. App. 1932); Flanagan v. Flanagan Coal Co., 77 W. Va. 757, 88 S. E. 397 (1916).

In contrast to these cases refusing to imply authority merely because of the office, the courts have frequently adopted the grounds of apparent authority to validate a corporate note made by its president. The express or apparent authority to bind the corporation may be delegated to the president by the corporation in several ways. There may be an express grant of the power by the corporate charter, or the by-laws, or by a resolution of the board of directors. Smith v. Steele Motors Co., 53 Idaho 238, 22 P. (2d) 1070 (1933); City Electric St. Ry. v. First Nat. Bank, supra. Authority to execute negotiable paper for the legitimate purposes of the corporation may be implied where he has been accustomed so to act that he is clothed with apparent authority. Such power is also generally held to exist where he is intrusted with the management of the corporation, or where the board of directors exists in name only and has failed to exercise any control or supervision over the affairs of the company. 2 Fletcher, Cyclopedia Corporations (Per Ed. 1931) § 600. This apparent power of a president to execute negotiable instruments should be strictly construed, but it is clear that many notes for which no authority could be implied are upheld by a showing of apparent authority. Vincennes Saving Loan Ass'n v. Robinson, 23 N. E. (2d) 431 (Ind. App. 1940); Alley v. Butte & Western Mining Co., 77 Mont. 477, 251 Pac. 517 (1926).

When the act of a corporation president in executing or indorsing a negotiable instrument is ratified by the corporation, the question of inherent power becomes of no importance. A great number of the cases fall into this category. As corporations act only by and through their officers and agents, ratification by the corporation may be inferred from affirmation or passive acquiescence or from receipt of benefits with knowledge of president's action but without any formal action of its board of directors. State ex rel. Guaranty Bldg. and Loan Co. v. Wiley, 100 Ind. App. 438, 196 N. E. 153 (1935). Ratification requires knowledge by the corporate directors of
all the circumstances of the transaction. Mere silence and failure to repudiate the
note will not amount to a ratification by estoppel if the other party is not prejudiced
by the failure to repudiate. Montrose Land & Investment Co. v. Greeley Nat. Bank,
78 Col. 240, 241 Pac. 527 (1925).

The question of express authority is a matter of fact and, as such, is for the jury
to determine. Implied or presumptive authority is a question of law for the court
N. E. 186, 189 (1920). The apparent authority of the president of a corporation to
execute a note is a mixed question of law and fact. Woollard v. City of Albany, 190
N. Y. S. 741 (Sup. Ct. 1921). When such an allegation is supported by sufficient
evidence, it should be presented to the jury. Citizens’ Bank v. Public Drug Co., 190
Iowa 983, 181 N. W. 274 (1921). The question is not one of law unless the facts
are undisputed and only one reasonable inference may be drawn. Indemnity Ins. Co.
v. Luquire Funeral Homes Ins. Co., 239 Ala. 362, 194 So. 818 (1940). This submis-
sion to the jury of the question of apparent authority explains, in part, the greater
number of cases validating corporate notes on such grounds.

It is the practice of the courts to construe very strictly any implied power of a
corporate president which has not clearly been conferred upon him either by the cor-
porate charter or by a by-law or resolution of the board of directors. In very few
jurisdictions will the courts impute to the president, solely by virtue of his office,
implied authority to negotiate for the corporation, i.e. actual authority circum-
stantially proven which the corporations intended its officer to possess. The apparent
authority of the president to issue commercial paper is subject to a more liberal
construction. This apparent power is not actually granted to the corporate agent
but he is deemed to have the capacity to negotiate since the corporation knowingly
permits the agent to exercise it and holds him out as possessing such authority. The
distinction between implied and apparent authority is tenuous. It seems to stem
mostly from the pleadings of counsel used to support corporate notes. It is sug-
gested that because of the greater liberality toward the apparent authority theory
that it will gradually envelope the theory of implied authority for which there is no
actual need. Most cases proveable on the ground of implied authority are
adapted as well to the more favored theory of apparent authority doctrine.

CHARLES W. BOYLE, JR.

COURTS—Jurisdiction In Personam Over Citizen Absent from State

This suit was originally brought by Meyer in the Colorado courts to enjoin
enforcement against him by Milliken or an In Personam judgment rendered in
Wyoming. It appeared that Meyer, at the time the Wyoming suit was commenced,
was domiciled in Wyoming, although at the time of the suit he was in Colorado;
that he was personally served with process in Colorado pursuant to the Wyoming
any appearance in that cause. Meyer contended that the In Personam judgment
of the Wyoming court was void for lack of jurisdiction over his person, and demanded
an injunction. The Supreme Court of Colorado upheld Meyer’s contention, declaring
the judgment void. On petition for certiorari to the Supreme Court of the United
States, held, domicile in a state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of an appropriate substituted service. *Milliken v. Meyer*, 61 Sup. Ct. 339 (U. S. 1940).

It is fundamental that in order for a state to render a judgment in *persona*m against a defendant, it is necessary that the state have jurisdiction over his person. Under recognized principles of Conflict of Laws, jurisdiction consists of such control over an individual by the state as will enable it to create an obligation against him. *Goodrich, Conflict of Laws* (1935) § 70. By virtue of the due process requirement of the Fourteenth Amendment, a person must also be given notice of the pendency of suit; this requirement must ordinarily be fulfilled by personal service, but a state may, by statute, provide for a substituted mode, so long as the method adopted is reasonably calculated to give notice. *Restatement, Law of Conflicts* (1925) § 90. These elements, control and service, are both essential to give a court jurisdiction. Hence even personal service on a non-resident defendant outside the state is insufficient when the action is in *persona*m. *Wilson v. Seligman*, 144 U. S. 41 (1882); *Dewey v. Ashley*, 12 Colo. 165, 20 Pac. 331 (1888); *Rand v. Hanson*, 154 Mass. 87, 28 N. E. 6 (1891). A state will not be permitted to reach out and impose obligations on persons over whom it otherwise has no jurisdiction, by notifying them that it intends to exercise jurisdiction over them. *Baker v. Baker*, *Eccles & Co.*, 242 U. S. 384 (1917); *Grote v. Rogers*, 158 Md. 685, 149 Atl. 547 (1930); *Nottingham v. Mfg. Co.*, 84 N. H. 419, 151 Atl. 709 (1930); *McNaughton v. Broach*, 236 App. Div. 448, 260 N. Y. Supp. 100 (1st Dep't 1932). But jurisdiction over the person of the defendant, once acquired by service, continues, although prior to the final determination of the cause, the defendant has left the jurisdiction. *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 353 (1913). Sanction for this continuing jurisdiction is found in the power of the sovereign to seize the person of the defendant and imprison him to await the sovereign's pleasure; once this power is asserted by service of process, the necessity of maintaining physical power is dispensed with, and the defendant is held subject to the court's jurisdiction as to all subsequent matters arising in the same litigation. *Nations v. Johnson*, 24 How. 195 (U. S. 1860); *Elsasser v. Haines*, 52 N. J. L. 10, 18 Atl. 1095 (1889); *Fitzsimmons v. Johnson*, 90 Tenn. 416, 17 S. W. 100 (1891).

By statute however, in a majority of jurisdictions a method has been adopted whereby it is possible, in a limited sense at least, to secure jurisdiction over a person when the state has no actual physical control over him, and no right to exercise such control. This situation arises where a non-resident defendant owns property within the jurisdiction. His property may be attached, and notice given him by constructive service. *See*, 9 Rose's Notes on U. S. Repts., (1st Ed. 1918) 1115-1120, and (2d Ed. 1932) 702-704; *see also*, Howard v. Marlin-Rockwell Corp., 156 Misc. 358, 281 N. Y. Supp. 666 (Sup. Ct. 1935). Sanction for this procedure is found in the state's jurisdiction over all property within its boundaries, although the judgment rendered has no efficacy beyond that. *Clark v. Wells*, 204 U. S. 164 (1906). Its constitutional validity has not been doubted since the decision in *Penny v. Neff*, 95 U. S. 714 (1877); *see also*, *Grannis v. Ordeon*, 234 U. S. 385 (1914); *Roller v. Holly*, 176 U. S. 398, 405 (1900); *Arndt v. Griggs*, 134 U. S. 316, 323 (1890). Constructive service is deemed sufficient notice to the defendant when coupled with the presumptive notice arising from the seizure of his property
by attachment. *Owensby v. Morgan*, 256 U. S. 94, 111 (1921). This procedure will be valid however only where, in connection with the process against the person for commencing the action, property belonging to him within the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose. *Pennoyer v. Neff*, supra at 733; *Aldridge v. Bank*, 165 Miss. 1, 144 So. 460 (1932). Cf., *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 61 Sup. Ct. 513 (U. S. 1941).

This rule does not apply in the federal courts, the reason being of course, that Congress has failed to enact legislation conferring jurisdiction upon the courts. The question has come up many times but it has now long been settled that a federal court cannot acquire original jurisdiction over a non-resident of the district in which the court is sitting by attaching his property within the district and serving him constructively, at least where the cause of the action is purely a personal one. *Big Vein Coal Co. v. Read*, 229 U. S. 31 (1913); *Ex Parte Des Moines & M. Ry.*, 103 U. S. 794 (1880); *Toland v. Sprague*, 12 Pet. 300 (U. S. 1836). Statutes enacted in 1872, 1887 and 1889 were thought to have done away with the necessity for personal service. Yet when this contention was advanced in the *Big Vein Coal Co. case*, *supra*, the Supreme Court reiterated the doctrine that attachment in the federal courts is not a devise for acquiring jurisdiction, but is available solely as an auxiliary remedy when there has been personal service, or a general appearance. See also, *Cleveland Coal Co. v. Hillman & Sons*, 245 Fed. 200 (N. D. Ohio 1917); *Bucyrus Co. v. McArthur*, 219 Fed. 200 (M. D. Tenn. 1914). However, where a state court has first acquired jurisdiction by means of the attachment of a non-resident’s property and constructive service, a federal court will succeed to the jurisdiction upon removal to that tribunal. *Blumberg v. Shaw Co.*, 131 Fed. 608 (C. C. N. Y. 1904). But when the action is strictly in rem, as to remove a cloud on title or to set aside a fraudulent conveyance, jurisdiction is conferred upon the federal courts by 18 Stat. 472 (1875), 28 U. S. C. § 118 (1934). For a good discussion of federal jurisdiction in general see Note (1939) 18 N. C. L. Rev. 51.

The decision of the court in the instant case rests upon the principle that the state which accords to its citizen privileges and affords to him protection for himself and his property by virtue of his domicile, may also exact reciprocal duties. The responsibilities of citizenship arise out of the relationship to the state which domicile creates, and that relationship is not to be dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence within the state. One such incidence of domicile is amenability to suit within the state even during sojourns without the state, where, as in this case, the state has provided and employed a reasonable method for apprising such absent party of the proceedings against him.

The problem confronting the Court in the principal case was the first of its type to be presented there. True, questions of a somewhat analogous nature had been previously decided by it in *Lafayette Ins. Co. v. French*, 18 How. 404 (U. S. 1856) (holding that a court could acquire jurisdiction over a foreign corporation which had consented to receive service as a condition to its doing business within the state), in *Doherty & Co. v. Goodman*, 294 U. S. 623 (1935) (holding that a court could acquire jurisdiction of a corporation or individual under a statute permitting service to be made on its agent in actions arising out of the conduct of its business) and in *Hess v. Pawloski*, 274 U. S. 352 (1927) (holding that a state statute, which
provided that a person using the highways of the state should be deemed to have appointed an agent to receive service in case of accident, was constitutional and was sufficient to give the court jurisdiction to render an in personam judgment against that person), yet the precise point in issue here had not previously been litigated before the Court. In *McDonald v. Mabee*, 243 U. S. 90 (1917), the court intimated that the rule of the instant case was correct, but failed to decide the point since the question there was one of due process, namely, whether the method of substituted service was fair.

In deciding as it did, the Court unquestionably followed the weight of authority, both in this country and in England. Although the cases decided here are few in number, it seems to have been long settled that personal service is not necessary when the person sought to be charged is a subject or a citizen of the country wherein the proceedings are taken, and where the substituted service is in conformity to the statute, and not lacking in due process; this is put upon the ground that the person domiciled there owes allegiance to the country and submission to its laws. *Natalbany Lumber Co. v. McGraw*, 188 La. 863, 178 So. 377 (1938); *Abington v. North Bridgewater*, 23 Pick. 170 (Mass. 1839); *Rawstorne v. Maguire*, 265 N. Y. 204, 192 N. E. 294 (1934). See also *Becquet v. McCarthy*, 2 Barn & Adol. 951 (K. B. 1831); *Bank v. Nias*, 16 Q. B. 717 (1851); *Same v. Harding*, 9 C. B. 661 (1850) *Vallee v. Dumergue*, 4 Exch. 290 (1849); *Meeus v. Thellusson*, 8 Exch. 638 (1853).

**DOMESTIC RELATIONS—Divorce—Construction of Voluntary Separation Statute**

Plaintiff deserted his wife without cause on April 18, 1932. A few months later they signed a separation agreement. The defendant wife obtained a limited divorce on the ground of desertion in 1935 which was in effect when the plaintiff filed the present action in 1938 for an absolute decree on the basis of a five-year voluntary separation. Since their separation neither party had sought a reconciliation or a resumption of marital relations. The district court dismissed the complaint. *Held*—reversed, the plaintiff is entitled to an absolute divorce on the ground of voluntary separation. *Parks v. Parks*, 116 F. (2d) 556 (App. D. C. 1940).

This case turned upon the construction of the words "voluntary separation." D. C. Code, Title 14, § 63 (Supp. 1939) permits absolute divorce for "voluntary separation from bed and board for five consecutive years without cohabitation." What constitutes a voluntary separation as contemplated by the Code provision is a question which does not depend upon the unexpressed desires or motives of the parties. The purpose of the 1935 amendment according to the court "was to permit termination in law of certain marriages which have ceased to exist in fact." *Parks v. Parks*, supra at p. 557. A Rhode Island court followed this theory in construing a statute provision which permitted absolute divorce after a separation of ten consecutive years at the discretion of the court. *Smith v. Smith*, 54 R. I. 236, 172 Atl. 323 (1934). Therefore any separation which continues for the statutory period uninterrupted by overt attempts at reconciliation or resumption of marital relations is voluntary within the meaning of the code provisions. The separation, however, must be based upon an agreement between parties, although the origin of the separation will not
affect the granting of the divorce. A party guilty of a marital wrong is not barred, therefore, from securing an absolute divorce on the ground of voluntary separation.

There are two types of statutes extant in several states which permit an absolute divorce on the ground of separation for periods ranging from two to ten years. One type found in the majority of these states does not require that the separation be voluntary. In the other type the separation must be voluntary. The District of Columbia, Maryland, Washington and Wisconsin have the latter type of statute.

In the states requiring simply separation as the basis of an absolute divorce, mutual assent to the separation is not generally required. *Knabe v. Berman*, 234 Ala. 433, 175 So. 354 (1937); *Best v. Best*, 218 Ky. 648, 291 S. W. 1032 (1927); *Goudeau v. Goudeau*, 146 La. 742, 84 So. 39 (1920); *Accord, Schuster v. Schuster*, 42 Ariz. 190, 23 P. (2d) 559 (1933); *cf. Gallano v. Monteleone*, 178 La. 567, 152 So. 126 (1934). Contra: *White v. White*, 196 Ark. 29, 116 S. W. (2d) 616 (1938); *Parker v. Parker*, 210 N. C. 264, 186 S. E. 346 (1936). After the decision of the court in the latter case, the legislature of North Carolina amended its statute (N. C. Cod Ann. (Mitchie, Supp. 1937) § 1659a) in 1937 by eliminating the words "either under deed of separation or otherwise," upon which the court had based its construction. Obviously the legislature was dissatisfied with the interpretation of its intent.


In the states where the statute requires that the separation be voluntary the mutual assent of the parties is essential. *Parks v. Parks*, supra; *Campbell v. Campbell*, 174 Md. 229, 198 Atl. 414 (1938); *McGarry v. McGarry*, 181 Wash. 689, 44 P. (2d) 816 (1935); *Rooney v. Rooney*, 186 Wis. 49, 202 N. W. 143 (1925).

In the District of Columbia and Maryland, if there is a separation agreement, the courts will look only to the voluntary character of the separation as evidenced by the conduct of the parties to the agreement. *Parks v. Parks*, supra; *Safe Deposit and Trust Co. v. France*, 176 Md. 306, 4 A. (2d) 717 (1939); *Campbell v. Campbell*, supra. So long as the parties adhere to the separation agreement during the statutory period the separation cannot be involuntary and the misconduct of one of the parties will not change the nature of the separation. The courts will not inquire into the origin of the agreement nor into the guilt or innocence of the parties. *Parks v. Parks*, supra; *Safe Deposit and Trust Co. v. France*, supra; *Campbell v. Campbell*, supra; *cf. Miller v. Miller*, 11 A. (2d) 630 (Md. 1940).

In the other two states which have this type of statute the character and origin of the separation controls the granting of a divorce. In *McGarry v. McGarry*, supra, the Washington court held that only the injured party was entitled to sue. In *Rooney v. Rooney*, supra, where an attempt at reconciliation was made for the purpose of getting grounds for a divorce the Wisconsin court held that "the mutual circumstances give character to the entire period of separation."

In the jurisdictions where the statute requires a voluntary separation, a divergence has arisen as to the effect of the misconduct of the party claiming a divorce on this ground. It seems that in the state of Washington there is no trend toward the liberalization of the elements of a voluntary separation. *McGarry v. McGarry*, supra, emphatically reaffirmed the doctrine laid down in *Pierce v. Pierce*, 120 Wash. 411,
208 Pac. 49 (1922). The most recent Wisconsin case was decided in 1925, thus there is no evidence to show what the court’s present attitude would be if a suit for divorce were brought by a guilty party on the grounds of a voluntary separation.

In the District of Columbia and Maryland the tendency is to broaden the definition of a voluntary separation and permit a guilty party to obtain a divorce on this ground. However, the principal case stands alone. The decision handed down by the court strains the ordinary connotation of the word voluntary. No other jurisdiction has adopted such a broad and artificial construction of a statute of this type. Parks, the plaintiff, had been judicially determined a deserter. Yet because of the presence of a separation agreement and the lapse of the statutory period of time, the desertion has ripened into a voluntary separation. The Maryland courts also give a liberal interpretation to their voluntary separation statute, but do not stray so far away from the usual meaning of the word voluntary. In Campbell v. Campbell, supra, the first case decided after the enactment of the statute, the parties had agreed to separate. For twelve years they abided by the agreement. When the husband sued for absolute divorce on the ground of voluntary separation, the wife maintained that the agreement had been forced upon her. The Court ruled that the acceptance of a separation agreement for twelve years could not be construed as involuntary on the wife’s part. Further, the Court held in no uncertain terms that the separation had to originate through the mutual assent of the parties. In Miller v. Miller, supra, the effect of a desertion upon the right to an absolute divorce upon the ground of a voluntary separation was first brought up. Here the wife sued for divorce on the ground of abandonment. The husband filed a cross-bill asking for absolute divorce on the ground of voluntary separation. The Court dismissed the cross-bill, holding that there was sufficient evidence of abandonment to sustain a decree for absolute divorce. It seems therefore that the Maryland courts will not construe as voluntary a separation caused by desertion. In North Carolina, where the statute does not require that the separation be voluntary, the courts have ruled that the separation must be by mutual consent, although a different construction might be forced by the amendment of Section 1659(a) supra. In Brown v. Brown, 213 N. C. 347, 196 S. E. 333 (1938), the plaintiff was a deserter. The court, following the doctrine laid down in Reynolds v. Reynolds, 208 N. C. 428, 181 S. E. 338 (1935), held that a party guilty of a crime toward his wife could not obtain a divorce on the ground of desertion.

The principal case smacks of judicial legislation. From the fact that Congress wrote in the word “voluntary” can it not be inferred that the Congress intended the word to have its ordinary meaning? If Congress had intended that the separation need not be voluntary, it seems likely it would have used apt words to convey this intention. The court in construing “voluntary separation” as applying to a legally determined deserter is removing the word “voluntary” from the statute.

From the cases reviewed, it is evident, therefore, that the decision in the principal case is anomalous.

LEO C. LORD.
EMINENT DOMAIN—Computation of Compensation—Difference in Market Value of Full Tract Before and After Taking

Plaintiff, pursuant to a state law, appropriated 167 acres of defendant's land and conveyed it to the United States Government for use in the construction of a road. Such land was part of a 337 acre tract, without buildings or other improvements but major part appeared to be cleared land, and some had been cultivated. Held, the measure of damages, presently applicable, is the difference in the fair market value of the land immediately before and immediately after the taking. The items going to make up this difference are understood to embrace compensation for the part taken, and injury to the remainder, which is to be offset by any general and special benefits accruing to the landowner from the construction of the road. State Highway and Public Works Commission v. Hartley, 218 N. C. 438, 11 S. E. (2d) 314 (N. C. 1940).

In cases of this type, the courts of the various states have divided themselves into four classes. The first class holds that the measure of damages for condemned land is the fair and reasonable market value of land actually appropriated plus the difference, before and after the taking, in the fair and reasonable market value of the remainder of the land. Federal Land Bank of Wichita v. State Highway Commission, 150 Kan. 187, 92 P. (2d) 72 (1939); Woodgate v. Central Nebraska Public Power and Irrigation Dist., 292 N. W. 461 (Neb. 1940). This doctrine has been followed in very few states. A second group, also in considerable minority, holds that the fair, reasonable, cash market value of land immediately before the strip was taken for highway purpose, less the fair, cash market value immediately after it was taken, is not the proper measure of damages. The value of the strip appropriated must be determined independently of the value of the remainder of the land not taken. The value of the land taken is within the peculiar province of the jury. Bailey v. Harlan County, 280 Ky. 247, 133 S. W. (2d) 58 (1939); State v. Davis, 140 S. W. (2d) 861 (Tex. 1940). The third class, constituting a number of the states, holds that where a portion of a parcel of land is taken by condemnation for the public use, the most accurate measure of damages to the landowner, including consequential damages to the portion not taken, is the difference between the market value of the entire parcel before taking and the value of the remainder after taking. Mississippi State Highway Commission v. Hillman, 195 So. 679 (Miss. 1940); Town of Fallsburgh v. Silverman, 23 N. Y. S. (2d) 65 (3rd Dep't 1940). The last class and the majority rule, which is adopted in the instant case, holds that a property owner from whom land is taken in an eminent domain proceeding must be compensated for the full value (not always the market value) of the land actually taken plus damages to the remaining land not taken, less any benefits to land not taken. Department of Public Works and Buildings v. Barton, 371 Ill. 11, 19 N. E. (2d) 935 (1939); Mississippi State Highway Commission v. Prewitt, 192 So. 11 (Miss. 1939); Bailey v. State Highway and Public Works Commission, 214 N. C. 278, 199 S. E. 25 (1938); State v. Daumhoff, 93 S. W. (2d) 104 (Mo. 1936).

The reasonableness of the majority rule is clear when it is considered that a man has a constitutional right to use this property as he pleases within the law. The Constitution does not allow the taking of his property without "due process of law". Thus, if the state has need of the land, it should compensate the individual for all loss and damage which he suffers from the taking. How else can it be said that the individual uses the land for the purposes which he sees fit? It seems
that the minority classes of cases minimize the all-important individual rights and stress to an unwarranted extent the rights of the state. In so doing, they are ultimately causing individuals to have, hold, and use property in subordination to the right of the state to step in at any time and take the land at the state's price. It is true that the measure of damages given by the minority is usually fair from a standpoint of market value, but it is not fair as seen from a constitutional viewpoint of the right of a person to use his property as he sees fit. And it is not the full measure as is given in the majority, which latter measures value in terms of the highest and best available use of the land. Illinois Light and Power Co. v. Bedard, 343 Ill. 618, 175 N. W. 851 (1931); Niagara, Lockport, and Ontario Power Co. v. Horton, 231 App. Div. 402, 247 N. Y. Supp. 761 (4th Dep't 1931).

The doctrine of the principle case is never to be so extended to give to the term "just compensation" the meaning that the compensation to be paid the owner is to be measured by the value of the property to the taker. This is the nemesis of all compensation measures. State v. Oklahoma R. Co., 153 Okla. 76, 4 P. (2d) 1009 (1931); Gilmore v. Central Maine Power Co., 127 Me. 522, 145 Atl. 137 (1929). The important variation of the majority rule is the greater consideration given to the highest value which the owner could obtain for his property in the market. This includes any increase in value which would result from the possibility that, if the instant taker's enterprise had not been started, other purchasers would give more for the property by reason of their expectation that because of its strategic position it might be used in a similar development. Joint Highway Dist. No. 9 v. Ocean Shore R. Co., 128 Cal., App. 743, 18 P. (2d) 413 (1933); Eumans v. Utilities Power Co., 83 N. H. 181, 141 Atl. 65 (1928). It was recently said, that the "strategic" value which should be paid for in eminent domain, involves a weighing of the conflicting interests of the landowner and the taxing or rate-paying public; such "strategic" values are consistent with our general economic practice with respect to the protection of property values without regard to whether they are created by socially useful efforts. Hale, Value to the Taker in Condemnation Cases (1931) 31 Col. L. Rev. I.

In order to understand the holding in the instant case a few words require definition. "Remainder" of lands means, that in order to calculate damages to lands remaining, such remaining tract must be contiguous to the part taken and used together with it for a common purpose, and the mere fact that the tracts are owned by a common owner or are in a common corner will not justify damages for injury to the remainder. Seattle v. Dexter Horton T. and S. Bank, 90 Wash. 661, 156 Pac. 844 (1916). Also, "special benefits" are those resulting from a public work which apparently enhances the value of the particular tract, as distinguished from the "general benefits" the particular public improvement has brought to the community at large. Swift and Co. v. Newport News, 105 Va. 108, 52 S. E. 821 (1906); Hardy v. Simpson, 118, W. Va. 440, 191 S. E. 47 (1937).

JOSEPH LEA WARD

EQUITY—Use of Writ of Ne Exeat in Divorce Proceedings

Pending divorce action, plaintiff secured a writ of ne exeat against her husband. Defendant gave bond with sureties, the condition reciting: "The condition of this bond is that the defendant will appear before the chancery court at its regular
September term, and from term to term during the pendency of said cause and shall remain within the jurisdiction of said court and make himself amenable to all orders and process of said court during the pendency of said suit." At the next term a divorce decree was granted, providing for alimony in monthly installments. Defendant failed to pay any installment and upon being cited for contempt was given thirty days to make up the default. At the end of that period defendant was out of the state and the sheriff was unable to serve process. Upon plaintiff's petition, summons was issued against defendant and sureties on the bond to appear before the next term, at which time the sureties produced the defendant in court. A decree was entered upon the bond for the amount of the defendant's past due installments. The defendant had left the jurisdiction for a period of four weeks after the decree while he was in default of alimony. Sureties appeal. Held, a bond given under a writ of ne exeat is not discharged when the principal appears and the final decree is entered, and is not a mere provisional or interlocutory remedy expiring at entry of final decree, but has the object of securing the party's presence in order that the decree may be executed or enforced. Johnson v. Johnson, 198 So. 308, (Miss. 1940).

Ne exeat is a writ in common use in equity proceedings and issues to restrain a person from going beyond the confines of the country, or more especially from going beyond the limits of the jurisdiction of the court until he has satisfied the plaintiff's claim or has given bond for the satisfaction of the decree of the court. Fletcher, Equity Pleading and Practice (1902) 500. Lamar v. Lamar, 123 Ga. 827, 51 S. E. 763 (1905). It is sometimes said to be in the nature of equitable bail. McGee v. McGee, 8 Ga. 295 (1850); Mitchell v. Bunch, 2 Paige 606 (N. Y. 1831). In the United States today ne exeat is looked upon, not in its original nature as a perogative writ, but rather a mere process of a court shown to restrain a party from leaving the state, Lamar v. Lamar, supra. Writs of ne exeat usually issue out of courts having equitable jurisdiction; and federal courts have power to issue the writ. This authority is based on their inherent jurisdiction as courts of equity. 36 Stat. 1162 (1911), 28 U. S. C. § 376 (1934) Griswold v. Hazard, 141 U. S. 260 (1890); Lewis v. Shainwald, 48 Fed. 492 (C. C. D. Cal. 1881). Codes in many states recognize the writ by statutory enactment. Ex Parte Wells, 121 Fla. 457, 164 So. 134 (1935); State ex rel. Perky v. Browne, 105 Fla. 631, 142 So. 247 (1932); Bronk v. State, 43 Fla. 461, 31 So. 248 (1901); Midland Co. v. Broat, 50 Minn. 562, 52 N. W. 972 (1892); State ex rel. Tolls v. Tolls, 160 Ore. 317, 85 P. (2d) 366 (1938); In Re Grbic, 170 Wis. 201, 174 N. W. 546 (1919); Davidson v. Rosenberg, 130 Wis. 22, 109 N. W. 925 (1906).

The equity courts, in the absence of statutory or constitutional provisions abrogating the remedy by writ of ne exeat, have always entertained jurisdiction to issue such writs for the protection of claims for alimony as being essential to justice. Bronk v. State, supra; McGee v. McGee, supra; Edmondson v. Ramsey, 122 Miss. 450, 84 So. 255 (1920). Note (1916) 29 Harv. L. Rev. 206, 207.

The New Rules of Federal Procedure preserve the writ of ne exeat. "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, . . ." Fed. Rules Civ. Proc. No. 64.
The usual condition of the *ne exeat* bond is that the defendant will not depart from the jurisdiction of the court and that he will obey its lawful orders and decrees; it does not usually secure the performance of the decree of the court. *Griswold v. Hazard*, supra. But *In re Appel*, 163 Fed. 1002 (C. C. A. 1st, 1908), held that when a bond is given to secure the release of a bankrupt when arrested under a writ of *ne exeat*, and conditioned that he shall not depart from the district, it is to be construed according to its terms. The departure of the bankrupt from the district without leave of the court is a breach thereof, although he is present to abide the judgment of the court when rendered.

The court, in the instant case, construed the condition of the bond as imposing upon the defendant the obligation not only to remain within the jurisdiction, but even more, to perform the decree, *i.e.*, pay the alimony charged. *Lewis v. Shainwald*, supra, holds that *ne exeat* is not a mere provisional remedy, expiring with judgment, but may be provided for in final decree and will continue in force until dissolved by the court or property security is given. In a divorce case where *ne exeat* was issued pending suit, an application of the bond sureties for release, after final decree and upon surrender of the defendant, was denied unless the defendant himself would give a new bond to perform the final decree. *Ksiazek v. Ksiazek*, 89 N. J. Eq. 139, 104 Atl. 315 (Ch. 1918). Discharge of the sureties after judgment is discretionary with the court, it was pointed out here. However, when a plaintiff wife waits more than a reasonable time to procure enforcement of a final decree under a *ne exeat* bond procured pending trial, it is no longer effective. *People v. Souchet*, 72 Colo. 531, 212 Pac. 832 (1923). Here the condition that the defendant would render himself amenable "to such process as shall be issued to compel the performance of the final decree" was construed as extending only to the pendency of the action and such time after final judgment as was reasonably necessary for the enforcement thereof. *People v. Souchet*, supra at 533.

A New Jersey court allowed the release of a surety on a *ne exeat* bond when the plaintiff, being unable at hearing to substantiate her charges, was granted leave to amend her petition. *Penny v. Penny*, 88 N. J. Eq. 160, 120 Atl. 257 (Ch. 1917). The court held that bonds conditioned to obey writs of *ne exeat* are in the nature of equitable bail, and that the obligations of sureties are the same as of bail at common law. In like opinion was the Georgia court in *May v. May*, 146 Ga. 521, 91 S. E. 687 (1917) which held that a *ne exeat* writ became *functus officio* when the principal appears and defends a suit for divorce and alimony and is within the court's jurisdiction against him. In the instant case although the bond recited that the defendant should make himself amenable to orders and process only "during pendency of said suit", the court, exercising its discretion, extended the operation of the writ to insure payments under the final decree.

*John R. Wall*

**FEDERAL CIVIL PROCEDURE—Effect of Master's Finding under Rule 53e(2)**

Under a patent-licensing agreement, defendant manufactured and sold an oil press invented by the plaintiff. The contract provided that the selling price should be determined by subsequent agreement, and in default of agreement should be double the cost of manufacture. Plaintiff was entitled to thirty per cent of the net profits.
The district court referred the plaintiff’s suit for an accounting to a master. He found that an agreement was reached, fixing the selling price as the same as that of a competing press and very considerably less than double the cost of manufacture. This finding was based on his solution of a conflict in oral testimony concerning the outcome of a conference between the parties and on correspondence wherein defendant reported sales at the lower price and wherein plaintiff showed particular interest in lowering defendant’s cost of manufacture—a thing of no importance to him if the sale price was double the cost. The district court rejected the master’s finding and found that no agreement had been reached. On appeal held, where the proof of a fact depends upon the credibility of witnesses, the finding of the trier of fact who observed their demeanour—i.e. the master, here—is unassailable except for very obvious error not present here. Santa Cruz Oil Corp. v. Allbright-Nell Co., 115 F. (2d) 604 (C. C. A. 7th, 1940).

Rule 53e(2) provides “... In an action to be tried without a jury, the court shall accept the master’s finding of fact unless clearly erroneous ...” (italics supplied). By the weight of authority, this rule leaves unchanged the scope of review in vogue before the New Rules, adopting the practice under Equity Rule 61 1/2, promulgated by the Supreme Court in 1932. 28 U. S. C. A. following § 723 (Supp. 1940). Cases so holding: Carter Oil Co. v. McQuigg, 112 F. (2d) 275 (C. C. A. 7th, 1940); In re Pullmatch, Inc., 27 F. Supp. 884 (S. D. Ohio, 1939); Victory F. & S. Co. v. Commercial Novelty Co., 26 F. Supp. 126 (D. Md. 1939). But a recent case in the Ninth Circuit holds that the new wording weakens the effect of the master’s finding. Carpenter, Babson & Fendler v. Condor Pictures, Inc., 110 F. (2d) 317 (C. C. A. 9th, 1940). The court deduced this from the Advisory Committee’s note to Rule 53e, which reads “This contains the substance of Equity Rules 61, 61 1/2 and 66, with modifications as to the form and effect of the report.” (Italics by the court).

By comparison with the wording of Equity Rule 61 1/2 (“... the report of the master shall be treated as presumptively correct”) the Ninth Circuit thought the “clearly erroneous” rule a grant of additional discretion to the district court. It seems unlikely that this was intended. While the Committee was not above a change or two sub silentio, the tendency of the new rules has been to narrow rather than broaden the scope of appeal from the original trier of fact, for the very practical reason that the press of business in the federal courts demands it. And Mr. Robert G. Dodge, member of the Advisory Committee, who was asked to report to the Institute on Rule 53, said, “... the provision with regard to the effect of a master’s report is merely a restatement of existing law. Equity Rule 61 1/2 provided that the report should be treated as presumptively correct. I take it that means the same as the new language.” Proceedings of the Washington Institute on the New Federal Rules (1938) 170.

The finding of a master on a primary fact must be distinguished from a finding on a mixed question of law and fact (sometimes called an “ultimate question of fact”, or a “conclusion of law” or an “inference”). A primary fact is one that does not involve a moral judgment: usually, one observable by the senses—e.g. a finding that defendant’s motorcar was traveling fifty miles an hour. The master’s finding to that effect, based on his solution of a dispute among the witnesses on the point, is entitled to a strong presumption of accuracy on account of his exclusive opportunity to observe this witness testifying calmly and that one avoiding the eye of the questioner. But assume that he also finds that defendant was negligent. This
involves the application of an ethical major premise—“Anyone who drives fifty miles an hour (under these circumstances) is negligent.”—to the fact that defendant did drive fifty miles an hour. The reviewing court is every whit as able to supply this major premise and apply it to the primary facts as determined by the master as he is.

That the master's finding on primary facts is not to be lightly disregarded is illustrated by In re *Connecticut Co.*, 107 F. (2d) 734 (C. C. A. 2d, 1939). There a streetcar passenger was injured by an emergency stop. The motorman claimed the stop was essential to prevent a collision with an auto ahead. The master found that the streetcar was going very slowly and that the auto was accelerating, so that a collision was not imminent. The district court reversed this finding, choosing to believe the motorman. In the appellate court, the finding of the master was restored.


But where, as in the principal case, the finding is plainly one of primary fact and not an "inference", and nevertheless the district court reverses the master, a problem is presented to the circuit court. Who has the benefit of a presumption, if anybody? "... so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses or so far as there is any testimony consistent with the finding, it must be treated as unassailable.'" *Adamson v. Gilliland*, 242 U. S. 350, 353 (1917). This was quoted and applied in the principal case. But one circuit, under the Equity Rules, came to the odd conclusion that the district court was entitled to the presumption. *Roosevelt v. Missouri State Life Ins. Co.*, 78 F. (2d) 752 (C. C. A. 8th, 1935). *Contra*: In re *Turley*, 92 F. (2d) 944 (C. C. A. 7th, 1937). Some courts pay only lip service to the sound rule stated in the *Santa Cruz* case, *supra*. E.g., *Beckley National Bank v. Boone*, 115 F. (2d) 513 (C. C. A. 7th, 1940), where a finding of the master, approved by the district court, was overturned by the circuit court despite conflicting testimony amounting to a virtual tossup. This despite the firmly established rule that a confirmation of the master's finding by the district court adds weight to the presumption. *Stonega C. & C. Co. v. Price*, 106 F. (2d) 411 (C. C. A. 4th, 1939).

It would seem to be unwise to give slight weight to the finding of the original trier of fact. Not only is he more familiar with the case, not only has he the opportunity to study the witnesses face to face, but a practice of lightly overruling his findings will lead to frivolous appeals. Counsel will reason that it pays to appeal every case which could be considered close.

*TIMOTHY PETER ANSBERRY*. 

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**Notes:**

LABOR LAW—Injunctions Against Peaceful Picketing—Free Speech Infringed

The plaintiff union after unsuccessful attempts to unionize defendant's employees, commenced to picket defendant's beauty parlor. There was no dispute between defendant and his employees and defendant did not object to their joining a union if they so chose. The employees joined with defendant in an action to prevent the union from picketing and a permanent injunction was issued by the Illinois court. Held, the injunction was an unconstitutional restraint on the right of free speech guaranteed by the Fourteenth Amendment. *American Federation of Labor v. Swing*, 61 Sup. Ct. 568 (1941).

The instant case represents a goal toward which labor and the leaders of labor have been striving since workers first banded together. The injunction has ever been looked upon as the stumbling block in labor's path and a weapon of class discrimination wielded by courts which favored property rights over human rights. The Clayton Act, 33 STAT. 738 (1914), 29 U. S. C. § 52 (1934) the first notable attempt to curtail the intervention of the federal chancellor in labor disputes, proved disappointing and was followed by a much more effective measure, the Norris-LaGuardia Act. 47 STAT. 70 (1932), 29 U. S. C. § 101 (1934). In the instant case the Court, by judicial interpretation, evolved a principle complementary to the legislative fiat laid down in the Norris-LaGuardia Act, *supra*. Peaceful picketing in a labor dispute is now immune from any interference state or federal. The definition of a labor dispute laid down in the cases arising under the Norris-LaGuardia Act now bind the state courts. Mr. Justice Frankfurter, speaking for the majority in the instant case states the principle thus: "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as contain only an employer and those directly employed by him" (p. 570). Although the present rule obtained in a majority of jurisdictions previous to the present case, there was a small but vociferous minority. In Washington an Anti-Injunction Statute similar to the Norris-LaGuardia Act was held an unconstitutional attempt to deprive the courts of jurisdiction given them by the state constitution. *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 63 P. (2d) 397 (1936). Other jurisdiction have found that no labor dispute exists when the employees signify their unwillingness to join a union and the employer does not stand in their way. *Retail Clerks Union v. Lerner Shops*, 140 Fla. 865, 193 So. 529 (1939); *Roth v. Retail Clerks*, 24 N. E. (2d) 280 (Ind. 1939); *Crosby v. Roth*, 136 Ohio 352, 25 N. E. (2d) 934 (1940); *Simon v. Schwachman*, 301 Mass. 573, 18 N. E. (2d) 1 (1938).

Picketing, peaceful and otherwise, has also been used for purposes other than simple unionization of employees in these cases the courts have not been so lenient. Picketing has been enjoined as illegal where its purpose was to compel an employer to maintain a certain price standard. *Tunik v. International Ass'n of Cleaning and Dyehouse Workers*, 2 Labor Cases 302 (Calif. Super. Ct. 1939); *Purcell Journeyman Barbers and Beauticians*, 133 S. W. (2d) 662 (Mo. App. 1939). It is doubtful that the instant case will affect those rulings. Nor would it seem to protect a secondary boycott which has been uniformly held illegal. *Hopkins v. Oxley State Co.*, 83 Fed. 912 (1897); *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663 (1903).

Although there was a charge of libel in the bill brought by the appellee and this
was one of the grounds on which the Illinois court rested the issuance of the injunction, the point was not discussed in the majority opinion. The basis of the decision was that the decree on its face prohibited all peaceful picketing unless the parties were in the proximate relation of employer and employee. The question naturally suggests itself whether or not a charge of libel, if sustained, would be grounds for an injunction. In Milk Drivers Union v. Meadowmoor Dairies, 61 Sup. Ct. 552 (1941) decided on the same day as the Swing case, the Court held that picketing with a background of contemporaneous violence was illegal. The violence permeated and tainted the entire action of the union. See (1941) 29 Georgetown Law Journal 658.

The libel charged in the instant case was the false representation that the employer was unfair to organized labor. Libel which amounts to violence or which will bring about violence, is of course grounds for an injunction. Gompers v. Buck Stove and Range Co., 221 U. S. 418 (1921). On the other extreme, publications which are a legitimate representation of a situation even though damaging to property rights are damnnum absque injuria. Beck v. Railway Teamsters Union, 118 Mich. 497; 77 N. W. 13 (1898). Strikers may appeal to customers not to deal with an employer until the strike is settled but the law does not permit appeals based upon a falsehood. Perfect Laundry v. Marsh, 186 Atl. 470 (N. J. Ch. 1936). The word “unfair” has been given a definite meaning in labor matters and signifies that the one designated as unfair is antagonistic to organized labor and refuses to bargain collectively with it. Steffes v. Motion Picture Operators Union, 136 Minn. 200, 161 N. W. 524 (1917). The legality of publishing that an employer is unfair when he is in fact neutral, i.e., willing to recognize a union if his employees choose to join, is still in doubt.

A line will have to be drawn somewhere between the Milk Drivers case, supra, and the instant case. Where this line will be drawn is problematical and will depend to a great extent on what is considered as violence. It is doubtful that the Court will go to the lengths of the Gompers case, supra. To paraphrase Mr. Justice Cardozo, the principle of violence does not change but the things that are violence change. It is also doubtful that an injunction will issue unless there is a clear and present danger that the words used will cause actual violence and in cases of mere misrepresentation the employer, if given any remedy at all, will probably be confined to an action at law.

DAVID A. WILSON, JR.

WILLS—Incorporation of Trust Instrument by Reference in New York

A testator inserted a clause in his will giving realty and personality to a trustee named in a revocable and amendable trust indenture and directed that the property be added thereto and administered according to its terms. The trust had been modified three times prior to the execution of the will and once thereafter. Held, the provision was invalid. The doctrine of incorporation by reference, by which an unexecuted document is permitted to take effect as part of the will, is not the law in New York. President and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N. Y. S. (2d) 232 (2d Dep’t 1940).

The requisites for incorporation by reference are: (1) the will must refer to the
paper as being in existence at the time of execution of the will, and the paper must in fact, exist at that time; (2) the will must show the testator's intention to incorporate the instrument and sufficiently describe it; (3) the instrument to be incorporated must correspond to this description. *Eschmann v. Cawi*, 357 Ill. 379, 192 N. E. 226 (1934). The general rule is that incorporation by reference is valid. *Eschmann v. Cawi*, supra; *In re Hogue's Will*, 6 A. (2d) 108 (Pa. Super. 1939).

A few jurisdictions either reject the doctrine or restrict its application within narrow bounds. *Atwood v. Rhode Island Hospital Trust Co.*, 275 Fed. 513 (C. C. A. 1st, 1921); *O'Leary v. Lane*, 149 Ark. 393, 232 S. W. 432 (1921); *Hathevy v. Smith*, 79 Conn. 506, 65 Atl. 1058 (1907); *Murray v. Lewis*, 94 N. J. Eq. 681, 121 Atl. 525 (Ch. 1923); *But cf. Swetland v. Swetland*, 102 N. J. Eq. 294, 140 Atl. 279 (Ch. 1928).


The narrow point in the *Fowles case* was that a testator could dispose of his property in accordance with the terms of his wife's will, and it has been suggested that this was merely a case of identification of the beneficiary by the act of another having independent legal significance. Evans, *Incorporation by Reference, Integration, and Non-Testamentary Act* (1925) 25 Col. L. Rev. 879, 899; Note (1932) 6 U. of Cin. L. Rev. 295, 304. *Matter of Rausch's Will*, supra, decided fourteen years later, likewise reached the same result as would follow under the doctrine of incorporation. In that case a bequest made by reference to the trustee under a specified trust deed was held valid. Mr. Justice Cardozo said: "All that the later will does is to give additional property to the same trustee to be held in the same way. . . . Here the identification of the donee is itself an expression of the gift, the discovery of the one being equivalent to the ascertainment of the other." (Pp. 330, 333.) As stated above the lower New York courts followed this case, not on the "fact of independent significance theory," but as a qualified rule of incorporation. Thus Surrogate Wingate declared in *Matter of Comey's Will*, 173 Misc. at 319, 17 N. Y. S. (2d) at 953: "This would seem merely a logical application of the modern doctrine of incorporation by reference as defined in *Matter of Rausch's Will* . . . which appears to be that incorporation of any document in this manner is permissible so long as it is clearly identified and is of a variety which excludes any reasonable possibility of 'chicanery or mistake.'"

Considering the decision in the instant case with respect strictly to the doctrine of incorporation by reference, it was correctly decided that the provision in the will should fail. If the property were held to pass under the original and three supplemental indentures made prior to the will, "then the purpose and intention of
the testator is frustrated because he intended that his property should be disposed of as provided in the original and four supplemental indentures” and “the doctrine permits the incorporation only of an instrument existing at the time of the execution of the will.” (P. 237.)

Adopting Dean Evan’s analysis, Professor Scott suggests that if such a bequest “can be upheld upon the ground that the terms of the testamentary trust are determined by facts of independent significance and the inter vivos trust as it exists from time to time is such a fact, there would seem to be no objection to permitting the property passing by the will to be added to the inter vivos trust in accordance with the terms of that trust as they are at the death of the testator even though they were modified after the execution of the will.” 1 Scott, The Law of Trusts (1939) 299. A like situation arises, he says, in cases of legacies of the contents of a room or box. Gaff v. Cornwallis, 219 Mass. 226, 106 N. E. 860 (1914); Appeal of Mary Magoohan, 117 Pa. 238, 14 Atl. 816 (1887). But these latter situations involve only a possible change in the subject matter of the gift, whereas an amendable trust might permit change of both the gift and beneficiary. In the instant case, the court said: “The reservation of power to amend the trust indenture and its repeated exercise eliminated all independent significance that might be attached to the trust indenture.” p. 237. There was a reservation of power to amend the trust indenture in Matter of Tiffany, supra, but it had not been exercised after date of the will. Reservation and exercise after date of the will of a power to amend should be immaterial if the settlor of the trust is someone other than testator. Thus in Swetland v. Swetland, 102 N. J. Eq. 294, 299, 140 Atl. 279, 281 (1928), the court said: “In the case at bar the trust agreement is not testamentary in character—it is not even executed by the testator, . . . it is declaratory merely, not dispositive.” Even when the testator is also settlor of the trust it would seem that the trust might be deemed to be a fact of independent significance, if the reserved power of amendment is clearly restricted to matters having no possible testamentary significance, i.e., amendments respecting managements, investments, powers of the trustee, or even perhaps providing for selection of successor trustees. The power reserved and the amendments made in the trust in the instant case were not of this character. The trust was not “as impersonal and enduring as the inscription on a monument.” (P. 332.) To consider it a fact of independent significance would open wide the door to “chicanery or mistake.” In such case the testator might by amendments to the trust make of it a mere “illusory” trust and not at all a fact of independent significance. Cf. Newman v. Dore, 275 N. Y. 371, 1 N. E. (2d) 966 (1937). If amendable, it is not the trust as a fact, but the acts in amending it which must have an independent significance. Under the facts, the bequest in the instant case could not be sustained, either under the doctrine of incorporation by reference or as a reference to a fact of independent significance.

CHARLES E. THOMPSON.
BOOK REVIEWS


As stated by the publisher, "The treatment of the subject in this book aims at satisfying both legal historian and practitioner. For the historian it is of particular interest, because the recognition of liability for animals marks an early departure from the archaic rule that liability was confined to personal acts. Moreover, the very precocity of this kind of liability has given it a character of its own, and the author devotes a chapter to the question whether its special position in the law of tort can any longer be justified.

"But the main part of the book is expository and treats of the law as it stands. For the practising lawyer a summary of rules is included, and full reference is made to such cases from all parts of the British Commonwealth as are authoritative upon the common law. Three appendices deal with the important legislation in the Dominions, and some of the more interesting and important decisions in the United States are also referred to."

As clearly indicated by its title, the volume deals with a very narrow field of Tort Law. Its scope may be well judged by the headings of the six parts into which the book is divided. They are: Distress Damage Feasant, The Action of Cattle-Trespass, The Duty to Fence, The Action of Nuisance, in Relation to Liability for Animals, The Scienter Action, and Animals and the Highway.

The user cannot fail to be impressed by the thoroughness with which the work has been done as particularly evidenced by the Bibliography, the Index of Statutes, the Index of Year Book and Anonymous Cases, and the Alphabetical Index of Cases, decided in all common-law parts of the British Empire and in the United States.

A feature of the work which will make it particularly useful to the legal practitioner is the Summary of Salient Rules of Modern Law covered in the work. This summary is keyed by page references to the body of the volume and should prove a most helpful "open sesame" to the scholarly historical and philosophical treatment of the various subdivisions

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of the law pertaining to liabilities in connection with ownership and possession of animals.

The author discusses the trend of liabilities away from emphasis upon "act" and toward emphasis upon "fault". In that early period when "act" was emphasized no liability appeared for acts of servants, animals, or inanimate objects. This emphasis upon "act" resulted in non-liability for damage not resulting from the defendant's own positive act. It resulted in liability for harm caused by positive acts in some instances where there was neither negligence nor intention to cause harm. In some instances the "act" was thought of as that of a chattel and the chattel itself was in a sense, subjected to liability. This suggests the noxal liability in respect to animals and slaves worked out in considerable detail in the Roman Law and reflected in certain rather startling parallels in the early laws of the slave states of this country.

Today liability is founded upon unlawful intention or negligent acts of the human being. The author comments that, "This changes the whole pattern of the law." A duty appears to prevent damage as the result of inaction which is supplemented by vicarious liabilities for the acts of servants or others.

Through this process of law development, the author concludes that, "we have arrived at a conception of liability for animals through several channels: (1) the right of distress damage feasant, (2) the action of cattle-trespass, (3) the scienter action and (4) the principle that an ordinary tort can be committed through the agency of an animal." He concludes that these four principles make an "untidy patchwork" of the law pertaining to liability for animals.

In conclusion it may be said that the author having selected a very narrow field of law has worked it with extreme care and thoroughness. His footnote material is accurate and well selected for Great Britain and the colonies. It is remarkably full, though an American lawyer might wish that more decisions from our courts of last resort had been included. The book will be indispensable to the historian and a useful reference work for the teacher. Many practitioners will desire to have it upon their shelves.

Few volumes are appearing today as the result of English research. It is to be regretted by the civilized world that the struggle in which England and her colonies are now engaged will inevitably suspend for some time productions of such quality as the book at hand. The work is evidence that the high ideals of English scholarship were maintained beyond the beginning of the present struggle. It is not doubted that their
fine traditions of accuracy and thoroughness will maintain themselves until peace once more comes to the world.

CLARENCE M. UPDEGRAFF*


The first edition¹ of this book, edited (like the second²) by Professor Hanna alone, pioneered what has become an important territory in legal education. One of the first case books designed for the modern “streamlined” courses into which several of what were previously regarded as independent subjects are compressed and, it is hoped, amalgamated³—it was the first to present materials by which the various remedies of creditors, individually and collectively, against their debtor could be studied in a comparative manner. A number of books⁴ have since developed a portion of the thesis even beyond Professor Hanna, integrating their contents to present the various alternatives and problems inherent in liquidation of the debtor’s estate, but the wide adoption of this book testified to the sound pedagogy of presenting each remedial procedure as an entity and justifies the editor in retaining⁵ its form.

Beginning with three cases on Judgments and Executions, followed by one case on Exemptions, three cases on Attachment and Garnishment, one case on final process in the federal courts, and four cases on Creditors’ Bills, we come to an extended treatment of Fraudulent Conveyances (twenty-five cases, a hundred twenty-five pages). This is followed

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¹Published in 1931 under the same title by the same publishers.
²Published in 1935.
³Typical have been the courses in Business Organizations, Security, and Procedure.
⁴STURGES, CASES AND MATERIALS ON THE ADMINISTRATION OF DEBTORS ESTATES (1933); GILLIG AND CAREY, CASES ON THE ADMINISTRATION OF INSOLVENT ESTATES (1932); GLENN, CASES AND MATERIALS ON CREDITORS’ RIGHTS (1940).
⁵It is rather interesting to note that in his persistence he now stands alone. The arrangement of the three editions has been substantially that of GLENN, THE RIGHTS AND REMEDIES OF CREDITORS RESPECTING THEIR DEBTOR’S PROPERTY (1915), and the first edition was highly praised by Professor Glenn, Book Review (1932) 32 Col. L. Rev. 149. Since then, Professor Glenn has published his book on LIQUIDATION (1935), and his new casebook (note 4, supra) shows the same integration.
by a rather brief treatment of General Assignments and Creditors' Agree-
ments (eleven cases, fifty-three pages)—minimized, according to the
editors, only because of the relative unsatisfactory result of classroom
presentation of the subject—and a reasonably detailed section on Re-
ceiverships (thirty-six cases, one hundred sixty-eight pages). The last
half of the book is devoted to Bankruptcy (seventy-six cases, four hun-
dred nineteen pages), and to Reorganization in bankruptcy (sixty-six
cases, two hundred sixty-three pages). Comparison with the Second
Edition discloses that in the first half of the book the changes are negli-
gible. In the section on Attachments and Garnishments, *Harris v. Balk*8
has been replaced by *Heydemann v. Westinghouse Electric Manufac-
turing Co.*7 In the section on General Assignments, a recent case8 replaces an
old one;9 and three cases10 on Creditors' Agreements have been reduced
to abstracts. Three cases on the receivership of insolvent banks have been
replaced by an editorial note, and two other receivership cases11 dropped
to footnotes. Some of the old cases have been more severely edited and
the elaborate notes—always a distinguished feature of this casebook—
have evidently been brought to date, but if copies of the Second Edition
are available, there is little reason for adopting the new so far as the first
part of the book is concerned.

The earlier editions of the book presented the outstanding problems
of liquidation under the Bankruptcy Act. Inasmuch as the Chandler Act
was designed to clarify and rectify many of those very same issues,
many of the old decisions have become moot, but there has not been time
for much case material under the revised statute. Consequently, our
editors have given us the old cases best illustrating the typical fact situa-
tions which must be solved, and have introduced them—and replaced
others—with editorial notes calling attention to the new statute. Bank-
nruptcy can still be taught with the Second Edition, but the new edition
will save a lot of work and, for a visually minded student body, may
prove more effective and faster.

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80 F. (2d) 837 (C. C. A. 2d, 1936).

*F. H. Roberts Co. v. Hopkins, 296 Mass. 519, 6 N. E. (2d) 837 (1937).*

*Gardner v. Commercial Nat. Bank, 95 Ill. 298 (1880).*

*Eiseman, Kay Co. v. Shepardson, 247 Ill. App. 31 (1927); Universal Road Machinery
Co. v. Skinner, 105 Conn. 584, 136 Atl. 468 (1927); Johns v. United Bank & Trust Co., 15
F. (2d) 300 (C. C. A. 9th, 1926).*

*Presidio Mining Co. v. Overton, 286 Fed. 848 (C. C. A. 9th, 1923); In re Hurlburt
Motors, 275 Fed. 62 (S. D. N. Y. 1920).*
The materials on Reorganization in bankruptcy have been very considerably extended. The Second Edition, published only a year after enactment of 77B, contained only eighty-four pages on the entire subject, and even less on corporate re-organization. In the current edition we have two hundred sixty-nine pages. It would be presumptuous of me to say the cases have been well chosen. Corporate re-organization, even under the Chandler Act, is only procedurally related to bankruptcy; functionally it is a problem of corporate finance. This material presents an adequate picture of this aspect of the problem.

An important mechanical change has been made in removing from the book proper all the texts of the Bankruptcy Act. It is now presented in a separate supplement, with useful notes comparing the new provisions with the old. Presumably it is the hope of the editors that the separate volume will permit page by page comparison of the Act and the text.

It is conceded that the materials here included cannot be taught in a course of four semester hours. The predicament of those who can chisel but three hours from an overcrowded curriculum is extremely trying. As suggested in the preface, the segregation of materials by subjects does permit the instructor to adapt his course to the needs of his student body, and either the materials on the individual creditor’s remedies or those on corporate reorganization may be omitted, as the circumstances require. It might be observed, however, that if the instructor, imbued with the conviction that students preparing for country practice need most a study of judgments, executions, attachments, and creditor’s bills, these materials are hardly adequate. A single case on judgment liens or on exemptions, for example, leaves room for much lecturing. In other words, the book is too big for a single course and adequate only for one of the suggested alternatives. But it undoubtedly does meet the varying demands of the country’s law schools better than any other book on the market and there appears to be no reason why the new edition will not enjoy the popularity of its predecessors.

Orrin B. Evans*

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You can take a 1911 Ford, put in a lot of labor patching up the tires, forcing putty into cracked cylinder walls and polishing up the brass, but when you get all through you still won't have much of a car. Repairman McGraw has striven mightily with the original chassis of this book (vintage 1898), has patched and polished, but in spite of all of his efforts it still isn't much of a book. It is very easy for a lawyer, and especially a law teacher, to be uppity about any elementary book dealing with law. One must try to be fair and to meet the re-editor (and his persistent publisher) on the level of the audience for which this book was intended. They were endeavoring, so the preface tells us, to refurbish a book which "has been popular with laymen as well as the first-year law students for whom it was intended." And "the reader is warned that this book is intended primarily as an introduction to the study of law and does not pretend to be conclusive or exhaustive". But even so, considered from the point of view of the legal novice, and especially from this point of view, it still isn't much of a book.

Mr. Smith's original book consisted in large part of black letter headings mostly in the form of outlines easily digested. Such text as there was, had a nice friendly ring to it and tucked away in it ever so often the reader would find a nice homey illustration to help him over hard places. But 'tis not so with Mr. McGraw's revamped model. He chopped out much of the black letter outline, inserted gobs of new text written in anything but a friendly tone and blotted out most of the homey examples without supplying any of his own. To a beginner the style must seem totally dull and, in some chapters, particularly the one on Persons and Rights, absolutely horrifying in its unyielding artificiality.

There are two primary reasons for these stylistic difficulties. In the first place the re-editor has spliced in a very considerable number of black letter headings and miscellaneous clippings from the West Publishing Company Hornbooks for the various fields covered. Secondly, the editor draws heavily at various spots in the book upon the restatements of torts, contracts, and agency, and unfortunately, he manages to carry over into the book the difficult dry language of these compilations.†

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†For example at pages 101-102 the beginner is given this sprightly bit of information: "Therefore a primary right is one which arises upon legal recognition of an interest, exists independently of an infringement of the interest, and is violated when the interest
Imagine pages of black letter headings, here reduced to ordinary type, clipped from Hornbook or restatement volumes and strung along together with no illustrations, no explanations, nothing to ease the terrific concentration of language in between and you will have a pretty good impression of what substantial parts of this book are like.

Dangers lurk in Mr. McGray’s mode of re-editing and sometimes they come boldly and obviously into the open. If the Hornbook at Mr. McGray’s elbow for the particular chapter is a good one, the revised product is pretty fair, but if the Hornbook is weak, the revision definitely inherits a good part of its anemia. Thus, by way of introduction to the nature of law, the state and “government”, the reader gets heavy doses of Bowman on Elementary Law, a Hornbook no longer advertised since Mr. McGray’s composite and synthesis of all Hornbooks has appeared. Since Bowman’s book is not particularly strong, these chapters aren’t either. But the chapter on Forms and Leading Systems of Law is a very material improvement over the earlier ones, principally because here Mr. McGray had Max Radin’s adequate Hornbook on Anglo-American Legal History at his elbow. In the chapter on Personal Property the evils of Mr. McGray’s method of procedure are especially evident. Note first that there is no Hornbook on the law of personal property as such. So the general introduction to the subject is hesitant, and the coverage of subjects like fixtures, gifts, liens and emblements is exceedingly skimpy or wholly nonexistant. But when the chapter moves on to a section on Sales of personal property, it takes on courage and improves amazingly. There is, you see, a Hornbook on Sales which is a pretty fair book. But in the very next section, one on Bailments, though the courage is still there, the quality is pretty sad, because the Hornbook on Bailments is not very good and certainly not up to date. So the reader is given a heavy dose of Roman law classification of Bailments with a dash of information about “exceptional bailments”, —“those which

is infringed; whereas a remedial right arises only when an interest protected by a primary right is threatened or infringed and entitles the subject or owner of the primary right to the appropriate legal relief. The former protects, the latter remedies.”

Again at page 325 et seq. the reader is faced with almost two pages of definitions of words like “interest”, “act”, “duty”, “subject to liability” and “privilege” which he is warned “are requisite for an understanding of the discussion thereafter”.

Miller, Criminal Law (1934), Burdick, Real Property (1914), and Clark, Code Pleading (1928) contribute some good material. Black’s three books on Constitutional Law (1895), on Legislative Interpretation (1911) and on Judicial Precedents (1912) make for some chapters which are as unrealistic about our American form of government and how it actually operates as the glibest high school civics text.
involve (a) innkeepers; (b) common carriers; and, (c) the post office department");(1) and not one word which would serve to tie his own experience with automobile parking lots, safety deposit boxes or Rent-a-Cars to the law of bailments.

This last suggests a reason, more basic than the stylistic difficulties just noted, why this book fails to hit the mark at which it was aimed. Anyone who proposes to write a book for legal novices which is to have any real value must somehow bridge the vast gap between his reader’s experience in life and cold, unfamiliar, abstract legal doctrine. He must by gradual stages introduce his reader to a new way of thinking about and looking at familiar occurrences and transactions in his everyday world. This, as anyone, who has ever taught freshman law students knows, is difficult enough in the classroom where the beginner has some opportunity to air his confusion, but it is many times more difficult if one proposes to do the job by way of the printed page. There are devices which the writer can use in trying to solve this problem. Use of copious and simple illustrations drawn from the field of this average reader’s experience is the most obvious one. Again, the author can develop each field of law around some leading and striking case, using its facts as the point of departure for a discussion of basic legal principle. But the use of either device implies a firm resolve on the part of the writer to concentrate on basic considerations and not to spread himself thin by offering a slight dab of information about every subject usually covered in three years of law study.

A book for law beginners should also somehow convey general impressions of how law actually works in the social order as compared and contrasted with how a novice reading doctrine and nothing but doctrine would fallaciously assume it works. It may be that this cannot really be accomplished by a book which spreads itself over even a limited number of fields of law. It may be that this can be done only by limiting oneself to a narrow field and by demonstrating some general ideas about law’s place in society, about law’s growth and its true functions from the point of view of what has transpired in the narrow field. But, however this may be, Mr. McGray should at least have made some effort to explain for instance that there is such a thing as substantive due process of law and something of what it has meant in the life of this country during the past sixty years; to suggest that in spite of claimed doctrinal differences, the conditional sale and the chattel mortgage can frequently be used interchangeably to accomplish the same commercial result; that neither legal rules or principles or standards can generally
be applied mechanically to "facts" to produce slot machine results; the real significance of the growth of administrative commissions; the real meaning of "rules" for the construction of constitutions or of statutes. None of this is done, and the beginner who reads this book will know very little about how law actually works.

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