THE MODERN LAW OF NATIONS AND ITS
MUNICIPAL SANCTIONS

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"The violation of laws never remains unpunished."
—Thomas Jefferson.

"Laws to be obeyed must have sanctions behind them; that is to say, violations of them must be followed by punishment. That punishment must be caused by power superior to the law-breaker; it cannot consist merely in the possibility of being defeated in a conflict with an enemy; otherwise there would be no law as between the strong and the weak. * * *

There is but one way to make general judgment possible in such cases. That is by bringing them to the decision of a competent court which will strip away the irrelevant, reject the false, and declare what the law requires or prohibits in the particular case. Such a court of international justice with a general obligation to submit all justiciable questions to its jurisdiction and to abide by its judgment is a primary requisite to any real restraint of law. * * *

If the law of nations is to be binding, if the decisions of tribunals charged with the application of that law to international controversies are to be respected, there must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation."

—Elihu Root.

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In conformity with the practice of the schoolmen, with at least two of whom I feel almost personally acquainted, and for whose writings I have a profound respect, I propose a text and a thesis. The text is from Victoria's *Relectio De Potestate Civili*:

"International law has not only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the rules of international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world."

The thesis is as a corollary from Victoria's text, which is itself a corollary to his Reading *On the Civil Power of the State*. 

And the conclusions flowing, as I conceive, from this text are that every rule of international law has a municipal sanction *in esse* or *in posse*, and that a failure to enact a municipal statute for that purpose—or to apply it if enacted—renders the state in default liable in damages.

In 1492, on the 12th day of October, Columbus landed on American soil, of which he took possession in the name of the Spanish sovereigns, and, returning to Spain in the following year, laid a New World at the feet of their Catholic Majesties, Isabella of León and Castile, and Ferdinand of Aragon.

Forty years after the discovery of the New World, a professor of theology in the University of Salamanca, extended to the problems arising through Spanish colonization of the New World the principles of that enlightened justice which the Spanish theologians applied to the relations of the nations and states of Christian civilization.

Thus a Christendom, broken by the Reformation, was replaced by an international community, today universal and embracing all peoples of all continents; the law ap-

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Applicable to members of the Christian community was found to be applicable to non-Christians; and the law of nations, once confined to Christendom, has become international. Without ceasing to be Christian in fact, the law of nations became laicized in form; and from century to century it has enlarged its content to meet new conditions by making that express which previously was implicit. Through Francisco de Vitoria it became a science—the science of the rules of social conduct; a moral science, because it applies to moral beings. It was endowed with its philosophy by Francisco Suárez; and it was given its literary form by Grotius in his *Commentary on the Law of Prize*—first written in 1604-5, and revised from time to time, but which unfortunately remained in manuscript until 1668—and its classic and over-elaborated form in his Three Books on the *Law of War and Peace*, published for the first time in 1625, in the midst of a Thirty Years’ War.

Thus the discovery of America gave birth to a modern law of nations, Spanish in origin, lay in form, but Catholic in fact and capable of continued development under the control of that Christian morality of which all peoples, and therefore all nations, are the beneficiaries.

The Spanish school came into being and passed out within the course of a century, but it has to its credit the modern law of nations—not merely as law but as a philosophy—Grotius himself saying that “the theologians”, and not the “doctors of the law,” are the ones who “follow natural reason.”²

Francisco de Vitoria was a Dominican—a member of the Order of Preachers—and he preached to the best of purposes. Before the Society of Jesus came into being, the Dominicans specialized in foreign missions, following in the wake of Columbus, and in this field of beneficent and humanitarian activity Bartolomé Las Casas stands out—and justly—as the Apostle to the Indians, and one whose noble example the Jesuits were later to imitate.

As a Dominican, Victoria was naturally interested in

² *Grotius, De iure praedae*, chapter viii, ms. p. 51: “Qua in parte theologorum magis sententiae, quam jurisprudentium standum est. Illi enim rationem sequuntur naturalem, hi vero instituta civilia, quae utilitatis alicujus causa permittunt fieri saepe, quod aliquo facere non licet.”
their missions to the New World, which then perhaps
loomed larger on the western horizon than now; letters
from the brethren beyond the seas passed from hand to
hand, and tales of improper conduct on the part of the
brethren themselves were not wanting. Victoria’s idea
was to treat the Indians as brothers and as equals, to help
them in their worldly affairs, to instruct them in spiritual
matters and lead them to the altar by the persuasion of a
Christian life on the part of the missionary. Or, as Chaucer
puts it:

But Cristes lore, and his apostles twelve
He taught, but first he folwed it himselfe.

Deeply versed in the lore of the Church—through his at-
tendance at the University of Paris—then without ques-
tion the international center—and his contact with thou-
sands of foreigners who, like him, were completing their
studies, lodged in quarters appropriately known as their
“nations”, and who could not fail to see themselves in their
fellow students, it was inevitable that Victoria should make
of Aquinas the guide of his life, for St. Thomas was also
a Dominican; he had also studied in the University of Paris,
and had even been its Rector. To be sure, The Sentences
of Peter Lombard were in vogue, but they were being re-
placed in matters spiritual by the theology of St. Thomas
Aquinas—then and today the doctrine of the Church—and,
in matters national and international, by conceptions of
St. Thomas, which gave permanent form to the views of
Aristotle on the nature of the state, and to the views of
St. Augustine on the two great questions which interest and
and baffle us today—war and peace.

When Victoria became prima professor of theology in
Salamanca in 1526, the conceptions of St. Thomas also made
their appearance, and when Victoria died twenty years
later, the doctrine, spiritual and temporal, of St. Thomas
remained as a monument of Victoria’s foresight and in-
fluence.

When in 1532 Victoria prepared his public Reading On
the Indians Lately Discovered, he appropriately discarded the Old for the New Testament, for was not his text— "Teach all nations, baptizing them in the name of the Father, and of the Son and of the Holy Spirit." The text involved the baptism of children of tender age, of unbelievers, without the consent of their parents. The authorities which he invoked were Peter Lombard and of course St. Thomas Aquinas, Doctors of the Church—the Sententiae (Dist. 4) of the former, and the Secunda Secundae (Question 10, Art. 12), and the Tertia Pars, (Question 68, Art. 10), of the latter. Here a casual reader turning the page might perhaps lay the Reading aside without troubling himself further with Victoria, his text or his authorities, but if he were a Spaniard, the next sentence would hold him as spellbound as Coleridge's Ancient Mariner held the unwilling wedding guest.

"The whole of this controversy and discussion," Victoria declares, "was started on account of the aborigines of the New World, commonly called Indians, who came forty years ago into the power of the Spaniards not having been previously known to our world." Here we have Victoria's own statement that the controversy of which he was to discourse had arisen not merely on account of the discovery of the New World, but because of the Indians coming into the power of the Spaniards. There is power and there is power. There is the power of justice; there is, unfortunately, the power of injustice. The question which confronted and deeply concerned Victoria, who insisted that the conduct of his government should be right, and that the duty of right-minded men was to set it aright—or at least

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3 For a scholarly reproduction of the first and second editions of Victoria's Relectiones (Lyons, 1557, and Salamanca, 1565) as well as of the manuscripts of the Relectiones as taken down by Victoria's students, see the first volume of the Relecciones Teologicas del Maestro Fray Francisco de Vitoria, edited by P. Mtro. Fr. Luis G. Alonso Getino (Madrid, 1933).

For a reproduction of the Simon's edition (1696) of two of Victoria's Relectiones, De Indis Recenter Inventis and De Jure Belli, together with a translation, see the volume De Indis et De Jure Belli Relectiones, published by the Carnegie Institution of Washington in 1917, in the Series of "Classics of International Law." This volume contains an introduction by Ernest Nys, a translation of the text by John Pawley Bate, and a revised text by Herbert Francis Wright. For the reproduction of De Indis see p. 302 and for the translation, p. 45.
endeavor to do so—was whether the Spaniards, his countrymen, were justified in taking possession of the territories of the aborigines of the New World, commonly called Indians, and, if so, on what grounds; if not—to use an academic expression—why not? And the question being one of right, which may be and often is different from law—since the conventional view is that right is a moral, whereas law is a legal conception—caused Victoria to state that “it is not for jurists to settle this question or at any rate not for jurists only.” for “since the barbarians in question * * * were not in subjection by human law; it is not by human, but by divine law that questions concerning them are to be determined.” Why was this so? Because, Victoria adds, and very properly, in terms applicable to our day as well: “Jurists are not skilled enough in the divine law to be able by themselves to settle questions of this sort”; nor was he sure that “in the discussion and determination of this question theologians have ever been called competent to pronounce on so grave a matter.” Why was the matter so grave “And as the issue,” he continued, “concerns the forum of conscience, its settlement belongs to the priests, that is, to the Church.”

We have just referred to the conventional view that law and right may differ, that the legal conception and the moral conception are things apart. But is this true? Are not the two sets of terms, in fact, complementary? What is morality without rules? And what is law without the moral guide of justice? If we insist that law should be moral, instead of a mere command of an artificial superior, then we shall make morality the test of law and find ourselves in accord with Victoria and the Spanish School.

But Victoria had in mind an additional purpose, which he reveals by asking: “In order that the whole of the matter be adequately examined and assured, is it not possible that so weighty a business may produce other special doubts deserving of discussion?” He answered that he thought that he would be “doing something which is not only not futile and useless, but well worth the trouble, if”—speaking in the first person—“I am enabled to discuss this question in a manner befitting its importance.” He did discuss, in its various aspects, this international event which, in its
material aspect, is supposed to be the most important event of modern history—indeed, it separates the medieval from the modern world. And the discussion, conducted “in a manner befitting its importance,” was not only “not futile and useless, but well worth the trouble,” as it resulted in the modern law of nations, which is also, in no slight degree, the law of nations of the future.

To come, however to the opening paragraph of Victoria’s Reading On the Indians Lately Discovered. The “disputation about them” was to fall into three parts. It did. In the first he inquired “by what right these Indian natives came under Spanish sway.” This phase of the subject required an examination not merely from the national but from the international point of view, leading him to state those principles of right and wrong in international relations, which he himself, as a high-minded son of the Church, with a legal training as sound as his conception of morality, considered applicable.

But the question was even larger, for the second part dealt with the rights which “the Spanish sovereigns obtained over them”—the Indians recently discovered—“in temporal and civil matters”—these rights, of course, to be tested by right, not might. But the question was even broader than this, involving not only the rights of the sovereigns, but those which “the Church obtained over them”—meaning, of course, the American barbarians, “in matters spiritual and touching religion.” These questions required an answer equally broad in scope—an answer involving the law of international relations: the right of a foreign nation to impose itself on equals as well as on inferior nations; and also the spiritual relations of nations and their peoples to one another. Under three headings we have the program of the modern international law.

As the relations of the Spaniards and the Indians were relations, to use Victoria’s own phrase, “of Indian principalities” with the Spanish monarch—in other words, relations of state with state—it is not merely advisable, but essential that we consider the state, its origin and its purpose, from within, before proceeding to its external rela-

4 Ibid.
tions and discussing whether, either as a mere state, or as a single state in an association of states, it possesses a municipal sanction, in esse or in posse, for every rule of the law of nations.

Victoria, as we have said, was elected prima professor of theology in the University of Salamanca in 1526, having been previously appointed professor and also director of studies in the University of Valladolid, in the then capital of Spain. The method at that time of choosing a professor was interesting and bids fair to make its appearance again—that is, a competition with public disquisitions of the candidates upon set subjects, in the presence of the students, who would choose from among the candidates for the chair the one who seemed best to meet requirements. Assuredly in Victoria's case the choice meets with the approval of succeeding centuries. It gave him the opportunity which he no doubt had in mind, since his eighteen years in France in the formative period of his life had confirmed him in internationalism—for who, belonging to a church which was international, could help but be an internationalist?

Now there were two professors of theology in the University of Salamanca—the prima and the vespera—the holder of the prima chair—the more coveted—meeting his class at six o'clock in the morning, when the student body was not worn out by the day's task, as was the case when its members came together at vespers in the afternoon. Probably that was the reason why the morning class was but an hour and a half in duration, whereas in the afternoon it sat in continuous session at the feet of the vespera master for two full hours. The later hour seems to us more attractive, I hope, although perhaps early or late Victoria would draw today as he did at Salamanca, where his auditors were said to number a round thousand.

It was the duty of the prima professor, in addition to his teaching, to deliver at least once a year a public address or disquisition, ordinarily based upon the course which he had professed throughout an academic term. The course consisted of lectiones or daily readings and the publicum (the term in vogue in Germany) was called a relectio, which would be considered not as a re-reading of the entire course
but as a re-statement of the views which had been set forth more at length.

As the international law of Victoria, as well as of other persons learned in the subject, is the law applicable to states and their peoples, it is necessary to discuss in some detail Victoria's conception of the origin and nature of the State and its government. And as a prelude to this discussion it will be advisable to give an outline of his conception in summary form. Victoria's view on the origin and nature of the state is the Aristotelian view that man, as a social and political animal, must live in organized society; and this, Victoria holds, by both divine and natural law. There must be government, for the people would fall apart if the rights of each were not accompanied by the correlative duties. In this government the source of power is twofold. It is divine, in that, according to a text adopted by Victoria, "all power is from God"; and it is human in that the form and exercise of that power depend upon the will of the majority of the people.

The introductory remarks to Victoria's *Relectio* on the State (*De Potestate Civili*) are in the nature of a justification, not merely of the topic which he had chosen, but of the method of its presentation; in the words of Victoria:

"The duties and functions of the theologian extend over a field so vast, that no argument, no discussion, no text, seem alien to the practice and purpose of theology. And this may account for the fact that the lack of able and sound theologians is as great as—not to say greater than—the lack of orators which is mentioned by Cicero, and which he explains by saying that men who are distinguished and skilled in every science and in all the arts are very rare. Theology, indeed, is the first of all those sciences and studies which the Greeks call *Theologia*.

Consequently, there is no occasion for surprise, if very few are found who are competent in a subject so difficult. In this immense domain, then, and in the extensive field composed of the writings of all scholars, an infinite number of possibilities present themselves; but I have selected one passage for special notice: surely if it merits my consideration and treatment of it, it is worthy—most illustrious and learned gentlemen—of your atten-

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tion. The passage, then, concerns the State: a matter with regard to which many points remain to be considered, although earnest and erudite men have already accorded it extensive treatment. Since the topic is too broad to be disposed of in a single discussion, I have chosen as the subject for today the public and private power by which States are governed.

"The passage to be read and commented upon is from the 'Master of the Sentences' (2d, 44), and is based upon the words of Paul (Romans 13:1): 'There is no power but of God.' Although a multitude of topics might be brought up in connection with this passage, nevertheless, our entire discussion shall be limited for the present to laic or secular power, in order that we may not be more discursive and rambling than is needful."

Victoria was not merely a master of the scholastic method, but through him the old scholastic method was renewed so as to apply to the newer theology whereof he was also the accredited master. The favorite authorities of Victoria's day in matters of the state were Aristotle and Cicero, and through Victoria we hear, as it were, their voices. As a Christian the New Testament was his guide, and just as in the case of the Reading On the Indians Lately Discovered,6 he took his text, in the Reading On the Civil Power, from the Sentences of Peter Lombard, from St. Augustine and from the Summa of St. Thomas Aquinas.

But to the State. The first question which confronted Victoria was the source of power; and the power "by which the secular State is governed"—the words are those of Victoria, for his concern was the secular State—"is not only just and legitimate, but is so surely ordained of God, that not even by the consent of the whole world can it be destroyed or annulled."

Now power, he says, "is twofold—public and private"—and Victoria's first anxiety was to state "the causes of civil laic power," as it was to be, he says, "the subject of the whole lecture." He here invokes the authority of Aristotle, to the effect that "'necessity' should be considered from the viewpoint of purpose," the first, as Aristotle holds, "of all causes, and the principal one."

What, then, of "the purpose that underlies the establishment of the power which we are about to consider?" Mother Nature looked after the animal world, supplying it with

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6 Supra, notes 3 and 4.
the means of protection. "To man alone," he says, "she granted reason and virtue," and man being endowed with reason, he could not live in solitude, either for his own comfort or for the perpetuation of the species; and he was likewise endowed with speech, "the messenger of the understanding," inasmuch as, in the famous phrase of Aristotle, he is a civil and sociable animal. For justice—"and the same is true of friendship"—"cannot be practised except by the multitude" (to be understood in this connection as meaning, it is believed, "more than one").

"Therefore," says Victoria, "since human societies have been established for this purpose—namely, that we should bear one another's burdens—and civil society is of all societies that which best provides for the needs of men, it follows that the community is, so to speak, an exceedingly natural form of inter-communication."

But "a single family is not self-sufficing." If society is in accord with nature, then it follows that states and commonwealths are not the invention of man, but of nature, "who produced this method of protecting and preserving mortals."

What is the conclusion which Victoria draws from these premises? That "the same purpose and necessity underlie the existence of public powers," and that hence, public powers are in accord with nature, and therefore "the use and the utility of public power, and of the community, and of society are absolutely the same." Why this identity? "For if all were equal," Victoria says, "and subject to no power, each individual would draw away from the others in accordance with his own opinions and will." What would be the consequence? "The commonwealth would of necessity be torn apart; and the State would be dissolved."

These observations are of the utmost importance, lying as they do at the root of government. Victoria was apparently of this opinion, because he invoked the authority of the New Testament, contained in substantially the same wording in three of the Gospels: "Every kingdom divided against itself shall be brought to desolation"; and "where there is no ruler * * * the people shall perish." The conclusion of Victoria on this phase of the subject is that "if States and societies are established in accordance with
divine or natural law, the same is true of power, without which States could not exist.” This is design in nature, according to the Greeks; according to the Christians, God in action.

In the Victorian conception, government must be according to the law natural and divine, but the form of the government must depend upon the state, that is, the people united in a community, “which by its very nature is competent to govern and administer itself, and to order all its powers for the common good.” In this connection, Victoria reverts to the statement he has already made—that if the state were without a head, “the commonwealth would of necessity be torn apart”—to use again his language. For if all were equal, there would be no superior, and consequently in an assembly no “one individual” could of himself assume authority, “in view of the fact that every man has by natural law the power and the right to defend himself, there being nothing more natural than to repel force by force.” But if the state were not, so to speak, “beheaded,” the situation would be otherwise, since the community or state might protect the right of each individual, “in order to preserve the integrity of the whole, and in a spirit of devotion to the public good.”

What should be the governing will—that of a single person—as in a monarchy (which Victoria prefers); or the authority vested in a select few (as in an aristocracy); or vested in the many (as in the case of a democracy)? We of today must supply our own answer to this question.

But whatever the form, it is therefore necessary that the administration of the State should be entrusted to the care of some person or persons (and it matters not whether this power is entrusted to one or to many). If this were not so, Victoria would be sore pressed to acknowledge that “princes and other magistrates found among pagans are legitimate.”

What, then, is the Victorian definition of public secular power? It is “the faculty, authority, or right to govern the civil State,” whether it be Christian or pagan; but be the government a monarchy, an aristocracy, or a democracy there need be no less liberty in one than in another, and the ruler of one or the other binds the State, which “as a
whole may rightfully be punished for the sin of the monarch”—meaning thereby the chief executive. To such an extent is this true that, in Victoria’s words, “if any king make unjust war upon another ruler, the injured party may plunder and make lawful war upon and slay the subjects of the unjust king, even if all these subjects be innocent; for when the king”—or other agency—“has once been set up by the State, any immoderate act of his is charged against the State.”

That the head of the State—whatever the name, whether consisting of one or of a number—is to be chosen by a majority of the people, and is to be subject to the government which has been established, is clear from the illustrations which Victoria gives. “Just as the majority of members of a State may set up a king over the whole State, although other members are unwilling,” so “in free States such as Venice and Florence, the majority may elect a king even though the rest of the citizens be opposed.” The proof in either case betrays a subtlety on the part of the great Dominican which would seem to be more natural to Suárez than to Victoria. “It suffices,” Victoria says, “in order to do anything legitimately, that the majority should agree on the course in question.” “This point,” he observes, much to our pleasure, “can be satisfactorily demonstrated,” adding by way of illustration: “For if two parties disagree, it must necessarily result that the sentiment of one party should prevail; and inasmuch as their desires conflict, the sentiment of the party which is in the minority ought not to prevail; therefore it is the sentiment of the majority which should dominate.” Victoria, although not given to hairsplitting, as is the wont of the philosopher, adds: “If the consent of all is required in order to create the king, why is it not also required in order that he be not so created? Why is unanimous consent more to be required in an affirmative than in a negative matter?”—a doctrine which applies, it would seem, in the unmaking as well as in the making of an agent of the State.

The dethroning of a monarch is thus the prerogative of the majority, and a revolt is justifiable if only it has the support of the majority in its behalf.

What of the agent, for such, in truth, the ruler is. The
State has the power of self-government, as in the case of
the Venice and Florence of Victoria's day—not to speak
of this Western World of ours; "for the State," he says,
"has the power of self-government, and the act of the
greater part is the act of the whole; therefore, the State
may accept the form of government that it desires, even if
this be not the best form. Rome, for example, possessed
an aristocratic government, which is not the best type." In
this we agree, preferring a representative democracy.

At the beginning of his public address On the Civil Power,1
Victoria stated that the Reading would be restricted to cer-
tain conclusions. Having disposed of various preliminary
matters, he devotes the balance of the Reading to a final and
all important conclusion: "the laws and constitutions of
princes are binding in such a way as to render transgressors
guilty in the court of conscience." This is indeed a weighty
subject, about which there was a difference of opinion. The
importance of the conclusion was not lost upon Victoria;
otherwise he would not have assigned it, as it were, the
place of honor. "If time permitted," he said, "many points
neither futile nor unworthy of mention might be brought
up in this connection and in support of this conclusion. But
inasmuch as a lengthy discussion would be inopportune,"
doubtless out of consideration for his audience, "I shall dis-
pose of the whole matter in as few words as possible." We
shall follow his example. There was a difference of opinion
on the subject, some holding that "the laws possess no
force which renders transgressors guilty in the court of
conscience," admitting, however, that "princes and mag-
istrates may justly punish the violators of said laws." The
concession in this matter is immaterial, inasmuch as the
violations of the laws of the state are punishable by the
appropriate authorities of the State.

However, it seemed to Victoria "indubitable that civil
laws are binding in the court of conscience." His authority?
The Apostle Paul: "Wherefore ye must needs be subject,
not only for wrath, but also for conscience sake." Victoria
adds: "And Peter says: 'Submit yourselves to every ordi-
nance of man for the Lord's sake: whether it be to the
king, as supreme', an admonition," Victoria adds, "which

1 Supra, notes 1 and 5.
would seem entirely unintelligible if laws were binding only in the courts of civil contentions and not in the court of conscience." Victoria then says "that civil laws are binding under pain of sin and guilt, in the same manner as ecclesiastical laws."

The two kinds of law he finds in agreement, for "divine law so endows a thing with the quality of a virtue or a vice that anything which is in accordance with the mandates of divine laws is rendered good and serviceable, although it would not otherwise be possessed of these characteristics; whereas that which is prohibited by divine law has in it something evil and vicious which it would not otherwise have."

A little later he adds: "In like manner, human law has this same power to endow anything with the quality of a virtue, and its opposite with the quality of a vice." Therefore he states his opinion in two short sentences: "There is no difference in this respect between human and divine law. For in both cases, just as there is merit in an act of virtue, so guilt attends a vicious act."

The violation of divine laws is a mortal, not a venial, sin. To the objection that the human law does not state whether the violation is a mortal or a venial sin, Victoria answers that "not even in divine law, and especially not in natural law, is a statement always included as to whether a given precept concerns mortal or venial sin." In each case, the question of mortal or venial sin "must be decided according to the particular case involved." Perhaps even today it is not superfluous to add that taxation is necessary for the well-being of the State. Victoria says roundly indeed, that "if any one should fail to pay his taxes, he would be committing a mortal sin," and among other illustrations he more than intimates that "if it is prohibited that any one should carry money out of the country, all those who do so are committing a mortal sin," from which it appears that Victoria was a man of the world as well as a theologian.

There are two questions of more than passing importance which Victoria discusses and which have greatly perplexed the past: "Has the king power to exempt one from liability to guilt, if he should so desire"—meaning, may the king, or, as we would say, the chief executive, issue a pardon of an of-
fense and remit a punishment? His answer is "that without doubt he is empowered to do so." This is universal practice, although the right should be and is sparingly used. The next question is whether the laws of the State are binding upon the members of the legislature who enact them and upon kings—meaning, of course, chief executives as well. There was a difference of opinion on this matter in his time, and it was that difference of opinion in the English-speaking world which brought the head of Charles Stuart to the block. Victoria was clear about the matter, maintaining against opposition that both legislators and executives are bound—for a reason which is worth while noting: "although the act of creating the law be voluntary on the part of the king; nevertheless, the fact that he is thereby bound or not bound, does not depend upon his own will: just as in the case of pacts; for he who enters into a pact of his own free will, is nevertheless bound thereby."

The assimilation of a pact to a law, binding those who have entered into it voluntarily, can not be passed over, for, although Victoria is dealing with the state—that is, men, women and children in association, and therefore forming a society—he had also in mind the association of the states and their peoples in a larger community extending beyond the narrow confines of Europe and embracing in our day the entire world, which society, being composed of natural persons, would fall out and the association dissolve, if, although equal, its members did not vest their governments with authority to make laws, to compel their execution and to punish their violation. For the larger community composed of these states would fall asunder, if there were not laws, and pacts having the force of laws, whereby the states forming the international community should conform their actions to the laws and pacts of their making. Therefore, to quote Victoria's conclusion in his own language, as it was and still is the goal toward which the forward-looking and far-seeing are directed:

"From all that has been said, a corollary may be inferred, namely: that international law has not only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the
rules of international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.”

For the violation of this law—which is a mortal sin—there exists the court of conscience. There is also, now existing at The Hague—and, appropriately in the Peace Palace—a Permanent Court of International Justice, in which the violations of the law of nations can be determined and righted. We can see the court at The Hague with our own eyes, but the court of conscience is none the less existent, although invisible, and it was to this court to which no less an internationalist than Grotius appealed in behalf of the rights of the Netherlands against the opposition of the Portuguese to Dutch navigation on the high seas and to trade without let or hindrance in the islands and territories of the Indian Ocean.

After saying that courts within nations take charge of violations of the law committed within their jurisdictions, and that the Creator of the Universe reserved to Himself punishment of the offenses of nations and their rulers, Grotius adds that there is one tribunal which even the luckiest of sinners does not escape, namely, conscience, or the estimation of one’s self, or public opinion, or the estimation of others. “To this double tribunal,” he says, “we bring a new case. It is in truth no petty case * * * No! It is a case which concerns practically the entire expanse of the high seas, the right of navigation, the freedom of trade * * *. In this controversy”—between Spain and the Netherlands—“we appeal to those jurists among the Spanish themselves who are especially skilled in both divine and human law; we actually invoke the very laws of Spain itself.”

Hitherto, in dealing with the Reading On the Civil Power we have been considering the “state” of Victoria, since the state is as a person in this larger state which we call the international community. And just as the inhabitants

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of a state, such as Spain, his own country, were bound by its national law, so his country, as a "person" of the international community of States, was and is bound hand and foot, as it were, by the law of nations.

Now, "the law of nations," in the Victorian conception, either is natural law or is "derived from natural law," and quoting the Institutes of Justinian, Victoria adds: "'What natural reason has established among all nations is called the jus gentium.'"

It should be observed that he remarks, in what we would call a sort of offhand way, that a large part at least of this jus gentium is synonymous in content with natural law, and that natural law is the source from which it flows. Later on, in the third section of the Reading On the Indians,9 in the opening paragraph of which the definition of international law is given, he completes his idea: "Indeed, there are many things in this connection which issue from the law of nations, which, because it has a sufficient derivation from natural law, is clearly capable of conferring rights and creating obligations." Here we catch a glimpse in the offing, but nevertheless a glimpse, of the impending sanction.

But to continue Victoria's enlargement of his definition: "even if we grant that it [the law of nations] is not always derived from natural law, yet there exists clearly enough"—What? Nothing more nor less than "a consensus of the greater part of the whole world, especially in behalf of the common good of all." This, in short, defines not only the law but the standard of the law.

Again to continue with Victoria's illustration. "For," he says, "if after the early days of the creation of the world or its recovery from the flood the majority of mankind decided that ambassadors should everywhere be reckoned inviolable and that the sea should be common and that prisoners of war should be made slaves"—at one time they were killed, later enslaved, later still ransomed, and in our day exchanged—"and if this, namely, that strangers should not be driven out, were deemed a desirable principle, it would certainly have the force of law, even though the rest

9 Supra, notes 3, 4 and 6.
of mankind objected thereto." This is not merely Victoria's law of nations, but the process by which that law of nations may be developed to meet the changing conditions of a changing world.

But Victoria immediately indulges in a further example, which will be peculiarly pleasing to our fellow-countrymen, for in advance he commends their adoption of the rule of *jus soli* in determining nationality: "If children of any Spaniard be born there," he says, meaning in our America, "and they wish to acquire citizenship, it seems they can not be barred either from citizenship or from the advantages enjoyed by other citizens—I refer to the case where the parents had their domicile there." The proof thereof is the law of nations, and one of its rules he now proceeds to apply. "He is to be called and is a citizen who is born within the state."\(^{10}\) But the authority is not enough. As a schoolman, he felt the necessity for it to be confirmed, and he says that "the confirmation lies in the fact that, as man is a civil animal, whoever is born in any one state is not a citizen of another state." So reasonable was the enlightened Spaniard that he eliminated by a stroke of his pen, or by a stress of his voice, the stateless person, saying immediately: "Therefore, if he were not a citizen of the state referred to, he would not be a citizen of any state, to the prejudice of his rights under both natural law and the law of nations."

Yet this is not all. The sojourner in the Americas who does not have the good fortune to be born in our part of the world, may become an American by naturalization. "Aye," Victoria continues, "and if there be any persons who wish to acquire a domicile in some state of the Indians, as by marriage or in virtue of any other fact whereby other foreigners are wont to become citizens, they can not be impeded any more than others"—here we have the favored nation clause—"and consequently they enjoy the privileges of citizens just as others do"; and the proviso is the law of our day, as well as of his—"provided they also submit to the burdens to which others submit." And though it be against the present immigration law of the United States, which would have excluded many of us were we or our

\(^{10}\) *Justinian, Inst.* lib. VIII, tit. 62, §11.
forbears not fortunate enough to have arrived before it was passed, Victoria says expressly that "refusal to receive strangers and foreigners is wrong in itself."

This is a sample of what the Spaniard could say in a couple of paragraphs, and it is therefore no wonder that in two short disquisitions he set forth in essence the law of nations as it was in his day, as it now is, and as it will be in generations, if not centuries, hence.

But what of rights and obligations—or, rather, obligations which are correlative with rights? The matter was one for which Victoria had a predilection, so that he considered it not only in his Relectio, but also in his daily lectures to his classes, which, it may be added, are in the course of publication at the present time, several volumes already having appeared containing Victoria's commentaries on the Secunda Secundae of St. Thomas.

A certain lecture consisted of a commentary or discussion of Question 40 of the Secunda Secundae of St. Thomas on the subject of war; and it is interesting to note—although we may not dwell upon it here—that there are implied, where not expressed, all of Victoria's views on the subject of war, as set forth in his later formal Reading. For our present purpose, however, we can choose but a single passage from the lecture—one which contains not merely the seed but the budding flower of the Victorian conception of sanctions.

"In the case of defensive warfare," Victoria says, "any king whatsoever and any commonwealth whatsoever—for example, this city [meaning the city in which he was lecturing]—may defend themselves"; and the passage which we are quoting is an admirable example of Victoria's method—first in the abstract, then a concrete example: "If the inhabitants of Toledo attack the inhabitants of Salamanca, the latter may defend themselves on their own authority. There can be no doubt on this point. Secondly, I hold," he says, "that the power of the prince is derived from the state. Therefore, in cases in which it is permissible for a state to wage war, it is in like manner permissible for a king to wage war." In our own behalf, we may add, by way of comment, that kings are, as it were, agents of an organized community. "Thirdly," speaking
again in the first person, he continues, "I hold that there is a distinction between private persons and states; for, granting that a private person may defend himself and his property, it is nevertheless impermissible for him to avenge himself or to reclaim his own property save through the judge." Here we have the very heart and soul of Victoria's system. Within the state there is a court of the prince, to which every injured person must resort, unless he is obliged on the instant to defend his life or to maintain his property against the urgent danger of an overwhelming attack. On other occasions the resort must be to law through a court of justice. In a word, Victoria's system is law with a court to interpret the law and to declare the sanction to be applied.

To recur again to Victoria: "For if it were permissible for him to do so in a different manner, that is, if any person whatsoever were the judge of his own cause, it would not be possible to govern the world." Why must this be so? Victoria replies: "For such [a state of affairs] would be contrary not only to divine law, but also to natural law," both of which permit—and indeed require—the organization of a state, "prince" or other magistrate, in order to keep peace and tranquillity within the borders of the community. "The state, on the other hand," he goes on to say, "has complete power to avenge itself, to recover its own property, and to punish its enemies," the truth whereof is demonstrated by the fact that, "if the state had not this power, there would be disorder in the world, and injury would be suffered at the hands of the wicked." What, then, is to be done? "Wherefore it follows, that, with respect to these three points—namely, avenging itself upon its enemies, recovering its property, and punishing its enemies—the state possesses the same power over its enemies as that which it possesses over its subjects." And the conclusion? "And if the state has this power, so also has the prince; for he draws his power from the state."

In the association of the artificial persons which we call states of the international community, the international court, in Victoria's day, was lacking, although the process of remedying right and wrong was in its nature and essence judicial.
So much by way of introduction, taken from Victoria's commentary on Question 40 of the *Secunda Secundae* of St. Thomas.

And now a passage from Victoria's Reading *On the Law of War*, in which the sanction makes its material appearance. To begin with, Victoria says: "Princes have authority not only over their own subjects, but also over foreigners, so far as to prevent them from committing wrongs." How can this be so? "By the law of nations and by the authority of the whole world." In the next passage, Victoria adds: "By natural law also, seeing that otherwise society could not hold together unless there was somewhere a power and authority to deter wrongdoers and prevent them from injuring the good and innocent." This power must exist, and because it must exist and is essential to the existence of every organized society, whether group, state or the international community, it is power under the natural law. "Now," declares Victoria, "everything needed for the government and preservation of society exists by natural law, and in no other way"—he is bold enough to say—"can we show that a State has by natural law authority to inflict pains and penalties on its citizens who are dangerous to it." In this passage, Victoria is speaking, of course, of a single and organized state, for which he has in a sentence provided the sanction, based on natural law, to be used within its borders. Turning to the international community, he says: "But if a state can do this to its own citizens, society at large"—including in the term "society" that largest of communities which embraces the world at large—"can do it to all wicked and dangerous folk, and this can only be through the instrumentality of princes"—or the agency of the state, as we would say today. "It is, therefore, certain," he continues, "that princes can punish enemies who have done a wrong to their State and that after a war has been duly and justly undertaken the enemy are just as much within the jurisdiction of the prince who undertakes it as if he were their proper judge." Here we have the judicial conception of international law applied not merely to the state but to the society of states, requir-

ing for its development and application a court of the prince in the midst of equal states.

"For instance," to use Victoria's own example in a later passage of the same Reading On War: "If French brigands made a raid into Spanish territory and the French king would not, though able"—note the word "able"—"compel them to restore their booty, the Spanish might, on the authorization of their sovereign, despoil French merchants or farmers, however innocent these might be." We are in the presence of a law and the authorization of the sovereign to apply it as against persons who, in judicial terms, would be called the defendant state. Why does this right of reprisals exist? "Because," Victoria informs us, "although the French State or Sovereign might initially be blameless, yet it is a breach of duty, as St. Augustine says, for them [the French State or Sovereign] to neglect"—note the word "neglect"—"to vindicate the right against the wrongdoing of their subjects,"—not in their own behalf, but in behalf of the state and of its people,—"and the injured sovereign can take satisfaction from every member and portion of their State." What is the inner meaning of this, implicit, if not express? That the defendant king has failed to provide a sanction and a law to carry it into effect, thus manifesting a lamentable lack of that "due diligence" required of both prince and state in international relations.

"An evil and adulterous generation seeketh after a"—sanction; but none other need be given than that of Victoria.

It is universally admitted that there must be relations between nations, for no nation, however large and powerful and possessed of material wealth, is sufficient unto itself. It is also admitted that there should be a law upon which these relations should be based. It is generally—although not universally—admitted that the law in such cases is the law of nations; but there is doubt among the modern "doctors" whether the law international or the law of nations can properly be called law because it lacks a "something", and that "something" is called a "sanction."

Perhaps the simplest way to settle the difference of opinion would be to suggest that there are various kinds of law which culminate in the law of nations. There is what is
called “natural law”; there is what is called “divine law”; there is the law of the state, which we call in English, “municipal law”; and there is something indefinable and intangible, and yet vastly important—the law, or, as we generally say, the rule of reason, synonymous, in a sense, with what is called natural law and at the same time a source of law.

As we are dealing with law, it is best to rely upon adjudged cases in which law, recognized as such, has been applied. On the question of sanctions, we cite first The Prometheus,\(^\text{12}\) decided in the Supreme Court of Hongkong, in 1906, by Sir Henry Spencer Berkeley, Acting Chief Justice, which case is made, as it were, for our present purpose. It was stated that the owners of the Prometheus—a Norwegian vessel—took aboard, in the war between Russia and Japan, a cargo to be delivered to a Japanese port. The question involved was whether food-stuffs were, or were not, contraband under the law of nations. In the language of the learned Chief Justice, “it was contended on behalf of the owners of the Prometheus that the term ‘law,’ as applied to this recognized system of principles and rules known as international law, is an inexact expression, that there is, in other words, no such thing as international law; that there can be no such law binding upon all nations, inasmuch as there is no sanction for such law, that is to say, that there is no means by which obedience to such law can be imposed upon any given nation refusing obedience thereto.”

What did the Chief Justice, a lawyer to his fingertips and engaged in the administration of the law, say to this? He did not concur: “In my opinion a law may be established and become international, that is to say, binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement.” Why should this be so? Because “the resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance can not, perhaps, be overcome.” What, then, is the effect? “Such resistance merely makes the resisting nation a breaker of the law to

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\(^{12}\) 2 Hongkong Law Reports 207 (1906).
which it has given its adherence, but it leaves the law, to
the establishment of which the resisting nation was a party,
still subsisting.” With this he might have stopped, but he
added two further sentences, one a question and the other
an answer. The question: “Could it be successfully con-
tended that because any given person or body of persons
possessed for the time being power to resist an established
municipal law, such law had no existence?” And “the an-
swer to such a contention would be that the law still existed,
though it might not for the time being be possible to enforce
obedience to it.”

It is to be observed that the learned Chief Justice—and
he was indeed learned—was speaking of international law
of our day, which he did not define, but as it is very material
to the present purpose, we should have a definition of our
day, and what definition could be better than that of Sir
Charles Russell, later to be known as Lord Russell of Kil-
lowen, a very distinguished practitioner at the bar. He
had had experience in international affairs—as had a Chief
Justice of the Supreme Court of the United States, who,
before his appointment to the Bench, was counsel in the
Alabama case,13 and whose authority we shall presently in-
voke in behalf of municipal sanctions for international law.
Sir Charles was counsel for Great Britain in the Bering Sea
Arbitration at Paris in 1892, and shortly thereafter he be-
came Lord Chief Justice of Great Britain—the first Catho-
lic raised to that position since the reign of Mary Tudor.

In an address before the American Bar Association in
1896, His Lordship asked the question: “What, then, is
international law?”—to which his reply was (and he was
not a theorist, but a hard-headed lawyer as well as a dis-
tinguished judge upon the Bench): “I know no better de-
finite of it” (meaning international law) “than that it is
the sum of the rules or usages which civilized states have
agreed shall be binding upon them in their dealings with
one another.”

The distinguished prima professor of theology in the Uni-

from the Secretary of State, with Accompanying Papers, relating to the
Court of Commissioners of Alabama Claims (Washington, 1877) pp.
147, 148.
versity of Salamanca could not have done better; indeed, it was his view as well as that of the learned Lord Chief Justice, that an "agreement is a pact"; and that a pact is a law which binds both the conscience and the conduct of individuals as well as nations. The difference is a mere question of wording. Writers on law have usually had in mind law as applied to the subjects of a state in their relation to the state and with one another, and that law is generally held to be the command of the superior, that is, of the state, or rather, the sovereign, to the subject—\textit{with a material penalty for violation of the law, whether it be fine or imprisonment.}

In international relations we are, however, dealing not with a superior and an inferior—as is said to be the case with municipal law (that is, the law of a particular state), but with equals, the theory being that as each state is the equal of the other, there is no superior to prescribe a law to an inferior. Therefore international law—\textit{if law be a command of a superior—can not be law. This conclusion, however, does not follow from such a premise; for there may be one kind of law in the case of a state—that of a superior to an inferior—and another kind of law between nations, in which the relationship of superior and inferior does not exist.}

Admitting for the sake of argument—although we do not admit it as a fact—that law is a command by the sovereign power in a state (as the analytical school of England jurisprudence insists), it must nevertheless be pointed out that there is a kind of law even within states which is not a command; for indeed, the common law of England was not a command from the sovereign, although its violation is subject to a penalty. If that be so, it follows that a command is not a necessary element either to a law or to its sanction. It is therefore very material to inquire, then, what is common law? It is frequent usage developing into a custom which, accepted as law, is applied as law through and by courts of justice. The analytical school, however, goes on the theory that what the king permits he commands; hence, they say, the common law, being permitted by the king, is commanded by the king and therefore enforced through the king's courts of justice. Permission, it
is to be said, is, however, not a command but is in fact a recognition and acceptance of the custom. Therefore, in the manner of the schoolmen, we may take it as proved that the common law, at least, is not a command.

If there can be law within a state without command, may there not be a law between states without a command? May we not say that in the latter, as in the case of the common law, command is absent, since between and among equals there can be no superior?

Now as there is a common law of the state, so there may be a common law of the states or nations, but between the states there can not be, even upon the basis of the arguments of the analytical school, a common law which is a command, because among equals there can be no superior whose permission can be distorted into a command. How does this common law of nations arise? Frequent usage of nations becomes hardened into the custom of nations, and through the adoption by nations of these universal customs, they become the common law of nations by agreement of the nations, evidenced by their application of customs in their mutual relations.

Just as the common law in England assumed definite form and shape through the decisions of courts, so the common law of nations has, in the course of centuries, assumed definite form and shape through the practice of nations. The process, differing in form, is essentially the same in each case; therefore the result should be and is the same. The only difference is that courts of justice exist within the state to apply the customary law in question in suits brought in such courts, the question being thus decided by judges learned in the law; while on the other hand there has been until recently no court between the nations, although from antiquity to the present day, there have been temporary mixed commissions or tribunals of arbitration created by agreement of the parties—that is to say, the states—to decide disputes which have arisen between them and which it has been the desire of the states to decide without a resort to war. In these tribunals, as well as in the Permanent Court of International Justice at the Hague, we have a court without a superior, created by the agreement of nations, with a law which it administers, whether it be
custom, "as evidence of a general practice accepted as law,"\textsuperscript{14} or agreements in the form of pacts, "having the force of law," according to Victoria's statement.

The definition of law as the command of a sovereign—a command which does not exist in customary law, forming a large part of the law of England—can not be said to be essential to the existence of law; and the law of nations, consisting of generally recognized customs, is even less the command of superiors than are the customs of England. Pacts of equal states—for what state ever recognized itself as inferior to another—are agreements. According to Victoria, pacts are laws and bind those who have entered into them voluntarily. In short, not only customs but pacts, are voluntary, without the necessary intervention of a sovereign within the state or between the states except as agent of the respective peoples.

But there is another kind of law—positive law, as it is called. This is the law of a king or other ruler, possessed of the right to make law, or of a legislature, having the power to enact laws. Therefore it is said to be the law of the sovereign. Assuredly, however, it is not the law of a personal sovereign, for such a sovereign no longer makes law in civilized states or communities. He is, for instance, a party to the law-making power in Great Britain, with the right to veto an act of Parliament, which right to veto has not been exercised these many years. In the United States, the Congress, composed of a Senate and a House of Representatives, enacts a law, which, to become effective, requires the approval of the President of the United States; or, to be passed over his veto, it requires the vote of two-thirds of both houses. It is only as a legal fiction, therefore, that the acts of the British Parliament and the acts of the American Congress can be said to be positive law in the sense of a command. But to speak only of the United States, we know that the source of power in each of the American states is vested in the people of the states. We know that the legislators who pass acts do so as representatives of the people and that the legislator is their agent, not their master.

\textsuperscript{14} Statute of the Permanent Court of International Justice at The Hague, Article 38 (2).
In the same way, the members of the Senate—ninety-six in number—are elected by the men and women of the different states of the American Union, and the members of the House are elected by the states in proportion to their respective populations and within what are called Congressional districts of the individual states. The senators are therefore the representatives of the peoples of the individual states and the members of the House of Representatives—there is an argument in the very name—are the authorized agents of the voters within their districts—men and women, without distinction of sex, exercising the right to vote. How can it be said that an act of Congress is a command, unless it be a command of the people—from below, not above? The theory of positive law as a command is not only monarchical but it is also archaic. Law in this modern world of ours is not a command; it is the authority and consent of the people given in advance to the enactment of laws which, in the opinion of their chosen agents are necessary for the common good within the state. Whether the laws be national or local, the process is the same, for the legislatures of each state are composed of a lower and an upper house corresponding to the Senate and the House of Representatives of the United States, with the right on the part of the Governor to veto, which veto can be overridden by the two houses of each of the states.

Suppose, however, the act within the state is passed by the legislature and approved by the Governor, but is displeasing to the people of the state. The act will be repealed, because the agency is subject to the principal.

In the same way, the Congress is but the agency of the people of the different states, and an act of Congress which is obnoxious to the people in their united capacity will be repealed. Indeed, the most solemn of laws—an amendment to the Constitution of the United States—which meets with the disapproval of the people of the states is subject to repeal; and within the past year the eighteenth amendment to the Constitution of the United States, forbidding the manufacture and sale of intoxicating liquors, was repealed on the 5th day of December, 1933. The repeal of an amendment requires the concurrence of three-fourths of the states, either by their respective legislatures or by con-
ventions especially called and elected for this purpose, as in the case at hand. This is indeed the consent of the governed; this is the Declaration of Independence in action—of government by the consent of the governed.

If this be the case within every republic of the Western World—of which there are twenty-one—we are justified in believing that it either is or will be the case with every other modern state, so that even if we argue by analogy, there is no need for us to change or attempt to change the conception of international law as a thing of custom or pact, because the law within the state, where once a sovereign power above and beyond the people was exercised by a personal sovereign, has given way to government “of the people, by the people and for the people.” Government by command involves a power superior to that of those who are commanded. Government by consent is the only form of government consistent with the nature and dignity of human beings.

Victoria does not express himself on this aspect of law in such definite terms; but what is his government by majorities except government by consent? And therefore within his state, as between nations, there is consent—which is not a command—and between states there are agreements, which negative a command. Therefore we need not trouble ourselves about the definitions of theorists of our day or of writers of the past, who insist that law is a command of a sovereign power above the people forming the state.

Let us consider the statement of Victoria in reference to the international community—“the world as a whole, being in a way one single State.” Now he has proved, as we have seen, that laws are made in the state and that they bind both the legislature and the king even though the act of creating the law be voluntary on the part of the king—and I add, the chief executive, to bring his statement up to date; and that it does not depend upon the will of the legislature or the chief executive that one or the other is bound. Also in the case of pacts, one who enters into a pact of his own free will is nevertheless bound thereby. The pact is an agreement, and the first principle of natural law is that
pacts, although entered into voluntarily—and they should be so entered into—are to be kept. *Pacta sunt servanda*.

Proceeding from the group forming the state to the group of states forming the international community, Victoria infers a corollary: "that international law has not only the force of a pact and agreement among men, but also the force of a law." Why is this so? It clearly is the case with individuals; it clearly is the case with the legislature and with the chief executive; and it clearly should be the case with the international community, composed of groups. The reason is that "the world as a whole, being in a way one single State, has the power to create laws that are just and fitting for all persons"—that is to say, for all persons of each and every group of individuals and of all states forming the international community—"as are the rules of international law." Here we have the groups of individuals associated for a political and social and moral purpose to form a state, and the states in turn forming the international community; and as the state represents the individuals and the group within state lines, so the international community represents the individuals and the states composing the international community.

It is easy enough for us to see all this today. It was not an easy thing for Victoria in his day and generation. Yet he divined the international community, if he did not create it. Indeed, he not only recognized the existence of, but defined, the community which existed of itself, irrespective of the will or the action of any man or of any group; for the international community existed *ex jure necessitatis*.

Now let us suppose that a person residing within a state violates the law of the state. According to Victoria, if the case be one of sufficient gravity, he commits a mortal sin, cognizable in the court of conscience. It is also cognizable in a court of justice; for the law of the state has a double sanction—the one spiritual, in the court of conscience, and the other material, in a court of justice. The great Grotius recognized this and stated it in unmistakable and incontrovertible terms in his address to the Christian Princes, prefixed to his tractate on the *Freedom of the Seas*. What, then, of international rules, the law of each and every state?

15 *Supra*, note 8.
“Consequently,” Victoria says, “it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin”; and he adds that “in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law.” Why? “The latter having been established by the authority of the whole world.”

Let us analyze this sentence—for it is but a sentence. We have international rules. But whether they be customs or agreements, or whether the violations of them be in peace or in war, in the cases which we have in mind, there is no command involved. These rules have arisen from customs; or they are express agreements as in the case of pacts. Now, in the Victorian conception, these customary rules, although they are not agreements, in the sense of pacts, are binding, as are pacts, because Victoria selects as his example the inviolability of ambassadors, which inviolability arose from the custom and the practice of nations, and not by municipal statute or by pact; and the custom being general, no country can refuse to be bound by the rule concerning the inviolability of ambassadors—and therefore, through its agent, the state, being bound by international law, commits a mortal sin if it violates the immunity of ambassadors, a sin cognizable alike in the court of conscience and in a court of justice.

What is the implication of all this? If, by the constitutional law of a state, an act of the legislative body be required in order to carry out the rule of international law, then it is the duty of the nation in question to pass such a municipal statute, and if it does not pass the municipal act, it is liable for damages to the nation or to the individual who may have suffered by its failure so to do. As Victoria frequently chooses the immunity of ambassadors in order to make his meaning clear—inasmuch as the immunities of diplomatic agents are universal and may therefore be considered as “established by the authority of the whole world”—let us test the appositeness of the illustration by a few decisions of municipal courts dealing with such immunities.

The first case is one of more than passing interest.\(^{16}\) It

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\(^{16}\) The Case of Andrew Artemonowitz Matueof, Ambassador of Muscovy, 10 Mod. 5 (1710).
happened in the lifetime of Peter the Great, Czar of all the Russias, whose empire had formally made its entry into the international community. One Andrew Artemonowitz Matueof had been appointed "ambassador extraordinary of his czarish majesty, emperor of Great Russia, her majesty's [Queen Anne's] good friend and ally". It appeared that his excellency was arrested and taken "by violence, out of his coach in the public street," and "he was detained in custody for several hours, in contempt of the protection granted by her majesty, contrary to the law of nations and in prejudice of the rights and privileges which ambassadors and other public ministers, authorized and received as such, have at all times been thereby possessed of, and ought to be kept sacred and inviolable".

As a result of this incident there was an act of Parliament passed in the year 1708, to carry into effect the law of nations relating to the immunity of ambassadors and public ministers, an immunity under the law of nations which had been recognized time out of mind. When the case of the Ambassador of Muscovy—for so he was called in the suit—was tried in the eighth year of the reign of Queen Anne, that is, in 1710, in the Queen's Bench, before Lord Chief Justice Holt, the question before the court was whether an ambassador could lawfully be arrested for debt—or for any other cause. The case was argued by the Attorney-General, Sir James Montague (later Chief Baron of the Exchequer), in behalf of the ambassador, and the Attorney-General said roundly that the ambassador could not be arrested, and then proceeded to state the reasons, as applicable then as they are today: "If the privileges of an ambassador may by law be broken in upon and invaded for the preservation of the property of a private subject, princes will be cautious of sending ambassadors to us; ours must expect the like treatment." This we consider to be a question of general right—not merely immunity from suit for indebtedness. After stating that "few will be prevailed with to take that character [of ambassador] upon them", the Attorney-General continued, "should an ambassador be liable to the restraints of the law of the land to which he goes, how easy would it be, upon an emergency, to take off his attendance upon his master's business?" Here we
have two reasons: that ambassadors would be unwilling to subject themselves to arrest or restraint; and that, under such circumstances, not merely the ambassador, but the business of his master, would or might suffer. The practice of nations was clearly in favor of immunity; for "the person of an ambassador", the Attorney-General continued, "has ever been held sacred and inviolable by the law of nations". Neither his property nor his person is liable to arrest. There should, however, be a remedy available to prevent abuse of the inviolability; otherwise unscrupulous ambassadors, or other diplomatic agents, might avail themselves of their immunity to violate the laws of the country to which they were accredited. What, then, is the way of preventing this? "An ambassador must be intreated", the Attorney-General further continued, "and upon refusal sent back to his master," the theory being that the country which he represents still exercises exclusive jurisdiction over his person and property, so that, in case he commits an offense or a crime within the country to which he is accredited, he should be returned to the jurisdiction of the country whereof he is the diplomatic agent.

The Attorney-General next dwells upon the representative character of the ambassador, asserting that nobody would say that "the Czar himself might have been arrested", and that "the same fiction of law that makes him [the ambassador] represent the person of his master, makes him extrarochial, and quasi, in the dominions of his master." And, finally, that "the ill treatment of ambassadors is a thing of dangerous consequence, for it may involve the nation in a war, and it would be very inconvenient that this should be in the power of any private person whatsoever."

The persons implicated were arrested, examined before the privy council, and seventeen were committed to prison. They were tried and convicted on the facts by the jury, but no sentence was rendered.

The case of Triquet v. Bath involved also the question of diplomatic immunities. It was tried in 1764, in the Court of King's Bench, before Lord Chief Justice Mansfield, who decided that "the privilege of foreign ministers and their domestic servants depends upon the law of nations", and

17 3 Burr. 1478 (1764).
that, to quote his exact words, "all that is new in this act is the clause which gives a summary jurisdiction for the punishment of the infractors of this law."

His Lordship then proceeded to recount in an interesting—indeed, entertaining way—for his judgments were literature as well as law—the facts in the case of the Ambassador from Muscovy—the wrath of the Czar and the humiliation of Great Britain, resulting in a special embassy and an illuminated apology to his "czarish majesty." His exact language we quote, lest inadvertently we do an injustice to my Lord Mansfield or to the Czar:

"* * * The act of Parliament was made upon occasion of the Czar's ambassador being arrested. If proper application had been immediately made for his discharge from the arrest, the matter might and doubtless would have been set right. Instead of that, bail was put in, before any complaint was made. An information was filed by the then Attorney-General against the persons who were thus concerned, as infractors of the law of nations, and they were found guilty, but never brought up to judgment.

The Czar took the matter up, highly. No punishment would have been thought, by him, an adequate reparation. Such a sentence as the court could have given, he might have thought a fresh insult.

Another expedient was fallen upon and agreed to; this Act of Parliament passed, as an apology and humiliation from the whole nation. It was sent to the Czar, finely illuminated, by an ambassador extraordinary, who made excuses in a solemn oration.

A great deal relative to this transaction and negotiation appears in the annals of that time; and from a correspondence of the Secretary of State there printed.

But the Act was not occasioned by any doubt 'whether the law of nations, particularly the part relative to public ministers, was not part of the law of England, and the infraction, criminal; nor intended to vary an iota from it'."

In an earlier case on the subject—that of Buvot v. Barbut, decided in 1736 by Lord Chancellor Talbot—Lord Mansfield, then known as William Murray and practising at the London bar, appeared as counsel in the case. As Lord Mansfield said, in the course of his opinion in the case of Triquet v. Bath: that he "was counsel in this case," and

17a 7 Anne, c. 12 (1708).
18 Supra, note 16.
had "a full note of it", preference should naturally be given to his statement of the matter. "These questions arose", he said, "and were discussed. 'Whether a minister could, by any act or acts, waive his privilege.' 'Whether being a trader was any objection against allowing privilege to a minister, personally.' 'Whether an agent of commerce, or even a consul, was entitled to the privileges of a public minister.' 'What was the rule of decision: the act of Parliament or the law of nations.'" His lordship continued: "Lord Talbot declared a clear opinion—'That the law of nations, in its full extent, was part of the law of England.' 'That the act of Parliament was declaratory, and occasioned by a particular incident.' 'That the law of nations was to be collected from the practice of different nations, and the authority of writers.' Accordingly, he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Binkershoek, Wiquefort, &c.; there being no English writer of eminence upon the subject."

Three years after the case of Triquet v. Bath, Lord Mansfield considered a like question in Heathfield v. Chilton, in part confirming what he had said in the previous case, making, however, a very precious addition: "The privileges of public ministers and their retinue depend upon the law of nations; which is part of the common law of England. And the act of Parliament of 7 Anne, c. 12, did not intend to alter, nor can alter the law of nations."

What conclusions are to be drawn from these three leading cases, each dealing with the nature and extent of diplomatic immunity? In the first place, it is to be observed that the immunity was that of the law of nations—a law existing previously to the statute of Queen Anne. In the second place, it is to be further observed, that the law of nations was the law of England—not statute law, but com-

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20 4 Burr. 2015 (1767).

21 The law of nations which Lord Mansfield had in mind was stated in the report of the Law Officers of the Crown in the famous diplomatic case of the Silesian loan to which his Lordship, as William Murray, then Solicitor-General, affixed his name—if the definition did not actually come from his hand: "The Law of Nations is founded upon Justice, Equity, Convenience, and the Reason of the Thing, and confirmed by long Usage, * * *"—Rt. Hon. Sir Ernest Satow, The Silesian Loan and Frederick the Great (Oxford, 1915) p. 82.
mon law—resulting from the practice of nations. In the third place, that it was a law superior to any other law in England, in that it could not be modified by an act of Parliament. And finally, that the statute was expressly passed to provide the rule of the law of nations with a municipal sanction, and that, in so doing, it recognized the law of nations as an existing and obligatory law. The right to immunity, and the duty of England to protect that right, existed. The duty was not created by the statute; it existed under international law, and, because the statute had not theretofore existed, Great Britain passed it, in order that the violation of the immunity of diplomatic agents under international law should not happen again.

It is to be observed that the three cases are English cases. But, as the common law of England became the law of the Colonies and was continued without modification when they became States, in so far as international law is concerned, the English cases were American precedents. An early and a leading and an interesting case is that of Nathan v. Commonwealth of Virginia,22 tried in the Court of Common Pleas of Philadelphia County, in the State of Pennsylvania, in the September Term of 1781, when our Washington, to whom reference is made, was paying his respects to Cornwallis, temporarily residing at Yorktown. It appears that a quantity of clothing belonging to the commonwealth of Virginia was imported from France, and one Simon Nathan, claiming an interest in the property, caused a foreign attachment to be issued against Virginia, and the clothing was attached in Philadelphia. "The delegates in Congress from Virginia,"—then sitting in Pennsylvania—"conceiving this a violation of the laws of nations, applied to the Supreme Executive Council of Pennsylvania, by whom the sheriff was ordered to give up the goods."

The case was elaborately argued by the Attorney-General of the Commonwealth of Pennsylvania and by counsel for the plaintiff. The court decided that the property of a sister state was not liable to attachment in Philadelphia. As the judgment was rendered without an opinion and in accordance with the views of the Attorney-General, only the material portion of his argument dealing with the prin-

22 1 Dall. 77 n. (1781).
ciple in question will be considered. "He premised, that though the several states which form our federal republic, had, by the confederation,"—which had gone into effect on the 1st of March, 1781—"ceded many of the prerogatives of sovereignty to the United States, yet these voluntary engagements did not injure their independence of each other; but that each was a sovereign, 'with every power, jurisdiction, and right, not expressly given up.'" His argument consisted of two points: "First: that every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void. Second: that a sheriff cannot be compelled to serve or return a void writ."

The first point the Attorney-General "endeavoured to prove, by considering, first, the nature of sovereignty, and, secondly, the rules of law, relative to process issued against ambassadors, the representatives of sovereigns," relying upon Vattel, who was before, and apparently still is after, their independence, the principal authority on international law in the United States—and in the Supreme Court since its organization.

Having stated there was no instance in our law books of a process against a sovereign, the Attorney-General considered suits against their representatives. The stock example, of course, was the immunity of diplomatic officers, existing by the law of nations, the violation of which was to be punished [in England] under the famous statute of 7 Queen Anne, Chap. 12, "which statute," he said, "did not introduce the immunity of diplomatic agents, but was merely declaratory of the law of nations, with nothing new in it, except the clause prescribing a summary mode of punishment"; and he concluded, under this heading, that this statute was a "part of the common law of the land before, and consequently extended to Pennsylvania." His authorities were Blackstone's Commentaries,23 and the cases of Triquet v. Bath24 and Heathfield v. Chilton.25

Since the writ of the sheriff was null and void against a representative, as against the sovereign, it followed that the sheriff attaching the goods in question was liable to

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24 Supra, note 17.
25 Supra, note 20.
punishment, and to show the "inconveniences" which would follow, the Attorney-General referred to the calamity which might happen to the body politic, if the sheriff could lawfully attach the goods addressed to a sovereign or its representative: "that any disaffected person, who happened to be a creditor of the United States might injure our public defence, and retard or ruin the operations of a campaign; that he might issue an attachment against the cannon of General Washington, or seize the public money designed for the payment of his army."

The allusion to Washington was not accidental. As appears by his diary, his army, marching toward Yorktown, arrived in Philadelphia on the 31st of August, and on the 5th of September there is an entry concerning "the rear of the French Army having reached Philadelphia and the American's having passed it." 26

There is a later case in Pennsylvania which is even more interesting. It is that of Respublica v. de Longchamps 27 in the Court of Oyer and Terminer at Philadelphia in 1784. The facts were that the Chevalier de Longchamps, an officer of the French Army in America, was indicted on the charge that he "unlawfully and insolently did threaten and menace bodily harm and violence to the person of * * * François Barbé-Marbois" in the residence of the French Minister Plenipotentiary. M. Barbé-Marbois was then Secretary of the French Legation and Consul General of France to the United States. It was specifically stated in the indictment that M. Barbé-Marbois was the time "under the protection of the laws of nations, and this commonwealth"; and that, on the 19th of May, the Chevalier de Longchamps, in the public street, "unlawfully, premeditatedly and violently" assaulted M. Barbé-Marbois, striking him "in violation of the laws of nations, against the peace and dignity of the United States and of the Commonwealth of Pennsylvania."

The Attorney-General, assisted by none other than the famous James Wilson, a signer of the Declaration of Independence, soon to be a member from Pennsylvania of the

27 1 Dall. 111 (1784).
Federal Convention in Philadelphia, to the success of which he largely contributed, and still later to be an original member of the Supreme Court appointed by President Washington, appeared for the prosecution. They advocated “the necessity of sustaining the law of nations, of protecting and securing the persons and privileges of ambassadors;”—to quote the exact language of the report—“the connection between the law of nations and the municipal law, and the effect which the decision of this case must have upon the honor of Pennsylvania, and the safety of her citizens abroad”.

In support of their contention, they invoked the authority of *Triquet v. Bath*,28 Blackstone’s *Commentaries,*29 and

> 28 *Supra*, notes 17 and 24. In this case, Lord Mansfield, after saying, “I was counsel in this case”—meaning that of Buvot *v.* Barbut, before Lord Talbot (*supra*, note 19)—“and have a full note of it,” continues without a break: “I remember, too, Lord Hardwicke’s declaring his opinion to the same effect; and denying that Lord Chief Justice Holt ever had any doubt as to the law of nations being part of the law of England, upon the occasion of the arrest of the Russian ambassador.”

Chief Justice McKean refers in the decision of *Respublica v. De Longchamps* (*supra*, note 27, at p. 117), to “the case of the Russian ambassador”: “A wrong opinion has been entertained concerning the conduct of Lord Chief Justice Holt and the court of king’s bench, in England, in the noted case of the Russian ambassador. They detained the offenders, after conviction, in prison, from term to term, until the Czar Peter was satisfied, without ever proceeding to judgment; and from this, it has been inferred, that the court doubted, whether they could inflict any punishment for an infraction of the law of nations. But this was not the reason. The court never doubted, that the law of nations formed a part of the law of England, and that a violation of this general law could be punished by them; but no punishment less than death would have been thought by the Czar an adequate reparation for the arrest of his ambassador. This punishment they could not inflict, and such a sentence as they could have given, he might have thought a fresh insult. Another expedient was, therefore, fallen upon. However, the princes of the world, at this day, are more enlightened, and do not require impracticable nor unreasonable reparations for injuries of this kind.”

The above passage from Chief Justice McKean’s opinion pronouncing judgment is here reproduced, in order to show the care with which the case of *Respublica v. De Longchamps* was considered and the judicial precedents examined and mastered regarding the law of nations as the law universal and therefore the law of each and every state.

There is an incident appearing in *Appleton’s Encyclopaedia of American Biography* (1st ed. 1888), vol. iv, p. 199, in the article on
Vattel's *Law of Nature and of Nations*. Upon these authorities they stated that M. Barbé-Marbois "must have been prevented from paying a proper attention to his appointments, which is certainly a violation of the law of nations", citing in this respect Vattel. "Upon the same principle"—to quote from the argument as reported—"that the infringement of a statute is an indictable offence, though the mode of punishment is not pointed out in the act itself, an offence against the laws of nations, while they compose a part of the law of the land, must necessarily be indictable".

Chief Justice McKean, a man of large political and judicial experience and himself a signer of the Declaration of Independence, stated the trial to be a case of "first impression in the United States"; that it was to be determined "on the principles of the laws of nations, which form a part of the municipal law of Pennsylvania".

The jury returned a verdict of "guilty", first on the assault count and later on both counts.

The case being considered of "first impression in the United States", the sentence of the court was suspended and the case stayed for the opinion of the judges. It was very carefully argued, as appears from the report and from the opinion rendered by Mr. Chief Justice McKean, in the course of which, after stating that the crime was an infraction of

"François de Barbé-Marbois," which shows that time left undimmed the Marquis de Barbé-Marbois' interest in things American:

"Just before Lafayette's death Marbois invited him, with the American minister and several of the latter's compatriots, including Col. Nicolas Fish, to dine with him. Before the repast the company was shown into a room that was in strong contrast with the other elegant apartments. It looked like a large room in a Dutch or Belgian farm-house. On a long, rough table was spread a dinner in keeping with the room: a single dish of meat, uncouth pastry, and wine in bottles and decanters, accompanied by glasses and silver goblets. 'Do you know where we are?' said Marbois to Lafayette and the other guests. The marquis looked at the low ceiling with its heavy, bare beams, and, after a brief pause, exclaimed: 'Ah! the seven doors, and the one window, and the silver goblets, such as the marshal of France used in my youth! My friends, we are in Washington's headquarters, on the Hudson fifty years ago.'"

29 *1 Bl. Comm.* 253.
30 *Vattel, Law of Nations* (1760), pref. 6, p. 203; *id.*, lib. 1, § 6; *id.* lib. 4, §§ 80, 84.
31 *id.*, lib. 2, § 218.
the law of nations, he added that "this law, in its full extent, is a part of the law of this state, and is to be collected from the practice of different nations, and the authority of writers"; that "the person of a public minister is sacred and inviolable"; and that "whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations"; and such being the case, that "he is guilty of a crime against the whole world".

The *Longchamps case* was not a whit less interesting than *Triquet v. Bath* and it makes an even stronger appeal to us of America, not merely because of its historical associations, but because of the argument of counsel and the opinion of the Chief Justice.

In passing, it may be said that it is also the first case, so far as is known, of a request for extradition from the United States on the part of a foreign government—in this instance, France, and de Longchamps the person to be extradited—which the court, after grave deliberation, refused on the ground that the offense was committed in the United States and should be tried where committed. In the argument, as we have seen, it was maintained that the law of nations being a part of the law of the land, the offense was as indictable as if under a statute, in that the law of nations, being the law of the land, had the effect of a statute, and that a person violating the law of nations was guilty of a crime against the whole world, and that not merely the law of the state in which the offense was committed was violated, but the right of every state of the civilized world was violated by the violation of international law, wherever it took place.

We are indeed deeply indebted to the argument of James Wilson and to the opinion of Thomas W. McKean, Chief Justice of Pennsylvania.

But important as the case is, and interesting as it must be admitted to be, it is perhaps more interesting by virtue of the persons involved; more so, perhaps, than any other case decided in our courts. François, Marquis de Barbé-Marbois was not merely Consul Gen-

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32 *Supra*, note 27.
33 *Supra*, notes 17, 24 and 28.
eral and Secretary of the Legation, who, as such, performed his duties to the satisfaction of his government during the period of our Revolution, but later he it was who advised M. de Vergennes, then Minister of Foreign Affairs of France, not to recommend a foreigner as the first Bishop of the Catholic Church in the United States and (if he recommended anybody) to name one John Carroll, who would be most acceptable because highly thought of in the United States. In addition, it was through the same Marquis de Barbé-Marbois, Minister of State of the great Napoleon, that the proposition was made to Robert R. Livingston, then our Minister to France, to cede the vast territory of Louisiana to the United States.

If we now turn to the Constitution of the United States, we find that Congress has the power "to define and punish," let us say, without quoting, offenses against international law, specifying some and including all others by the words, "offenses against the law of nations." The word "piracy" is used. But what if it is not defined? Then, of course, it is piracy against the law of nations. If, however, it is defined by Congress, it is still according to the law of nations, for if the definition of the United States differ from the meaning under the law of nations, the statute is an attempt to set up a definition inconsistent with the law of nations and is, to the extent of the inconsistency, null and void as against the nations. Why is this so? Because a statute of the United States, even if dealing with the law of nations, is an unilateral act and therefore can only bind the United States and be exercised within their jurisdiction.

The best case, perhaps, on the subject is United States v.


35 The text from this point to the discussion of the Arjona case (infra, p. 199), is reproduced by permission, with an occasional modification, from a presidential address entitled "International Law, Municipal Law, and Their Sanctions," delivered before the American Society of International Law on April 27, 1933, and printed in the Proceedings of the Society for 1933, pp. 5-33.

35a Art. viii, § 10.
Smith, decided in 1820. The defendant Smith was indicted for piracy under an act of Congress of March 3, 1819, providing "that if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death." Here we have the exact case of the Constitution, by virtue of which Congress is authorized "to define and punish * * * Piracies," etc. So much for the first question raised.

The second was whether the crime of piracy was defined by the law of nations with reasonable accuracy. The opinion in the case was that of the learned Justice Story, who said in this connection: "What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public laws; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." What, then, was the definition under the law of nations? "Robbery, or forcible depredations upon the sea, animo furandi, is piracy." Then, too, he says, great writers on maritime law profess the same doctrine, and the common law to which he refers "recognises and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations (which is part of the common law)—it is Justice Story who is speaking—"as an offence against the universal law of society, a pirate being deemed an enemy of the human race." Here we have the law of  

36 5 Wheat. 153 (1820).  
37 An Act to protect the commerce of the United States and punish the crime of piracy. 3 Stat. 513 (1819), 33 U. S. C. § 383 (1926).  
38 Supra, note 36, at pp. 160-161.  
39 For a more elaborate statement of Justice Story's conception of the law of nations and its sources, see La Jeune Eugénie, 2 Mason 409, Fed. Cas. No. 15,551 (1822). Arranged in seven numbered parts, the statement reads:  
"(1) Now the law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or (2) secondly, in
nations considered as an integral part of the law of the United States, and the offense or the felony is sufficiently defined, “whether we advert to writers on the common law, or the maritime law, or the law of nations”; that is to say, the law of nations binding upon every nation is a part of the municipal law of every nation, to be rendered effective in case of need by a municipal statute, the offense being under international law and the punishment under a municipal statute. A case of piracy, however, is of a very general nature. Although a pirate’s acts may bring him under the definition of piracy under the law of nations, he is regarded as not acting under the law of any country and is to be tried for the offense in any country within whose jurisdiction he may be brought.

There are many interesting cases of an international nature punishable by a municipal sanction. Speaking within the jurisdiction of the United States, it will suffice for us to cite a few American cases dealing with neutrality. The law of neutrality used to confer an equal right upon both belligerents. Thus in the time of Grotius it was stated by that great man to be within the right of neutral nations to allow a belligerent to cross its territory on condition that the same right were accorded to the other belligerent. But Grotius also allowed the neutral to grant preferred treat-

things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, (3) lastly, from the conventional or positive law, that regulates the intercourse between states. (4) What, therefore, the law of the nations is, does not rest upon mere theory, but may be considered, as modified by practice, or ascertained by the treaties of nations at different periods. (5) It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. (6) Nor is it to be admitted, that no principle belongs to the law of nations, which is not universally recognized, as such, by all civilized communities, or even by those constituting, what may be called, the Christian states of Europe * * *. (7) But I think it may be unequivocally affirmed, that every doctrine that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and customs, it may be enforced by a court of justice, whenever it arises in judgment * * *.”
ment to the belligerent whose cause was just as against the belligerent with an unjust cause. This latter conception of neutrality, however, has been disregarded, as it involves the exercise, on the part of the neutral, of the function of a judge, deciding the cause of the war, one or the other of the belligerents to be adjudged right or wrong, according to the view of the neutral. This was not the American conception, which was that the neutral should be "neuter" in the sense that he should take no part in the contest and that, if an American citizen did so, it was at his peril; and a statute of the United States to that effect was passed in 1794,\(^40\) the first municipal statute upon this international right or duty. President Washington's administration was of the opinion that the offense was under international law and that, as international law was the law of the land, it did not require a statute. However, to remove any possible doubt on the question, and to provide definite penalties, the statute was passed making the violation of neutrality a municipal offense and creating a municipal punishment for the violation of international law thus specifically recognized by the statute of the United States. The neutrality statute in question warned American citizens against trading in contraband and blockade, in that they might be captured by the belligerent whose cause was injured by such trade, even though the offense were committed on the high seas outside of the jurisdiction of any nation.

Let us consider two situations, with which we are familiar,—perhaps too familiar, as they are taken from the so-called law of war—for I have often wondered how an illegal thing can claim to be a thing of law. The first deals with the law of neutrality, and the second, with an offense upon the high seas, without reference to neutrality.

Let us suppose that a belligerent vessel is lying within the territorial waters of the United States and that an individual, native or foreign, enlists himself as a member of the foreign crew. This is a violation of a statute of the United States designed to carry into effect what President Washington's government believed to be the neutral duty of the United States, and therefore of its citizens. It was not a law passed at random; it was passed because of the fear in many quarters that the rule of international law

\(^{40}\)Neutrality Act of 1794, 1 Stat. 381 (1794).
did not carry with it a municipal penalty. Therefore the Neutrality Act of June 5, 1794, was passed for the express purpose of making a municipal duty by statute what President Washington and his advisers considered an international duty without statute. Here we have a municipal sanction of an admitted principle of the law of nations.

Let us take as an illustration an early case in the history of the United States. It is that of Gideon Henfield, who in 1793 was charged with having illegally enlisted on a French privateer, the Citizen Genet, at Charleston, South Carolina, and with having taken part in the capture of a British vessel at a time when the United States was at peace with Great Britain. The trial took place before the Circuit Court of the United States for the Pennsylvania District, and the case was argued before Judges Wilson Iredell and Peters. The former, in his charge to the jury, said:

"It is the joint and unanimous opinion of the Court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws.

It has been asked by his counsel, in their address to you, against what law has he offended? The answer is, against many and binding laws. As a citizen of the United States, he was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an ex post facto law, but a law that was in existence long before Gideon Henfield existed."

But this was not all. "There are, also," the learned judge continued, "positive laws, existing previous to the offence committed, and expressly declared to be part of the supreme law of the land." He had in mind treaties, and he referred, among others, to the definitive treaty of peace with Great Britain, which declared, he stated, "that there shall be a firm and perpetual peace between His Britannic Majesty and the United States, and between the subjects of the one and the citizens of the other." 42 It was clearly the opinion of the court that Gideon Henfield had offended

41 Francis Wharton, State Trials (Philadelphia, 1849), pp. 49, 84.
42 Id., at p. 85.
against the law of nations in general and in particular, and that, since the law of nations was acknowledged by the United States, he had committed "an offence against this country" and was "punishable by its laws."

A second illustration is that of a war vessel of a foreign belligerent country being fitted out within the United States. A year after the Gideon Henfield case the Neutrality Act, to which I have referred, was passed. Its provision on this phase of the question is that any person who, within the "waters of the United States," fitted out and armed or was knowingly "concerned in the furnishing, fitting out or arming of any ship or vessel" for employment "in the service of any foreign prince or state * * * with whom the United States are at peace," or who issued "a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid," should, if convicted, "be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the court," the fine to be in no case "more than five thousand dollars" and the imprisonment not to "exceed three years * * *." The statute further provided that a person engaged in augmenting the force of any armed vessel or any cruiser of a foreign country within the jurisdiction of the United States, the country to which it belongs being at peace with the United States, should "upon conviction be adjudged guilty of a misdemeanor," and should "be fined and imprisoned at the discretion of the court," with the further proviso that the fine should "not exceed one thousand dollars, nor the term of imprisonment be more than one year."

It would be supposed that if any person within the jurisdiction of the United States were to be punished for enlisting in the crew of a foreign belligerent vessel, and if any individual were to be punished for issuing commissions within the United States, and if any individual were to be

42a Supra, note 40.
43 Act of June 5, 1794—An Act in addition to the act for the punishment of certain crimes against the United States, supra, note 40, at p. 383, § 3.
44 Id., at p. 383, § 4.
punished for augmenting the force of any ship, that any group of individuals setting on foot expeditions against the "territory or dominions of any foreign prince or state with whom the United States are at peace" would likewise be fined; and such, indeed, was the case, the statute providing for this offense a fine not to "exceed three thousand dollars," and imprisonment for not more than three years. Nor should it astonish us, given the above provisions of the Neutrality Act, that captures made by a belligerent "within the waters of the United States or within a marine league of the coasts or shores thereof" should be declared unlawful, as, indeed, they were.

And finally, the statute, to be complete, would not merely need to define the offense and the punishment, but the court in which the person or persons guilty of the offense should be tried. It was to be the district court of the United States of the jurisdiction in which the offense was committed.

It is to be observed that in all these provisions the offense is committed within the jurisdiction of the United States. But if the same offense should be committed in a foreign country, the offense should be punishable by the laws of that country as in the case of the United States, and if the offense should not be so punished, it would be as a liability under international law, to be the subject of diplomatic negotiations, and, failing in them, to be submitted to an international tribunal.

Let us say a word of contraband and of blockade. It is admitted to be a right of the citizens of each and every state under the law of nations to trade in certain articles, called contraband articles, which help a belligerent in prosecuting its real or alleged right under international law. But it is also the right of the belligerent to seize the commodities under certain conditions and to prevent the entry of a neutral vessel and cargo into a blockaded port of the enemy. The carriage of contraband is permitted to the neutral, however, only if it has not been declared a punishable wrong in the proclamations of neutrality which the neutral states are accustomed to issue after the outbreak of a war. Their

45 Id., at p. 384, § 5.
46 Id., at p. 384, § 6.
citizens are warned in these proclamations that in carrying contraband and in seeking to enter a blockaded port, they do so at their peril. When in the future the carriage of contraband or the running of blockades is made a legal wrong by international law, there will then be a municipal duty on the part of the neutral to provide a penalty for the offense in either case.

I have already referred to piracy, but it is here a last and crowning example. It is robbery or theft committed by force upon the high seas. The flag which the pirate vessel may fly is not regarded as that of any country; and such vessel has no protection from its flag, if it engage in an act of piracy, for piracy is an offense against each and every nation of the international community and the pirate is looked upon as an enemy of the human race. Therefore it is that, wherever the act be committed, the pirate vessel coming into any port is subject to seizure and the crew liable to the punishment of death, which is the international punishment for the international crime of piracy. This is an extreme example, in that any vessel guilty of piracy, without reference to the nationality of the vessel or of the equipment of the crew, may be proceeded against in any port of any nation to which one or the other is brought.

Is it not possible to assimilate to piracy an act which the nations have agreed should be treated as piracy? We do not need to argue the question. It is not theoretical; it is practical, inasmuch as this very step was taken in the matter of belligerent attacks upon merchant vessels in the treaty signed at Washington February 6, 1922,47 of which ratification was advised by the Senate of the United States on March 22 of the same year. The provision in question of this treaty, which assimilated to piracy acts in contravention "of the humane rules of existing law," was adopted by the Conference for the Limitation of Armament, held at Washington in 1922, upon the proposal, it should be said, of no less a person than Mr. Elihu Root.

Thus we have instances of municipal laws passed in order to punish violations of international law, whether

they take place within the exclusive jurisdiction of the state in question or upon the high seas, outside of the exclusive jurisdiction of any state—as in the case of piracy, which, being an offense against humanity, is triable within any jurisdiction within which the vessel or the members of the piratical crew be found.

In the English-speaking world, crime is punishable within and according to the laws of the country where it is committed. Non-English-speaking countries also punish violations of their law which take place within a country according to the law of the particular country; but, as a general rule, the law follows their nationals, whethersoever they go, to such a degree that an offense against the law of their own country, although committed within a foreign jurisdiction, is punishable when the national returns to the homeland. But there is a tendency, even in the English-speaking world, to pass laws for the punishment of an increasing number of offenses committed in foreign parts, upon the national being found within the jurisdiction of the country whereof he is a subject or citizen.

* * * * * * *

Let us consider certain international cases which involved violations of the law of nations, and which gave rise to extended diplomatic negotiations, but which were fortunately settled without a resort to force. We may, indeed we should, begin with a case in which the United States violated international law to the detriment of Great Britain and the world at large. It is the Trent case, almost as well known as the Alabama case.48

48 On the Trent case see John Bassett Moore's Digest of International Law (Washington, 1906), vol. vii, pp. 768-779. Judge Moore observes, (p. 775), that "the fullest and most satisfactory discussion of the Trent case is that given in the monograph of Dr. Heinrich Marquardsen, the preface to which is dated at Erlangen, February, 1862." The title of the monograph is Der Trent-Fall.


49 Supra, note 13.
Now the Trent was a British packet, and therefore a neutral ship, in the Civil War between the states of the American Union. It was a mail steamer, entirely neutral in its action, plying as it was on its regular voyage between two neutral ports, Vera Cruz and St. Thomas, by way of Havana. It had aboard among its passengers two civil agents of the Confederacy (Messrs. Mason and Slidell), the one of Virginia, the other of Louisiana, both members of the Confederacy, who were on their way to St. Thomas to embark on a British steamer for Southampton, England. As passengers on the Trent they were on a British, and therefore neutral, steamer, sailing under the British flag, on a scheduled voyage between neutral points. The San Jacinto was a man-of-war of the United States, commanded by a "man of war," Charles Wilkes, who nearly precipitated a war between the two countries. He halled the Trent on November 8, 1861, had it boarded, and removed Messrs. Mason and Slidell, taking them aboard his vessel and landing them in Boston harbor. He found himself a popular hero, with his digestion threatened by banquets in his honor.

As confirmed by his official reports of the affair, Captain Wilkes had acted without orders from his government, indeed without knowledge of the authorities in Washington. Each government involved found itself in an embarrassing position. What Captain Wilkes had done was in accordance with the principles of international law as laid down by my Lord Stowell in his prize court decisions and,

51 Ephraim Douglass Adams, Great Britain and the American Civil War (New York and London, 1925), Vol. I, p. 205. Secretary Seward to Mr. Adams, November 27, 1861—John G. Nicolay and John Hay, Abraham Lincoln (New York, 1890), Vol. 5, p. 32. In further reference to this point, see the statement of Miss Slidell, one of the Trent passengers, summarized on p. 517 of the Proceedings of the Massachusetts Historical Society (1911-1912), Vol. 45 (Richard Henry Dana's paper on "The Trent Affair—An Aftermath"), that "the American officer who boarded the Trent took pains to state that the commander of the San Jacinto had no instructions from his Government, but was acting on his own responsibility."
therefore, in accordance with British practice,\textsuperscript{52} of which the United States had formerly and repeatedly complained. Therefore, the Government of the United States after the event could not well approve Captain Wilkes' action, without at the same time accepting that British policy, which had been one of the causes of the War of 1812.

The Government of Great Britain, on its part, was no doubt inwardly pleased that, in opposing Captain Wilkes' action, it was upholding the contention of the United States in earlier days, when the American Government had insisted that American merchant vessels, in a war in which the United States were neutral, should not be subject to visit and search, and the removal of civilians from American merchantmen. President Lincoln himself warned against inconsistency:

"We must stick to American principles concerning the rights of neutrals. We fought Great Britain for insisting, by theory and practice, on the right to do precisely what Captain Wilkes has done. If Great Britain shall now protest against the act, and demand their release, we must give them up, apologize for the act as a violation of our doctrines, and thus forever bind her over to keep the peace in relation to neutrals, and so acknowledge that she has been wrong for sixty years."\textsuperscript{53}

What was to be done? Her Majesty, Queen Victoria, and the Prince Consort were opposed to any war with the United States. Secretary Seward, in behalf of the American Government, declared, in what is described as "one of his chief literary triumphs,"\textsuperscript{54} that Captain Wilkes had

\textsuperscript{52} See letter of Lord Palmerston to Mr. Delane, editor of the London \textit{Times}, Nov. 11, 1861, involving the very point at issue, in which his Lordship admitted that the right of a belligerent "to stop and search any neutral not being a ship of war, and being found on the high seas and being suspected of carrying enemy's despatches" was "according to the principles of international law laid down in our courts by Lord Stowell, and practised and enforced by us." E. D. Adams, \textit{op. cit. supra} note 51 at p. 208. See also \textit{The Galaxy}, at p. 650, column 1, lines 3-5, \textit{op. cit. supra} note 50.

\textsuperscript{53} Nicolay and Hay, at pp. 25, 26, \textit{op. cit. supra} note 51. President Lincoln was in the habit of referring to Messrs. Mason and Slidell as calculated "to be white elephants."

\textsuperscript{54} \textit{Id.} at p. 38. Concerning this document, the authors say: "That long and remarkably able document must be read in full, both to under-
acted on his own responsibility and that his action was not approved; and likewise in behalf of the government, he expressed regret at the incident.\textsuperscript{55} Great Britain was willing to and did accept the amende honorable. The two commissioners were therefore returned to British custody. But their usefulness, as it turned out, had ended.

The result of the incident was that the governments of the two countries admitted in principle that the early practice of Great Britain and the unauthorized action of Captain Wilkes were opposed to the principles of international law.

If this were all, we should not be citing the incident on this occasion. Of course, Great Britain had the right to protest, and it was in our interest as well as Great Britain's that Her Majesty's Government did so. But Prussia protested, Austria protested, and France protested. Each was right; and every member of the international community would have been right if each had protested. For if it was a right of Great Britain, as a neutral, to protest the unneutral action of the United States, it was the right of each and every member of the international community to protest.\textsuperscript{55a} It was indeed a threefold right: a right in behalf

stand the wide range of the subject which he treated and the clearness and force of his language and arguments. It constitutes one of his chief literary triumphs. There is room here only to indicate the conclusions arrived at in his examination. First, he held that the four persons seized and their dispatches were contraband of war; second, that Captain Wilkes had a right by the law of nations to detain and search the Trent; third, that he exercised the right in a lawful proper manner; fourth, that he had a right to capture the contraband found. The real issue of the case centered in the fifth question: 'Did Captain Wilkes exercise the right of capturing the contraband in conformity with the law of nations?' Reciting the deficiency of recognized rules on this point, Mr. Seward held that only by taking the vessel before a prize court could the existence of contraband be lawfully established; and that Captain Wilkes having released the vessel from capture, the necessary judicial examination was prevented, and the capture left unfinished or abandoned.'

\textsuperscript{55} See comment of Secretary Welles, Diary of Gideon Welles (Boston, 1911), Vol. I, p. 299.

\textsuperscript{55a} The correspondence of Russia and Italy on the Trent case is published in Sen. Ex. Docs. 22 (pp. 1-3) and 30 (pp. 1-3), respectively. From these documents it will be seen that Russia expresses its satisfaction over the maintenance, instead of the repudiation, of the early
of Great Britain as the nation directly injured; the right of Prussia, of Austria, and of France as subject to a prospective injury; and the right of each and every one directly or prospectively injured to protest not only in behalf of the law common to each of the neutral nations, but also in behalf of the international community of which each was a member.

If the ministers of foreign affairs of Prussia, Austria and France were today to contemplate such action, they would be able to invoke the unimpeachable authority of a great American statesman, Elihu Root, once himself a Secretary of State:

"** it follows necessarily that when one sovereign state is dealing not with its internal affairs but with its international relations and violates the rule of right as against another equal and independent state, all other equally independent states have a right to insist that the international rule shall be observed, and such insistence is not interfering with the quarrels of others but is an assertion of their own rights. In each case every state must be guided by its own circumstances and interests in determining how far it will go in supporting its interference. There can, however, be no doubt of the international right to interfere in behalf of the maintenance of the law." 56

Let us hold the scales of justice even and now take a case in which Great Britain violated international law to the detriment of the United States and the world at large.

The classic example of this phase of the question is that of the Alabama,57 a cruiser built in a British shipyard in Liverpool, at the request of agents of the Government of the

American doctrine; while Italy, also expressing its satisfaction at the peaceful solution reached through the conciliatory attitude of the United States, stated its own attachment to the freedom of the seas, and added that "we hesitated to believe that it [the Government of the United States] desired to change its character all at once and become the champion of theories which history has shown to be calamitous, and which public opinion has condemned forever."


57 Supra, notes 13 and 49.
Confederate States of America, and to be used by the authorities of the Confederate States to commit hostilities against the United States. The case of the *Alabama* is not only the classic case, but the arbitration is the classic arbitration of the nineteenth century. The case was in a way an accident, very unfortunate for Great Britain. The arbitration, however, was in the interest of Great Britain, as well as of the United States and of the world at large, because it showed that arbitration might stop the hand of war in a case which threatened to plunge the two English-speaking nations into what we may call a fratricidal, if not a civil, war.

The case was, as I have said, accidental. The American Minister, Charles Francis Adams, of the classic Adams family of the United States, had informed the British Government that a certain vessel (No. 290) was being built in behalf of the Confederate Government in the British shipyard of Lairds at Liverpool. Her Majesty's principal Secretary of State for Foreign Affairs, the Earl of Russell, formerly and affectionately known as Lord John Russell, was unwilling to undertake the action which Mr. Adams requested, namely, to take step so that the vessel should not be permitted to depart from British waters. However, he recognized, and well he might, the gravity of the affair and submitted the question in the usual course to the Queen’s Advocate, Sir John Harding. Now the Queen’s Advocate happened to be mentally incapacitated, a fact which his devoted wife concealed from the authorities, so that the request for the information lay unanswered upon his desk.58 Finally, when Mr. Adams persisted in his statement that the vessel was being built for the Confederate Government and that it would soon take the seas, his Lordship bestirred himself, and, learning of Sir John Harding’s situation, submitted the question to the other law officers of the Crown, the Attorney General, Sir William Atherton, and the then Solicitor General, Sir Roundell Palmer, later, as Lord Selborne, to be Lord High Chancellor, who advised that the vessel be seized and not permitted to depart from British jurisdiction. However, the vessel had that very

morning—July 28, 1862—taken the seas, which fact Lord Russell should have known and prevented. Mr. Adams knew that the vessel was to depart and His Lordship, with better means of knowledge at his disposal, should also have known and should have prevented its leaving British jurisdic-
tion.

In addition, the shipbuilding Lairds had under construc-
tion for the Confederate States certain vessels known as “iron rams,” “designed to raise the blockade” of the South-
ern ports. In September, 1863, the rams were about to put to sea, Lord Russell announcing that the British authori-
ties “advise that they cannot interfere in any way with these vessels.” Whereupon Mr. Adams countered with: “My lord, it would be superfluous in me to point out to your Lordship that this is war.” 59 The “rams” did not sail.

The tension produced by the “unneutral” conduct of Great Britain in the matter of Confederate vessels was the source of immense irritation in the United States, and irri-
tation in Great Britain because of the irritation in America. Incidents such as these all too often generate war.

Now it so happened—and this is the fortunate part of the incident—that Mr. Gladstone later became Prime Min-
ister, and he accepted the suggestion of a peaceful settle-
ment in the form of arbitration by an arbitral tribunal. Thus it was that the treaty of May 8, 1871, in its first article, provided “that all the said claims, growing out of acts committed by the aforesaid vessels, and generally known as the ‘Alabama Claims,’ shall be referred to a tri-
буnal of arbitration to be composed of five Arbitrators,” one to be “named” by the President of the United States; one by Her Britannic Majesty; one by His Majesty the King of Italy; one by the President of the Swiss Confederation; and finally, one by His Majesty the Emperor of Brazil. 60

It is to be observed that there were three “Majesties” and two “Presidents”; but we of the American Republic are


60 Treaties, Conventions, International Acts, Protocols, and Agree-
ments between the United States of America and Other Powers, 1776-
happy to be able to say that the decision was in behalf of the "presidential" claimant. The tribunal was to meet at Geneva, which it did, on December 15, 1871, and the claims were to be decided "by a majority of all the Arbitrators."\(^{61}\)

The Alabama case was unanimously decided, although the British arbitrator, Sir Alexander Cockburn, then Lord Chief Justice of the Queen's Bench, rendered a separate opinion assigning separate reasons from those stated in the majority opinion.

The contention of the United States was that the conduct of Great Britain was in violation of the law of nations. This, Great Britain denied. As a result of discussion, the representatives of the two countries agreed that—

"In deciding the matters submitted to the Arbitrators, they shall be governed by the following three rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to have been applicable to the case."\(^{62}\)

The three rules were:

"A neutral Government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties." \(^{63}\)

The British Government did not, as already mentioned, accept these rules as rules of international law, but "Her

\(^{61}\) Id., Art. II, p. 702.

\(^{62}\) Id., Art. VI, p. 703.

\(^{63}\) Ibid.
Britannic Majesty," so runs the treaty, "commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article I arose." However, "Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future," agreed that, in deciding the claims, "the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules." By so doing, Great Britain accepted in advance an adverse decision.

But if those rules were not rules at the time, they were to become so, and they are to be the rules of the future, for the high contracting parties agreed "to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them." They have acceded to them in substance if not in form.

The importance of the Alabama case lies in the fact that if there be no international law upon which the parties are agreed, they can make the law for the case, so that through their initiative the rules which had not been declared to form a part of international law may, as the rule of right reason, become international law by the agreement of the nations and thus become the municipal law of each and every country so accepting them.

"The tribunal *** has arrived at the decision embodied in the present award ***.

And whereas the circumstances *** were of a nature to call for the exercise on the part of Her Britannic Majesty's government of all possible solicitude for the observance of the rights and the duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861;

And whereas the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterward have granted to that vessel, and the ultimate step by which the offense is completed, cannot be admis-
sible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence;

And whereas the privilege of exterritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality;

And whereas the absence of a previous notice cannot be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation;

And whereas, in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters, as a base of naval operations for a belligerent, it is necessary that said supplies be connected with special circumstances of time, of person, or of place, which may combine to give them such character; * * *

It will be observed that the above "whereases" were framed by the tribunal in such a way as to lay down the general principles applicable to all the violations of neutrality with respect to the Confederate vessel involved. The tribunal now proceeded to apply them to all of the vessels. But as we are interested at present only in the vessel which has given its name to the arbitration, I quote here merely the award in its behalf:

"And whereas, with respect to the vessel called the Alabama, it clearly results from all the facts relative to the construction of the ship at first designated by the number '290' in the port of Liverpool, and its equipment and armament in the vicinity of Terceira through the agency of the vessels called the Agrippina and the Bahama, dispatched from Great Britain to that end, that the British government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number '290,' to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable;

And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result,

*65 Supra, notes 13, 49 and 57.*
and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred;

And whereas, in spite of the violations of the neutrality of Great Britain committed by the '290,' this same vessel, later known as the Confederate cruiser Alabama, was on several occasions freely admitted to the ports of colonies of Great Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found;

And whereas the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed:

Four of the arbitrators, for the reasons above assigned, and the fifth, for reasons separately assigned by him,

Are of opinion—

That Great Britain has in this case failed, by omission, to fulfill the duties prescribed in the first and the third of the rules established by the sixth article of the treaty of Washington." 66

It is not necessary to say a further word in this connection other than that, as international law was law, as such it measured the right of the United States and the duty of Great Britain, and that the failure of Great Britain to take the necessary preventive measures and to provide judicial remedies, rendered that country liable for a violation of international law; and that the lack of a municipal statute to that effect was no excuse before an international tribunal.

* * * * * * *

There was an aftermath to the Alabama case which, although the judgment of a national court, is hardly less important than the award of an international tribunal, and it is to be observed that the opinion of a unanimous court was delivered in the case of the United States v. Arjona 67 by the same Morrison R. Waite, then Chief Justice, who had with great distinction argued the case of the Alabama for the United States before the Alabama Tribunal; and, curiously enough, the case in the Supreme Court, as in the arbitral tribunal, turned upon the question of "due diligence," applicable alike in a national as well as in an international tribunal.

The facts of the Arjona case are simple. A law of the United States of May 16, 1884, 68 had been passed by the Con-

66 Id., at pp. 148, 149.
67 120 U. S. 479 (1887).
gress "to prevent and punish the counterfeiting within the United States of notes, bonds, and other securities of foreign Governments." That statute had been violated within the jurisdiction of the United States of notes, bonds, and other securities of foreign Governments.

That statute had been violated within the jurisdiction of the United States by one Ramon Arjona. He was tried for having violated this statute within the jurisdiction of the United States, to the detriment of Colombia. The Federal court before which he was tried was divided in opinion, and the case was certified to the Supreme Court of the United States. The question upon which the court divided was the constitutionality of the statute which the defendant had violated.

The Supreme Court held that the statute in question was constitutional, and that, indeed, it was the duty of the United States to pass the act in question, and that if the Government of the United States had not passed the act, it would have been remiss in its duty toward the injured nation and toward every other nation of the International Community. After citing various articles of the Constitution, the Chief Justice, speaking for the Court, announced its opinion that—

“All official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose given to the United States. The national government is in this way made responsible to foreign nations for all violations by the United States of their international obligations, and because of this, Congress is expressly authorized 'to define and punish * * * offences against the law of nations.'”

What then, is this law of nations, which the Government of the United States would have violated, had it not passed the act in question? “The law of nations”—the Chief Justice said, speaking in behalf of a unanimous court—“requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this, the obligation of one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation, has long been recognized.” It is, indeed, interesting to learn from such an authoritative source that the obligation was of long standing, but the importance of the statement lies in the fact that
a rule of international law requires each and every member of the International Community to enact a municipal statute for the protection of a rule of the law of nations, just as the *Alabama* case,\(^69\) in which Chief Justice Waite had been counsel, decided not merely that the failure to do so, but that the lack of due diligence, rendered Great Britain liable in damages; that is to say, every rule of the law of nations has *in esse* or *in posse* a municipal sanction. Let us follow the Chief Justice in his friendly invasion of the domain of international law:

"Vattel,"—he says—"in his Law of Nations, which was first printed at Neuchatel in 1758, and was translated into English and published in England in 1760, uses this language: 'From the principles thus laid down, it is easy to conclude, that if one nation counterfeits the money of another, or if she allows and protects false coiners who presume to do it, she does that nation an injury.'"

The Chief Justice here pauses to speak in his own behalf:

"When this was written money was the chief thing of this kind that needed protection, but still it was added: 'There is another custom more modern, and of no less use to commerce than the establishment of coin, namely, *exchange*, or the traffic of bankers, by means of which a merchant remits immense sums from one end of the world to the other, at very trifling expense, and, if he pleases, without risk.'"

Vattel himself penetrates the domain still farther, accompanied by the learned Chief Justice:

"For the same reason that sovereigns are obliged"—Vattel says—"to protect commerce, they are obliged to support this custom, by good laws, in which every merchant, whether citizen or foreigner, may find security."

If commerce is to be protected by a nation, and laws are to be passed for that purpose by every nation, we have in these few lines a duty of due diligence which encircles the world.

So much for the law; now as to its application to the United States.

\(^{69}\) *Supra*, notes 13, 49, 57 and 65.
“No nation can be more interested in this question than the United States,”—the Chief Justice later continues—the meaning of which is that the United States can require of the other nations of the world that due diligence be used in order to protect their money, “their own securities, and those of the states, the cities, and the public corporations, whose interests abroad they alone have the power to guard against foreign national neglect, [which] are found on sale in the principal money markets of Europe.”

“But”—he continues, applying the rule of law to the United States—“if the United States can require this of another, that other may require it of them, because international obligations are of necessity reciprocal in their nature.” For he adds that, “the right, if it exists at all, is given by the law of nations, and what is law for one is, under the same circumstances, law for the other.” Therefore, he continues, “a right secured by the law of nations to a nation, or its people, is one the United States, as the representatives of this nation, are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact. * * * Therefore the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations.”

It is to be observed that the duty does not arise by virtue of the municipal law of the United States. The duty arises from the law of nations—a law superior to municipal law, including in this category the Constitution of the United States which, to the world at large, is a domestic matter. And the judgment in the Arjona case is a solemn asseveration on the part of the Supreme Court of the United States that the law of nations is not a law which we accept, but a law which is “imposed” upon us and which we must protect; for, if we do not, we cannot invoke the rules of international law in our own benefit, and while we would not cease to be a member of the international community, we, nevertheless, would not be considered as a member in good standing.
We might well be content to rest our case upon these statements of the Chief Justice, which are also those of his brethren; for the complete reasoning of the Court requiring due diligence in enacting municipal legislation to protect a rule of the law of nations, is the contribution which the *Arjona* case makes to the law of the International Community.

However, there is another phase of the case no less worthy of our attention. By Article I, section 8, clause 10 of the Constitution, the Congress is not merely impliedly, but expressly authorized "to define and punish * * * offenses against the law of nations." This authorization does not make the law of nations a part of our law; it recognizes the existence of the law of nations as a part of our law without action on our part, the law being—again to quote Chief Justice Waite—"imposed" upon the United States from their inception, as upon every state of the International Community. Indeed, the law of nations, existing before the birth of the United States, became "imposed" upon us the moment the United States came into being. It was not created by the United States; it was not adopted by the United States; it could not be adopted because it was already the law of the United States *ex jure necessitatis*; and it cannot be abrogated by the United States because it was not made by the United States. Therefore, the United States cannot create international law; the most it can do is to define and to enforce it; but the expression "to define" international law is in itself a recognition of its existence, and the definition, it may be said, is only to make that express which is implicit. But that does not, indeed cannot, mean that the definition which the Government of the United States may make of international law is acceptable to the other nations. If it be correct, it is binding, not because it is the act of the United States, but because the definition of international law made or proposed by the United States is in accordance with, to use Victoria's phrase, "a consensus of the greater part of the whole world, especially in behalf of the common good of all."

This is indeed much, but it is not all. The statute creating a liability within the jurisdiction of the United States
does not need to mention that it is passed to render effective
the law of nations, because the law of nations is the law of
the United States, whether it be so stated or not. As this
phase of the case arose, it was considered and likewise de-
cided by the Supreme Court. Let us, however, allow the
Chief Justice to speak in behalf of the Court, numbering
his questions and answers in the paragraph of the opinion
dealing with this phase which is, as it were, a link in the
chain of the argument.

1. "Whether, in enacting a statute to define and punish an of-
fence against the law of nations, it is necessary, in order 'to de-
fine' the offence, that it be declared in the statute itself to be 'an
offence against the law of nations.'"

2. "This statute defines the offence, and if the thing made pun-
ishable is one which the United States are required by their in-
ternational obligations to use due diligence to prevent, it is an
offence against the law of nations."

3. "Such being the case, there is no more need of declaring in
the statute that it is such an offence, than there would be in any
other criminal statute to declare that it was enacted to carry into
execution any other particular power vested by the Constitution
in the Government of the United States."

4. "Whether the offence as defined is an offence against the law
of nations depends on the thing done, not on any declaration to
that effect by Congress."

This is a short and weighty sentence implying that in
matters international the Congress of the United States is
a mere legislature of the International Community for the
enactment of a municipal statute in order to create a
municipal sanction for the protection, or redress of a viola-
tion, of a rule of the law of nations.

5. "As has already been seen, it was incumbent on the United
States as a nation to use due diligence to prevent any injury to
another nation or its people by counterfeiting its money, or its
public or quasi public securities."

6. "This statute was enacted as a means to that end, that is to
say, as a means of performing a duty which had been cast on the
United States by the law of nations, and it was clearly approp-
riate legislation for that purpose."

A break in the quotation must be made to call attention
to the phrase “cast on the United States,” not “made by the United States.”

7. “Upon its face, therefore, it [the statute] defines an offence against the law of nations as clearly as if Congress had in express terms so declared.”

Seven is said to be the perfect number, and the decision of the Supreme Court in the Arjona case can be said to be equally perfect.

Indeed it would almost seem that United States v. Arjona was, as it were, a case not actually arising in practice, but stated by the Court, in order to show the students of international law that the law of nations exists without an affirmative act on the part of the respective countries; that this law of nations so imposed, “casts” a duty upon every civilized nation to enact municipal laws to protect a right under the law of nations, thus complying with a duty, not only of the particular country in question, but a duty under international law; that a failure so to comply, renders the nation so failing liable in damages to the nation injured; and that the failure to use due diligence either in passing the municipal law, or in preventing the violation of international law, renders the nation liable under the law of nations, because the municipal statute should have been in existence at the time of the injury—for liability arises even though a subsequent statute be enacted. The injury looks to the past; the statute to the future.

This was the predicament in which England found itself in the reign of Queen Anne, and this was why the passage of a statute and a remedy under the statute, were not regarded as a compliance with the duty which England owed to the Russian Ambassador at the very moment of his arrest. The injuries of the past are not cured by subsequent statute.

To state it all in a word: International law should be, and is today, we may happily say, the law of every nation in the civilized world. It may have, and in some instances does have, a specific and international sanction. But whether or not it has such a sanction, it nevertheless involves the duty on the part of each nation to pass appropriate and adequate laws providing a municipal remedy for any and every viola-
tion of international law, whether in peace or in war, within its jurisdiction—that is to say, within its own territory where its jurisdiction is exclusive, or on the high seas where jurisdiction is common to all nations. But the consideration of this duty raises an important issue. A sanction cannot be provided for any law unless that law is properly formulated—at least in general terms.

Now the formulation and adequate statement of international law can only mean the codification of international law—a world code for a world law in clear and unmistakable but general terms—leaving to each nation the duty to enact municipal statutes most apt, in its opinion, to comply in full measure with its obligations under the law of nations.

"From all that has been said," to quote again, and finally, the language of Victoria, "a corollary may be inferred, namely: that international law has not only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the rules of international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world." 70

70 Supra, notes 1, 5 and 7.
SOME CONSTITUTIONAL ASPECTS OF THE NATIONAL INDUSTRIAL RECOVERY ACT AND THE AGRICULTURAL ADJUSTMENT ACT*

ROBERT A. MAURER †

It is futile to attempt to prove that the Agricultural Adjustment Act ¹ and the National Industrial Recovery Act² as a whole are constitutional or that they are unconstitutional. The problems presented by these Acts are many and varied and the whole does not admit of one categorical answer. It may be conceded that both statutes must be brought within the authority of Congress delegated to it, either expressly or impliedly, by the Constitution of the United States. Some suggestions have been offered of new constitutional theory. For example, it has been said that the "general welfare" clause of the Preamble may justify an assumption of power in Congress. This is unsound, but since it has been offered, it should be said that were this clause a grant of power, which it is not,³ yet it relates to the purpose of the Constitution as a whole, and it is quite obvious that the gen-

* Note by Editorial Staff: Mr. Justice Adkins, of the Supreme Court of the District of Columbia, has said of this article, "I have also derived direct and substantial aid from * * * the draft of an article by Professor Robert A. Maurer to be published in the January issue of the GEORGETOWN LAW JOURNAL * * * on 'Some Constitutional Aspects of the National Industrial Act and the Agricultural Adjustment Act.'" The statement was part of Mr. Justice Adkins' opinion in Victor et al. v. Ickes, Secretary of the Interior, Supreme Court of the District of Columbia, Eq. No. 56,298, decided Dec. 1, 1933, 61 WASH. L. REP. 870, in which four retail distributors of gasoline in Detroit sought by injunction to restrain the Secretary from interfering with their actions in violation of the Code adopted for the petroleum industry under the N. R. A., and in which the constitutionality of the Act was upheld and the injunction denied. For further statement of this case see Recent Decisions, infra, p. 358.

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³ I WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES, (2d ed. 1929) §§ 61, 63.
eral welfare was sought to be promoted under a frame of government of dual character, separating federal powers from state powers, and setting up countervailing departments with checks one upon another, with specific limitations upon all, and with specific guarantees to the people against excess of governmental authority. By all of these taken together is the "general welfare" to be promoted.

Again it has been suggested that the clause empowering Congress to lay and collect taxes for the general welfare may be invoked to sanction an exercise of power by Congress beyond the scope of the other clauses in which lie the delegated powers of Congress. If this suggestion relates to the money-raising and mere money-spending activities of Congress, all will concur, for the purposes of federal taxation are admittedly broad, and there are no practical means, other than public opinion, to check the use of federal money, where no regulatory power to command, to control, or to compel is sought to be exercised in connection with the spending, except possibly in the extraordinary event that an officer refuses to disburse funds on the ground that the purpose is unconstitutional.

There is definite purpose in a written constitution. This one of ours was ordained and established in a time of great stress and strain. It was not intended as a mere fair weather instrument. That the federal government is one of delegated powers will, of course, not be questioned, and it is not believed that constitutional limitations will be permitted by the Supreme Court to be lightly swept aside.

4 Art. I, Sec. 8, of the Constitution, provides that Congress shall have the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States."

5 The Report of the Committee on Ways and Means of the House of Representatives on the N.R.A. Bill (H. R. Rep. No. 159, 73d Cong. 1st Sess.) said of § 1: "This section also establishes the constitutional basis for this legislation, which is predicated upon both the interstate commerce clause and the general welfare clause of the Constitution. It did not make clear which of the "general welfare" clauses was in mind.

That would be revolution indeed, for it would mean the end of constitutional government itself. It must be assumed that Congress intended to remain within established limits when it enacted the so-called N. R. A. and A. A. A. statutes. The objects of this legislation were very far reaching, yet an analysis of the statutes indicates a clearly discernible purpose to secure industrial recovery, in part through a broad voluntary effort on the part of industry and the trades, and by the Government as well, and, in a restricted sense, through enforcement of penal provisions. It is important that this distinction be kept in mind in an appraisal of the effects of these statutes when put into actual operation, even with respect to the declared emergency purposes set out in the opening sections of each Act. Has Congress shown an intent to keep within specific constitutional limitations in the exercise of regulatory power, or does it rely upon some broader sovereign authority that goes beyond its definite constitutional grants of power? The Agricultural Adjustment Act may fairly be said to relate the emergency aspects of this legislation to the monetary and interstate commerce powers of Congress. And so related, they indicate no attempt of Congress to step outside its sphere of delegated authority, though they may involve an extension of such authority beyond that heretofore exercised. The declaration of policy in the Industrial Recovery Act likewise aims "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof." This purpose fairly adhered to needs no emergency to support it, unless it embraces, for a temporary and emergency period, an extension of governmental power beyond normal limits, and a consequent withdrawal of individual right to a corresponding degree. It must be admitted that when we deal with emergency legislation we enter upon a field for the most part unexplored. The Supreme Court has been called upon in but a few instances to define the limits. In the case of

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7 The doctrine of inherent sovereign powers, as affecting internal affairs, was expressly repudiated in Kansas v. Colorado, 206 U. S. 46 (1907).

8 Supra note 2, at § 1.
Wilson v. New⁹ the test of governmental power in Congress involved the maintenance of wages of railroad employees under the Adamson Law¹⁰ for a fixed and limited period, to preserve the status quo pending the operation of special arbitration machinery designed to avert a threatened national strike of railroad employees. The power of government to regulate the wages of employees even of public utilities has, under normal conditions, been uniformly denied,¹¹ and was expressly denied in the court's opinion in that very case.¹² The Supreme Court has since referred to this exercise of power in the Adamson Law as one warranted only by the emergency and for a temporary period.¹³ It is noted that the excess of power, beyond that which is normally valid, conceded to Congress in the case of Wilson v. New, is linked to the commerce power and is distinctly an outgrowth of that power. It may not be assumed either from this case or from the District of Columbia rent law case¹⁴—which involved the war power of Congress and its power exclusively to legislate for such District—that an emergency due to industrial depression opens up some entirely new field for federal legislative experiment, for example, in matters purely local and within the domain of reserved state power, and not in some substantial manner related to interstate commerce. The dictum of Chief Justice White, who wrote the court's opinion in Wilson v. New, to the effect that, of course, a mere emergency could not give

⁹ 243 U. S. 332 (1917).
¹¹ Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U. S. 522 (1923).
¹² Also Adkins v. Children's Hospital, 261 U. S. 525 (1923). The Supreme Court, upon the authority of Adkins v. Children's Hospital, affirmed an order of the District Court of the United States for the District of Arizona allowing a preliminary injunction restraining the enforcement of the Arizona state minimum wage law for women. Murphy v. Sardell, 269 U. S. 530 (1925).
¹³ Adkins v. Children's Hospital, supra note 12; Wolff Packing Co. v. Court of Industrial Relations of Kansas, supra note 11.
birth to a power that never lived,\textsuperscript{15} is a clear indication of the line which should separate the proper exercise of power within constitutional limitations from the mere usurpation of authority by Congress which would amount to an overthrow of constitutional government. The court characterized the legislation in question as the exercise of a power which inevitably resulted from Congress' authority to protect interstate commerce in dealing with a situation like that which was before it, "to the end that no individual dispute or difference might bring ruin to the vast interests concerned in the movement of interstate commerce, for the express purpose of protecting and preserving which the plenary legislative authority granted to Congress was reposed."\textsuperscript{16} Matters of purely local business and industry are not \textit{per se} within the legislative power of Congress, and the \textit{ipse dixit} of that body cannot be so extended without overthrowing the Constitution itself. It is only when the local intrastate matter works some burden upon or discrimination against interstate commerce, when there is some substantial interrelation, interdependence, or interaction between local business and interstate commerce, capable of proof of record, that the Supreme Court has recognized the intervention of Congress as proper to protect and preserve its grant of power. By indirection, local matters are then made capable of federal control, but not in and for themselves. That is the doctrine of the \textit{Shreveport case},\textsuperscript{17} of the \textit{Wisconsin Passenger Fares case},\textsuperscript{18} and of \textit{Stafford v. Wallace}.\textsuperscript{19} Those who framed this legislation for approval and adoption by Congress sought to extend federal authority to its uttermost limit for the laudable purpose of overcoming the depression. In doing

\textsuperscript{15}"\* \* \* and although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed," \textit{supra} note 9, at 348.

\textsuperscript{16} \textit{Id.}, at 350.

\textsuperscript{17} \textit{Houston E. & W. Texas Ry. Co. v. United States}, 234 U. S. 342 (1914).


\textsuperscript{19} 258 U. S. 495 (1922). See also \textit{Board of Trade of Chicago v. Olsen}, 262 U. S. 1 (1923), and \textit{Tagg Bros. \& Moorhead v. United States}, 280 U. S. 420 (1930).
so, they provided for certain governmental activities as to which it was not necessary to bother about constitutional limitations. This is particularly true of the Agricultural Adjustment Act. The money-spending and money-loaning function indicated in the making of cotton option contracts, payments to secure reductions in acreage, payments of money raised by the processing taxes, are none of them in excess of constitutional powers vested in Congress. If any citizen wishes to part with his property or limit his use of his property voluntarily for a money or other valuable consideration offered by the Government, he is not, of course, in a position thereafter to complain of a violation of his constitutional rights. We assume that in the exercise of such functions Congress is not attempting to exercise any control or command or compulsion, such as is associated with the ordinary regulatory process.

A Constitutional Basis for Enforcement.

In the licensing provision of the Agricultural Adjustment Act, which carries a penal provision, the scope of enforcement is specifically limited. Power is given to the Secretary of Agriculture “To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof.” In the making, even, of Marketing Agreements voluntary in character, the authority of the Secretary of Agriculture is restricted to agreements with those processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof. This statute is without ambiguity. The enforcement through license control carries with it a responsibility, which rests upon those who administer the act, to

20 Supra note 1, at Title I, § 6.
21 Id. at § 8 (1).
22 Id. at §§ 8, 9.
23 Id. at § 8 (3).
24 The italics are those of the writer in this and subsequent passages.
25 Supra note 1, at § 8 (2).
establish their jurisdiction over licensees who are handling agricultural products as a matter of actual fact in the current of interstate or foreign commerce.

In the Industrial Recovery Act, also, there was no need to bring the President's voluntary agreements with trade or industry within any specific constitutional limitation.\textsuperscript{26} What has been said above applies to this feature of the Industrial Recovery Act. However, an examination of the strictly regulatory features of both of these Acts reveals for the most part a studied attempt by the authors to bring such exercise of power within some federal delegated constitutional authority.

In the N. R. A., Codes of Fair Competition for trades and industry are authorized. "After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act,\textsuperscript{26a} as amended * * *,"\textsuperscript{27} It is further provided that "When a code of fair competition has been approved or prescribed by the President under this title (Title I), any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined * * *."\textsuperscript{28} If the penal provisions of this Act, laid for its enforcement, were not intended by Congress to be limited to matters of fact in interstate commerce, in accordance with the recognized limitations upon

\textsuperscript{26} "The President is authorized to enter into agreements with, and to approve voluntary agreements between and among, persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associations, or groups, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of this title with respect to transactions in or affecting interstate or foreign commerce, and will be consistent with the requirements of clause (2) of subsection (a) of section 3 for a code of fair competition," \textit{supra} note 2, at § 4 (a).


\textsuperscript{27} \textit{Id.} at §§ 3 (a), (b).

\textsuperscript{28} \textit{Id.} at § 3 (f).
the power of Congress itself, then why did not the Act relate the effect of the Act and the enforcement provisions to transactions generally, irrespective of their local or inter-state character? In the licensing provision, which has a penal aspect, in that a license may be withheld or revoked, we find substantially the same limitation.\(^{29}\)

If the theory upon which these various enforcement provisions are founded is correctly stated, then the conclusion is inescapable that the problem before a court passing upon the infliction of penalties, is primarily one of determining whether the factual situation of record brings the case within the indicated statutory limitation. It may be argued that the purpose of these statutes, as set forth in the declarations of emergency and of policy by Congress, are much broader than the commerce power of Congress. Presumably this may be true. These broad purposes of national rehabilitation are, however, sought to be accomplished through a variety of effort by mutual and voluntary agreements which carry no penalties, and also by a variety of mere money-spending activities of the federal government, particularly in the aid of agriculture. It is nevertheless true that in those provisions in which the government exhibits the heavy hand of authority to control or to compel a surrender of individual right and individual initiative in the fields of agriculture and of industry, with pains and penalties, the statutes themselves in their very terms base the power to enforce upon the commerce clause. In this respect the intent of Congress has been made clear. It is not necessary to assume that the changed conditions, economic in character, do not call for a recognition of the necessity of extending, under present emergency conditions, the commerce powers of Congress beyond that heretofore exercised. The expansive nature of this commerce power is well recognized. The Supreme Court has on many occasions held, that when conditions call for new legislation not theretofore deemed necessary, it is no objection that the legislation is new. The power lies dormant in Congress until the necessity for its exercise arises. Changed conditions call for a develop-

\(^{29}\) Id. at § 4 (b).
ment of legislation to meet them. The whole history of interstate commerce law from 1887 to this date is a forward movement, step by step, of the power of Congress even to the point of control by indirection of those things once deemed purely local, but later found to be within the commerce clause because of their substantial effect upon the interstate control of commerce.

Reference has been made in support of this legislation to the current or stream of commerce, and to the emergency conditions which are said to bring all business within that stream. It is assumed in consequence that the powers of Congress extend to the sources of commerce and to all matters in trade or business irrespective of their local or interstate character. However, it would not be fair to assume that in the administration of the Acts this view is taken as the basis of action to enforce. A statement made by Chief Justice Hughes in the recent *Appalachian Coals* case has been seized upon. The Chief Justice, after speaking of injurious practices in the industry which demanded correction, said, "When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry." It would be rash to assume, from such generalizations as this, that the Supreme Court is ready to sanction a complete overthrow of the police power of the states over trades and industry carefully guarded for a century, with respect to all those known provisions of the N. R. A. codes now in operation. Admittedly the codes cover virtually every aspect of industry and trades. It is to be remem-

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30 *Appalachian Coals, Inc., v. United States*, 288 U. S. 344, 372 (1933). This was a suit brought to enjoin a combination alleged to be in restraint of interstate commerce. The government contended (at p. 358) that the creation by producers of coal of an exclusive selling agency "eliminates competition among the defendants themselves and also gives the selling agency power substantially to affect and control the price of bituminous coal in many interstate markets." The language of the Chief Justice above quoted was used by the court in justification of the plan adopted to improve fairly competitive conditions. The court (at p. 373) held that "the facts found do not establish, and the evidence fails to show, that any effect will be produced which in the circumstances of this industry will be detrimental to fair competition."
bered that by settled authority the exercise of legitimate state police power which affects interstate commerce, though permitted within recognized limits in the absence of legislation by Congress, must give way before any regulation enacted by Congress under its constitutional authority. The result of the codes under the N. R. A., in destruction of state police power, if every provision of them is enforceable, is apparent. It is common knowledge that the provisions of the codes do not stop with interstate commerce or with those trades or industries that are interstate in character. There is no pretense of such limitation. Things purely local in character by any conception or definition of intrastate, as distinct from interstate, are included. To bring such transactions within the constitutional regulatory power of Congress, enforceable under penalty of the law, it is necessary that we concedo not only that Congress may pour money into the "wells of commerce" to keep them from going dry, but also that it may, under the power to regulate interstate and foreign commerce, reach back into the states and control without limit the sources of production, and manufacturing processes, output of farm and factory, and increase of goods and of labor; say who shall and who shall not engage in new enterprise; and generally dictate the hours of labor, the wages to be paid, the conditions of employment, and the relations of employer and employee. To the average layman, as well as to the average lawyer, a statement such as this portrays a system of constitutional government quite different from that under which we have lived, both from the point of view of the proper function of the states in our scheme of government, and of the proper function of government in relation to individual initiative and liberty. The Supreme Court said in the famous Child Labor case: 32

"The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the

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Constitution. *Pipe Line Cases*, 243 U. S. 548, 560. The maintenance of the authority of the State over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.

In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County v. Oregon*, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government.

* * * This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution."

We cannot doubt that this is a statement of fundamental principle, whether we approve or disapprove of its application by the Court in particular cases.

It is conceivable that the courts may sanction such an extension of federal authority as is contemplated under the codes in the face of the unusual needs caused by the depression, grown to the proportions of what we call an emergency, the excess of federal regulation beyond the normal being only temporary, and leaving recognized constitutional limitations unimpaired under more normal conditions. Such a result, so far-reaching in its implications, would be justified only in case that issue is presented under a statute so clearly and explicitly founded upon a claimed emergency power as would admit of no other reasonable interpretation. Had the Congress provided, for example, that "When a code has been approved or prescribed by the President under this title, any violation thereof shall be a misdemeanor, and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense," a prosecution by the government of a plumber, or of a restauranteur, or of an hotel proprietor, there being no evidence of record of any interstate transaction or of any substantial injurious consequence to inter-
state commerce, would of necessity be based upon the broadest possible conception of an emergency power in Congress to regulate business irrespective of its interstate character. One cannot reasonably doubt the significant difference of the legislative intent when the statute adds words of limitation such as a code "of fair competition" and any violation thereof "in any transaction in or affecting interstate or foreign commerce."

The question, then, is this: Has Congress recognized in the N. R. A. and the A. A. A., the constitutional limitations upon its regulatory powers? The answer is "Yes," if we assume that it was intended that in the administration much should be left to voluntary agreement of a cooperative character and voluntary surrender of constitutional guarantees to federal policy in return for a release from prosecution under the anti-trust laws (the monopoly prohibition excepted), and an expectation or hope that mutual effort would hasten recovery; and if we accept as true that it was intended that enforcement of penal provisions was to be resorted to only where transactions complained of could be proven of record to be within federal authority under the interstate commerce clause, as a matter of fact.

These conclusions find support in the legislative history of the N. R. A. In his address to the United States Senate, presenting to that body the Industrial Recovery Act, Senator Wagner of New York, who was largely instrumental in the formulation and drafting of this legislation, said:

"I have been discussing codes which are voluntary both as to their competitive practices and as to their labor provisions, and it is primarily upon such spontaneous action that the bill relies. It is not my intention to substitute Government for business, or to remove from the shoulders of business men the responsibility for economic recovery. The duties of industrialists are enhanced by the opportunities which the bill offers for constructive cooperation."

Again, in the same address, he said:

"The question of the proper exercise of Federal authority

33 Cong. Rec., 73d Cong. 1st Sess. 5256 (1933)."
depends upon whether the bill confines itself to national matters, or whether it attempts to extend to matters which are of purely local concern. The answer is clear. The language of the bill expressly provides that any compulsory measures, such as the licensing feature of the bill, and any penalties for violation of the codes, shall be confined to business in or affecting interstate commerce. Thus no attempt is made to extend Federal action to an area of activity not covered by the commerce clause of the Constitution. 34

In view of Senator Wagner's peculiarly intimate association with this legislation, and of the special deference paid to his sponsorship, which may be noted in the Senate's deliberations, 35 these pronouncements are important and persuasive.

It is admittedly difficult, if not impossible, to reconcile with established principles of law and with the specific statutory limitations hereinbefore described, those provisions of the National Recovery Act, additional to the above mentioned sections, which are obviously designed securely to guard and advance the interests of labor. Every code of fair competition must embody the following conditions: (1) Recognition of the right of employees to organize and bargain collectively, free from employer interference, restraint or coercion, in self-organization, selection of representatives, and mutual aid and protection; (2) Prohibition of the "yellow dog" contract as a condition of employment; 36 (3) Compliance by employers with maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President. 37 Having been incorporated in the codes, their violation is subject to criminal prosecution. No mention is here made of transactions in or affecting interstate commerce, but it should be remembered that it is only violations of the codes "in any transaction in or affecting interstate or foreign commerce" that constitute unfair

34 Ibid.
35 Id., at p. 5254.
36 In Adair v. United States, 208 U. S. 161 (1908), and Coppage v. Kansas, 236 U. S. 1 (1915), federal and state statutes of like import, with criminal penalties, were held to be unconstitutional deprivations of liberty of contract.
37 Supra note 2, at § 7 (a).
methods of competition within the meaning of the Federal Trade Commission Act, and that are made misdemeanors.38

The duty is enjoined upon the President to afford every opportunity to employers and employees to establish standards of minimum wage, hours of labor, and "such other conditions of employment as may be necessary * * * to effectuate the policy of this title"39 by mutual agreement. However, Congress does not leave these matters to voluntary action alone. Where no such mutual agreement has been approved by the President, he is empowered, after investigation into labor practice, policies, wages, hours of labor, and conditions of employment, to prescribe a limited code of fair competition.40 If the purpose was to differentiate labor and wage conditions from other incidents of local manufacture and production beyond the field of interstate commerce and to assert a power of control in Congress, acting through the President, new to our law, there is no precedent to sustain it. Perhaps it was thought to base this power upon that broad and rather indefinite emergency purpose set out in the Preamble to the Act. Upon the authority of Wilson v. New,41 that would be at best of doubtful validity, unless a substantial relation to interstate commerce could be shown. It is possible to avoid an unconstitutional result by a different construction. These limited labor codes "shall have the same effect as a code of fair competition approved by the President under subsection (a) of section 3."42 This reference back to the general code making power of the President, already referred to above,43 is quite significant, particularly in respect to the enforcement of it under penal provisions or otherwise, and would seem necessarily to carry with it the limitation to transactions in or affecting interstate commerce.

38 Id. at §§ 3 (b), (f).
39 Id. at § 7 (b).
40 Id. at § 7 (c).
41 Supra notes 9, 15 and 16.
42 Supra note 2 at § 7 (c).
43 Supra, p. 213.
License Powers

The National Recovery Act has provided for control of the management of interstate business by employers, first through general codes of fair competition for trade or industry, voluntary or compulsory, and, second, through a licensing system which seems to be aimed particularly at destructive wage or price cutting, but which goes much further, in that the President may take complete control of an industry and deny one the right to engage in that industry, if the codes of fair competition prove ineffective.

"Whenever the President shall find that destructive wage or price cutting or other activities contrary to the policy of this title are being practiced in any trade or industry or any subdivision thereof, and, after such public notice and hearing as he shall specify, shall find it essential to license business enterprises in order to make effective a code of fair competition or an agreement under this title or otherwise to effectuate the policy of this title, and shall publicly so announce, no person shall, after a date fixed in such announcement, engage in or carry on any business, in or affecting interstate or foreign commerce, specified in such announcement, unless he shall have first obtained a license issued pursuant to such regulations as the President shall prescribe."\(^{44}\)

The theory upon which this assumption of federal power is based is that distressed conditions due to the depression of business may have led a minority of an industry to resort to price-cutting cut-throat competition to get business, paying starvation wages, and requiring long hours of labor under sweatshop conditions. This would constitute *unfair competition in commerce*, a special evil growing out of the depression, prejudicial to those employers in the industry whose consciences would not permit them to resort to such methods. It may be sustained if the conditions of license imposed are directed *bona fide* toward the removal from interstate commerce of such unfair competitors, and are not a disguised effort directly to invade the police power of the states. It may well be that out of the emergency conditions some such new evils of unfair methods of competition have grown

\(^{44}\) Id. at § 4 (b).
which Congress may control by appropriate legislation, as it did when it passed the Adamson Law. Such a result is not necessarily out of harmony with the decision of the Supreme Court in the Child Labor Cases and Bailey v. Drexel Furniture Company. The congressional legislation condemned in those cases was, in the one, an effort under normal conditions to inflict a penalty upon any producer, manufacturer, or dealer who shipped in interstate commerce the product of a mine or manufactory in which children had been employed contrary to the provisions of the statute within thirty days prior to shipment; in the other, a substantially similar effort to accomplish the same result under a thinly disguised regulation in the form of a tax measure. Both were held attempts by Congress to control by indirection matters within the police power of the States and not within interstate commerce.

There can be no doubt that Congress may freely select the means, the manner, or the mode of carrying its powers into effect, and inasmuch as the codes of fair competition apply only to interstate and foreign commerce transactions, there is no obstacle in the way of a licensing system to accomplish a legitimate regulatory purpose, by means which anticipate evils to be corrected, if Congress so wills. Under familiar principles, if the conditions to the grant of a license are commensurate with the scope of a regulatory power legitimately enforced, and there is no arbitrary discretion to give or withhold a license, there is no violation of any constitutional principle. But the licensing power here bestowed may also be invoked to enforce a "voluntary agreement" entered into between the President and persons engaged in trade or industry. There is novelty in the law which encourages the making of mutual agreements, and then denies the right of one to continue in business without a license, subject to drastic criminal penalty. Nevertheless, the statute limits such enforcement by license and criminal penalty to transactions in or affecting interstate commerce, and the violation of a mutual agreement entered into for the purpose of securing certain advantages held out by the statute, such as the

45 Supra note 32.
46 259 U. S. 20 (1922).
suspension of the anti-trust laws governing agreements in restraint of trade, by analogy to unfair methods of competition, and on general principles of law, would seem to give sanction to this result. The authority to license business enterprises is, furthermore, extended to the purpose "otherwise to effectuate the policy of this title." Of course, this is also restricted to interstate and foreign business. But what is the limit of this licensing power thereby conferred? Aside from the purposes above indicated, what is the scope of the legislative will which the President is to execute? The answer lies only in the general declaration of policy of the Act, which says, "It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof * * *." The provisions of the Act which specifically carry out this purpose have already been discussed in this paper. The declaration of policy continues, "and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources." The first clause suggests that Congress may have a purpose "for the general welfare," and apart from interstate commerce, to promote industry for the purpose of cooperative action. This and other objects are commendable, but it will not be presumed that Congress seeks to promote the general welfare by granting to the President a regulatory power through license that goes beyond the constitutional regulatory power of Congress itself, and that, furthermore, so obviously leaves him free to adopt

47 Supra note 2 at § 1.
and enforce through license his own conception of the means by which these broad purposes of social and economic welfare are to be obtained. It would be within his unlimited discretion to determine the conditions upon which he will grant a license "otherwise to effectuate the policy of this title."

Reference has already been made to the licensing feature of the Agricultural Adjustment Act, under which the Secretary of Agriculture has the power to issue licenses to processors, associations of producers, and others. That the license control is intended to be commensurate with the power of Congress is clear, for the subjects of control are those engaged in the handling "in the current of interstate or foreign commerce," of agricultural products. The terms and conditions upon which a license is granted must not be in conflict with existing Acts of Congress, and must be such "as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy * * *."

Here again we have reference to the administrative control of unfair practices, in accord with established legal concepts extended, it may be, to include extraordinary competitive conditions. Note, however, that the license control includes "charges." Government control of the prices at which agricultural commodities or products may be sold is clearly not in accord with the law of the Constitution, as defined in Tyson v. Banton, Ribnik v. McBride, Wolff Packing Company v. Court, Williams v. Standard Oil Company, and New State Ice Company v. Liebman. This challenge of unconstitutionality of the price fixing aspects of this statute is met in the declaration of emergency of the Act itself, which expressly declares that the basic industry of agriculture and transactions in agricultural commodities have become affected "with a national public interest." If such a result may be declared by Congress, yet

48 Supra note 23.
49 273 U. S. 418 (1927).
50 277 U. S. 350 (1928).
51 Supra notes 11 and 13.
52 278 U. S. 235 (1929).
CONSTITUTIONAL ASPECTS OF N. R. A. AND A. A. A. 225
it is not conclusive upon the courts. If conceded, then the power to regulate goes as far as public interest is involved, even to the extent of regulating the price, as with public utilities. This assumption of power explicitly rests upon the declared emergency, is expressly temporary in character, and raises a question of the most profound nature.54 In its defense the Government will undoubtedly invoke the authority of Wilson v. New.54a A decision of the Supreme Court on the point sustaining the price control aspect of license power of the Secretary of Agriculture under the Agricultural Adjustment Act, limited expressly to those matters "in the current of interstate and foreign commerce," will not necessarily determine the more far-reaching question raised by the National Recovery Act and pressed for a favorable answer by its sponsors, namely, whether the admitted existence of an economic emergency warrants the assumption by Congress of a regulatory control of American industrial life in all its aspects, free from the control of those limitations which are inherent in the commerce clause and the other powers delegated to Congress in the Constitution.

Delegation of Legislative Power

The Recovery Acts present a number of problems involving the delegation of legislative power. It has been said that Congress has in an unconstitutional manner delegated the legislative power to the President. An analysis of these statutes does not sustain this view. In the Agricultural Adjustment Act, the question is squarely presented in those Sections which provide for the laying of taxes upon processors to secure funds with which to carry out special aids to agriculture. The Secretary of Agriculture is given a very broad discretionary authority to determine whether such taxes shall be levied and in what amounts. The general principle stated in Field v. Clark,55

54 See United States v. Calistan Packers, 4 F. Supp. 660 (N. D. Cal. (1933), noted in (1933) 22 GEORGETOWN LAW JOURNAL 100; Economy Dairy Co. v. Sec'y of Agriculture, 61 WASH. L. REP. 633 (1933).
54a Supra notes 9, 15, 16 and 41.
55 143 U. S. 649 (1892).
in the *Grimaud case*,\(^5^6\) and in the *Hampton case*,\(^5^7\) is that when the legislature lays down an intelligible principle or policy, "a primary standard,"\(^5^8\) to guide the administrative discretion in filling in the details of the statute by the making of rules and regulations, and in applying the statute to factual situations upon which the statute is intended to operate, then there is no unconstitutional delegation of legislative power, even though the legislation be stated in broad terms. The statute provides that "there shall be levied processing taxes as hereinafter provided."\(^5^9\) When rental or benefit payments to producers are to be made, the tax shall be in effect. The rates shall be determined by the Secretary of Agriculture at such rate "as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity."\(^6^0\) The processing tax "shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity,"\(^6^1\) the Secretary being authorized to make findings of facts as to the accumulation of surplus stocks and the depression of farm prices. "The current average farm price" and "the fair exchange value" of a commodity are defined in general terms and the Secretary is empowered to make findings from statistical data, a clear fact-finding function, involving judgment, of course, but not involving an uncontrolled discretion. This statute is reminiscent of the *Flexible Tariff Law*,\(^6^2\) and the provisions for the exercise of administrative discretion furnish an exact analogy to that Tariff Law. Under the authority of the *Hampton case*,\(^6^2^a\) this delegation of power to the Secretary of Agriculture is unmistakably constitutional.

There has been considerable controversy over the delegation of code-making power to the President in the N. R. A., that is, as to his authority to approve "a code or

\(^5^6\) United States *v.* Grimaud, 220 U. S. 506 (1911).
\(^5^7\) J. W. Hampton, Jr., & Co. *v.* United States, 276 U. S. 394 (1928).
\(^5^8\) United States *v.* Shreveport Grain & Elevator Co., 287 U. S. 77 (1932).
\(^5^9\) *Supra* note 1, at § 9 (a).
\(^6^0\) *Id.* at § 9 (b).
\(^6^1\) *Ibid.*
\(^6^2^a\) *Supra* note 57.
codes of fair competition for the trade or industry * * *."63
This authority is expressly limited to findings that the trade associations or groups which draw the codes shall be open in membership and truly representative, and further that they shall not promote monopoly or oppression of small enterprises. The President may impose conditions for the protection of consumers and competitor and he may make such exceptions to, and exemption from, such code "as the President in his discretion deems necessary to effectuate the policy herein declared."64 There is no clear or definite principle provided in this Act as a guide to the President's discretion, other than those matters above stated. What may he include in these codes? The statute contemplates that the codes shall be initiated by the members of an industry, but also authorizes the President "upon his own motion" to prescribe and approve a code of fair competition.65 If we look to the declaration of policy,66 as the guide to the exercise of the executive discretion, we find the policy of Congress stated in very broad terms. It is as all-embracing as the nation itself in all of its social and economic aspects. If we look upon this declaration of policy as the basis upon which the delegation of authority is vested in the President to approve a code—and it is his approval that gives it official sanction and makes it the standard of unfair competition—it seems rather obvious that on this basis there is no limitation whatever upon the discretion exercised in the drawing of codes. The President could insist upon any provision which is, in his estimation, within any of the broad purposes of the declaration of policy. It is as much as to say that Congress has declared that the social and economic conditions of the nation should be improved in respect to the purposes stated, and that the President shall enact such statutes in the form of code provisions as will bring about improvement. Such a sweeping all-embracing declaration would seem not to satisfy the judicial test heretofore laid down to prevent the Legislature from handing

63 Supra note 2 at § 3 (a).
64 Ibid.
65 Id. at § 3 (d).
66 Supra note 8.
over its law-making power to the President. It may well have been in contemplation of the framers of this statute, that many things might be included in the codes for moral effect in securing voluntary cooperation and not for the purpose of legal enforcement. The history of the administration of the N. R. A. lends color to that supposition.

Consider, however, that by the statute itself the code is to be one of "fair competition" and its violation shall in law be deemed "an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act." Herein lies an understandable purpose to confine the codes to those provisions which may be brought within the concept of unfair methods of competition. These words have come to carry with them a quite definite connotation in Federal Trade Law. Here is a standard to which the President can look for a guide to the exercise of his discretion as definite at least as such concepts recognized in the law as "just and reasonable rate" and "public convenience and necessity," standards for the administrative determination of rates in the one case and the issue of certificates in the other. In the Federal Trade Commission Act of 1914 "unfair methods of competition" were expressly declared to be unlawful. Authority was vested in the Federal Trade Commission to enforce this law through administrative findings as to what are "unfair methods" and to issue cease and desist orders against their continuance. With reference to this the United States Supreme Court in Federal Trade Commission v. Gratz, said:

"The words 'unfair methods of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was

67 Id. at §§ 3 (a), (b).
68 Id. at § 3 (b).
69 Supra note 26a.
70 253 U. S. 421, 427 (1920).
certainly not to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

Authority vested in the President by the National Recovery Act to approve or prescribe codes of fair competition is distinctly an administrative power. The adoption of the codes by Congress, in advance, as its standards, does not change the result. The code-making authority is still within the limitations of the statute itself and it should be remembered that Congress expressly provides that it is violation of the code standards in transactions in or affecting interstate or foreign commerce that shall be deemed an unfair method of competition and shall be a misdemeanor under the penal provision of the Act. This specific limitation would seem unquestionably to apply to the President's authority to include matters in the codes which cannot by any known standard be deemed to constitute unfair competition. So construed, the delegation of authority to the President is not an unconstitutional delegation of legislative power.

Whether or not the President steps outside of his statutory authority presents a different question, of course, from that of unconstitutional delegation of legislative power. However, if it is not the intent of Congress that the President should include in a statute, as a basis of criminal prosecution, those matters which constitute only normal natural competitive advantage, which is not in any modern sense unfair, this would seem to reflect a purpose in Congress that the President, in his administrative act in approving or prescribing codes, should be guided by the standards of unfair competition which have been developed in the law heretofore. For example, he could not, it is submitted, attempt to equalize normal competitive advantage which grows from efficient organization of industry, expert management which would justify higher salaries in one plant than in another, reputation for prompt and efficient service, good workmanship and materials, and willingness to make good any defects in manufactured products, opportunity to secure employees at lower wages in one place than those that normally prevail in another,

71 Supra note 2 at §§ 3 (b), (f).
close proximity to markets, and others of like character. It will be for the courts ultimately to determine, at least for the purpose of enforcing the penal provisions of the statute, whether provisions in the codes include matters that may fairly be described as unfair methods of competition. This is not to say that the President may not in the codes seek to secure by purely voluntary acquiescence on the part of industry other purposes included in the declaration of policy of the National Recovery Act.

There is another section of the N. R. A.—that pertaining to limited labor codes 72—which presents a problem both as to its interpretation and as to its constitutionality. It is a vulnerable part of the N. R. A. Its legislative background is completely dark.73 It may have been intended as a latent threat to encourage the establishment of "mutual agreements" concerning labor practices, policies, wages, hours of labor, and conditions of employment, which it immediately follows in the statute. It will be remembered that this provision has a penal effect in that it provides that where no mutual agreement has been arrived at in these matters, the President may prescribe a code "which shall have the same effect as a code of fair competition approved by the President under subsection (a) of Section 3." Insofar as this provision, in this relationship, may be taken as restricted in its penal aspects to violations "in any transaction in or affecting interstate or foreign commerce," this separate delegation of code-making power would seem to be entirely unnecessary, because such labor practices, wages, hours of labor, and the like, as could conceivably relate to unfair methods of competition in interstate commerce are already within the general code-making power. If it be true, however, that Congress intended to grant some wider code-making authority, beyond the field

72 Id., at § 7 (c).

73 In the Report of the Committee on Ways and Means of the House of Representatives on the National Industrial Recovery Bill (H. R. Rep. No. 159, 73d Cong. 1st Sess.), there is but a brief paraphrase of § 7 (c), with no comment or discussion. In the Report of the Committee on Finance of the Senate on the same bill (Sen. Rep. No. 114, 73d Cong. 1st Sess.), no mention whatever is made of § 7 (c), except that the House Committee Report was included at the end of this report. There was no discussion of § 7 (c) in either House or Senate.
of interstate commerce and applicable only to purely local transactions in trade and industry, then this attempted delegation would seem to be unconstitutional because it lays down no standard of control of purely local labor practices, policies, wages, hours of labor, and the like, which could serve as an intelligible guide to the exercise of discretion by the President as to what regulations should be included in the codes and made enforceable. Furthermore, this legislation, read as without any limitation whatever, if carried beyond the interstate commerce field, would completely destroy the reserved power of the states, and would also sweep away all judicial decisions affecting the liberty of contract, such as Muller v. Oregon,74 Sturges v. Beauchamp,75 Holden v. Hardy,76 Lochner v. New York,77 and Adkins v. Children's Hospital.78 Though the principle of these cases, from the viewpoint of the impropriety of general restrictions upon hours of labor and wages under the police power of the states, may be deemed to have been weakened by strong dissenting opinions and by the decision in Bunting v. Oregon,79 there still remains a constitutional objection to the inclusion of such general restrictions within the commerce power of Congress.

It is reported upon good authority that up to this time little effort has been made by the N. R. A. administration to carry into effect this rather puzzling provision. It is probable, therefore, that we shall not have at any early date, if at all, any judicial determination of its purpose and effect. Possibly any view of it will prove eventually to be purely academic.80

74 208 U. S. 412 (1908).
75 231 U. S. 320 (1913).
76 169 U. S. 366 (1898).
77 198 U. S. 45 (1905).
78 Supra notes 12, 13.
79 243 U. S. 426 (1917).
80 Since this article was written several cases have been decided, among them Purvis, et al. v. Bazemore, — F. Supp. — (S. D. Fla. 1933), where it was held that the N. R. A., in so far as it provides for the regulation of business purely local in its nature (here dry cleaning and dyeing establishments), is unconstitutional in that it invades "the reserve power of the States." A second case is that of Victor, et al. v. Ickes, Sec'y of the Interior, 61 Wash. L. Rep. 870 (1933). [Note by Ed. Staff: see same case, supra note *, p. 207, and Recent Decisions, infra, p. 358.
WHEN MAY SUIT BE INSTITUTED AGAINST THE
SURETY ON THE PERFORMANCE BOND OF
A FEDERAL CONTRACT? PROPOSAL
TO CLARIFY THE QUESTION

O. R. McGUIRE *

THE law on this subject is in such a state of uncertainty
that it is extremely doubtful in any particular case
when suit may be properly instituted by a subcontractor,
materialman, or laborer against a federal contractor and
the surety on his performance bond to recover for material
or labor entering into the public work and for which pay-
ment has not been made by the contractor or the surety.
Unquestionably there has been more litigation over this
question than any other single question arising in connec-
tion with federal contracts; and with the United States
now engaged in the greatest building program in its his-
tory, the uncertainties and volume of litigation will un-
doubtedly increase.

As will be shown hereinafter, the accumulating decisions
of the courts appear to add doubts on the point, until the
protection which the federal government is supposed to
have exacted for materialmen and laborers has become in
many cases a delusion and a snare—misleading material-
men and laborers to their detriment, and enabling some
contractors to qualify for government contracts who could
not have otherwise obtained a performance bond. The
hired sureties are too often successful in their defense
that the suit on the bond was brought prematurely or too
late; that is, before the expiration of six months from the
date of final settlement or more than a year after such
date.

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Government; author of Controversies with the United States (1928),
16 GEORGETOWN LAW JOURNAL 281, 454, which was reprinted as Senate
Doc. No. 204, 70th Cong. 2d Sess., Public Contracts and Publicity
(1930), 18 id. 179, Tort Claims against the United States (1931), 19 id.
133, etc. Editor, BECK, MAY IT PLEASE THE COURT (1930) and collabora-
ator with Hon. James M. Beck in THE VANISHING RIGHTS OF THE
STATES (1926) and OUR WONDERLAND OF BUREAUCRACY (1932).
While the lien laws of the several states very generally provide for liens in favor of subcontractors and laborers whose material and labor contributed to the construction of a building or other work for private parties, there is no right of lien under such laws or under federal laws against the public buildings or other public works of the United States. As was stated by the Supreme Court of the United States in the Ansonia Brass and Copper Company case:¹

"It was in recognition of the inability of contractors for labor and materials to take liens upon the public property of the United States that Congress passed the Act of August 13, 1894, c. 280 (28 Stat. 278), amended February 24, 1905, c. 778 (33 Stat. 811), providing for bonds in favor of those who furnished labor or materials in the construction of public works. It was in view of this purpose to provide protection for those who could not protect themselves by liens upon public property that the statute was given liberal construction in this court. See Guaranty Trust Company v. Pressed Brick Company, 191 U. S. 416, 422; Hill v. Surety Company, 200 U. S. 197, 203."

While it may be possible, as between private parties, for a contractor to give a subcontractor an assignment on the owner for a part of the compensation to be paid by the owner, sufficient to protect a subcontractor or laborer for his materials and work, no such assignment has any legal force or effect against the United States.² Moneys earned but unpaid by the United States to a contractor and in the possession of the Government can not be reached by garnishment proceedings.³ An assignment could be made of a claim against the United States after the check or warrant in payment of the claim had been issued, or garnishment proceedings maintained after the contractor had secured such payment and deposited it to his credit in some bank, but generally these proceedings are of little practical benefit to a subcontractor or laborer in attempt-

ing to enforce against a contractor and his surety a claim for material or work entering into the construction of a building or other public work for the United States.

The only available remedy in most cases is by suit against the contractor and surety as provided in the 1894 4 and 1905 5 statutes referred to by the Supreme Court of the United States in the extract quoted from the Ansonia Brass and Copper Company case. It should be mentioned at this point that the United States has long since corrected the defects in the contracts considered in the Ansonia Brass and Copper Company case, wherein two of the three contracts considered in that case provided that, as progress payments were made, the United States should have a lien on the work completed as of the date of the payments, instead of taking title to such of the work as had been completed. This situation is not likely to arise in the future for the reason that the several departments and establishments are not now permitted to use such forms of contracts as their fancy may dictate but are required to make common use of a standard form of construction contract promulgated by the President of the United States for uniform and obligatory use throughout the government service.6 This standard form of contract, prescribed in 1926, provides, in effect, that the United States shall take title to such of the work as may have been completed as of the dates of the progress payments made thereunder.7

The performance bond required under the 1894 and 1905

6 Bureau of Budget Cir. No. 197, Nov. 19, 1926; Cir. No. 275, March 1, 1929.
7 The applicable stipulation in the standard form of construction contract prescribed by the President for obligatory use throughout the Federal Government service is Article 16 (c), as follows:

“All material and work covered by partial payments made shall thereupon become the property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which the payments have been made, or the restoration of any damaged work, or as a waiver of the rights of the Government to require the fulfillment of all the terms of the contract.”

As to the effect of the latter part of this article, see Mittry v. United States, 73 Ct. Cl. 341 (1931).
statutes for the construction, but not for supply, contracts must contain an obligation for the faithful performance of the contract and an obligation to make payments promptly to materialmen and laborers. The President has likewise prescribed for uniform and obligatory use with the standard form of construction contract a standard form of performance bond so that the situation considered in United States v. Starr is not likely to arise where the performance bond furnished by the contractor did not contain any such stipulation.

The pertinent part of the 1894 and 1905 statutes is as follows:

"* * * any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later."

8 Supra note 6.
In the first place, this statute requires the materialman or laborer to make application by affidavit to the department or establishment under whose jurisdiction the contract was performed for a copy of the contract and bond while other statutes then provided—and had provided since the foundation of the Government—that the contract and bond should be filed in the accounting offices of the United States, now the General Accounting Office, where they are required in connection with the settlement of claims and accounts arising thereunder.\(^\text{10}\) The only result of requiring application to be made to an officer of the United States who does not have the custody of the contract and bond from which to make copies, is to delay matters until the application may be forwarded by such officer to the General Accounting Office and the copies prepared. This circumlocution could have been avoided by providing in the 1894 statute\(^\text{11}\) that the application for copies of the contract and bond be made to the official of the Government having custody thereof.

In the second place, materialmen and laborers must wait for six months after completion and final settlement of the contract to see whether the United States has brought suit against the contractor and his surety. Where a contract may be in course of performance for several years, the contract period for the Boulder Dam, for example, being for some five years, or where completion and final settlement may be delayed for a considerable period, the laborer or materialman may need his money, and a number of instances have arisen where they have compromised with the contractor or surety for a fraction of their agreed compensation. In fact in one instance the balance due the contractor from the United States was considerably less than the amount due from the contractor to his unpaid materialmen, with the result that the contractor failed and refused to submit his final claim, endeavoring thereby, to delay final settlement and prevent any suit against him and his surety. However, a final settlement

\(^{10}\) 1 STAT. 610 (1798), Rev. Stat. § 3743, as amended by 28 STAT. 210 § 18 (1894), and as further amended by the Budget and Accounting Act, 42 STAT. 23, 27 (1921), 5 U. S. C., § 13 (1926).

\(^{11}\) Supra note 4.
was stated by the General Accounting Office in the case notwithstanding the lack of cooperation on the part of the contractor. In keeping with modern methods of doing business, there should be a provision in the law whereby, after a reasonable period of 60 or 90 days, an unpaid subcontractor may institute suit against a contractor and his surety and the maintenance of the suit of such subcontractor should not be made to depend on whether the first subcontractor seasonably brought suit. This feature of the matter will be hereinafter referred to in connection with the proposed remedy for the present situation.

In the third place, the 1894\(^{12}\) and 1905\(^{13}\) statutes do not define what shall constitute “complete performance of said contract and final settlement thereof,” and in interpreting these statutes some of the courts appear to have overlooked the rule that statutes in pari materia are to be construed together, with the result that there is great uncertainty as to what constitutes “final settlement” and what official of the Government is charged with the duty and responsibility of making it.

Similar to larger business organizations, the contracting, inspection, and claims settlement work of the United States is not performed by one individual for any department or establishment of the Government. This work is performed by different officials, not only because of the volume of the work and the specialized training required therefor, but as a check on each other. It is now, and has been true since the original Treasury Act of 1789,\(^{14}\) that no money may be drawn from the Treasury unless the warrant therefor has been countersigned by the proper accounting officer, now the Comptroller General of the United States, and that all claims and demands for or against the United States shall be settled and adjusted by such accounting officers.\(^{15}\) The effect of a warrant is to authorize a charge against an appropriation made by the Congress and a credit on the books of the

\(^{12}\) Ibid.

\(^{13}\) Supra note 5.


Treasury to the disbursing officer of the United States for his expenditure for purposes authorized by the appropriation act and in payment of a legal obligation against the United States. Such a credit constitutes the checking account of a disbursing officer, and at stated intervals, generally once a month, he must render his accounts to the accounting officers of the United States, now the General Accounting Office, where each payment is examined as to the availability of the appropriation to make the particular payment, the legality thereof, and whether it is correct in amount. The disbursing officer is denied credit against the funds advanced to his account on the books of the Treasury for all payments which fail to meet the legal test. The settlements of the accounting officers of such accounts as well as claims submitted to them for direct settlement are final and conclusive on the executive branch of the Government.16

Such decisions and settlements of the accounting officers can not be reversed in so far as the executive branch of the Government is concerned. A statute is necessary in any particular case to establish a different rule, but in most cases there is ample provision for judicial review through a suit against the United States in the Court of Claims or in a district court exercising concurrent jurisdiction with the Court of Claims. However, except in internal revenue and customs cases, the judgments may not be paid from general appropriations but must be specifically reported to Congress for an appropriation with which to pay them.17 When a disbursing officer has been refused credit by the accounting officers and suit is brought against the officer and his surety to recover the


17 33 Stat. 422 (1904), 31 U. S. C. § 583(2) (1926). As to payments of judgments in internal revenue and customs cases, see the annual appropriation Acts for the Treasury Department.
erroneous or illegal payment, the defenses available are limited.18

In other words, the settlement and adjustment of claims and accounts for and against the United States is the exclusive function of the accounting officers in so far as administrative, as distinguished from judicial, settlements are made chargeable to appropriated moneys for the current conduct of the business of the Government. These accounting officers were independent of the control of all of the spending agencies of the Government except the Treasury Department during the period from 1789 to 1921, and have been independent of all the spending agencies including the Treasury Department since 1921.19 Moreover the settlements of the accounting officers were made by statute final and conclusive on the administrative branch of the Government. To this extent, at least, the mode of administrative settlement of claims for and against the United States is comparable to that used by large corporations organized for profit, which generally have their control and accounting officers independent of the spending agencies of the corporations, with no one having the authority to overrule a decision of the accounting officers except the board of directors or an executive committee. Congress performs that function for the United States.

If this line of distinction had been clearly observed by the courts in the interpretation of the 189420 and 190521 statutes, there possibly would not have arisen the present confusion as to what constitutes final settlement of a con-


19 Cooke v. United States, 91 U. S. 389 (1876), where it was said: "Thus it is seen that all claims against the United States are to be settled and adjusted 'in the Treasury Department'; and that is located 'at the seat of government.' The assistant-treasurer in New York is a custodian of the public money, which he may pay out upon the order of the proper department or officer; but he has no authority to settle and adjust, that is to say, to determine upon the validity of, any claim against the government."

20 Supra notes 4 & 11.

21 Supra notes 5 & 13.
tract for the purposes of institution of suit by a subcontractor or laborers. The first case in the Supreme Court of the United States to consider the question was *Illinois Surety Company v. Peeler,* hereinafter referred to as the *Peeler case.* This case was decided in 1916, at which time the accounting officers were bureau officials of the Treasury Department, though by law and custom neither the President nor the Secretary of the Treasury claimed or exercised any authority to review or direct such officers in the settlement of claims and accounts for and against the United States.

An examination of the opinion in the *Peeler case* discloses that the court very properly distinguished between "payment" and "final settlement" and pointed out that the final settlement of claims and accounts for administrative purposes, as distinguished from a judicial settlement, was then made in the Treasury Department. The court then said:

"We should not say, of course, that instances may not be found in which the word 'settlement' has not been used in Acts of Congress in other senses, or in the sense of 'payment.' But it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well defined meaning as denoting the appropriate administrative determination with respect to the amount due. We think that the words 'final settlement' in the Act of 1905 had reference to the time of this determination when, so far as the Government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six months' period runs. The time of the final administrative determination of the amount due is a definite time fixed by public record and readily ascertained. As an administrative matter, it does not depend upon the consent or agreement of the other party to the contract or account. The authority to make it may not be suspended, or held in abeyance, by refusal to agree. Whether the amount so fixed is due, in law and fact, undoubtedly remains a question to be adjudicated, if properly raised in judicial proceed-

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22 240 U. S. 214 (1916).

23 *Supra* note 16; McGuire, *Legislative or Executive Control over Accounting for Federal Funds* (1926) 20 Ill. L. Rev. 455, 474, and authorities cited therein, and McCarl v. Miguel, *supra* note 16.
ings, but this does not affect the running of the time for bringing action under the statutory provision."

Unquestionably this is a sound statement of the law and is in accord with the statutory procedure for the adjustment and settlement of accounts and claims with the United States. The certificate of settlement, which is a formal document, issued by the accounting officers of the United States, shows on its face the date of such settlement. In other words, the date of such settlement is "fixed by public record and readily ascertained" and such a settlement does not depend upon the consent or agreement of the other party to the contract. However, the doubt in the lower courts in the application of this statement of the law seems to be due to the next paragraph of the opinion in the Peeler case as follows:

"In the present case, the construction of the building was in charge of the Secretary of the Treasury and under the general supervision of the Supervising Architect. The Secretary of the Treasury was authorized to remit the whole or any part of the stipulated liquidated damages as in his discretion might be just and equitable. Act of June 6, 1902, c. 1036, 32 Stat. at L. 310, 326. On August 21, 1912, the Supervising Architect having received the certificate of the chief of the technical division of the office that all work embraced in the contract had been satisfactorily completed, made his statement of the amount finally due, recommending that only the actual damage (as stated) be charged against the contractor and that the proper voucher should be issued in favor of the contractor for the balance, to wit, $3,999.01. And, on the same date, this recommendation was approved and actual damages charged accordingly by direction of the Secretary of the Treasury. This, in our judgment, was the 'final settlement' of the contract within the meaning of the act. We understand that the administrative construction of the act has been to the same effect. The regulation of the Treasury Department, as it appears from its circular issued for the information of persons interested in claims for material and labor supplied in the prosecution of the work on buildings under the control of that Department (Dept. Circ., No. 45, Sept. 12, 1912), is as follows: 'The department treats as the date of final settlement mentioned in said acts' (referring to the Acts of 1894 and 1905, supra), 'the date on which the department approves the basis of settlement under such contract recommended by the Supervising Architect, and orders payment accordingly.'"

It was a coincidence in the Peeler case that the Secretary of the Treasury happened to be the head of the
Treasury Department in which was located both the office of the supervising architect of the Treasury and the accounting officers of the United States, but the attorney for the surety company, which was contending that the action was prematurely brought, invited the attention of the court to the fact that the procedure in the War, Navy, and Interior Departments was unlike that prevailing in the Treasury Department and that the procedure was not identical in any of these Departments. As such head, the Secretary of the Treasury had complete control over the supervising architect, the operating official in charge of the construction work, but the Secretary had no control whatever over the settlements made by any of the six auditors or comptroller, the accounting officers of the United States who were bureau chiefs of the Treasury Department.24 Certainly the Secretaries of the other Departments of the Government had no control over the accounting officers of the Treasury Department. Of course, the heads of such other Departments could approve a recommendation of their subordinates as to the basis of settlement, as was done by the Secretary of the Treasury in the Peeler case, but such approvals were not binding on the United States and they were not, and are not "the proper authority" to fix administratively the amount which the United States "was finally bound to pay".25 The confusion and tremendous amount of litigation on the part of sureties contending either that the suit of materialmen

24 Taft, Our Chief Magistrate and His Powers (1925) 81. In Re Departmental Reference, 59 Ct. Cl. 813 (1924); St. Louis, Brownsville & Mexico Railroad v. United States, 268 U. S. 169 (1925); and cases cited supra in notes 16 and 23. The adoption of this rule was the result of no accident. Mr. Baldwin, who brought in the Bill, which became the original treasury department Act of 1789, incorporating therein substantially the Ordinance of the Congress of the Confederation creating the accounting officers of the United States, is reported to have said on the floor of the House of Representatives that: "He hoped to see proper checks provided; a comptroller, auditor, register and treasurer. He would not suffer the secretary to touch a farthing of the public money beyond his salary. The settling of the accounts should be in the auditor and comptroller; the registering them in another officer; and the cash in the hands of one unconnected with either."

25 Supra note 10.
is prematurely brought or that it has been brought too late has been due to the application which was made in the Peeler case of the correct legal principle.

Purporting to follow the Peeler case are the cases of United States Fidelity & Guaranty Company v. McNulty,26 Mandel v. United States,27 Crellin v. Pawling,28 and Haas v. Title Guaranty & Surety Company,29 which concern alleged "final settlements" of Navy Department contracts, where the Secretary of the Navy does not happen to be the administrative superior of the accounting officers of the United States as well as administrative superior of the operating officers of that department in charge of the work. In contrast with the statement of the court in the Peeler case that the time of final administrative determination of the amount due was a definite time fixed by public record, an examination of these Navy Department cases discloses that in at least two of them the court admitted the testimony of an employee of the Navy Department in an effort to determine the administrative machinery in that Department for the settlement of claims and the date of final settlement in the respective cases. If final settlement had been made in these cases by the Navy Department, documentary evidence was available to prove that fact, and statutory procedure existed for placing authenticated copies of the documents in evidence.30 No such documents were produced for the good reason that none existed or could exist under the statutory law showing that the Navy Department authoritatively determined the amount the United States was in any event bound to pay in the particular cases.

The case of Antrim Lumber Company v. Haman31 was one involving a Bureau of Indian Affairs, Department of the Interior, contract. One of the six auditors of the Treasury Department, the auditor for the Interior Department, whose office has been since merged in the General

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26 13 F. (2d) 78 (C. C. A. 1st, 1926).
27 4 F. (2d) 629 (C. C. A. 3rd, 1925).
29 254 Fed. 958 (C. C. A. 7th, 1918).
31 18 F. (2d) 548 (C. C. A. 8th, 1927).
Accounting Office, had settled the claims arising under the contract and had certified a balance of a few hundred dollars to be due the United States. A copy of the certificate of settlement was furnished in due course to the Commissioner of Indian Affairs who thereupon made demand on the contractor and his surety for payment of the balance certified by the auditor for the Interior Department as being due the Government. The Circuit Court of Appeals for the eighth circuit, purporting to follow the Peeler case, held that "final settlement" was made on the date of the letter of the Commissioner of Indian Affairs making demand on the contractor and his surety for payment of the balance, apparently overlooking entirely the fact that whatever administrative action in the settlement of the claim was taken by the Interior Department, comparable to the action of the Secretary of the Treasury in the Peeler case, had been taken before, and not after, the auditor had stated his settlement, and also overlooking the fact that by statute the auditor's settlement was made final and conclusive on the Commissioner of Indian Affairs, as a part of the executive branch of the Government.

If these opinions and judgments be correct, then it must be admitted, notwithstanding the universal rule of statutory interpretation, that repeals and amendments of existing statutes by implication are not to be sanctioned wherever the old and new statutes may stand together, that the phrase "final settlement" in the 1894 and 1905 statutes, without more, has not only impliedly repealed or amended the operation of statutes existing since the original Treasury Act of 1789 that all claims and accounts shall be settled and adjusted in the accounting offices of the United States—and not by the operating officers of the Government whose acts gave rise to the claims—but that the phrase has actually reversed the operation of such statutes and enabled the operating officers, rather than the accounting officers of the Government to determine administratively the amount which the United States is required to pay from an appropriation in settlement of

32 Supra notes 4, 11 & 20.
33 Supra notes 5, 13 & 21.
34 Supra note 14.
a contract. But, in this connection, it is to be observed that the courts have permitted such a result to be obtained by the use of a stipulation in a contract with the United States that administrative determinations of certain specified questions shall be final and conclusive on both parties to the contract.

As the Special Committee on Administrative Law has suggested in its annual report to the Grand Rapids meeting of the American Bar Association, such a result has come about because the courts applied the rule of law established as to contracts between private parties in the interpretation of contracts with the United States where, in a proper sense, there is no negotiation between the parties as to the terms of the contract, and where there are statutes circumscribing the authority of the respective officers of the United States. The United States tenders its contracts in accordance with section 3709, Revised Statutes, to the lowest responsible bidder and, if his bid is accepted, he is required to execute a printed form of contract supplied by the Government. After a contract has been signed, the contracting officer generally has very little more to do with the contract. The work is supervised, inspected, and accepted by other officers or employees; the progress payments are made by another set of officers and employees; and final settlement is made by still another set of employees who also audit and settle the progress payments.

Such was the situation when there came before the Circuit Court of Appeals for the eighth circuit the Lambert Lumber Company case. The late Circuit Judge Kenyon who wrote the opinion in that case was a member of the Senate when the agitation was started as the result of a recommendation made to the Congress in 1912 by President Taft for the consolidation of the accounting offices

of the United States, and Senator Kenyon took an active part in the consideration of the bills which finally became the Budget and Accounting Act of 1921. This 1921 act consolidated all of the accounting offices, consisting of the offices of the six auditors and a comptroller of the Treasury, into the General Accounting Office and made that office independent of all of the spending agencies of the United States, including the Treasury Department. The voucher stated in favor of the contractor in the Lambert Lumber Company case had been administratively approved by the administrator of Veterans' Affairs, under whose jurisdiction the work had been performed, and had been referred to the General Accounting Office for final settlement. The latter office had issued its certificate of settlement and the question was whether the "final settlement" for the purpose of the 1894 and 1905 statutes had been made when the administrator administratively approved the settlement or when the General Accounting Office issued its certificate of settlement.

This Circuit Court of Appeals for the eighth circuit had decided the Antrim Lumber Company case, referred to above, but, after a recitation of some of the history of the accounting system of the United States, it concluded in the Lambert Lumber Company case that final settlement had been made when the General Accounting Office issued its certificate of settlement on which a check was drawn in payment of the balance due under the contract. A similar conclusion was reached by the District Court for Delaware though apparently, from the opinion, the Lambert Lumber Company case was not brought to the attention of the District Court.

The Circuit Court of Appeals for the fourth circuit subsequently had before it a case arising in the War Department. There the constructing quartermaster (not the Secretary of War), who was not a member of the

38 Supra notes 10, 15, 16 & 25.
39 Supra notes 4, 11, 20 & 32.
40 Supra notes 5, 13, 21 & 33.
41 Supra note 31.
42 United States, etc., v. French Dredging & Wrecking Co., 52 F. (2d) 235 (D. C. Del. 1931).
finance corps of the Army and without authority to direct officers of that corps, prepared and approved a voucher and transmitted it to the disbursing officer of the finance corps for payment. Some of the necessary documents showing the authority for extra work had not been transmitted by the constructing quartermaster to the finance officer, and he held the voucher until the missing papers were furnished. The lower court had held that final settlement was made on the date the disbursing officer secured the signature of the contractor on the voucher and issued the check in payment, while the Circuit Court of Appeals held that final settlement had been made on the date the constructing quartermaster prepared and approved the voucher for payment.

It will be noted that in the *Lambert Lumber Company case*, the voucher, after receiving the approval of the head of the Veterans' Administration—in the same manner that the voucher received the approval of the head of the Treasury Department in the *Peeler case*—was transmitted to the General Accounting Office for settlement as a claim, while in the *Consolidated Indemnity Company case* the voucher was approved by a construction quartermaster in the field and not by the head of the War Department and that the construction quartermaster had no more jurisdiction and authority to direct the finance officer—even though they were both officers of the Army—than an officer of the Navy has authority to direct an officer of the Army. In fact the general rule is that a disbursing officer shall not be directed by any of his administrative superiors in the matter of disbursement of public funds, and when in doubt the disbursing officer is authorized to apply, under the Act of 1894, to the comptroller general for a decision which shall govern in the audit and settlement of the accounts. While the court stated in this case that it was following the *Peeler case*, it is exceedingly difficult to agree with such a statement.

A fourth recent case is the *Price case*. There the

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45 Supra note 22.
contractor defaulted in the performance of the contract and the contract was terminated by the United States in accordance with the right reserved therein. The termination was made in August, 1927, and the work was relet to another contractor. The chief of the Bureau of Public Roads, Department of Agriculture, made demand on the contractor and his surety in letter of November 6, 1928, for payment of a stated balance, supposed to represent the increased cost to the United States in the reletting of the work. There being no compliance with the demand, the claim was referred on January 20, 1930, to the Attorney General of the United States for collection, and he transmitted it to the United States Attorney for the Baltimore district with instructions to take the necessary action to effect collection of the claim. As is customary in such cases, the United States Attorney took the matter up with the surety before instituting suit and on June 10, 1930, the surety company paid the balance without suit having been instituted by the United States therefor.

The lower court held that final settlement was made for the purpose of the 1894 and 1905 statutes on June 10, 1930, when the surety paid its indebtedness under the bond, but the Circuit Court of Appeals disagreed with this conclusion and held that final settlement was made on or before November 6, 1928, when the bureau chief of the Department of Agriculture made demand for payment. Observe that the demand was not made by the Secretary of Agriculture, the head of the department concerned, approving the settlement as in the Peeler case, and that no settlement of the claim had been made by the accounting officers of the United States as in the Antrim Lumber Company case, above cited.

As a matter of fact, law, and administrative procedure, the action taken by the heads of Departments or their subordinates in all of these cases, including the Peeler case,
was nothing more than the administrative examination of the claims arising under the contracts with report of the facts directly to the accounting officers of the United States for consideration in the settlement of the claims, or report of the facts attached to a voucher to a disbursing officer for payment and inclusion in his accounts submitted at regular intervals to the accounting officers of the United States for audit and settlement. Also, as a matter of fact, the Comptroller General is authorized and required to prescribe the forms, systems and procedure for the administrative examination of claims against the United States. To say that such an examination or approval of a voucher constitutes final settlement of the contract is to ignore both the plain terms of the law and the century old procedure in the matter of settlement of claims against the United States chargeable to appropriated moneys.\textsuperscript{50a}

The rights of materialmen and laborers under a performance bond given by a contractor with the United States in accordance with the 1894\textsuperscript{51} and 1905\textsuperscript{52} statutes should not be a matter of hide-and-go-seek on the part of the surety companies and such materialmen and laborers, but it appears to be most difficult for an attorney to determine the date on which he should institute suit on the bond and not be met with a defense having nothing whatever to do with the merits of his client's claim, but contending that the suit was either premature or too late. That the problem is one of serious concern to subcontractors is demonstrated by the cases cited above and the numerous inquiries received by the governmental offices from subcontractors seeking to secure some definite information as to just when the United States effected final


\textsuperscript{51} Supra notes 4, 11, 20, 32, 39 & 47.

\textsuperscript{52} Supra notes 5, 13, 21, 33, 40 & 48.
settlement in any particular case. The hazards of such litigation have grown to be such that the bond is of little protection to laborers who can not afford the expense of such litigation. The problem has become much more acute in recent years because of the large public building program.

Proposals are now pending in both houses of Congress to correct this situation. The Special Committee on Administrative Law mentioned in its report to the Grand Rapids meeting of the American Bar Association the Bill, which had been introduced by Senator Logan of Kentucky, and a corresponding Bill introduced a few days later by Congressman Celler of New York, both men being very much interested in a safe and orderly procedure in the administrative service of the Federal Government. There are several very important sections in these bills to codify the scattered statutes now applicable to government contracting, and which the Special Committee on Administrative Law mentioned as being in the interest of a larger measure of review of the action of operating officers in advertising, contracting, and making findings of fact respecting Government contracts. For present purposes attention may be directed to section 14 only of these Bills, which is copied in the margin in pertinent part. In substance, this section provides that instead

53 However, erroneous information on the part of the Government officers as to the date of "final settlement" is not binding on anyone. Union Gas Engine Co. v. Newport Ship Co., 18 F. (2d) 556 (C. C. A. 4th, 1927).
54 S. 1834, 73rd Cong. 1st Sess.
55 H. R. 6125, 73rd Cong. 1st Sess.
56 "Section 14. Security—(a) Every contract with the United States for the construction or repair of public work, where the amount is in excess of $2,000, shall be accompanied—
(1) By a performance bond, with good and sufficient surety or sureties, upon which suit may be brought by the United States within twelve months from final settlement under the contract.
(2) By an additional bond, with good and sufficient surety or sureties, including, among other things, the obligation that the contractor shall promptly make payment to all persons supplying labor or material for such work.

Every person, copartnership, association, or corporation who, whether as subcontractor or otherwise, has supplied labor or material
of one bond, as at present, the contractor shall give two bonds—one for the protection of the United States, and one for the protection of materialmen and laborers. As the bond premium is based on a percentage of the work and not on the amount of the bond, the giving of two bonds will not, or should not, result in any increased cost to the contractor and indirectly to the United States. Suit under the bond for the protection of materialmen and laborers may be commenced within one year from the date of final settlement. Each subcontractor has a right of

for such work, whether or not said labor or material enter into and become component parts of the work or improvement contemplated and who has not been paid therefor, shall have the right to sue on said additional bond in the name of the United States for his, their, or its use and benefit, in the appropriate court of the United States for the district in which the contract was to be performed, irrespective of the amount in controversy, and not elsewhere, and to prosecute the same to final judgment for such sum or sums as may be justly due him, them, or it, and to have execution thereon: Provided, however, That the United States shall not be liable for the payment of any costs or expenses of any such suit.

No such suit shall be commenced prior to ninety days from the date upon which the said person, copartnership, association, or corporation furnished, supplied, or performed the last of the labor or material for which the said claim is made, and every such suit shall be commenced not later than twelve months from the date of final settlement under the contract.

Any such person, copartnership, association, or corporation who has no contractual relationship, express or implied, with the contractor furnishing the said additional bond, shall not have a right of action upon the said additional bond unless the said person, copartnership, association, or corporation shall have given written notice to the contractor or his surety within ninety days after such labor and/or material has been supplied, stating with substantial accuracy the amount claimed and the name of the party with whom the said person, copartnership, association, or corporation contracted. Said notice shall be served either in the manner now or hereafter provided by law for the service of a summons, save that service need not be made by the marshal, or by mailing said notice by registered mail, postage prepaid, in an envelope addressed to the contractor or to the surety at its principal office or place of business.

Any claimant under such bond shall, upon application therefor and furnishing an affidavit to the General Accounting Office that he has supplied labor or materials for such work and payment therefor has not been made, be furnished, at the cost of the applicant, with a certified copy of the said contract and additional bond, upon which he may bring suit, and he and his sureties on said bond shall also be furnished
suit and he will not have to intervene in another suit filed by some other contractor, as at present, and have his case thrown out of court in event the first subcontractor brought his suit prematurely.

In order to avoid the result in the Hill case, referred to in the above quoted extract from the Ansonia Brass and Copper Company case,⁵⁷ of having suit brought against a contractor and surety by a subcontractor two or three times removed, that is, a materialman supplying a subcontractor or a sub-subcontractor with materials which finally entered into the public work, and when the contractor has had no notice or means of knowing definitely whether his subcontractors had paid their materialmen and laborers, the Bills provide that such sub-subcontractors shall give written notice to the contractor or his surety of the unpaid bills within ninety days after the materials or labor have been supplied.

It is further provided in these Bills that any claimant under such a bond may make application to the General Accounting Office for a copy of the contract and bond, and that such claimant shall be furnished by that office with a statement of the date when final settlement has been made under the contract, and that the statement of the date of final settlement shall be conclusive upon all the parties.

Such a provision will have a good effect in eliminating the present volume of litigation between sureties and subcontractors as to when final settlement has been made in any given case, and it will have a further good effect of

by the General Accounting Office with a statement of the date when final settlement has been made under the contract, which statement of the date of final settlement shall be conclusive upon the parties. A copy of said additional bond and contract, certified as aforesaid, shall be prima facie evidence of the contents and due execution and delivery of the original.

If the full amount of the liability of the sureties on said additional bond is insufficient to pay all amounts awarded in such suits, the same shall be prorated among the judgment creditors. In any such suit, the sureties on the additional bond may pay into court for distribution among all claimants the full amount of their liability under the additional bond, and, upon so doing, they will be relieved from further liability."

⁵⁷ Supra note 1.
requiring administrative officers of the Government to follow the procedure in the *Lambert Lumber Company case*, cited above;\(^58\) that is, requiring such officers to forward the final settlement voucher with their report and recommendations to the General Accounting Office for audit and settlement so that all prior payments administratively made to the contractor may be examined and the account finally closed. As it is now, some of the final payments are handled in this manner and some are made in the administrative departments with a possibility of overpayments, with resulting demands on the contractors for refunds or suits against disbursing officers and their sureties, and in any event with confusion worse confounded in attempts of subcontractors to maintain suits against contractors and their sureties.\(^59\)

But even with these desirable features, it is not to be expected that the Bills will be enacted into law until such time as sufficient demand is made therefor.

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\(^{58}\) *Supra* note 37.

\(^{59}\) The court rightly said in *London & Lancashire Indemnity Company v. Smoot*, 287 Fed. 952 (App. D. C. 1923), that the 1894 and 1905 statutes are ambiguous, but added that the courts should “try to give coherence to its provisions and accomplish the intentions of Congress.” For a good summary, see *Shealey, The Law of Government Contracts* (2d ed. 1927) 158-168 incl.
THE TAXATION OF GOVERNMENTAL INSTRUMENTALITIES

PART TWO *

Collector v. Day and Its Consequences

LOUIS B. BOUDIN †

V.

THE new era opened with a bang. Collector v. Day,¹ decided less than a year and a half after Veazie Bank v. Fenno,² was a complete departure from the entire line of cases discussed in Part One of this paper—the development of a half-century from McCulloch v. Maryland³ to Veazie Bank v. Fenno. This departure embraced two distinct elements, which must be kept apart in the discussion if we are to penetrate the thick fog which surrounds the subject and avoid the errors and misrepresentations with which ignorance and design have overlaid it. These two elements are: first, the application of the exemption established for federal instrumentalities to state instrumentalities; and, second, the extension of both to include income.

In our legal system, we are quite used to seeing large oaks from small acorns grow. It is no unusual thing to find an all-important doctrine “grow” in course of time out of some rule of law of limited or narrow application when first introduced, so that the original author or “discoverer” of the rule could hardly recognize it as his own if he could see it at full maturity. It is, therefore, gen-

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¹ 11 Wall. 113 (1871); note 3, Part One of this paper.

² 8 Wall. 533 (1870); notes 31, 34, Part One of this paper.

³ 4 Wheat. 316 (1819); notes 7, 8, 10, 20, 21, 33, 36, 37, 42 & 43, Part One of this paper.
erally assumed that the "development" of the doctrine here under consideration followed some such course, and that Collector v. Day \(^4\) is the direct outgrowth of McCulloch v. Maryland.\(^5\)

Nothing could be further from the truth—at least so far as the establishment of an immunity for state instrumentalities is concerned. In this respect, Collector v. Day \(^6\) was not an *extension* of any rule or principle theretofore laid down, but a complete *denial* of the principle upon which all the preceding cases in this field had been decided, and an almost direct reversal of the case immediately preceding it.\(^7\) As was shown at length in Part One of this paper, McCulloch v. Maryland,\(^8\) and all the cases which followed it, up to and including the *Veazie Case*,\(^9\) proceeded upon the theory of the *superiority* of the federal government to the state governments; and that in the *Veazie Case* the claim of *parity* of state instrumentalities with those of the federal government was decisively rejected by the majority of the Supreme Court.

\(^4\) *Supra* note 1.

\(^5\) *Supra* note 3. How widespread and deep-seated is the misunderstanding and confusion referred to in the text can be seen from the following extract from the review of my *Government by Judiciary* by Benjamin F. Wright, Jr., Professor of Government at Harvard University: "It is especially strange that he should approve so highly of the *McCulloch* case when it established the basis for the principle of tax exempt income in what is perhaps the clearest example of judicial legislation in the history of the Court. Mr. Boudin erroneously places the blame for this 'vicious principle of taxation which has been a source of mischief and annoyance ever since' on Collector v. Day. In that case, all except one judge, the only quoted by Mr. Boudin, found that the same principle of construction which had limited the states in the earlier cases now limited the national government." (1932) 45 *Harvard Law Rev.*, 1272.

\(^6\) *Supra* notes 1 & 4.

\(^7\) In his argument for the government, the Attorney-General said: "But if it be argued that the sovereignty of the States requires that the same exemption should be made from the taxation of the United States, which have been made from the taxation of the States, in favor of the means used by the General Government * * * the conclusive answer to this argument is, that this court has already decided otherwise in *Veazie v. Fenno, supra.*" [*Supra* note 2.]

\(^8\) *Supra* notes 3 & 5.

\(^9\) *Supra* notes 2 & 7.
The Supreme Court now reversed itself, and adopted the doctrine of equality, rejected by it only a little over a year ago. *Veazie Bank v. Fenno*\(^\text{10}\) was not formally reversed. Nor was it just ignored, as happened to *Lochner v. New York*\(^\text{11}\) in *Bunting v. Oregon.*\(^\text{12}\) Nor was it "distinguished". Rather, it was snubbed. The snub was administered by Mr. Justice Nelson, who now wrote for the Court—properly enough, since his doctrine, rejected in the *Veazie Case,*\(^\text{13}\) now prevailed. Such things happen every once in a while in the Supreme Court. This case is, however, unique in that the former leader of the majority now acquiesced.\(^\text{14}\) Justice Bradley alone dissented.

The tax involved in this case was the *general income tax* laid by the federal government during the Civil War, which remained in force for sometime afterwards. The "instrumentality" was a state judge. And the decision was, that the salary of a state judge was not subject to the provisions of a federal law taxing *all* incomes. The decision was made on the supposed authority of *Dobbins*

\(^{10}\) *Supra* notes 2, 7 & 9.

\(^{11}\) 198 U. S. 45 (1905).


\(^{13}\) *Supra* notes 2, 7, 9 & 10.

\(^{14}\) Perhaps the following extract from Albert Bushnell Hart's biography of Chase may throw some light on this point:

"Three years later the court had occasion again to decide fundamental questions of taxation, and between 1869 and 1871 it rendered three decisions, in all of which may be seen the influence of Chase's identification with the financial measures of the Civil War. The first of these, *Veazie Bank v. Fenno*, 1869-70, was a test case upon the most sweeping portion of the national bank legislation, the ten per cent tax on state bank notes, which Chase had so long and so unsuccessfully advocated when Secretary of the Treasury, and which was first imposed by an act of March 3, 1865. The opinion was written by the chief justice, and is in effect a brief history of his purpose and understanding in drafting the national bank legislation.

The general result, then, of the decisions which related to the finances of the Civil War was to uphold the legislation of Congress; and in several instances Chase took the opportunity to vindicate his policy by a brief historical and judicial review of the principles and probable reasons of that legislation. The most important decision was that upholding the tax on state bank notes; and that principle has never since been disturbed."
v. The Commissioners of Erie County\textsuperscript{15} and Weston v. The City of Charleston;\textsuperscript{16} although, as the reader will recall, those cases were decided upon the theory of the \textit{superiority} of the federal government, and in each case the "instrumentality" was taxed \textit{specifically, as such, eo nomnie}, and in the Weston case at least the fact that the tax there involved was regarded by them as an income tax, led to the dissent of some of the judges, and it was assumed in the argument at the bar as well as in the discussion upon the bench that the exemption would not apply in case of an income tax.\textsuperscript{17}

In justice to the Court, however, we must say that the Court did not really cite these cases as \textit{authority}. That would have been too ridiculous. These cases were merely cited as illustrating the proposition that \textit{federal} "instrumentalities" were exempt from state taxation; and the first case,\textsuperscript{18} possibly, as proving the fact that an officer may be regarded as an "instrumentality". The real basis of the decision is the claim of the independence of the state governments and their equality with the federal government, and a \textit{denial of the superiority} of the federal government. Said the Court through Mr. Justice Nelson:

\begin{quote}
"The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the States within the limits of their powers not granted, or, in the language of the 10th Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States.

Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties as-
\end{quote}

\textsuperscript{15} 16 Pet. 435 (1842); note 18, Part One of this paper.
\textsuperscript{16} 2 Pet. 448 (1829); notes 14, 15, 19, 24, 25, 27, Part One of this paper.
\textsuperscript{17} See discussion and quotation \textit{supra} note 16 and cross-references therein.
\textsuperscript{18} \textit{Supra} note 15.
signed to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws." (Italics author's.)

The decision is squarely put on what the Court regards "as a reasonable, if not necessary, consequence" of the new doctrine of equality. It is true, this doctrine of equality is in complete opposition to the hitherto prevailing doctrine of the superiority of the federal government, and this was pointed out in the argument. But this is 1871—in the midst of the reaction which followed the Civil War and Reconstruction, and in the very heart of the "Dreadful Decade." So the Court proceeds boldly to overthrow the doctrine established in *McCulloch v. Maryland* 19 and thereafter maintained for half a century.

"The supremacy of the general government, therefore,"—says the Court—"so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power 'to lay and collect taxes' enables the general government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the States." (Italics author's.)

The Court then proceeds to summarize its position thus:

"It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. *In both cases the exemption rests upon necessary implication*, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of

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19 Supra notes 3, 5 & 8.
what avail are these means if another power may tax them at discretion?” (Italics author's.)

The Court here conveniently forgot that the “necessary implication,” which was the basis of the federal exemption established by Marshall, was the result of the *superiority* of that government and its laws, and not of its *equality*. *Equality* is just as consistent with the right of either government to tax the other’s instrumentalities as with the right of neither. And up to *Collector v. Day*, no decision of the Supreme Court had based a federal exemption on a claim of equality. Also the Court conveniently overlooked the simple fact that the danger from hostile taxation “at discretion” only exists where the taxation is *specific, eo nomine*, and does not exist in cases of *general property* or *general income* taxes; and that is exactly why Marshall and those who followed in his footsteps limited the exemption even of federal instrumentalities to cases of *specific taxation, eo nomine*. Certainly, there is no danger from taxation “at discretion” when the taxing government includes *its own instrumentalities* along with those of the *other* government, as was the case in this instance, and as *must* be the case in every *general property* tax and every *general income* tax.

The opinion closes with the uncomplimentary remark about *Veazie Bank v. Fenno* already referred to.²²

²⁰ *Supra* notes 1, 4 & 6.
²¹ Except in cases involving the problems of *regulation*, which come under a different principle, and which remain unaffected by *Collector v. Day*. Such is the present law governing the problem of the taxation of state banks by the federal government, which remain unimpaired notwithstanding *Collector v. Day*. See further discussion *infra*.
²² “But we are referred”—says Judge Nelson—“to *Veazie Bk. v. Fenno*, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *McCulloch v. Maryland*, namely, ‘That the power to tax involves the power to destroy.’

The power involved was one which had been exercised by the States since the foundation of the government, *and had been*, after the lapse of three-quarters of a century, *annihilated from excessive taxation by the general government*, just as the judicial office in the present case might be, if subject, at all, to taxation by that government.” (Italics author's.)
Mr. Justice Bradley wrote a brief dissenting opinion in which he prophesied the evils which have eventually followed from the decision, although he erred in some of the details suggested—errors due more to the fact that the

23 Mr. Justice Bradley's opinion is as follows: "I dissent from the opinion of the court in this case, because it seems to me that the general government has the same power of taxing the income of officers of the State governments as it has of taxing that of its own officers. It is the common government of all alike; and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the State government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the State governments, their officers, or people; nor can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or functions of the State governments, which are constituent parts of the system or body politic forming the basis on which the general government is founded. The taxation by the State governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation. In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as anyone can be to any interference by the general government with the just powers of the State governments. But no concession of any of the just powers of the general government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made. An extended discussion of the subject would answer no useful purpose."

While this was sufficient for the case, it is noteworthy that Mr. Justice Bradley did not stress the point of the superiority of the Federal Government over the state governments. However, in his dissenting opinion in Union Pacific R. R. Co. v. Peniston, 18 Wall. 5 (1873), in which the present argument was insufficient, Mr. Justice Bradley said: "But, it may be asked, if the States cannot tax a United States corporation created for public and national purposes, on what principle
subsequent decisions were not consistent with one another, rather than to a failure on his part to properly appraise the dangers lurking in Collector v. Day.24

VI.

Since that case is the fountain-head from which flows the great polluted stream of tax-exemption, it is worth our while to look at it a little more closely. Its basis is the so-called sovereignty of the States, and their equality with the federal government within their own sphere. We have already had occasion to say something about this so-called “sovereignty”, and we shall in the further course of this discussion have more to say on the general question of equality. At this point we shall consider, particularly, this question of equality in connection with the judiciary, which is the specific agency of the state governments involved in the case here under consideration.

We lawyers are particularly sensitive to all questions of judicial independence, and are, therefore, apt not to look too critically at general phrases dangling before our eyes that much-desired but never-attained state of blessedness. But in a situation like this, when both the federal government and the states are threatened with serious loss of revenue, and most of us are threatened with a constantly increasing burden of taxation because others of us enjoy unwarranted exemptions, it behooves us to be realists. What, then, realistically speaking, is this vaunted independence of the state judiciary?

This question did not arise for the first time in Collector v. Day.25 On the contrary, it arose at the very
threshold of our existence under the Constitution—for it is, in fact, older than the Constitution itself. And it has had a judicial history under the Constitution—a very interesting history, indeed. Let us look at that history—at least insofar as it is reflected in the decisions of the United States Supreme Court.

The first case involving this subject in the United States Supreme Court is that of United States v. Judge Peters referred to in Part One of this paper. But the pre-history of this case goes back of the adoption of the Constitution. And this pre-history is interesting because it illustrates the difference in the situation of the state-courts under the Confederation and under the Constitution.

Our system of federal courts is, of course, an innovation introduced by the Constitution. But the Confederation had at least one court—the Court of Appeals in prize cases, to which appeals lay in all prize cases from the admiralty courts of the several states. Such an appeal was taken to the Court of Appeals from a decision of the Court of Admiralty of the State of Pennsylvania, which had adjudged that the British sloop Active, which had been captured by the armed brig Convention belonging to the State of Pennsylvania, on September 15, 1778, off the New Jersey coast, was the lawful prize of the State of Pennsylvania. The appeal was taken by Gideon Olmstead and others, citizens of Connecticut, who were in charge of the Active when it was captured by the Convention, and who themselves claimed the brig as a prize. The Court of Appeals sustained the claim of Olmstead and his comrades, reversed the judgment of the Admiralty Court of Pennsylvania, and adjudged the Active and its cargo to be the lawful prize of Olmstead and his comrades. But the Judge and Marshal of the State Court of Admiralty refused to obey the judgment of the Federal Court of Appeals.

"Whereupon"—so reads the record—"the court of appeals declared and ordered to be entered on record, that as the judge and marshal of the court of admiralty of the State of Pennsylvania had

26 5 Cranch 115 (1809); note 28, Part One of this paper.
absolutely and respectively refused obedience to the decree and writ regularly made in and issued from this court, to which they and each of them were and was bound to pay obedience, this court, being unwilling to enter upon any proceedings for contempt, lest consequences might ensue, at this juncture, dangerous to the public peace of the United States, will not proceed further in this affair, nor hear any appeal, until the authority of this court be so settled as to give full efficacy to their decrees and process."

This remarkable record was made in January, 1779. There the matter rested until after the Constitution was adopted and a real federal judiciary set up thereunder.27

After the organization of the federal judicial system under the Constitution, Olmstead and associates brought suit in the federal district court against the state treasurer for the recovery of the proceeds of the Active and cargo, now invested in United States securities, and in January, 1803, they recovered judgment.28 But the State of Pennsylvania, evidently not realizing the change in her "sovereignty" which the adoption of the Constitution had wrought, took the position that her courts, the independent courts of a sovereign state, had adjudged this property to her; and no federal court was going to order her officers what to do with her money. The Legislature thereupon adopted an act which, after declaring that both the Court of Appeals under the Confederation, and the Federal District Court under the Constitution had no jurisdiction in the premises, directed the Governor to take measures to protect the State against the usurpations of the federal judiciary. The Governor approved the act, and announced his readiness to defend the independence of the State and its judiciary by force of arms if necessary. And such was still the popular belief in the sovereignty of the states and the independence of their judiciaries that Judge Peters of the Federal District

27 In the meantime the judge of the Court of Admiralty of Pennsylvania ordered the Active and her cargo sold, and money brought into his court, there to be held subject to the further order of that court. Subsequently, the money was invested in United States securities which were turned over to the state treasurer of Pennsylvania to be held subject to further order.

28 The judgment was entered by default, the State refusing to make an appearance or enter a defense.
Court for the Pennsylvania District, was actually afraid to issue an execution upon his own judgment, and no execution was issued by him for more than six years.  

Finally, Olmstead and associates applied to the United States Supreme Court for a mandamus against Judge Peters, the District Judge, compelling him to issue execution upon his judgment. Thereupon John Marshall, speaking for an unanimous Supreme Court, explained the absurdity of the claim of the States to sovereignty and of their courts to independence.

"If—said he—"the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves." (Italics author's.)

But in establishing the superiority of the federal courts over the state courts, he destroyed the sovereignty of the states, if they had any left, and made the independence of their judiciaries a mockery. For one thing is certain—and let there be no mistake about it—a state which cannot enforce its own laws by means of its own courts as courts of last resort cannot possibly be sovereign, and courts whose decisions are not final cannot possibly be independent.

The struggle flared up again in Martin v. Hunter's Lessee, when the Virginia Court of Appeals tried to retrieve the lost independence of the state judiciaries by attacking the constitutionality of section twenty-five of the Judiciary Act of 1789, which gave the right of appeal from the state courts to the federal Supreme Court in all federal questions—leaving it to the Supreme Court to decide what was a federal question. But the battle was

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29 See in this connection Boudin, 1 Government By Judiciary (1932) 253-54.

30 1 Wheat. 304 (1816); note 9, Part One of this paper.
lost before it was begun, and all that was left for the Supreme Court to do was to read a formal obituary over the departed independence of the state courts.31

With due deference to the temper of the times, and out of respect for the high rank of the departed, there was considerable circumlocution on the part of Mr. Justice Story who delivered the opinion of the Court, but the sentence was death:

"Such"—said the Court—"is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people, solemnly declared, in establishing one great department of that government which was, in many respects, national, and in all, supreme. It is a part of the very same instrument which was to act not merely upon individuals, but upon states; and to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others.

On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one." (Italics author's.)

The decisive fact was that the federal government was supreme over the states, and its organs decided the limits of the power assigned by the Constitution to each.

The last time this question came up in this acute form was on the eve of the Civil War, in the famous Booth

31 It is interesting to note, however, that notwithstanding the firm declaration by the United States Supreme Court of the superiority of the federal judiciary over the state judiciaries, the Supreme Court did not dare to issue its mandate to the state court in the form in which it has since become common, which is a peremptory order to do thus and so. For an account of this interesting case, the long struggle of the Virginia Court of Appeals against the United States Supreme Court, and the division of opinion within the latter court itself, which led to compromise action, see Boudin, 1 Government By Judiciary (1932) 281-290.
Rescue Cases,\textsuperscript{32}—one of the preludes to the Civil War. In denying the right of the state courts to interfere by habeas corpus with the processes of the federal courts, or to pass independently on the constitutionality of acts of Congress—rights asserted by the Supreme Court of Wisconsin—the United States Supreme Court, through Chief Justice Taney, said:

"The Judges of the Supreme Court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a Government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent Government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye."\textsuperscript{33}

\textsuperscript{32} Ableman \textit{v.} Booth and United States \textit{v.} Booth, 21 How. 506 (1859); \textit{In re} Booth, 3 Wis. 13 (1854). For the circumstances of this case, see I Boudin, \textit{op. cit. supra} notes 12, 29 & 31, at 478-483; Gregory, \textit{A Historic Judicial Controversy} (1913) 11 Mich. L. Rev. 179; Winslow, \textit{The Story of a Great Court} (1912).

\textsuperscript{33} It is curious how judges will persist in the use of accepted formulas even while in the act of contradicting or nullifying them. So, here, Mr. Chief Justice Taney still speaks of the separate and distinct sovereignties acting separately and independently of each other, while he is enforcing the superiority of the federal courts over the state courts. For it must be remembered that while, under his decision, it is incompatible with the dignity of an independent government to have the courts of another government issue writs of habeas corpus directed to its officers, the federal courts do not hesitate to issue such writs to officers of the state governments. See \textit{In re} Loney, 134 U. S. 372 (1890); \textit{In re} Neagle, 135 U. S. 1 (1890); Ohio \textit{v.} Thomas, 173 U. S. 276 (1899).
Judge Taney, however, has told only half the story. Not only is the "sphere of action appropriated to the United States * * * far beyond the reach" of the process of the state courts, but the sphere "appropriated" to the state courts is wholly within the keeping of the Federal Supreme Court.

It is an elementary principle of jurisprudence that the courts of an independent state derive their authority wholly from their own government, and that no other government can either add or detract from it. One cannot, therefore, base the jurisdiction of independent courts except on the laws of the sovereignty which creates them. Nor can they be required to enforce laws of other sovereignties or the rights of outsiders except as a matter of comity, in pursuance to their own policy of enforcing the policy of their own states. As a corollary, no criminal prosecution can be based, nor any civil recovery in the nature of a penalty had, in any really independent court, except by virtue of the laws of its own sovereignty. But the federal government has conferred jurisdiction on the state courts, and the Supreme Court has held that rights and penalties created and decreed by federal laws are enforceable in the state courts, thereby creating new jurisdictions for them.34. Not that the Supreme Court has been any too consistent about it.35 But the point is that the jurisdiction of these nominally independent courts is dependent upon, and actually determined for them by, the laws and courts of a sovereignty other than their own. The federal government can also deprive the state courts

34 So Congress has conferred upon the state courts jurisdiction in naturalization cases, and in the enforcement of the federal bankruptcy laws. As a consequence, the state courts have been given jurisdiction to enforce the penal laws of another sovereignty, which is contrary to the first principles of jurisprudence; and, conversely, the federal courts have been enforcing criminal offences against federal laws claimed to have been committed in proceedings in state courts—also a very questionable proceeding under general principles of jurisprudence and international law, if the two systems are really independent. See Claffin v. Houseman, 93 U. S. 130 (1877); Holmgren v. United States, 217 U. S. 509 (1910).

35 See United States v. Fox, 95 U. S. 670 (1878), and discussion of this case in 2 Boudin, op. cit. supra notes 12, 29, 31 & 32, at 197-199.
of jurisdiction by taking away from them jurisdiction over its officers who are otherwise subject to their jurisdiction;36 while at the same time asserting and enforcing jurisdiction over state officers, if rights are claimed against them under its laws.37 Furthermore, the federal government, through its legislative and judicial departments, can force the state courts to take jurisdiction against their will and enforce laws which they say is against the public policy of their states. This was decided in the Second Employers' Liability Case38 after a spirited attempt by a noted Chief Judge of one of the original thirteen states, backed up by the unanimous opinion of his own court, to save the last vestige of the after-a-fashion "independence" of the state courts, and the right of the sub modo "sovereign" states to declare their own public policy through their own courts. Said Chief Judge Baldwin in this last effort on behalf of a lost cause, pleading for at least a modicum or semblance of independence for the state courts:

"By its provisions the sovereignty of each of the states is as carefully guarded as that of the United States. Each was to remain free to maintain its own executive, legislative, and judicial magistracies. * * * The power to maintain a judicial department is one, incident to the inherent sovereignty of each state, 'in respect to which the state is as independent of the general government as that government is independent of the states.' As to that power, the two governments are upon an equality. The Collector v. Day, 11 Wall. 113, 126.

But the superior court was called upon to say whether the plaintiff could under the Act of Congress of 1908 insist on its entertaining an original action, which could only be brought, if at all, under that act, and which could only be sustained by disre-

36 See Justices v. Murray, 9 Wall. 274 (1870).
37 That state officers may be tried in the federal courts for offences against federal laws, and that the states cannot deprive the federal courts of this jurisdiction, is, of course, too well known to require discussion. But attention may be called to the writ of injunction which is being constantly used by the federal courts against state officers, enjoining them from enforcing state laws claimed to be in contravention of the Federal Constitution or federal laws in spheres where the federal law is claimed to be supreme, including the enjoining of state officers from enforcing state taxing laws.
garding many of the requirements of our own law with respect both to pleadings and evidence. It is a statute not in harmony with our system of administrative justice * * * but it is not to be presumed that Congress would (if it could) require those (state courts) of a state to enforce rights * * * which can only be enforced by following modes of procedure not permitted by the state law, and opposed to the public policy which that law declares * * *.

But, if Congress intended to give an action under the Act of April 22, 1908, in the courts of the states, as well as in those of the United States, it is our opinion that the superior court was justified in sustaining the demurrer.

If it be assumed that Congress has power to prescribe a different rule for accidents occurring in or outside of Connecticut in the course of running a railroad train between states, and to create a new statutory action for its enforcement cognizable by the courts of the United States, it cannot in our opinion require such an action to be entertained by the courts of this State.

It would also compel the courts established by a sovereign power, and maintained at its expense for the enforcement of what it deemed justice, to enforce what it deemed injustice."^ {Italics author's.)

It is interesting to note that in this plea Chief Judge Baldwin relied chiefly on Collector v. Day. 40 But the United States Supreme Court brushed this plea aside with a stern rebuke, and did not even dignify Collector v. Day by mentioning it in order to "distinguish" it." Said the Supreme Court, unanimously:

"The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State


40 Supra notes 1, 4, 6, 20, 21, 22, 23, 24 & 25. It is interesting to note that no case earlier than Collector v. Day is referred to by Judge Baldwin, although the question of the relations of the two judicial systems has been before the Supreme Court since the Judge Peters Case (Supra note 26).

41 Perhaps it is in order to mention here that in addition to forcing the state courts to take jurisdiction of a case which they claim was contrary to the public policy of the state, the federal statute which they were asked to enforce also provided a different distribution of the proceeds of the litigation from that provided by the state laws for the distribution of the estate of a decedent (this being an action for the causing of death). Judge Baldwin stressed this point, and it was likewise disregarded by the Supreme Court.
are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State * * *.

We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." (Italics author's.)

But Collector v. Day is still the mainstay of the "instrumentalities" now enjoying exemption from taxation, and the pièce de résistance of all those who are seeking to extend these exemptions.42

VII.

Collector v. Day 43 opened the floodgates of claims for exemption both for federal and state "instrumentalities." Now that the states were placed on a plane of equality with the federal government, each exemption in favor of the federal government was made the basis of a similar, or even more extended, exemption in favor of the state government. Occasionally a particular exemption was granted first to state instrumentalities, and then extended to the federal government. The latter was, of course, a logical necessity. The former was not so, however, and sometimes the courts stopped in their course to recall that,

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42 While careless judges, and, more often, careless counsel, often commit the same errors as do legal writers in going beyond Collector v. Day for the authority sustaining exemptions of state "instrumentalities," careful judges and lawyers alike never cite any case earlier than Collector v. Day as authority for such exemption. See Chief Justice Hughes' opinion in Willcuts v. Bunn, 282 U. S. 216 (1931), and the very careful argument of Messrs. Maxwell Everts, Richard Lindabury, Julien T. Davies, Frederic R. Coudert, and Richard Reid Rogers, in Flint v. Stone Tracy Co., 220 U. S. 107 (1911), note 39, Part One of this paper.

43 Supra notes 1, 4, 6, 20, 21, 22, 23, 24, 25 & 40.
after all, the federal government was superior to the state governments, and, therefore, the exemptions granted in favor of the federal government's so-called "instrumentalities" could not be extended mechanically to cover state "instrumentalities" as well.

The decisions over the sixty year period between Collector v. Day and Burnett v. Coronado Oil & Gas Co.\(^4\) constitute a jungle of confused and confusing reasoning, principles and theories; the net result of which, however, was a vast extension of the exemption-field, evoking, at times, vehement protest from minorities in the court itself, and compelling statesmen to look about for a remedy which would do away with this great and growing evil.

In United States v. B. & O. R. R. Co.,\(^4\) it was decided that bonds of a railroad company held by a municipality were exempt from federal taxation. The law in question taxed all railroad bonds, and the action was brought not against the municipality but against the railroad company, as the law provided that the railroads were to pay the tax. The Supreme Court held, however, that this was in reality a tax against the bondholders, and that municipalities which were bondholders were exempt. The actual decision was that Congress had not intended to tax the property of municipalities, but the court was of the opinion that Congress cannot do so. Mr. Justice Bradley concurred on the ground that Congress did not intend to tax the property of municipal corporations, and reserved the question of whether Congress could do so. Justices Clifford and Miller dissented, in an opinion written by Mr. Justice Clifford, in which he said:

"Property owned by a municipal corporation and used as means or instruments for conducting the public affairs of the municipality may not be subject to federal taxation, as it may perhaps be regarded as falling within the implied exemption established by a recent decision of this court. Collector v. Day, 11 Wall., 113. Well-founded doubts, however, may arise even upon that subject, as the tax in that case was levied directly upon the salary of a judicial officer, and the opinion of the court is carefully limited to the case then before the court. But concede, for the sake of the

\(^4\) 285 U. S. 393 (1932).
\(^4\) 17 Wall. 322 (1873).
argument, that the means and instruments for conducting the public affairs of the municipality are entitled to the same exemption from such taxation as the revenues of the State, it by no means follows that the private property owned by such a corporation, and held merely as private property in a proprietary right, and used merely in a commercial sense for the income, gains, and profits, is not taxable just the same as property owned by an individual or any other corporation. Such a right is one which may be of great value to the government in time of war and imminent public danger, and one which the United States ought never to surrender.

Corporations of the kind are very numerous, and they may and often do own large amounts of bank stock, bonds, and stocks of railroads, vacant lots and other real estate of great value, and many other species of personal property and choses in action never used or intended to be used as means or instruments for conducting the public affairs of the municipality, and in respect to all such property the right of Congress to pass laws subjecting the same to taxation with the property of the citizens generally is as clear, in my judgment, as it is that the power to lay and collect taxes, duties, imposts, and excises is vested by the Constitution in the national legislature."

Forbes v. Gracey 46 held that a Nevada statute taxing the proceeds of mines on lands, title to which was in the United States, did not tax a federal instrumentality and was, therefore, constitutional. This decision is chiefly interesting in the light of what subsequently happened in the particular field which it covers.

The same is true of Merchants' National Bank of Little Rock v. United States, 47 in which the Supreme Court upheld the constitutionality of an act of Congress declaring that "every national banking association, state bank or banker or association, shall pay a tax of ten per centum on the amount of notes of any town, city or municipal corporation paid out by them." The decision was made on the authority of Veazie Bank v. Fenno, 48—on the ground that the tax in question was not on the obligations themselves but on their circulation.

Western Union Telegraph Co. v. Texas 49 held that states cannot tax "instruments of foreign and interstate com-

46 94 U. S. 762 (1877).
47 101 U. S. 1 (1880).
48 Supra notes 2, 7, 9, 10, 13 & 22.
49 105 U. S. 460 (1882).
merce"; and that, therefore, a state tax on messages sent to or from the offices of the Western Union Telegraph Company within the state was invalid unless it was restricted to messages sent between points within the state.

Van Brocklin v. Anderson\textsuperscript{50} decided for the first time that property of the United States was exempt from general state taxation. This fact is extremely interesting in the history of our subject, and the long opinion written by Mr. Justice Gray to justify the decision is even more interesting. It was generally assumed in the discussions of the question of exemption for a long time period to the decision of this case that the property of the United States government was not subject to taxation by the states, and most people would have asserted that there never was any question about it. The fact is, however, that up to the decision of this case the question was never actually decided by the United States Supreme Court. Furthermore, Mr. Justice Gray's opinion shows that the matter had been disputed by high professional authority and actually decided adversely in some state courts, and that the United States Supreme Court itself was equally divided on the subject as late as the year 1850.\textsuperscript{51} And it is of no little interest in following the development of the law of this subject that Collector v. Day\textsuperscript{52} and United States v. B. & O. R. R.

\textsuperscript{50} 117 U. S. 151 (1886).

\textsuperscript{51} Mr. Justice Gray's opinion shows that in two cases the Supreme Court of Pennsylvania decided against the exemption of federal instrumentalities from state taxation. The second case, Roach v. Philadelphia County, 2 Am. Law Journal (N. S.), 444 (1845), is particularly interesting. That was a suit brought by the County of Philadelphia against the Treasurer of the Mint of the United States to recover state taxes which had been assessed against the Mint Building and the lot of ground upon which it stood. Both were property of the United States. The state court upheld the right of the state to impose the tax in question. On appeal to the United States Supreme Court, that court was evenly divided. As a result, the judgment of the state court upholding the tax was affirmed by the United States Supreme Court. (Gray, J., in the Van Brocklin Case, supra note 50, said: "In Roach v. Phila. Co. a tax on the United States mint was held valid, but no opinion is reported.") That was, therefore, the law as settled by the Supreme Court itself, until it was upset in the Van Brocklin Case in 1886, supra note 50.

\textsuperscript{52} Supra notes 1, 4, 6, 20, 21, 22, 23, 24, 25, 40 & 43.
Co. were used by the Court as authorities on which to base the conclusion that such an exemption existed in favor of the United States government.

In Mercantile National Bank of N. Y. v. Mayor the Supreme Court stated for the first time, obiter, that the federal government cannot tax state or municipal bonds held by private individuals or corporations. California v. Central Pacific R. R. Co. held that corporations which held franchises from the federal government and state governments could not be taxed by the states on their franchises because that involved the taxation of a franchise granted by the United States. Mr. Justice Bradley wrote the unanimous opinion of the court in which it was declared that "no persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise."

This, too, is significant in view of the later history of our subject, and should be carefully noted. Manhattan Co. v. Blake decided that a state bank deposit is not exempt from federal taxation because the money belonged to a state for which the bank is acting as disbursing agent. The right of the federal government to tax deposits in state banks was conceded, and it was claimed that this was not an ordinary deposit, but that the bank was merely acting as agent for the state. The Court in its opinion differentiated between the character of the bank in its capacity as a bank holding the money of the state on deposit, and its character as disbursing agent for the state, which was covered by a separate agreement. The Court also pointed out that the exemption was sought by the bank and not by the state. Unfortunately the courts are not always so alert to observe who actually benefits by the exemption.

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53 Supra note 45.
54 121 U. S. 138 (1887).
55 127 U. S. 1 (1888).
56 148 U. S. 412 (1893).
57 The importance which Collector v. Day (Supra notes 1, 4, 6, 20, 21, 22, 23, 24, 25, 40, 43 & 52) had assumed by this time is shown by the fact that counsel for the bank, in the citation of authorities in support of his position, cited that case ahead of McCulloch v. Maryland (Supra notes 3, 5, 8, 19, 22 & 23), Collector v. Day being made the leading authority.
In the famous *Income Tax Cases,* the Supreme Court *decided* for the first time that a federal tax upon the *income* derived by private persons or corporations from municipal bonds is a tax on the power of the state to borrow money and is, therefore, unconstitutional. Although the case was decided by a divided court, there seems to have been no dissent from that part of the decision. In delivering the opinion of the court, Chief Justice Fuller said on this point:

"Another question is directly presented by the record as to the validity of the tax levied by the act upon the income derived from municipal bonds. The averment in the bill is that the defendant company owns two millions of the municipal bonds of the city of New York, from which it derives an annual income of $60,000, and that the directors of the company intend to return and pay the taxes on the income so derived.

The Constitution contemplates the independent exercise by the Nation and the State, severally, of their constitutional powers.

As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.

A municipal corporation is the representative of the State and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal taxation. *Buffington v. Day,* 11 Wall. 115; *United States v. Baltimore & O. R. Co.,* 17 Wall. 322, 332."

In *Ambrosini v. United States,* it was held that a liquor dealer who is required to give a bond to the state as a condition of his being licensed as such, is not required to affix a United States revenue stamp on the bond under a general stamp *tax* law, on the ground that the bond to be given by the liquor dealer to the state is a "state instrumentality", and as such cannot be taken by the United States.

But in *South Carolina v. United States,* it was held

58 *Pollock v. Farmers' Loan & Trust Co.,* 157 U. S. 429 (1895); note 4, Part One of this paper.
59 187 U. S. 1 (1902).
60 199 U. S. 437 (1905).
by a divided court that state officers, conducting liquor establishments on behalf of the state, under the so-called dispensary system for state liquor control, are subject to the general license tax of the federal government.

In both cases the federal tax was a purely revenue-raising measure, and the state license in the first case and the state dispensary in the second were intended to regulate the liquor trade; the only difference between the two cases being, insofar as the state was concerned, that in the second case the regulation went further than in the first case, in that the liquor itself was owned by the state and could only be sold by its officers.

In the second case the argument on behalf of the state was thus stated by Mr. Justice Brewer who delivered the opinion of the Court:

"It cannot be doubted that the regulation of the sale of liquor comes within the scope of the police power, and equally true that the police power is in its fullest and broadest sense reserved to the states; that the mode of exercising that power is left to their discretion, and is not subject to national supervision. But if Congress may tax the agents of the state charged with the duty of selling intoxicating liquors, it in effect assumes a certain control over this police power, and thus may embarrass and even thwart the attempt of the state to carry on this mode of regulation."

But this argument on behalf of the state was held not to prevail against the taxing power of the federal government, which the court feared might be seriously curtailed if the contention of the state be granted. Mr. Justice Brewer, therefore, continued:

"The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. Vance v. W. A. Vandercook Co., (No. 1), 170 U. S. 438. The profits from the business in the year 1901, as appears from the findings of the fact were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down."

Mr. Justice White, speaking on behalf of himself and
Justices Peckham and McKenna, elaborated on the argument of the absolute right of the state to regulate the liquor traffic, and then appealed to the authority of the Ambrosini Case,\textsuperscript{61} saying:

"And, lastly, in Ambrosini v. United States (1902), 187 U. S. 1, * * * it was held that Congress could not impose a stamp tax upon a bond which the state law required to be given as a prerequisite to the right to sell liquor.

Is the ruling now made reconcilable with the cases just referred to? In other words, is it consistent with the theory of the Constitution as interpreted from the beginning? In order to give the reasons which convince me that it is not, let me review the contentions which are relied upon to support the ruling."

And, it must be conceded that if the equality of the states with the federal government be granted, then Mr. Justice White was undoubtedly right in his contention that the Constitution "as interpreted from the beginning" clearly forbade the interference by the federal government, through its taxing power, with the power of regulation reserved to the states. What Mr. Justice White overlooked is the fact that the Constitution "as interpreted from the beginning" up to Collector v. Day\textsuperscript{62} not only did not concede that equality, but, on the contrary, proceeded upon the opposite theory of the superiority of the federal government. Not one of the cases cited by him, therefore, which antedates Collector v. Day was properly in point. Of course, Collector v. Day is supposed to have changed all that, so that now, as we shall see later, the equality of the states is supposed to be the fundamental position. But that position has never been consistently maintained, and this is one of the cases in which it was denied, even though in direct and flagrant opposition to the holding in the Ambrosini Case.\textsuperscript{63}

In Home Sav. Bank v. City of Des Moines\textsuperscript{64} it was decided by a divided court that a state tax upon state banks which taxes its shares, the tax being measured by the value of its property and being payable by the bank,

\textsuperscript{61} Supra note 59.
\textsuperscript{62} Supra notes 1, 4, 6, 20, 21, 22, 23, 24, 25, 40, 43, 52 & 57.
\textsuperscript{63} Supra notes 59 & 61.
\textsuperscript{64} 205 U. S. 503 (1907).
is invalid insofar as the property assessed included federal securities. The majority of the court claimed that the case was covered by the Bank Tax Cases discussed in the first part of this paper, but the minority evidently thought that this case went beyond that, and that it involved an extension of the exemption, and it would seem that the minority was right.

Farmers & Mechanics Sav. Bank v. Minnesota declared an exemption from state taxation in favor of bonds issued by the municipality of a Territory, on the ground that they were a federal instrumentality, although at the time the tax was laid the Territory had become a State and, therefore, ceased to be part of the federal domain. Also, the tax in question was laid on the surplus of the owner-bank, after deducting from its assets the amount of all of its deposits, and it appeared that the entire assets amounted to about $12,000,000., while the bonds in question amounted to $700,000. The bonds, therefore, could just as well have been attributed to the deposits, which were not taxed, as to the surplus; and in any event would constitute only a very small part of the surplus which had been taxed.

The Court in its opinion referred to the question as novel, but upon examination held that this case was covered by the Bank Tax Cases already referred to. But it is quite clear that there was an extension in two directions—as to the territory involved, as well as to the nature of the exemption, since in the Bank Tax Cases, the tax was laid on all of the assets, which necessarily included the federal securities there under consideration.

In Gillespie v. Oklahoma, the Supreme Court held by a divided court that a lessee of restricted Indian mineral lands, the title to which is in the United States, need not

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65 Note 30, Part One of this paper.
66 232 U. S. 516 (1914).
67 The claim of the bank was that the entire amount of the bonds should have been deducted in making the assessment. The Court did not say in so many words that it sustained the claim in its entirety, but from the fact that the Court did not give any specific instructions, it would seem that it considered the whole amount should be exempted.
68 Supra note 65.
pay a general income tax laid by a state upon all its citizens, and taxing income from whatever source, on the ground that in taxing the income derived by the lessee from his share of oil and gas received under the leased lands, the state was taxing a federal instrumentality.

In *Metcalf v. Mitchell,*70 the Supreme Court refused to extend the exemption from the federal income tax to an engineer who claimed exemption on the ground that he received his income from a state or its subdivisions as compensation for services rendered as consultant in the construction of water works. The holding was that:

“One who is not an officer or employee of a state, does not establish exemption from the federal income tax merely by showing that the income is received as compensation for service rendered under a contract with the state. * * *” 71

In *Northwestern Mutual Life Insurance Co. v. Wisconsin,*72 it was held that a franchise tax imposed by a state upon a domestic insurance company measured by a percentage of its gross receipts is invalid insofar as it includes interest derived from United States bonds. Mr. Justice McReynolds in delivering the opinion of the court said:

“Certainly since *Gillespie v. Oklahoma,* 257 U. S. 501, 505, it has been the settled doctrine that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom.”

*Panhandle Oil Co. v. Mississippi*73 declared an exemption from a general state gasoline tax in favor of a dealer in gasoline on sales made by him to the coast guard fleet and the Veterans’ Hospital on the ground that to tax a

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70 269 U. S. 514 (1926).
71 As this is being written, one of the leading federal attorneys of the country has submitted a claim for a refund of an income tax paid by him on a fee received by him from a state while in private practice for carrying on a prosecution on behalf of the state under a special appointment as Deputy Attorney-General of the state. The basis of the claim presumably is the fact that the word “officer” will cover this special designation. Hope springs eternal in the human breast—and in the case of claims for this kind of tax exemption, these hopes are usually justified.
72 275 U. S. 136 (1927).
73 277 U. S. 218 (1928).
dealer's income from such sales would be taxing federal instrumentalities. The decision was by a divided court—Mr. Justices Holmes, Brandeis, McReynolds and Stone dissenting. Mr. Justice Butler delivered the opinion of the Court, and the theory of the exemption is stated by him thus:

"The United States is empowered by the Constitution to maintain and operate the fleet and hospital. Art. I, Sec. 8. That authorization and laws enacted pursuant thereto are supreme (art. VI); and, in case of conflict, they control state enactments. The States may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions."

Among the authorities cited by Mr. Justice Butler in support of the decision were Gillespie v. Oklahoma74 and Northwestern Mutual Life Insurance Co. v. Wisconsin.75 Mr. Justice Holmes wrote the opinion in the first of these cases, and Mr. Justice McReynolds in the second. Both now dissented,—showing that they considered the decision an extension beyond the cases cited, and a reading of Mr. Justice Holmes' dissenting opinion leaves no room for any doubt on that point. Among other things, Mr. Justice Holmes said:

"To come down more closely to the question before us, when the Government comes into a State to purchase, I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else * * *

I am not aware that the President, the Members of Congress, the Judiciary or, to come nearer to the case in hand, the Coast Guard or the officials of the Veterans' Hospital, because they are instrumentalities of government and cannot function naked and unfed, hitherto have been held entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales; and I had not supposed that the butchers and tailors could omit from their tax returns all receipts from the large class of customers to which I have referred."

74 Supra note 69.
75 Supra note 72.
Willcuts v. Bunn holds that gains derived by a dealer from the sale of municipal bonds not issued at a discount are subject to federal income tax. Impliedly it holds that gains derived by a trader from the sale of municipal bonds which happen to be sold at a discount are not subject to federal income tax, on the theory that by taxing the trader in these bonds the federal government is taxing a state instrumentality. Mr. Justice Hughes delivered the opinion in this case; and, aside from the decision itself, the opinion is interesting for two statements. The first statement refers to the general theory of exemption as now enforced by the United States Supreme Court. This theory is thus stated by the present Chief Justice:

"The familiar aphorism is 'that as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the states, so are those of the states exempt from taxation by the general government.'"

Evidently the present Chief Justice is much concerned for the dignity of the states and believes in their equality with the federal government. But, being a practical man, he could not shut his eyes to the fact that it was not the state which asked for the exemption, but a trader in its securities. So he says later in his opinion:

"No State has ever appeared at the bar of this court to complain of this Federal tax, and it is not without significance that in the present instance the States of New York and Massachusetts do appear here as amici curiae in defense of the tax."

Whether or not the eyes of the Court were opened by the fact that two states actually appeared as amici curiae in favor of the tax cannot, of course, be stated with certainty. One thing is certain, however: Had the courts always waited until the federal government came to the defense of its instrumentalities and the state governments to the defense of their instrumentalities, many of the exemptions established by its decisions would never have been established.

\[76 \text{Supra note 42.}\]
In *Indian Motocycle Co. v. United States* 77 it was held that a manufacturer of, or dealer in, motor cycles need not pay the federal income tax on motor cycles sold to a municipality for use in its police service,—on the ground that for the federal government to exact the income tax would be taxing a state instrumentality. The decision was again by a divided court, Justices Brandeis and Stone dissenting. In his dissenting opinion, Mr. Justice Stone said:

"The implied immunity of one government, either national or state, from taxation by the other should not be enlarged. Immunity of the one necessarily involves curtailment of the other's sovereign power to tax. The practical effect of enlargement is commonly to relieve individuals from a tax, at the expense of the government imposing it, without substantial benefit to the government for whose theoretical advantage the immunity is invoked * * *

This is especially the case where, as here, the sole ground of the immunity is that, although the tax is an excise collected by one government from an individual normally subject to it, the incidence of the tax may conceivably be shifted to the other government. In such a case it is not clear how a recovery by the taxpayer would benefit directly the government supposed to be burdened; and the assumption of indirect benefit in the case of a tax of this type necessarily rests upon speculation rather than reality. See *Lash's Products Co. v. United States*, 278 U. S. 175. * * * It is significant that neither the federal nor any state government has appeared by intervention or otherwise to support this claim of immunity in cases in which the taxpayer has urged it upon us."

The most astonishing thing about this case is that Mr. Justice Holmes, who so vigorously dissented in the *Panhandle Oil Case*, 78 considered that case "controlling in principle" in this case, and he, therefore, "acquiesced" in the decision. This is doubly curious, because, as a matter of fact, the *Panhandle Oil Case* was not at all controlling, since Mr. Justice Butler in delivering the opinion of the Court in that case specifically placed that decision on the *superiority* of the federal government over the state governments, as can be seen from the

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77 283 U. S. 570 (1931).
78 *Supra* note 73.
passage of that opinion quoted above in the discussion of that case. 78a

We now come to Burnett v. Coronado Oil & Gas Co., 79 the last of the series here under consideration. This case involved a state "instrumentality" of the same kind as the federal "instrumentality" involved in Gillespie v. Oklahoma 80—namely, an oil and gas lease of state school lands. And the decision, following Gillespie v. Oklahoma, was that the profits from such a lease are not subject to the general federal income tax. The decision was by a divided court, Mr. Justices Brandeis, Stone, Roberts and Cardozo, dissenting. It should be noted here that shortly before the Coronado Case came up, the Court had decided the case of Group No. 1 Oil Corp. v. Bass, 81 in which a similar federal "instrumentality" was held to be subject to state taxation. The decision was based, however, on one of those distinctions without a difference, which have become so prevalent in this particular branch of the law since the Supreme Court abandoned the original principle upon which McCulloch v. Maryland 82 was decided. The question now was: Should the Court follow its hyper-technical distinction established in Group No. 1 83 and follow Gillespie v. Oklahoma, 84 or should it look at the substance of the matter and follow the Group No. 1 Case. The majority of the Court decided in favor of the former alternative, which was formally the correct one. The minority, therefore, took the broad ground that Gillespie v. Oklahoma ought to be frankly overruled, instead of merely distinguished. Speaking for himself, and Mr. Justices Roberts and Cardozo, Mr. Justice Stone said:

"I think the judgment below should be reversed and Gillespie v. Oklahoma, 257 U. S. 501, should be overruled. Neither can stand as the law of this Court consistently with the principles recently reaffirmed in Group No. 1 Oil Corp. v. Bass, 283 U. S. 279."

78a Supra p. 280.
79 Supra note 44.
80 Supra notes 69 & 74.
81 283 U. S. 279 (1931).
82 Supra notes 3, 5, 8, 19, 22, 23 & 57.
83 Supra note 81.
84 Supra notes 69, 74 & 80.
Mr. Justice Stone then proceeds to quote the decision in the last-mentioned case to the effect that "remote and indirect effects upon the one government of such a non-discriminatory tax by the other have never been considered adequate grounds for thus aiding the one at the expense of the other." He then proceeds:

"The doctrine thus announced was not a new one. More than fifty years before, and long before the decision in the Gillespie Case, it had been definitely decided in Forbes v. Gracey. * * *

In deciding the Group No. 1 Oil Corp. Case, it was not necessary to determine whether the result in that case would have been different if the oil, from the sale of which the taxpayer derived his income, had become his only when severed from the soil, or whether there were other distinguishing features between that case and the Gillespie Case... It was enough, there, that, as the taxed income was derived from the lessee's sale of the oil, title to which was, by the lease, vested in him before severance, the case was definitely controlled by precedents whose avowed principles the Court approved. Now, we are concerned with a lease identical with that involved in the Gillespie Case, and comparison of it with the Texas lease is unavoidable. If we can find no distinction of substance between the operation and effect of the Texas leases and the Oklahoma leases, the Gillespie Case should no longer be followed. That no such distinction can be drawn is obvious."

Mr. Justice Brandeis wrote one of those dissenting opinions for which he has come to be famous. Unfortunately we cannot discuss it here at length, but we cannot refrain from quoting the opening paragraph, which reads as follows:

"Under the rule of Gillespie v. Oklahoma vast private incomes are being given immunity from State and Federal taxation. I agree with Mr. Justice Stone that that case was wrongly decided and should now be frankly overruled. Merely to construe strictly its doctrine will not adequately protect the public revenues. Compare Jaybird Min. Co. v. Weir, 271 U. S. 609 * * * ."

VIII.

In examining the development of the law of our subject since Collector v. Day,85 the writer purposely omitted one case—perhaps the most important of the entire series.

85 Supra notes 1, 4, 6, 20, 21, 22, 23, 24, 25, 40, 43, 52, 57 & 62.
The writer did that for two reasons: first, because of the importance of the case, which sets it apart from the others, and requires more detailed examination; and, second, because it illustrates a peculiarity of our governmental system to which I have called attention elsewhere, and which is rather important in this connection. Many, if not most, of the cases, the aggregate effect of which was the evil now sought to be remedied by constitutional amendment, were obscure cases of which the public knew very little. In some of these cases, at least, even the government involved hardly knew what was taking place. The cases were decided as a matter of routine—sometimes as a matter of routine litigation between private parties. That does not mean that the court decided them all carelessly. As anyone who reads the Van Brocklin Case may see, the Supreme Court sometimes takes as much care in deciding a private case which may have serious consequences as if those concerned in these consequences were actually before the Court. That, however, is not always the case. At any rate, even when the Court takes great pains to examine the case very carefully, there is not that stimulus of public attention which every governmental agency requires in order to do its best. It is, at least, a plausible suggestion that had the Court, in deciding Gillespie v. Oklahoma, known what its consequences would be, as stated by Mr. Justice Brandeis in the Coronado Case, the decision might have been the other way. It is because of this that the writer considers Flint v. Stone Tracy Co. of such great importance in this connection.

This case, which involved the Federal Corporation Tax of 1909, was fought out in the grand style—the manner of the Legal Tender Cases and the Income Tax Cases. The array of counsel was as great and as dis-

86 Boudin, op. cit. supra notes 12, 29, 31, 32 & 35.
87 Supra notes 50 & 51.
88 Supra notes 69, 74, 80 & 84.
89 Supra notes 44 & 79.
90 Supra note 42.
91 12 Wall. 457 (1871).
92 Supra note 58.
tungished, and the arguments presented were, in the main, as learned and as careful. The substance of the argument against the tax 93 was that Collector v. Day 94 had decided that state "instrumentalities" were on a basis of equality with federal "instrumentalities"; and California v. Central Pacific R. R. Co. 95 had decided that a franchise was an instrumentality, that incorporation was a franchise, and that, therefore, the states could not tax a corporation which was either incorporated by, or derived any franchise from, the United States government. Ergo, the federal government has no power to tax corporations which derive their corporate franchises from the states. To complete the parallel with California v. Central Pacific R. R. Co., some of the corporations involved in this litigation were public service corporations. 96 But the arguments were rejected, and the right of the federal government to levy the tax sustained, in a unanimous opinion of the Supreme Court, delivered by Mr. Justice Day. In his opinion Mr. Justice Day said:

"It is next contended that the attempted taxation is void because it levies a tax upon the exclusive right of a State to grant corporate franchises, because it taxes franchises which are the creation of the State in its sovereign right and authority. This proposition is rested upon the implied limitation upon the powers of National and state governments to take action which encroaches upon or cripples the exercise of the exclusive power of sovereignty in the other. It has been held in a number of cases that the State cannot tax franchises created by the United States or the agencies or corporations which are created for the purpose of carrying out governmental functions of the United States * * *

While the tax in this case, as we have construed the statute, is imposed upon the exercise of the privilege of doing business in a

93 There were other questions raised in this case, and one of these, particularly, was argued at great length, namely, that the tax was a direct and income tax, and, therefore, within the ban of the Income Tax Cases, but we are not here concerned with those phases of the case.
94 Supra notes 1, 4, 6, 20, 21, 22, 23, 24, 25, 40, 43, 52, 57, 62 & 85.
95 Supra note 55.
96 In his brief, Mr. Frederic R. Coudert said: "If the precise case here has not before arisen, its exact converse has, and if it be admitted, as it always has been, and still must be, that this principle of immunity is reciprocal, then indeed it must be conceded that this court has adjudicated the very question here involved."
corporate capacity, as such business is done under authority of State franchises, it becomes necessary to consider in this connection the right of the Federal Government to tax the activities of private corporations which arise from the exercise of franchises granted by the state in creating and conferring powers upon such corporations. We think it is the result of the cases heretofore decided in this court, that such business activities, though exercised because of state-created franchises, are not beyond the taxing power of the United States. Taxes upon rights exercised under grants of state franchises were sustained by this Court in Railroad Co. v. Collector, 100 U. S. 595; United States v. Erie R. R. Co., 106 U. S. 327; Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397. * * *

The question was raised and decided in the case of Veazie Bank v. Fenno, 8 Wall. 533. In that well-known case a tax upon the notes of a state bank issued for circulation was sustained. Mr. Chief Justice Chase, in the course of the opinion, said:

'Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect? * * *

It is true that the decision in the Veazie Bank Case was also placed, in a measure, upon the authority of the United States to control the circulating medium of the country, but the force of the reasoning, which we have quoted, has not been denied or departed from.

In Thomas v. United States, 192 U. S. 363, a Federal tax on the transfer of corporate shares in state corporations was upheld as a tax upon business transacted in the exercise of privileges afforded by the state laws in respect to corporations.

In Nicol v. Ames, 173 U. S. 509, a Federal tax was sustained upon the enjoyment of privileges afforded by a board of trade incorporated by the State of Illinois. * * *

We, therefore, reach the conclusion that the mere fact that the business taxed is done in pursuance of authority granted by a State in the creation of private corporations does not exempt it from the exercise of Federal authority to levy excise taxes upon such privileges."

So much for ordinary corporations. As to public-service corporations, Mr. Justice Day said:

"We come to the question: Is a so-called public-service corporation, such as the Coney Island and Brooklyn Railroad Company, in Case No. 409, and the Interborough Rapid Transit Company, No. 442, exempted from the operation of this statute? In the case of South Carolina v. United States, 199 U. S. 487, this court held that when a State, acting within its lawful authority, undertook to carry on the liquor business, it did not withdraw the agencies
of the State carrying on the traffic from the operation of the internal revenue laws of the United States. If a State may not thus withdraw from the operation of a Federal taxing law a subject-matter of such taxation, it is difficult to see how the incorporation of companies whose service, though of a public nature, is, nevertheless, with a view to private profit, can have the effect of denying the Federal right to reach such properties and activities for the purposes of revenue.

It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations, and, though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred."

This brings us back to the question: What is the after-a-fashion equality between the federal and state governments, supposed to have been established by Collector v. Day? 97

That it is not real equality is quite obvious. We have shown in an earlier portion of this paper that the state courts are entirely subordinate to the federal courts. But this is not a peculiarity of the judicial branch of our government. It is true that the President of the United States cannot send his order to the Governor of a state in the way the Chief Justice of the United States Supreme Court sends his order to the Chief Judge, or any other judge, of a state court. Nor can Congress send any such order to a state legislature. These, however, are purely matters of form which do not affect the substance of things, and that substance is—that wherever the federal government is competent to act at all, it is superior to the state governments and not on a basis of equality with them. When the United States Supreme Court ordered the state courts of Connecticut to entertain jurisdiction in cases under the Federal Employers' Liability Act, it was not merely because the United States Supreme Court is superior to the state courts, but because Congress is su-

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97 Supra notes 1, 4, 6, 20, 21, 22, 23, 24, 25, 40, 43, 52, 57, 62, 85 & 94.
perior to the state legislatures, and, therefore, can declare the public policy of the State of Connecticut to be different from what the state legislature has declared it to be, either by direct legislation or by failing to change what its courts have declared to be the common law of the state.

Lack of space does not permit the enumeration here of the manifold ways in which the superiority of the federal government over the state governments manifests itself. A few examples will suffice.

Notwithstanding the criticism by the majority of the Court in Collector v. Day \(^98\) of the decision in Veazie Bank v. Fenno,\(^99\) that decision still seems to be the law in the particular field which it covers—the regulation of the banking business of the country. This is so not only because Veazie Bank v. Fenno was specifically reaffirmed in Flint v. Stone Tracy Co.,\(^100\) but also because it actually has been applied continuously in manifold ways ever since it was announced in 1869, and just now the chances are very good that it will be made the legal sanction for a uniform system of banking under national regulation, the necessity for which has become apparent during the present depression. And since the decision in Flint v. Stone Tracy Co., state corporations are as subject to the taxing power of the federal government as are corporations organized under federal law, while the latter, of course, are exempt from state taxation.

Theoretically, the state governments are as sovereign and independent in the regulation of intra-state commerce as the federal government is in the regulation of inter-state and foreign commerce. So the text-books tell us, and the statements of the text-books are a correct transcript of many statements of the United States Supreme Court and of its judges in adjudicated cases. In reality, however, this supposed equality is a snare and a delusion. It is, in fact, non-existent. This becomes obvious when we discuss the taxing power in connection with the power of regulation—a connection which is becoming more important from day to day, so that today taxation is perhaps

\(^{98}\) Ibid.

\(^{99}\) Supra notes 2, 7, 9, 10, 13, 22 & 48.

\(^{100}\) Supra notes 42 & 90.
the most important form of regulation. We know from Marshall's decision in *Brown v. Maryland*,¹⁰¹ that the states cannot tax importers of foreign merchandise, and this rule applies also to those who engage in inter-state commerce. But the federal government can tax everyone who engages in *intra*-state commerce, as we all know from the multifarious sales-taxes which we have been compelled to pay on all kinds of articles purchased in *intra*-state commerce for use within states by persons who perhaps never went beyond the boundaries of their state. The State of New York has just adopted a sales-tax. If the law is well drawn, it specifically exempts inter-state and foreign commerce from its operation, but whether or not it does so, it will not be applicable to such commerce. If, on the other hand, the federal government again adopts a sales tax, as some expect it to do in the near future, that tax will apply to intra-state commerce as well as to inter-state commerce.

We know from *Western Union Telegraph Co. v. Texas*¹⁰² that the states cannot tax messages sent into or coming out from the state. But the Federal government can tax every telegraph or telephone message used in intra-state commerce, and also every check, draft, or express-receipt used in such commerce.

In *Helson v. Kentucky*¹⁰³ it was held that the state could not collect a perfectly valid and constitutional tax on the *use* of gasoline from a ferry company operating a ferry between two states, *on the gas consumed within the state* in the operation of the ferry, because that would be taxing inter-state commerce. And in *Superior Oil Co. v. State of Mississippi*¹⁰⁴ two of the judges of the Supreme Court thought that such a state tax could not be collected even in a case where a fishing corporation, to avoid the tax, practically shipped the gasoline to itself in another state, and then shipped it back into the state for the purpose of using it in its fishing smacks. But the federal

¹⁰¹ 12 Wheat. 419 (1827); notes 11, 12 & 21, Part One of this paper.
¹⁰² Supra note 49.
¹⁰³ 279 U. S. 245 (1929).
¹⁰⁴ 280 U. S. 390 (1930).
government can, and does, tax every gallon of gasoline used in *intra*-state commerce.

The regulation of commerce is no more an exception to the general rule of the superiority of the federal government over the state governments than is the judicial department. That superiority pervades every inch of the ground where the two governments touch each other.

In *Ohio v. Thomas* 105 it was held that the Governor of a Federal Soldiers' Home is not subject to the state laws concerning the use of oleomargarine when he furnishes that article to the inmates of the Home as part of the rations, and the same rule would apply to the use of intoxicating liquors in a state where such use is either regulated or prohibited by law. Anyone can imagine what would have happened to a governor of a state hospital, or the warden of a state prison, who should furnish intoxicating liquors as part of the rations to the inmates of such state institution in violation of federal law, while the Eighteenth Amendment was in force, or while there was any provision in the Constitution giving the federal government the power to regulate the use of intoxicating liquors.

We must, therefore, come to the sad but absolutely unavoidable conclusion that the real meaning and effect of the alleged equality between the federal and state governments, announced in *Collector v. Day*, 106 and repeated on numerous occasions since, is that of furnishing a loophole for tax-dodgers, whereby the federal government is deprived of a large portion of its legitimate revenue. 107

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105 173 U. S. 276 (1899).
106 *Supra* notes 1, 4, 6, 20, 21, 22, 23, 24, 25, 40, 43, 52, 57, 62, 85, 94, 97 & 98.
107 While the net result of the equality principle established by *Collector v. Day* was to deprive the federal government of a large portion of its legitimate revenue, the other principle established by that case, namely, the extension of the exemption to incomes, deprived the states themselves of a large portion of *their* revenue. There can be no doubt of the fact that that extension is as illegitimate as it is out of harmony with the principles laid down by Marshall in *McCulloch v. Maryland*. In his concurring opinion in *Helson v. Kentucky*, (*supra* note 103 at page 252), Mr. Justice Stone said: "In view of earlier decisions of the Court, I acquiesce in the result. But I cannot yield assent to the
reasoning by which the present forbidden tax on the use of property in interstate commerce is distinguished from a permissible tax on property, measured by its use or use value in interstate commerce. * * * Nor can I find any practical justification for this distinction or for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, which is neither aimed at nor discriminates against interstate commerce." There can, therefore, be no doubt of the fact that the net result of Collector v. Day has been a detriment not only to the federal government, but also to the states themselves.
THE SUPREME COURT OF THE UNITED STATES*

In the first case testing the validity of recent state measures of extraordinary legislation enacted during the emergency period, the Court upheld the South Carolina Emergency Banking Act of 1933. This Act, granting to the governor plenary powers over all state banks and prohibiting the institution of legal proceedings against such banks without his consent, was held not to deprive depositors in insolvent banks of their property without due process of law under the Fourteenth Amendment. Con-
sidering a subsequent statute, as well as the one in question, the depositors were held not deprived of any effective remedy.

The Court upheld the Minnesota Mortgage Moratorium Act, which authorizes the extension of the redemption period from mortgage foreclosures upon the payment by the mortgagor to the mortgagee, as a condition to such relief, of the whole or a part of the income or rental value of the property. The Court voted five to four to sustain the constitutionality of the statute as within the police power of the state in view of the economic emergency, even as to a mortgage foreclosed prior to the enactment, against the contention that it is repugnant to the contract, due process and equal protection clauses of the Federal Constitution. Mr. Chief Justice Hughes wrote the majority opinion, in which Mr. Justices Brandeis, Stone, Roberts and Cardozo concurred. The dissenting opinion of Mr. Justice Sutherland was concurred in by Mr. Justices Van Devanter, McReynolds, and Butler. The decision, with its implications, may well be regarded, as stated in the dissenting opinion, as one of the most momentous on constitutional law during the present generation. That it was similarly considered by the majority of the Court is shown by the exhaustive treatment of the problems involved.

A third case, argued before the Court but not yet decided, concerns the New York statute establishing a milk control board and empowering it to supervise, regulate, and fix the maximum and minimum wholesale and retail prices of the entire milk industry within the state. The constitutionality of the statute, which seeks to make milk a public utility, has been questioned: the appellant alleging that it operates to deprive him of liberty and property without due process of law as a result of the price differential fixed by the board. Counsel for the state contend that the due process clause of the Fourteenth Amendment is the only concept involved

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2a Ibid. at c. ——.
4 Minn. Laws 1933, c. 339, p. 514.
5 Nebbia v. People, etc., No. 531, argued Dec. 4-5, 1933; noted in (1933) 22 Georgetown Law Journal 75.
6 N. Y. Laws, 1933, c. 158, §§ 300-319.
in the case: that the condition of the milk industry in New York State—as possessing many attributes of a public utility—amounts to a public emergency necessitating the exercise of the state power within the provisions of the due process clause. It is to be noted that the possibility of this case being decided upon the sufficiency of the information rather than upon its merits may obviate the necessity of the Court's determining the constitutionality of the statute.

The importance and effect of these cases are not limited by the boundaries of the three states whose statutes have been challenged: indirectly involved are similar statutes of several other states, and in one, the milk licenses being promulgated under the authority of the Agricultural Adjustment Act.\(^7\) In addition there exists in each case the question of the power, not otherwise invested, and the extent to which it may be exercised, of the state to deal with an economic emergency. The timely significance of the issues has attracted general interest to the decision of the Court in each case.

The provisions of the Federal Corrupt Practices Act\(^8\) making it an offense for the treasurer of a political committee, which accepts contributions and makes expenditures for the purpose of influencing the election of presidential electors, to fail to file a statement showing contributions and expenditures were held constitutional by the Court in Burroughs et al. v. United States.\(^9\) The petitioners contended that the Act was inconsistent with the provisions of Section 1, Article II, of the Constitution, committing the power of appointment of presidential electors and the manner of their appointment to the states. The Court, however, held that the Act interferes, neither in purpose nor effect, with the manner in which such appointment shall be made. Congress clearly has the power to protect the election of president and vice-president from corruption: to say that it is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection.

\(^9\) No. 434, decided Jan. 8, 1934.
In *United States v. Louisiana* the Court held valid an order of the Interstate Commerce Commission, under Section 13 (3) and 13 (4) of the Interstate Commerce Act, directing railroads in Louisiana to increase intrastate rates in conformance with the increase in interstate rates in the *Fifteen Per Cent Case*. Although the Commission in the *Fifteen Per Cent Case* did not find that each of the several interstate rates resulting from the authorized surcharges would be just and reasonable, nor did it require the carriers to increase their interstate rates but only permitted them to do so at their option, the Court held that the findings of the Commission on which its order increasing the interstate rates was based were sufficient. The decision in the principal case was referred to by the Court in affirming, *per curiam*, an appeal from the District Court of the United States for the District of Montana.

The power of the Federal Trade Commission to compel the adoption and use of more specific and accurate trade designations for commercial products was recognized in *Federal Trade Commission v. Algoma Lumber Co., et al.* The use of the commercial name "California White Pine" to designate lumber from a species of pine botanically classified as yellow pine was held to constitute an unfair method of competition within the meaning of the Federal Trade Commission Act.

Among the numerous decisions relating to federal tax problem, four in particular are noteworthy.

In *Griswold v. Helvering* it was held that one-half of the value of property acquired by a decedent and his wife as joint tenants prior to the first federal estate tax, the decedent dying after the effective date of Section 402 (d) of the Revenue Act of 1921, was properly included in the de-

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10 No. 17, decided Nov. 6, 1933; this case noted in Recent Decisions, *infra* p. 374.
12 178 I. C. C. 539; 179 I. C. C. 215 (1931).
13 Montana v. United States, No. 222, affirmed Nov. 13, 1933.
14 No. 240, decided Jan. 8, 1934, noted in (1933) 22 Georgetown Law Journal 77.
16 No. 38, decided Nov. 6, 1933.
cedent's gross estate for federal estate tax purposes. Such application of Section 402, which provides for the inclusion in the gross estate of the value at the time of death of all property, "(d) To the extent of the interest therein held jointly," did not give the statute a retroactive effect. Mr. Justice Sutherland in delivering the opinion of the Court said:

"Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy at that time, and not its creation at the earlier date, which furnishes the basis for the tax * * *. After the creation of the joint tenancy, and until his death, decedent retained his interest in, and control of, half of the property. Cessation of that interest and control at death presented the proper occasion for the imposition of a tax. See Gwinn v. Commissioner, 287 U. S. 224, and cases cited * * *. The statute as applied does not lay a tax in respect of an event already past, but in respect to one yet to happen."

This decision seems to adopt the reasoning of the minority opinion delivered by Mr. Justice Roberts in Coolidge v. Long;¹⁸ it adds force to the question whether or not the case of Third National Bank of Springfield v. White¹⁹ has over-ruled the cases of Nichols v. Coolidge²⁰ and Coolidge v. Long.

In Helvering v. Butterworth, et al.,²¹ it was held that a testamentary trustee, in computing the net income of the trust, was entitled, under Section 219 (a) (2) and (b) (2) of the Revenue Acts of 1924²² and 1926²³ and the substantially similar provisions of the Revenue Act of 1928,²⁴ to deduct amounts distributed to the testator's widow who had elected to take under the will an interest in the trust in lieu of her statutory interest. But a testamentary trustee was not entitled to deduct the amount paid to the widow who had elected to take under the will what specific amount was designated by the will as an annuity. The

¹⁸ 282 U. S. 582 (1931).
¹⁹ 287 U. S. 577 (1933).
²⁰ 274 U. S. 531 (1927).
²¹ Nos. 75-78, decided Dec. 11, 1933.
annuity was a charge upon the estate as a whole, and the payment was not necessarily made from income, nor was it a distribution of income, but rather in discharge of a legacy. From this latter holding the Chief Justice dis- sented.

The amounts voluntarily paid by an individual, who had been secretary and a stockholder, to creditors of a bank- rupt corporation were held—in *Welch v. Helvering*—not deductible by him in his federal income tax returns as ordinary business expenses necessary to re-establish his credit and begin a similar business. In delivering the opinion of the Court, Mr. Justice Cardozo pointed out that such payments may have been necessary for the develop- ment of the new enterprise, but that they did not con- stitute ordinary expenses, and said:

> "Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. Men do at times pay the debts of others without legal obligation or the lighter obligation imposed by the usages of trade or by neighborly amenities, but they do not do so ordinarily, not even though the result might be to heighten their reputation for generosity and opulence."

In an opinion delivered by Mr. Justice Roberts, it was held that amounts distributed to beneficiaries under a trust did not constitute federal taxable income to them, where the trustee should have withheld such amounts and the bene- ficiaries were later required by court order to return them. From this opinion, Mr. Justices Brandeis and Stone joined in the dissent of Mr. Justice Cardozo.

Four decisions affecting state taxes were *Minnesota v. Blasius*, *Johnson Oil Refining Co. v. Oklahoma*, *American Airways, Inc. v. Grosjean, etc.*, and *Federal Compress & Warehouse Co. v. McLean, etc.*

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25 No. 33, decided Nov. 6, 1933.
26 Freuler, etc. v. Helvering, No. 129, decided Jan. 8, 1934.
27 No. 7, decided Nov. 6, 1933; this case noted in Recent Decisions, *infra*, p. 382.
28 Nos. 22-24, decided Dec. 4, 1933.
29 No. 546, decided Nov. 13, 1933.
30 No. 166, decided Jan. 8, 1933, noted in (1933) 22 *Georgetown Law Journal* 76.
Where cattle were shipped into Minnesota and there sold to a livestock trader, who held them for re-sale in the course of his business of selling cattle both within and without the state, the original shipment of the cattle had ended and they were no longer in transit or in the course of interstate commerce, but had acquired a situs in and become a part of the general mass of property within the state, subject to the taxing power of the state. This decision presents the question whether the federal regulation of certain types of commodities as part of interstate commerce abrogates the state power to tax them.

The imposition by Oklahoma of a personal property tax upon a fleet of tank cars owned by a foreign corporation and used principally in interstate commerce was held illegal under the due process clause of the Fourteenth Amendment. The right of the state to tax its proper share of the property employed there in the course of business was recognized—but limited under the "average situs" test to the number of cars found, on a daily average, within the state.

The Court affirmed, per curiam, a decree of the District Court of the United States for the Eastern District of Louisiana approving the imposition by Louisiana of a state gasoline tax on gasoline used by an interstate air carrier. The gasoline had been purchased by the carrier outside the state, imported to supply depots within the state, and consumed by airplanes in interstate commerce. The Court had been asked to determine whether or not the excise violated the commerce clause of the Federal Constitution, or the Fourteenth Amendment, as a tax for use of highways which the carrier did not use.

That the imposition of a privilege tax by Mississippi upon the business of operating a cotton compress and warehouse by a licensee under the Federal Warehouse Act does not constitute a violation of the commerce clause of the Federal Constitution was held in Federal Compress and Warehouse

31 Supra note 27.
32 Supra note 28.
33 Supra note 29.
34 3 F. Supp. 996 (E. D. La. 1933).
Co., et al., v. McLean, etc.\(^36\) As the privilege taxed is exercised before the interstate commerce begins, the burden of the tax upon such commerce is too indirect and remote to violate the clause. The fact that the licensee’s contract with interstate carriers designates him as the carriers’ agent and his warehouse as the carriers’ depot is immaterial: parties cannot by their contract convert a local into an interstate business.

In a per curiam opinion the Court affirmed\(^37\) without argument decrees of the District Court of the United States for the Southern District of Texas \(^38\) upholding an order of the Texas Railroad Commission which denied permits to appellants, engaged exclusively in interstate private contract carriage, to operate over certain highways. The order of the Commission was based on the grounds that the bridges and pavements were inadequate and that traffic congestion was too heavy for public safety and convenience, under the authority of a Texas statute\(^39\) prohibiting persons from engaging in the business of private contract motor carriers over the public highways without having first obtained permits from the Commission, even though engaged exclusively in interstate commerce. Appellants had questioned the constitutionality of the statute and the orders: whether the statute was repugnant to the commerce clause of the Federal Constitution; and whether the order was within the statutory power of the Commission.

The jurisdiction of a federal court to set aside as confiscatory an order of the Kentucky Railroad Commission fixing rates for gas supplied to consumers in the city of Lexington was upheld in the case of Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky.\(^40\) But the federal court, having found the rate confiscatory, was not empowered to deny an injunction against the en-

\(^{36}\) Supra note 30.


\(^{38}\) 4 F. Supp. 61 (S. D. Tex. 1933).


\(^{40}\) No. 11, decided Dec. 4, 1933.
forcement of that rate on the ground that the company had refused to do equity by consenting to the rate which the court had deemed just and reasonable. The establishment of rates is a legislative function, and the refusal of a court to enjoin the enforcement of a rate which is found to be confiscatory except on the condition that the utility submits to a rate which the court deems reasonable, constitutes an interference with the legislative function by the judiciary.

In a voluminous opinion and dissent, the Court held 41 that a petitioner apprehended in Illinois is extraditable to Great Britain on the complaint that he has committed the offense in that country of "receiving money knowing the same to have been fraudulently obtained." As the offense charged is generally recognized as criminal in both the United States and Great Britain, it is not necessary that it be a crime in Illinois. Once the contracting parties to an extradition treaty are satisfied that an identified offense is generally recognized as criminal in both countries, there is no occasion for deciding that extradition should fail merely because the fugitive may succeed in finding, in the country of refuge, some state in which the offense is not punishable. Mr. Justices Brandeis and Roberts joined in the dissent of Mr. Justice Butler.

The Nebraska Standard Bread Loaf Law of 1931 42 and regulations thereunder pertaining to standard weights of loaves, tolerances and periods during which the weights should be maintained, was held valid in Petersen Baking Co., et al. v. Bryan, et al.42a The statute had been questioned under the due process clause, but the Court held that a state has undoubted power to protect purchasers of bread from the imposition of shortweight loaves and that the delegation of authority to the state secretary of agriculture violated neither the due process nor equal protection clauses of the Fourteenth Amendment.

A statute of Virginia,43 relating to the elimination of

41 Factor v. Laubenheimer, etc., No. 2, decided Dec. 4, 1933.
42 Neb. Laws 1931, c. 162, p. 430.
42a No. 230, decided Jan. 8, 1934; noted in (1933) 22 Georgetown Law Journal 77.
grade crossings, was held unconstitutional by the Court under the due process clause of the Fourteenth Amendment in that it empowered the highway commissioner to order the elimination upon his own finding without notice to or hearing of the railroad, and without court review of such action. The statute in so empowering the highway commissioner amounted to a delegation of purely arbitrary and unconstitutional power, as to which the indefinite right to resort to a court of equity referred to by the Virginia Supreme Court afforded no adequate protection. From this opinion the Chief Justice, Mr. Justices Stone and Cardozo dissented.

A particularly interesting decision was handed down in the case of Funk v. United States. Mr. Justice Sutherland delivered the opinion of the Court holding that the wife of a defendant in a federal court criminal prosecution is a competent witness in his behalf, notwithstanding the old common law rule to the contrary. The exclusion of such testimony is not required by public policy: "The public policy of one generation may not, under changed circumstances, be the public policy of another." Mr. Justice Cardozo concurred in the result; Mr. Justices McReynolds and Butler were of the opinion that the judgment of the court below was correct and should have been confirmed.

The question of whether a claim of privilege attaches to communications between husband and wife conveyed through a third person was presented to the Court in the case of Wolfle v. United States. In its opinion, the Court held that a stenographer employed by the husband may testify in a federal court as to confidential statements in a letter to the wife dictated by the husband and transcribed by the stenographer. The rule against the privilege of communications made in the presence of a third person applies, regardless of the confidential nature of the relationship between the husband and his stenographer.

44 Southern Railway Co. v. Virginia, No. 26, decided Dec. 4, 1933.
45 — Va. —, 167 S. E. 578 (1933).
46 No. 394, decided Dec. 11, 1933.
48 66 F. (2d) 70 (C. C. A. 4th, 1933).
49 No. 338, decided Jan. 8, 1934.
In *Snyder v. Commonwealth of Massachusetts*\(^50\) the Court held that the refusal by a Massachusetts trial court to permit an accused person being tried for murder to be present when the jury, judge and counsel visited the locality of the alleged crime did not deny the accused due process of law in violation of the Fourteenth Amendment. The view of the premises by the jury had been ordered by the court on the motion of the prosecution under a state statute\(^51\) providing therefor. The opinion of the Court, delivered by Mr. Justice Cardozo, occasioned the dissent of Mr. Justice Roberts, with whom Mr. Justices Brandeis, Sutherland, and Butler concurred.

In the case of *Ormsby v. Chase*\(^52\) it was held by the Court that the law of New York, where an injury occurred, and not the law of Pennsylvania, in which the alleged tort-feasor lived and died and in which the action against his executors was brought, determined whether the right of action survived his death. Although actions for personal injuries are transitory and the injured person might have sued in Pennsylvania during the tort-feasor's lifetime, her right to sue was, by the law of New York, terminated by the death of the tort-feasor.

A case in which the Nebraska Supreme Court had ruled\(^53\) that a radio station could not avoid liability for defamatory words uttered over its facilities by a political candidate because of Section 28 of the Radio Act of 1927,\(^54\) which prohibits censorship of the radio addresses of candidates for public office, was appealed to the Court in the case of *KFAB Broadcasting Co. v. Sorensen*.\(^55\) The Court, however, dismissed the case without determining the merits of the controversy, for the reason that the judgment was based upon a non-federal ground adequate to support it.

Certiorari has been denied in the case of *Texas Electric Service Co. v. City of Seymour*,\(^56\) in which was challenged

\(^{50}\) No. 241, decided Jan. 8, 1934.


\(^{52}\) No. 101, decided Dec. 11, 1933.

\(^{53}\) 123 Neb. 348, 243 N. W. 82 (1932).


\(^{55}\) No. 574, dismissed Dec. 4, 1933.

\(^{56}\) No. 467, certiorari denied Nov. 6, 1933; noted in (1933) 22 George-town Law Journal 76.
the authority of a city council to regulate the rates for competitive municipal and private electric power plants after a rate war between the two.

The effect of the repeal of the Eighteenth Amendment upon pending prohibition prosecutions came before the Court in the case of United States v. Chambers, et al.\(^{57}\) The Department of Justice brought this appeal from a decision of a federal district court in North Carolina holding \(^{58}\) that the repeal deprived the Prohibition Act \(^{59}\) of any further force and effect, and released and extinguished all penalties and criminal liabilities incurred thereunder. The timeliness of the question explains the precedence given its determination.

Among the cases docketed, two,\(^{60}\) in which certiorari has been granted, present the Court with the question whether a landlord's claim for damages suffered by reason of a bankrupt tenant's default upon a lease, which contains, \textit{inter alia}, a covenant authorizing the landlord to terminate the lease and re-enter upon the adjudication of the tenant as bankrupt, and which provides that upon such termination the tenant shall indemnify the landlord for loss suffered, is provable in bankruptcy under Section 63 (a) (4) of the Bankruptcy Act,\(^{61}\) and liquidatable under Section 63 (b).

Certiorari has also been granted\(^{62}\) in a case appealed from the Minnesota Supreme Court,\(^{63}\) questioning the jurisdiction of a state court over an action between foreign corporations as a burden upon interstate commerce where the cause of action accrued beyond the state. A foreign corporation qualified to do business in Minnesota prosecuted a transitory cause of action in the Minnesota courts against a foreign corporation not so qualified, but conducting interstate commerce partly upon waters subject to the jurisdiction of Minnesota. Jurisdiction of the

\(^{57}\) No. 659, to be argued Jan. 15, 1934.
\(^{58}\) United States \textit{v.} Chambers et al., - F. Supp. - (M. D. N. C, 1933).
\(^{60}\) Manhattan Properties, Inc., \textit{v.} Irving Trust Co., etc., No. 505; Brown, et al., \textit{v.} Irving Trust Co., etc., No. 506.
\(^{62}\) International Milling Co. \textit{v.} Columbia Transportation Co., No. 561.
\(^{63}\) \textit{Minn.} - , 250 N. W. 186 (1933).
latter corporation was obtained by the attachment of property within the state to the extent of such property. In the court below it was held that the trial of the action in Minnesota would unreasonably burden interstate commerce notwithstanding the fact that the plaintiff corporation had its principal office there. The plaintiff's residence was not considered of controlling importance since the cause of action did not accrue in Minnesota.

Another case involving the power of national banks to pledge their assets to secure private deposits and the right of the depositor to a return of his deposit after having been required to surrender the securities pledged to the receiver of the insolvent bank has been docketed. The two cases previously reported have been argued before the Court and are now awaiting its decision.

The New York Telephone Company has docketed an appeal from rate orders of the New York Public Service Commission, entered in 1923 and 1926, prescribing rates for telephone service in New York City and elsewhere in the state. The case is notable not only because of the merits of the controversy it seeks to decide and the length of time—approximately four years—taken to bring it to the Court, but as well for the size of the record in the case. The record totals some 5,700 pages or about 18,000,000 words, and is said to be one of the largest ever filed with the Court. Its preparation has been the principal reason for the delay: twenty-seven orders were granted extending the time for docketing the appeal. A case involving telephone rates for the city of Chicago is also before the Court. As in the New York case, the litigation has been lengthy—involving a rate order entered more than ten years ago.

W. B. S.

64 Illinois Central Railroad v. Rawlins, etc., No. 516.
65 Texas and Pacific Ry. Co. v. Pottoroff, etc., No. 128; noted in (1933) 22 Georgetown Law Journal 78. City of Marion, Ill., et al. v. Sneeden, No. 400; noted in (1933) 22 Georgetown Law Journal 78.
66 New York Telephone Co. v. Maltbie, etc., No. 586.
A THOROUGH revision of the pure food and drug legislation is in prospect. Being outside the immediate focus of public attention upon the legislative and administrative moves affecting our economic life the contents of the proposed Federal Food and Drugs Act¹ remain unknown to others than those personally interested. However, this legislative change which is contemplated is a matter deserving of general concern since this bill, fostered by the Committee on Commerce of the United States Senate, would repeal the present Federal Food and Drug Act,² which has served as the basic pure food law administered by the Department of Agriculture for the last score of years, and would replace this old law with a new one.

Broadly, the basic and amendatory federal legislation has sought to regulate foods and drugs as a matter of interstate commerce, seeking thereby to maintain indirectly a high quality of foods and drugs. The manner of regulation has been to prohibit from the channels of interstate commerce foods or drugs determined to be adulterated or misbranded. Thus the substance and purpose of the clauses of major importance in the existing law consists in defining what constitutes misbranding and what constitutes adulteration of foods and drugs and, secondly, in conferring upon the Secretary of Agriculture administrative duties to determine standards of quality for purposes of the application of these definitions and to conduct inspections.

The proposed Federal Food and Drugs Act in its broad plan does not vary from the general method of procedure followed by the present law. The use of the channels of commerce remain closed to the subject matter of that commerce which is adulterated or misbranded. Upon

¹ S. 1944; 73rd Cong. 1st Sess.
analysis the new law indicates three aspects of change from the present state of the law. In the first instance the terms of the law and its regulatory power are extended to include cosmetics with foods and drugs. The second innovation has to do with an extension of the regulatory powers of the law to prevent the false advertising of foods, drugs and cosmetics. And thirdly, the new law contemplates an enlargement of the powers of the administrator of the Act and a broadening of the legislative definitions of adulteration and misbranding so as to make the law more stringent. Each of these new features will be touched upon.

The most striking, though not the most significant, change in the proposed law is the application of the law to cosmetics, putting this commodity upon the same basis as foods and drugs heretofore. Cosmetic beautifiers are by this Bill defined to include "all substances and preparations intended for cleansing, or altering the appearance of, or promoting the attractiveness of, the person." 3 Obviously this definition does not suffer from restrictive technical terms and will certainly include all the more common preparations such as powders, paints, lotions and creams.

The adulteration of cosmetics receives special treatment in the Act, as do foods and drugs. By definition of terms, cosmetics are adulterated when they prove injurious when put to their customary use, or to the use prescribed upon the package, or if they contain ingredients of a kind or quantity prohibited by the regulations provided by the administrator of the act. 4 Thus cosmetics are put to the tests of actual use and of the chemist. Needless to say much that may be significant in any future application of the law to cosmetics lies in the regulations evolved by the Secretary of Agriculture. 5 Such provisions as relate to misbranding of cosmetics are similar to those affecting

3 Supra note 1 at § 2 (c).
4 Ibid. at § 5: "A cosmetic shall be deemed to be adulterated—(a) If it is or may be injurious to the user under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual. (b) If it bears or contains any poisonous or deleterious ingredient prohibited, or in excess of the limits of tolerance prescribed, by regulations as hereinafter provided."
5 Ibid. at § 10.
drugs and foods, the main purpose of such provisions being to afford protection to the user by prohibiting misleading or false labels. In chief, these require an accurate and truthful statement of the ingredients of the cosmetic. 6

Past experience demonstrates that regulations of labels and brandings of manufactured foods and drugs do not suffice to protect the public from injury through misleading and false statements regarding such commodities. The second important variation in the proposed law from the present law consists in extending this protection against ambiguity and falsity in the information contained on labels and their equivalents to the field of advertising. This legislative effort is directed at the vendor of commodities within the terms of this Act who piously complies with the provisions of the law regarding misbranding, but who has found that in this day and age the label provides neither the only nor the best means of propagating the sale of his product. In 1906, when the original Federal Food and Drug Act was enacted, the label and its information may have served as an important factor in bargain counter sales. But today with the wider use of newspapers, and newspaper advertising, and with the use of the radio commercially for advertising purposes, American advertising methods have relegated the label and the brand to the position of serving chiefly as a mark of identification. Advertisements presume to tell all there is to tell. Hence it is that the false and misleading statements against which the public may need protection are to be found not on the label but in the advertisement.

The proposed legislation makes advertisements include “all representations of fact or opinion disseminated in any manner or by any means other than by the labeling.” 7

The dissemination of such facts or opinions which have as a direct or indirect purpose the sale of foods, drugs, or cosmetics falsely represented by these facts or opinions are prohibited. The clause of prohibition expressly mentions the radio and the United States mails. Although newspapers as a medium of advertising are not specifi-

6 Ibid. at § 6.
7 Ibid. at § 2(j).
cally mentioned, such newspaper as is itself entered in interstate commerce would be prohibited from carrying false advertisements. Further, the newspaper, even though it is not transported in interstate commerce, would be precluded from carrying false advertisements concerning foods, drugs, or cosmetics which were the subject matter of interstate commerce. The false advertisement is that which is deemed to be in any particular untrue or which “by ambiguity or inference creates a misleading impression.” The terms of the Bill strike sharply at the advertising of patent prescriptions by declaring that advertisement false which alleges a drug to be a cure for a named disease when it is only a palliative. Where specified organic ailments or contagious diseases are concerned the advertisement may not counsel self-medication. To do so would give rise to an inference which is false, and this the Bill would preclude.

This clause relating to advertising serves as an interesting example of a small beginning in the regulation of branding and labeling of goods expanding into the broad problem of regulating the field of advertising. It is to be anticipated that under the proposed law the Department of Agriculture will issue regulations and orders governing the advertising of commodities concerned in this Bill, just as it has done in pursuance of its control over labeling, by setting forth highly technical rules for the guidance of those making labels, and by passing upon the labels submitted to the Department prior to use. Presumably such a system of regulation will result in the submission of the plans of an advertising campaign to the Department for approval.

These two newer aspects of the proposed Federal Food and Drug Act need not becloud the fact that the chief

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8 *Ibid.* at § 17(a): “The following Acts are hereby prohibited: (3) The dissemination of any false advertisement by radio broadcast, United States mails, or in interstate commerce for the purpose of inducing, directly or indirectly, the purchase of food, drugs, or cosmetics. (4) The dissemination of a false advertisement by any means for the purpose of inducing, directly or indirectly, the sale of food, drugs, or cosmetics in interstate commerce.”


10 *Ibid.* at § 9 (b), (c).
reason for revising the existing legislation is to strengthen it by strengthening the legislative definitions and to remove those obstacles to the administration of the law which time has brought to light. The details of such a revision are too numerous and technical for a full discussion. The following are some points of particular interest.

An important step has been taken to exclude unfit foods from commerce. One of the conditions which shall constitute adulteration is the preparation of packing foods, drugs, or cosmetics under unsanitary conditions.\(^\text{11}\) To provide for the proper enforcement of this clause, the use of inspection is brought into play in a way not previously followed. Up to the present time, inspections have been limited to the inspection of certain commodities, imported meats in particular, and has not extended into factories or establishments in which foods are processed. The intended law provides for a system whereby the Secretary of Agriculture may impose upon the industry involved in the production of any class of foods, drugs, or cosmetics, a permit system requiring that each producer obtain such permit as a prerequisite to the operation of his business. The revocable permit will be conditioned upon conformance to regulations relating to conditions of manufacture prescribed by the Secretary. For the purpose of determining the response to the regulations, each person holding a permit must agree to submit to an inspection of his factory.\(^\text{12}\) But further than this, the Secretary will be authorized to appoint persons who, with the permission of the owner, operators or custodians of factories or carriers, will enter and inspect the conditions of manufacturing and transportation. To insure that permission of the owner will be forthcoming, the Bill seeks to confer upon the United States District Courts power to issue an injunction restraining the shipment of any such goods in interstate commerce as may issue from a factory of a person who refuses to submit to inspection. Contempt proceedings against violators of the court decrees are expressly sanctioned.\(^\text{13}\) Thus it appears that inspection,

\(^{11}\) Ibid. at § 3(a) (4).
\(^{12}\) Ibid. at § 12.
\(^{13}\) Ibid. at § 13.
whether under the permit system or without it, becomes a procedure operative upon the whole industry involved in the production of foods, drugs and cosmetics.

Provisions for the seizure of goods are made in the Bill. While the courts have heretofore been permitted to seize goods believed impure, now the executive officials, by virtue of the inspection and the existence of probable cause to believe that goods are adulterated, will be empowered to seize and hold the goods. Such a seizure by an administrative official, even where there was a certainty of adulteration of the foods or drugs, has not been possible heretofore.\textsuperscript{14}

It has long been the procedure for the Secretary of Agriculture to have hearings for the purpose of determining the standards of qualities of commodities which would bring them within the terms of the definitions of adulteration. This practice long ago demonstrated itself as the most practical method of achieving regulatory standards. There has been one grave difficulty, however. These standards and definitions have not been admissible in a court of law without the supporting testimony of expert witnesses. The Government has been faced with the necessity of defending its definitions in each cause of action. The proposed Act affords a remedy for this difficulty. This law would declare the standards determined upon by the Secretary of Agriculture to have the force and effect of law.\textsuperscript{15}

This proposed legislation once again evidences the tendency of the administrative law to expand. The constitutional control over commerce conferred upon Congress has approached the effectiveness and extent of the police power of the States in affording protection to the public health. The intention to impose federal regulatory measures upon the various mediums of advertising is only suggested by the Bill, but its import as an evidence of future policy in legislation is apparent.

\textsuperscript{14}Ibid. at § 16.
\textsuperscript{15}Ibid. at § 11.
DOES REPEAL LEAVE PROHIBITION IN THE DISTRICT OF COLUMBIA AND THE TERRITORIES?

REPEAL has not ended Prohibition. Ironic though it may seem, the National Prohibition Act 1 continues in full force and effect—in the District of Columbia and the Territories. The Attorney General of the United States has so ruled. In brief, that is the summation of this paper.

By the Twenty-first Amendment to the Constitution, originating as a Joint Resolution in the United States Senate, the Seventy-second Congress declared, "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." 2 This proposal was deposited in the Department of State on February 20, 1933; and at once the several States assumed their prerogative to act upon it. In rapid succession repeal passed the gauntlet of an indifferent popular vote and subsequent State conventions. On December 5, 1933, less than ten months after its inauguration, the Resolution was formally agreed to by Utah, the thirty-sixth State to ratify. The plebiscite had banished a noble experiment.

But had it been exiled altogether? The National Prohibition Act has not become a nullity, so far as the District of Columbia and the several possessions and Territories are concerned. Congress had acted precipitously; a majority of the States found themselves again free to deal with the liquor question and formulate their own codes and regulations, unhampered by Federal dominance; but the national legislature had forsaken, for the moment, their favorite jealously-guarded wards, the District of Columbia and the Territories, and had made no stipulation as to repeal for them.

The Attorney General of the United States was appealed to in the hope of solving this paradox, but there was small comfort for the repealist when, in a remarkably ab-

2 S. J. Res. 211, 72d Cong., 2d Sess., signed by Speaker of the House of Representatives and the Vice President of the United States, February 20, 1933.
breviated opinion, October 23, 1933, he stated.3 "The Attorney General is of the opinion that after the Repeal of the Eighteenth Amendment, the National Prohibition Act of October 28, 1919, known as the Volstead Act, as supplemented and amended, will be in full force and effect in the District of Columbia, Alaska, Hawaii, Puerto Rico, the Virgin Islands and the Canal Zone." Prohibition, then, awaits another and final legislative fiat before suffering complete demise.

The question immediately presents itself—why should not the National Prohibition Act be as effectively repealed in the District of Columbia and the Territories as in the rest of the Union? Indubitably the Twenty-first Amendment, having become a part of the Constitution, removed what former Federal restriction existed in the several States.

The Attorney General did not cite any authorities to substantiate his opinion, yet certainly he must have fortified his position by reference to the decided cases. It is interesting to conjecture, and then to view the decisions on which he obviously relied. But first it might be well to consider the manner in which Prohibition was made a part of the laws governing the District of Columbia and the Territories.

In 1900 when Congress, by legislative enactment, established a government for the Territory of Hawaii, it provided, "The Constitution, and except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States."4 Some years thereafter this Act was amended, and among other provisions it was stipulated, "Nor shall spirituous or intoxicating liquors be sold except under such regulations and restrictions as the territorial legislature shall provide."5 However, it was not until immediately after the entrance of the United States into the World War, that Congress definitely decreed Prohibition

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3 This was an informal statement made by the Attorney General and given to the press on or about October 26, 1933.
for Hawaii, making it unlawful to sell, give away, manu-
facture, transport, import, or export intoxicating liquors.  
And after the National Prohibition Act became law in 
1920, it was supplemented in 1921 by a further measure 
which specifically referred to Hawaii—and the Virgin 
Islands, in addition—as being subject to the National 
Prohibition Act; at the same time it conferred on the 
courts of those territories jurisdiction to enforce both the 
original and the supplemental Acts.  

Alaska next enjoyed the benevolent disposition of Con-
gress, and on February 14, 1917, the President's signature 
was affixed to the Alaska Prohibition Law.  

In the following month, "An Act to provide a civil gov-
ernment for Porto Rico, and for other purposes," was 
placed upon the statute books, and Puerto Rico found 
itself the recipient of a prohibition law. Some years later 
Congress specially conferred upon the Territorial courts 
of Puerto Rico concurrent jurisdiction with the United 
States Courts of that district of all offenses under the 
National Prohibition Act and all Acts amendatory or sup-
plemental thereto.

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7 Sec. 3 of "An Act Supplemental to the National Prohibition Act."
10 This is the Spanish spelling of the name of the Island and adopted 
by the United States Geographic Board in December, 1890, before 
aquisition by the United States. However, Porto Rico became com-
mon after an Act of Congress spelling the name that way. Recently 
(June 1, 1932) the Geographic Board readopted the Spanish spelling 
in accordance with S. J. Res. 36, May 17, 1932.
11 42 STAT. 993 (1922), 48 U. S. C. § 862 (1926): "That there be, 
and is hereby, conferred upon the territorial magistrates and courts 
of Porto Rico, jurisdiction concurrent with the commissioners and 
courts of the United States for the said Territory of all offenses 
under the Act of October 28, 1919, known as the National Prohibition 
Act, and All Acts amendatory thereof and supplemental thereto, the
Under its plenary power Congress then enacted a prohibition law for the District of Columbia, known as the Sheppard Act, March 3, 1917, which was in force and effect at the time of the passage of the Volstead Act.

And finally, in the National Prohibition Act itself, a special provision assured the aridity of the Canal Zone.

It thus having been shown that Prohibition was made effective in the District of Columbia and the several Territories by separate enactments of the Congress, one should next turn to the statute books in order to determine if any later Acts by the national legislative body affected the earlier laws. The Sheppard Law, previously mentioned, continued in effect as the Prohibition Law for the District of Columbia until the passage of the National Prohibition Act in 1919. This later Act did not refer specifically to the Sheppard Law. Nevertheless, it stated: "All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in liquor shall be construed as in addition to existing laws." While the two Acts covered the same field, the conclusion is unavoidable that the provisions of the Sheppard Law, in so far as the manufacture, transportation, and sale of intoxicating liquor is concerned in the District of Columbia, were repealed by the National Prohibition Law.

It is a well-settled rule of statutory construction that where a new statute covers the whole subject of a prior one, adds offenses, and prescribes different penalties from those enumerated in the prior law, the former statute is

jurisdiction of said Territorial magistrates and courts over said offenses to be the same which they now have over other criminal offenses within their jurisdiction."

12 Stat. 1123, § 2 (1917).

13 Supra note 1, at § 63: "That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession, or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt or spirituous liquors, except for sacramental, scientific * * * purposes * * *: Provided, That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad."

14 Id. at § 52.
repealed by implication, because the provisions of both can not stand together. It is equally well settled that, without express words of repeal, a previous statute will be held modified by a subsequent one, if the latter was plainly intended to comprise the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern it.

It would serve no useful purpose here to attempt a comparison, provision by provision, section by section, of the Sheppard Law and the National Prohibition Act, in order to justify this conclusion. A short treatment of the two measures will suffice.

In the first place, the National Prohibition Act, enacted in 1919, is a later expression of Congress, the Sheppard Law having been adopted in 1917. This, in itself, invites particular attention to the later Act and a sounding out of the legislative intent in that Act.

The National Prohibition Act, it will be noted, covers the whole subject comprehended by the Sheppard Law. There is no entity embraced by the Sheppard Law which is not included within the provisions of the National Prohibition Act; the use of alcoholic liquors "for beverage purposes" is forbidden by both statutes. Permits are similarly authorized in both statutes, to be issued regarding liquors for non-beverage and sacramental purposes; but since the Sheppard Law provided for their issuance through the Commissioners of the District of Columbia, while the National Prohibition Act designated the Commissioner of Internal Revenue, the provisions of the latter Act must govern. Thus, after the National Prohibition Act became the law of the land, and the local law of the District of Columbia, the Commissioners of the District have not had any power whatsoever over the manufacture or sale of intoxicating liquors for any purpose whatever. Consequently, it must be admitted that all of those sections of the Sheppard Law which related to the issuance of permits by the Commissioners of the District of Columbia have been repealed.

The National Prohibition Law covered thoroughly the question as to what is intoxicating liquor, already defined in the Sheppard Law. All commodities, then, as well as
all actions with respect to the use of the commodities, forbidden by the Sheppard Law, are also forbidden by the National Prohibition Act.

The Sheppard Law related exclusively to the District of Columbia, while the National Prohibition Act is a law of the United States. But it must be remembered that the District of Columbia occupies a peculiar status, in that the Congress of the United States is the only legislative body having authority to enact laws for the District of Columbia, and this status is entirely distinct and separable from that of any State of the Union or Territory having a legislative body with power to enact laws locally applicable. Since the District of Columbia is within the jurisdiction of the United States, and subject to the "exclusive jurisdiction" of the Congress of the United States, it can not be doubted that the District of Columbia is included within the territorial and legislative jurisdiction of the United States, and is, therefore, subject to the National Prohibition Act.

The National Prohibition Act, being a later Act, differing as shown above, made by the same law-making body, upon the same subject, covering the same field, yet with much more detailed regulation, and prescribing a list of penalties to govern violations of the Act, clearly by implication repealed the Sheppard Law in these regards. Hence the National Prohibition Act became the Prohibition Law for the District of Columbia.

However, two years after the passage of the National Prohibition Act, Congress passed an Act 16 supplementing it, and providing, "That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act." This section at once raises the question whether or not any previous provision of law regard-

15 Constitution, Art I, Sec. 8, cl. 17; Capital Traction Company v. Hof, 174 U. S. 1 (1899).
ing "the manufacture and taxation of and traffic in intoxicating liquor" is in direct conflict with the provisions of the National Prohibition Act and this Act supplemental thereto. And, as a consequence, is not the Sheppard Law restored and again made effective in the District of Columbia? At first glance, it would seem that that might be a proper inference. But it has already been shown that the Sheppard Law of 1917 was repealed by the National Prohibition Act of 1919; and, therefore, a later Act, in 1921, supplementing the National Prohibition Act, can not be held to revive the Sheppard Law already repealed by implication two years previously.

The Sheppard Law, or at least that part of it which had not been repealed by the National Prohibition Act, itself was expressly repealed by the Beverage Permit Act 17 of April 5, 1933, with the exception of sections 11 and 20. Section 11 related to drinking in public, and section 20 to the operating of locomotive engines, street cars, automobiles and the like while intoxicated.

The National Prohibition Act, then, having become the local prohibition law for the District of Columbia, as well as for the Territories, does it remain a valid enactment for the District of Columbia, and the Territories, despite the repeal of the Eighteenth Amendment? Reference to a number of cases decided by the Supreme Court of the United States are enlightening on this point and lead to the conclusion that the Volstead Law yet rules supreme in the District of Columbia and the Territories alike.

In El Paso & N. E. R. Co. v. Gutierrez, 18 the court had before it the question whether the first Employers' Liability Law, 19 which had already been held void as to the States, was valid as to the District of Columbia and the Territories. The first section of that Act provides in part: "That every common carrier engaged in trade or com-

17 48 Stat. (1933), Pub. No. 73rd Cong., 1st Sess.: "The Act entitled 'An Act to prohibit the manufacture and sale of alcoholic liquors in the District of Columbia, and for other purposes,' approved March 3, 1917, with the exception of sections 11 and 20 thereof, is hereby repealed."
18 215 U. S. 87 (1919).
19 34 Stat. 232 (1906).
merce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees "* * *." The Court sustained the Act in so far as it is valid. It was held in the Employers' Liability Cases that, in order to sustain the act, it would be necessary to show that Congress had exceeded its authority in attempting to regulate the second class of commerce named in the statute that this court was constrained to hold the act unconstitutional. The act undertook to fix the liability as to 'any employee,' whether engaged in interstate commerce or not, and, in the terms of the act, had so interwoven and blended the regulations of liability within the authority of Congress with that which was not that the whole act was held invalid in this respect.

It is hardly necessary to repeat what this court has often affirmed, that an act of Congress is not to be declared invalid except for reasons so clear and satisfactory as to leave no doubt of its unconstitutionality. Furthermore, it is the duty of the court, where it can do so without doing violence to the terms of an act, to construe it so as to maintain its constitutionality; and, whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid. It was held in the Employers' Liability Cases that, in order to sustain the act, it would

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20 The Court said: "A perusal of the section makes it evident that Congress is here dealing, first, with trade or commerce in the District of Columbia and the Territories; and, second, with interstate commerce, commerce with foreign nations, and between the Territories and the States. As we have already indicated, its power to deal with trade or commerce in the District of Columbia and the Territories does not depend upon the authority of the interstate commerce clause of the Constitution. Upon the other hand, the regulation sought to be enacted as to commerce between the States and with foreign nations depends upon the authority of Congress granted to it by the Constitution to regulate commerce among the States and with foreign nations. As to the latter class, Congress was dealing with a liability ordinarily governed by state statutes, or controlled by the common law as administered in the several states. The Federal power of regulation within the states is limited to the right of Congress to control transactions of interstate commerce; it has no authority to regulate commerce wholly of a domestic character. It was because Congress had exceeded its authority in attempting to regulate the second class of commerce named in the statute that this court was constrained to hold the act unconstitutional. The act undertook to fix the liability as to 'any employee,' whether engaged in interstate commerce or not, and, in the terms of the act, had so interwoven and blended the regulations of liability within the authority of Congress with that which was not that the whole act was held invalid in this respect."
In the *El Paso case*, above cited, the Supreme Court referred to the decision of Court of Appeals of the District Columbia in *Hyde v. Southern Ry. Co.*,[21] in which a similar holding was made, as "a well-considered opinion."

The recent case of *Atlantic Cleaners & Dyers, Inc., et al. v. United States*[22] also is of interest on this question. That case involved the construction of the Sherman Anti-Trust Act.[23] Section one of that Act forbids the combinations and conspiracies in restraint of trade when applied to be necessary to write into its provisions words which it did not contain.

Coming to consider the statute in the light of the accepted rules of construction, we are of opinion that the provisions with reference to interstate commerce, which were declared unconstitutional for the reasons stated, are entirely separable from and in nowise dependent upon the provisions of the act regulating commerce within the District of Columbia and the Territories. Certainly these provisions could stand in separate acts, and the right to regulate one class of liability in nowise depends upon the other. Congress might have regulated the subject by laws applying alone to the Territories, and left to the various states the regulation of the subject matter within their borders, as had been the practice for many years."

[21] 31 App. D. C. 466 (1908). The Court of Appeals said: "Congress having undertaken to exercise plenary power in the one act, as it has been interpreted, not only in the District of Columbia and the Territories, where it has been conferred, but also in the states, where it has not, the question for our determination is whether the provisions of the same, as they relate to the respective jurisdictions, are separable and not dependent upon each other, so that one may stand notwithstanding the invalidity of the other. The rule, in this regard is well settled, as we have seen; the difficulty lies in its application.

This condition of severableness of the provisions of a statute, that may preserve the validity of one notwithstanding the repugnance of the other to the Constitution, is not dependent upon the fact that they may be found in separate sections, though this would ordinarily render the task of separation easier. It is sufficient if the separation can be accomplished by exercising a clause of the same section, and leaving the remainder complete and unchanged in meaning without reading into it another word. *Penniman's Case (Vial v. Penniman)*, 103 U. S. 714, 717, 26 L. ed. 602, 604; *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 617, 47 L. ed. 328, 333, 23 Sup Ct. Rep. 206; *Florida C. R. Co. v. Schutte*, 103 U. S. 118, 142, 26 L. ed. 327, 335."


interstate commerce, and section three forbids the same Acts when applied to transactions in the District of Columbia or the Territories. There the Court held that the words "trade" and "commerce" used in section three of that Act should be given a much broader construction than the same words when used in section one, for the reason that the power to enact section three was plenary, while the power to enact section one was limited to the interstate commerce clause of the Constitution.\footnote{Supra note 22, at 434-435: "Section 1 having been passed under the specific power to regulate commerce, its meaning necessarily must be limited by the scope of that power; and it may be that the words 'trade' and 'commerce,' are there to be regarded as synonymous. On the other hand, § 3, so far as it relates exclusively to the District of Columbia, could not have been passed under the power to regulate interstate or foreign commerce, since that provision of the section deals not with such commerce but with restraint of trade purely local in character. The power exercised, and which gives vitality to the provision, is the plenary power to legislate for the District of Columbia, conferred by Art. 1, § 8, cl. 17 of the Constitution. Under that clause, Congress possesses not only every appropriate national power, but in addition, all the powers of legislation which may be exercised by a state in dealing with its affairs, so long as other provisions of the Constitution are not infringed, Capital Traction Co. v. Hof, 174 U. S. 1, 5. Undoubtedly under that extensive power, it was within the competency of Congress to prohibit and penalize the acts with which appellants are here charged; and the only question is whether by § 3 it has done so."}

These decisions necessarily make tenable the pronouncement of the Attorney General; and the National Prohibition Act continuing in effect in the District of Columbia

\footnote{Supra note 15, the Supreme Court said:
"The Congress of the United States, being empowered by the Constitution 'to exercise exclusive legislation in all cases whatsoever' over the seat of the National Government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the District all legislative powers that the legislature of a state might exercise within the state; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate the judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States. Kendall v. United States (Stokes) (1838) 12 Pet. 524, 619; Mattingly v. District of Columbia (1878) 97 U. S. 687, 690; Gibbons v. District of Columbia (1886) 116 U. S. 404, 407."}
and the Territories, Congress even now is preparing legislation to assure for the Nation's Capital a more appeasing beverage than 3.2 per cent. But suppose the trend of authority had been *contra*, and as a result the Volstead Law had been deemed without force and effect in the District of Columbia. Apparently the seat of the national legislative body would be without any Act of Congress to regulate the sale of intoxicating liquor.

The only power of the Commissioners of the District to make regulations upon this subject will be found in section 2 of the Joint Resolution of Congress, approved February 26, 1892 [25] and paragraphs 45 and 46 of the new License Law [26] for the District of Columbia, approved July 1, 1932.

To what extent the courts would sustain regulations on

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[25] 27 Stat. 394 (1892): "That the Commissioners of the District of Columbia are hereby authorized and empowered to make and enforce all such reasonable and usual police regulations in addition to those already made under act of January twenty-sixth, eighteen hundred and eighty-seven, as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia."

[26] 47 Stat. 550 (1932). Paragraphs 45 and 46 of the License Act read as follows:

"Par. 45. The Commissioners of the District of Columbia are hereby authorized and empowered, when in their discretion such is deemed advisable, to require a license of other businesses or callings not listed herein and which, in their judgment, require inspection, supervision, or regulation by any municipal agency or agencies and to fix the license fee therefor in such amount as, in their judgment, will be commensurate with the cost to the District of Columbia of such inspection, supervision, or regulation, and are further authorized and empowered in their discretion to modify any of the provisions of this section so far as eliminating therefrom any business or calling herein required to be licensed, or to raise or lower the amount of the license fee provided herein, as the cost of inspection, supervision or regulation is raised or lowered.

Par. 46. The Commissioners are further authorized and empowered to make any regulations that may be necessary in furtherance of the purpose of this section and to revoke any license issued hereunder when, in their judgment, such is deemed desirable in the interest of public decency or the protection of lives, limbs, health, comfort, and quiet of the citizens of the District of Columbia or for any other reason they may deem sufficient."
this subject promulgated under authority of the Joint Resolution, *supra*, is problematical since they have construed this statute rather strictly.

It will be noted that the license fee the Commissioners are authorized to fix under this License Act must be "commensurate with the cost to the District of Columbia of such inspection, supervision, or regulation."

J. T. C.
NOTES

COURTS—Right of Judge to Comment on Evidence.

In *Quercia v. United States*, Judge Lowell in the United States District Court of Massachusetts, gave the following instruction to the jury: "And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie. Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty." (Italics supplied.) Though perhaps more naive than vicious, since an instruction so pregnant with prejudicial error could scarcely hope to be sustained on ultimate appeal, this charge nevertheless illustrates the power of the trial judge in the federal courts to comment on the evidence and give his opinion upon the facts. Here, it is true, the abuse of the power worked a reversal of the case, but in its act of reversing, the Supreme Court reasserted with emphasis the validity of the power itself. And it should be noted that even so patent an abuse of the power did not impress the Circuit Court of Appeals as sufficiently prejudicial to warrant a reversal of the case.

The federal courts have consistently upheld the right and power of the trial judge to comment on the evidence and give his opinion upon the facts, provided he give the jury to understand that they are not bound by that opinion and that theirs is to be the final decision. This was the common law rule at the time of the adoption

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1 289 U. S. 466 (1933).
2 *Quercia v. United States*, 62 F. (2d) 746 (C. C. A. 1st, 1933). Wilson, J., speaking for the majority said: "It is difficult to conceive of a jury accepting seriously such a standard for determining whether a witness was telling the truth." But since the jury were informed that the opinion was not binding on them, the majority thought there was no prejudicial error, and affirmed the conviction. Bingham, J., dissented, saying: "The instruction was so charged with passion and prejudice that it exceeded the bounds of fair comment, and caused a mistrial."
of the Federal Constitution, and remains the rule in England today. It represents the most effective restraint on the power of the jury that the courts have been able to evolve in the long struggle for supremacy that is the history of the development of the jury system. Finding ineffective the earlier and harsher methods of starving the jury into rendering the desired verdict, or punishing them by writs of attaint and fines for returning an undesirable one, the common law judges turned to the subtler scheme of indicating the path and then leading the jury along it. Where they could not be driven, the jury were easily led. Complacent in the assurance that his was the ultimate decision, the juror was only too willing to allow the judge to unravel the difficult knot of evidence for him, and show him where the true solution lay. And knowing how rarely the average juror, once his independence was acknowledged, would allow his mental inertia to be disturbed by the qualification, the judge, with tongue in cheek, never failed to add that his was but an opinion, and that the jury were at liberty to disregard it, and decide the facts for themselves.

This practice had become so well established at the time the Federal Constitution was adopted, that it was only natural that it should have been carried into this country with the adoption of the Bill of Rights. It was not long, however, before some of the states recog-


Scott, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW (1922) 78: "The orthodox method of procuring unanimity was to starve and freeze and jolt the jurors until they were all of one mind." And in note 21 at the same page the author states: "By a New Jersey statute it was expressly provided that the juror 'shall be kept together in some convenient private place without meat, drink, fire or lodging until they all agree upon a verdict,' Allinson's Laws, 470."

1 HOLDSWORTH, HISTORY OF ENGLISH LAW (2d ed. 1914) 161-5.

The Sixth Amendment of the Constitution of the United States guarantees the right of trial by jury in criminal cases, and the Seventh Amendment provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *."
nized in the practice vestiges of the autocratic control they had but lately left behind them. Many of them proceeded summarily to strike it from their judicial systems. Tennessee led the way in 1796 by constitutional provision. Others followed, some by similar constitutional provisions, others by statutory enactments, and still others by judicial decree. In all, forty states changed the rule.


10 ARKANSAS: Const. of 1836, Art. 7, § 12; Sharp v. State, 51 Ark. 147 (1888).

CALIFORNIA: Constitutional amendment in 1862, Art. 6, § 19 of the Constitution of 1849; People v. MacDonald, 167 Cal. 545, 40 Pac. 256 (1914).

NEVADA: Const. of 1864, Art. VI, § 26; Nevada v. McGinnis, 5 Nev. 337 (1869).


WASHINGTON: Const. of 1889, Art. IV, § 16; State v. Wheeler, 93 Wash. 538, 161 Pac. 373 (1916).

DELAWARE: Const. of 1897, Art. IV, § 22; State v. Wyatt, 27 Del. 473, 89 Atl. 217 (1919).

11 MISSISSIPPI: R. C. 1822, c. 13, § 144, which was repealed in 1830, but reenacted in 1860; Maston v. State, 83 Miss. 647, 36 So. 70 (1904).

MISSOURI: Acts of 1831, prohibiting comment by the judge in criminal cases. This statute was extended to civil cases in 1839, but this latter extension was repealed in 1845. The rule was kept in force, however, both as to criminal and civil cases, by the courts. See Rosenwald, Right of Judicial Comment on the Evidence in Missouri (1929) 14 St. Louis L. Rev. 221, 258.

NORTH CAROLINA: R. S. 1837, c. 39, § 136; State v. Baldwin, 178 N. C. 687, 100 S. E. 348 (1919), wherein the Court said, "It is, therefore, not an inherent right of a defendant that the judge should be restricted from expressing any opinion during a trial. * * * Being in derogation of the common law and of the practice and procedure in the English and Federal courts, and of the procedure generally elsewhere, we cannot extend it beyond its terms (referring to the above statutory provision)."

ILLINOIS: R. S. 1845, § 28; People v. Kelly, 347 Ill. 221, 179 N. E. 898 (1931), wherein the court refers to this statutory provision as having been enacted in 1827. This case is discussed at some length infra.


TEXAS: Acts of 1853; Texas & Pac. Co. v. Murphy, 46 Tex. 356, 26 Am. Rep. 272 (1876), where the court called this statutory provision "a radical departure from the mode of proceeding in trials, as prac-
ticed in the courts of England and of many, if not most, of the American States, wherein the common law prevails.”

MASSACHUSETTS: G. S. 1860, c. 115, § 5; Commonwealth v. Barry, 9 Allen 276 (1864). For the common law rule before the statute, see Matthews v. Allen, 16 Gray 594 (1860), and Commonwealth v. Child, 10 Pick. 252 (1830), where Parker, C. J., said, “We know of no rule requiring the judge to conceal his opinion. He is to comment on the evidence.”


COLORADO: R. S. 1867, c. 70, § 28, which was repealed by amendment, G. S. 1883, § 168. The rule was kept in force by the courts without benefit of statute, as in Ryan v. People, 50 Colo. 99, 114 Pac. 306 (1911), where the court said, “It is not only not the duty of the court, but it has no power or authority to tell the jury what weight it shall give to any testimony.” But see Kolkman v. People, 89 Colo. 8, 300 Pac. 575 (1931).


MAINE: Acts of 1874, changing the earlier common law rule followed in Phillips v. Kingfield, 19 Me. 375, 36 Am. Dec. 760 (1841). This statutory provision has been practically nullified by subsequent decisions of the Maine courts, construing the statutory prohibition against the rendering of an opinion by the judge to mean “an authoritative opinion,” but not restricting him from “suggesting an obvious inference from admitted facts and circumstances.” State v. Mathews, 115 Me. 84, 97 Atl. 824 (1916).

NORTH DAKOTA: C. C. P. 1877, § 248; Territory v. O’Hare, 1 N. D. 30, 44 N. W. 1003 (1890). The same rule was followed after North Dakota was admitted to the Union. State v. Barry, 11 N. W. 428, 92 N. W. 809 (1902).


UTAH: Code of Crim. Proc., § 257 (1878), as followed in Hopt v. Utah, 110 U. S. 574 (1884). See infra note 47. In 1877, the Utah court followed the common law rule, saying there was no statute “to abridge or curtail the right of the court to express his opinion as to the weight of evidence, as it existed at the common law.” People v. Lee, 2 Utah 441 (1877). But in State v. Greene, 33 Utah 497, 94 Pac. 987 (1908), twelve years after Utah was admitted to the Union, the court said: “We know of no rule of law that permits a judge before whom a case is being tried to express his opinion in the presence of the jury and in their hearing as to the weight of the evidence on a controverted question of fact.”

NEW MEXICO: Acts of 1880, c. 6, § 23; Douglas v. Territory, 17 N. M. 108, 124 Pac. 339 (1912). For the same rule after New Mexico was admitted to the Union, see Chavez v. State, 19 N. M. 325, 142 Pac. 922 (1914).

South Dakota: C. L. 1887, § 5048; See Comp. Laws of South Dakota (1929), § 4430, providing: "The court must decide all questions of law which may arise in the course of the trial, but can give no charge with respect to matters of fact."


Indiana: Sutherlin v. State, 148 Ind. 695, 48 N. E. 246 (1897). But in Shank v. State, 25 Ind. 207 (1866), the court said, "It is a grave question of policy, whether the presiding judge should discuss the evidence at all in his charge to the jury. It was the practice of the English judges to do so, and in this state it has not been prohibited, and so long as the nisi prius bench shall be occupied by gentlemen of integrity and learning, and guided in the discharge of their duties by a love of impartial justice, it is not at all probable that the legislature will interfere to limit this authority, derived from the common law." The only statutory provision on the point provides, "In charging the jury, the court must state to them all matters of law which are necessary for their information in giving their verdict. If he presents the facts of the case, he must inform the jury that they are the exclusive judges of all questions of fact, and that they have a right also to determine the law." Ind. Ann. Stat. (Burns, 1926), § 2301 (5). Thus, Indiana is but doubtfully in the state majority column. For other cases wherein the state majority rule is apparently followed, see Killian v. Eigenmann, 57 Ind. 480 (1877); Unruh v. State, 105 Ind. 117, 4 N. E. 453 (1886).

Iowa: State v. Allen, 100 Iowa 7, 69 N. W. 274 (1896).


Michigan: Originally the common law rule was followed, as in Sheahan v. Barry, 27 Mich. 217 (1873), but there was a gradual shift in the cases of Marich v. Elsey, 47 Mich. 10, 10 N. W. 57 (1881); People v. Lyons, 49 Mich. 78, 13 N. W. 57 (1882); McDuff v. Detroit Eve. Journal Co., 84 Mich. 1, 47 N. W. 671 (1891); People v. Clarke, 105 Mich. 169, 62 N. W. 1117 (1895); to a complete reversal in People v. Durham, 170 Mich. 598, 136 N. W. 131 (1912), where the court said, "Under the system of jurisprudence which has so far obtained in this state, whether rightfully or wrongfully, the trial judge is precluded from intimating to the jury his views as to how they should decide the issues of fact within their province," wholly ignoring what was said in the Barry case, where the common law rule was explicitly followed.


Ohio: Metropolitan Life Ins. Co. v. Howle, 68 Ohio St. 614, 68 N. E.
4 (1903), where the court said: "A court in charging a jury should so evenly balance the scales of justice as not to indicate by a wink, look, shake of the head, or peculiar emphasis, as to his notions as to which way the verdict should go." This was a civil case, and apparently there is a distinction between civil and criminal cases in this respect in Ohio, for in Sandofsky v. State, 29 Ohio App. 419, 163 N. E. 634 (1928), which was a criminal case, the court said: "It is a well-established fact that the court has a right to comment upon any fact in the record regardless of the source from which it proceeds."

OKLAHOMA: Originally part of the Indian Territory, Oklahoma was purchased by the United States and opened to settlement in 1889, and was admitted to the Union in 1907. By statute (25 Stat. at L. p. 783, c. 333, § 6), the Arkansas practice (which follows the rule of the majority of the states) was extended in civil cases to the Indian Territory. In Isaac v. United States, 7 Ind. Terr. 196, 104 S. W. 588 (1907), which was a criminal case, the common law rule was expressly followed. But in Kirk v. Territory, 10 Okla. 46, 60 Pac. 797 (1900), it was held error for the trial judge to express an opinion as to the character of a witness (criminal case). And after Oklahoma was admitted to the Union, the rule followed in the majority of the states became well settled. Carter v. State, 12 Okla. Crim. 164, 152 Pac. 1132 (1915).


WISCONSIN: Byington v. City of Merrill, 112 Wis. 211, 88 N. W. 261 (1901), departing from the rule of Ketchum v. Ebert, 33 Wis. 611 (1873), where the common law doctrine apparently was followed.

WYOMING: Hay v. Peterson, 6 Wyo. 419, 45 Pac. 1073 (1896).

13 States in which the common law rule remained unchanged are:


DISTRICT OF COLUMBIA: Capital Traction Co. v. Hof, 174 U. S. 1 (1899), where Gray, J., said: "It is beyond doubt at the present day that the provisions of the Constitution of the United States, securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia." Horning v. United States, 254 U. S. 135 (1922); Hyde v. United States, 35 App. D. C. 490 (1910); Maxey v. United States, 30 App. D. C. 63 (1907); Washington Gas and Light Co. v. Poore, 3 App. D. C. 127 (1894).

MINNESOTA: Bonness v. Felsing, 97 Minn. 227, 106 N. W. 909 (1906). A distinction is made between civil and criminal cases. In the latter, under Gen. St. 1894, §7333, the judge is allowed to comment on the evidence, but he must inform the jury that they are the exclusive judges of the facts. In civil cases the judge is likewise allowed to comment on the facts, but he does not have to inform the jury that they are the exclusive judges of the facts unless he is expressly requested to do so. See King Cattle Co. v. Joseph, 165 Minn. 28, 205 N. W. 639 (1925).

NEW HAMPSHIRE: Flanders v. Colby, 28 N. H. 34 (1853), wherein
As the changes were originally made, seven were by constitutional provision, eighteen by statute, and fifteen by judicial decision. Beginning in 1796, the movement gradually gathered impetus in the next fifty years, and reached its height in the forty-year period between 1850-90. Since that time the changes have been few.13a

Of the three methods of change perhaps that by judicial decree is the most interesting. This is so not only because being in derogation of the common law it amounts to judicial legislation, which is always of interest; but because this self-demoting attitude of the American judges, by which they reduced themselves to the position of mere umpires or arbiters, lends itself to a striking contrast with the more jealous spirit of the British jurists.14

the court said: "The judge must make such suggestions upon the evidence as he deems most proper. This is a matter which cannot be limited."

NEW YORK: New York Firemen Ins. Co. v. Walden, 12 Johns 512 (1815). In this case Chancellor Kent said that he was "far from wishing to restrain the judges of the courts of law from expressing freely their opinions to the jury on matters of fact, and still less from interfering with their power of controlling the mistaken verdicts of juries, by a liberal exercise of the discretion of awarding new trials. No man can be more deeply sensible of the value and salutary tendency of this judicial aid and discretion, and none, certainly, can possess higher confidence in the character and wisdom of the court whose judgment is now under review * * * I am disposed to hand to posterity the institution of juries as perfect, in all respects, as we now enjoy it; for I believe it may, in times hereafter, be found to be no inconsiderable security against the systematic influence and tyranny of party spirit, in inferior tribunals." See also, Durkee v. Marshall, 7 Wend., 313 (1831); Dows v. Rush, 28 Barb., 157 (1858); People v. Smith, 180 N. Y. 125, 72 N. E. 931 (1904).


RHODE ISLAND: State v. Lynott, 5 R. I. 295 (1858).
13a See Note (1932) 30 Mich. L. Rev. 1303, where, under a classification differing in several respects from the above, the contemporaneous statutory provisions are given, indicating that Arizona has incorporated its former statutory provision into its constitution of 1910, and that the judicial rule in Alabama, Iowa, Michigan, and Wyoming has been translated into statutory enactments.
14 An example of this spirit is shown in the trial of Colonel John Lilburne, found in 4 Howell's State Trials 1270 (1649), where the defendant is reported to have asserted: "The jury by law are not only judges of fact but of law also, and you who call yourselves judges of the law are no more but Norman intruders, and indeed and in truth, if the jury please, are no more but cyphers to pronounce their
Where made by constitutional provision, there can of course be no doubt of the change or of its validity; the constitution is the law of the land, and only an amendment can alter it. But where the change is made by statute, an interesting question as to the constitutionality of such a statute may arise, and has, in fact, twice arisen.

The question first arose in Hawaii fourteen years after its annexation by the United States. Six years before its annexation Hawaii enacted a statute providing that: "The judge * * * shall in no case comment upon the character, quality, strength, weakness or credibility of any evidence submitted, or upon the character, attitude, appearance, motive or reliability of any witness sworn in a cause. * * *" The Organic Act, under which Hawaii was made a Territory, provided that "the Constitution, and, except as otherwise provided, all the laws of the United States * * * which are not locally inapplicable, shall have the same force and effect within the said Territory (of Hawaii) as elsewhere in the United States." It was admitted that the Seventh Amendment, guaranteeing the right of trial by jury, applied to the Territories, and that the Federal Constitution was to be read in the light of the common law in effect at the time of its adoption. Notwithstanding these concessions, and recognition of the numerous pronouncements by the United States Supreme Court of the federal rule, the majority of the Hawaii Supreme Court held, that inasmuch as the Organic Act of 1900 had not expressly repealed section 1798 of the Revised Laws (i. e., the statute in force before annexation), that section remained in effect, and there was nothing in that section in conflict with the Seventh Amendment of the Constitution. The determination of the question resolved itself into one proposition: Was the right of the judge to comment on evidence and give his opinion upon the facts an essential part of the common law jury trial at the time the Federal Constitution was adopted? An affirmative answer to this proposition would necessitate the holding that the statute involved was unconstitutional. Before answering it in the negative, the majority of the court reviewed a number of authorities, from which it concluded that the right of the judge to comment on the evidence and give an opinion on the facts was a matter of well-established practice at common law, but

verdict." Whereupon Mr. Justice Jermin exclaimed: "Was there ever such a damnable blasphemous heresy as this, to call the judges of the law cyphers." See Scott, supra, note 6, at 82-3.

16 Session Laws of 1892, c. 56, § 1.
18 Thompson v. Utah, 170 U. S. 343 (1898); Callan v. Wilson, 127 U. S. 540 (1888); Reynolds v. United States, 98 U. S. 145 (1879); Webster v. Reid, 11 How., 437 (1850).
did not constitute an integral part of the jury trial. Since the Federal Constitution was designed to perpetuate only the right to a jury trial in its essence, and not all the details incident thereto, it was no deprivation of constitutional rights to alter the incidents where the essence was retained. Faced by the decision of the United States Supreme Court in Capital Traction Co. v. Hof, wherein Mr. Justice Gray defined the common law right of jury trial by saying: "'Trial by jury' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence," (italics supplied), the majority held that full effect could be given to this language by a holding "that the power referred to, to advise on the facts, is the power to state or sum up the evidence." That this was anything but a full effectuation of the decision of the Supreme Court in United States v. Hof may be seen by antecedent and subsequent holdings of that court, clearly demonstrating that the Supreme Court considers the power of the judge "to advise the jury on the facts," much broader than merely "to state and sum up the evidence." A vigorous dissent from the holding of the majority of the Hawaii Supreme Court was registered by Perry, J., in which he endeavored, by no means unconvincingly, to demonstrate that the right of the judge to comment and give an opinion upon the facts was one of the component parts of the trial by jury as it was known at common law, and as recognized by the United States Supreme Court.

The second case to raise the question is that of People v. Kelly, coming nineteen years after the decision in Bannister v. Lucas. It is the first and (so far as can be ascertained) only case on the mainland ever to challenge the constitutionality of a statute changing the common law rule. The Illinois statute forbidding the judge to comment on the facts was first passed in 1827. The original Illinois Constitution of 1818 provided that "the right of trial by jury shall remain inviolate." The Constitution of 1848 retained this provision

20 174 U. S. 1 (1899).
21 See cases cited supra, note 3, and infra, note 46.
22 347 Ill. 221, 179 N. E. 898 (1931).
23 Supra, note 15.
24 This statutory provision appears in Rev. St. 1845, § 28, reappearing in the Laws of 1872, § 51, from which (as amended by the Laws of 1873-4, p. 92) the present provision was obtained, Ill. Rev. Stat. (Cahill, 1929), c. 110, § 72.
25 Art. 9, § 6.
verbatim, but the Constitution of 1870, and all subsequent constitutions, provided that "the right of trial by jury as heretofore enjoyed shall remain inviolate." By the decisions of the Illinois courts, the right to trial by jury, as guaranteed by the first Illinois Constitution, referred to the right as it existed at common law, and all subsequent constitutions referred to the right as originally guaranteed in the first constitution. Thus, while the court in People v. Kelly was not bound by the Seventh Amendment of the Federal Constitution and the decisions of the Supreme Court interpreting its provisions, it was presented with practically the same problem by its own Constitution. In its decision, upholding the constitutionality of the statutory provision, the majority of the court argued substantially as the majority in Bannister v. Lucas. By the constitutional provisions (they argued), only the essentials of trial by jury were preserved. "The cardinal principle is that the essential features of trial by jury as known to the common law must be secured"; but the right of the judge to comment on the evidence was not one of the essentials, therefore the statutory abrogation was not a violation of the constitutional right. The court split on this question of essentiality, De Young, J., registering an able dissent, in which Dunn, J., concurred.

The research undertaken by both the majority and minority in People v. Kelly on the point of essentiality disclosed practically the same results (though somewhat more elaborately developed) as were produced in the Bannister case. The majority added two arguments to those given in the latter case, one based on logic alone, the second on logic supported by authority. In the first it was argued that, since trial by jury was instituted not as a structural part of the government, but as a right or privilege of the accused for the purpose of "safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the Court," it

26 Art. 13, § 6.
27 Art. 2, § 5.
28 Sinopoli v. Chicago Ry. Co., 316 Ill. 609, 147 N. E. 487 (1925). In George v. People, 167 Ill. 447, 47 N. E. 741 (1897), the court said: "In order to determine the true meaning of the words 'the right of trial by jury as heretofore enjoyed,' it is necessary to go back to the common law of England."
29 The provisions of the Federal Constitution regarding trial by jury relate only to offenses against the federal laws; they are limitations only upon the power of the federal government, and are not restrictions on the power of the states. Eileenbecker v. District Court of Plymouth County, 134 U. S. 31 (1890); Cook v. United States, 138 U. S. 157 (1891).
30 Orr, J., speaking for the majority in People v. Kelly, supra, note 22, at p. 900.
31 Sutherland, J., in Patton v. United States, supra, notes 3 and 19. Earlier in the case Mr. Justice Sutherland said: "The record of English and colonial jurisprudence ante-dating the Constitution will be
would be illogical to contend that such a privilege included, as one of its essentials, authority to the trial judge to place his own interpretation on the weight of the evidence, and thus invade the exclusive function of the jury as judges of the facts. The second argument carries with it the surface persuasiveness of a syllogism: If the right of the judge to comment on the facts is one of the essentials of the right to trial by jury, then the defendant must have the right to demand that the judge give an opinion in any case. Prescinding from the philosophic merit of this argument, it must be conceded that the right of the judge to give his opinion is purely discretionary. He may exercise the right if he chooses, but he cannot be compelled to do so.

The significance of People v. Kelly lies not in the decision (since the strength of the argument made by the minority is scarcely less striking than that of the majority), but rather in the uniqueness of the case itself. "While the fact that the statutes in question have been construed and applied for a considerable period of time does not render them free from constitutional attack," the long continued acquiescence in their application "would seem to indicate an opinion on the part of the profession generally that they are not obnoxious to the constitutional requirement." The presumption of validity from long continued acquiescence is by no means conclusive, but it is not without some weight. On the other hand, it is significant that while no challenge of the constitutionality of these statutes was made until almost one hundred years after the enactment of the first one, the past twenty years have brought two court searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of the government, as distinguished from a right or privilege of the accused."

32 Smith v. Carrington, 4 Cranch 62 (1807), where Marshall, C. J., said: "There can be no doubt of the right of a party to require the opinion of the court on any point of law which is pertinent to the issue, nor that the refusal of the court to give such opinion furnishes cause for an exception; but it is equally clear that the court cannot be required to give to the jury an opinion on the truth of the testimony in any case." In Parmiter v. Coupland, 6 M. & W. 106 (1840), Parke, B., said: "The judge, as a matter of advice to them in deciding that question, might have given his own opinion as to the nature of the publication, but he was not bound to do so as a matter of law." And in Connecticut, where the common law rule is still followed, Thayer, J., in State v. Bissionnette, 83 Conn. 261, 76 Atl. 288 (1910), said: "The court might in its discretion comment on the weight of the testimony, but it was not bound to do so."

33 Orr, J., in People v. Kelly, supra, note 22, at p. 899.
35 People v. Olson, 245 Ill. 288, 92 N. E. 157 (1910).
contests of their validity, and more than one expression of doubt
from "the profession generally." 36

There is substantial agreement among the authorities on three of
the essentials of the common law trial by jury. These are: (1) That
the jury be twelve in number, (2) Impartial in their attitude, and
(3) Unanimous in their decision.37 A fourth is generally added,
namely, that the jury arrive at their verdict "under the direction
and supervision of the judge." 38 The difficulty lies in the interpreta-
tion of this fourth requirement. In People v. Kelly 39 the majority
restricted "the direction * * * of the judge" to the duty of the court
to instruct the jury in matters of law, and "superintendence" to the
other general duties to be performed "in conducting and controlling
the trial in conformity with the established rules of court and ac-
cording to the laws regulating its practice and procedure." In Hof
v. Capital Traction Co. 40 the United States Supreme Court construed
the words "direction and supervision" to include instructions to the jury
in matters of fact as well as matters of law. Obviously the question is
one of degree, the position of the state courts differing from that
of the federal courts only in the breadth of interpretation to be given
this fourth factor.

The United States Supreme Court has never passed upon the con-
stitutionality of a statute prohibiting the judge from commenting
on the evidence and giving his opinion on the facts. On the contrary,

36 Scott, supra, note 6, says at page 89: "At common law it was
clearly proper for the judge not merely to state the law and to sum
up the evidence, but also to express an opinion on the questions of
fact in issue as long as he leaves to the jury the ultimate determina-
tion of the issue, and makes it clear that it is not bound to adopt his
opinion as its own. Since the judge had this power at common law,
he is not deprived of it merely because the right to trial by jury is
guaranteed by the constitution. But in many of the states this power
has been expressly taken away by constitutional or statutory pro-
visions. It may well be questioned how far the legislature can consti-
tutionally curtail in this way the power of the judge." (Italics sup-
plied.) And in his Preliminary Treatise of Evidence at the Com-
mon Law (1898), Prof. Thayer says: "It is not too much to say of
any period, in all English history, that it is impossible to conceive
of trial by jury existing there in a form which would withhold from the
jury the assistance of the court in dealing with the facts. Trial by
jury, in such a form as that, is not trial by jury in any historic
sense of the words. It is not the venerated institution which at-
tracted the praise of Blackstone and of our ancestors, but some-
thing novel, modern, and much less to be respected." (Page 188,
note 2.) And see III Willoughby, Constitution of the United States
(2d ed., 1929) § 1070.
37 Scott, supra, notes 6, 14, and 36, at pages 73-4.
38 People v. Kelly, supra, note 22.
39 Ibid.
40 Supra, note 20.
in *Hopt v. Utah,* the Supreme Court reversed the judgment of the lower court for a violation of the code provision of the Territory requiring that "the judge may state the testimony and declare the law, but must not charge the jury in respect of matters of fact." No question of the constitutionality of the statute was raised, and the Court simply held that it was error (under the code provision) "for the court to charge that the offence, by whomsoever committed, was that of murder in the first degree."

In *Mitchell v. Harmony,* Chief Justice Taney, after stating the common law rule, and the practice followed in those states departing from the rule, said: "It is not necessary to inquire which of these modes of proceeding most conduces to the purposes of justice. It is sufficient to say that either of them may be adopted under the laws of Congress. And as it is desirable that the practice in the courts of the United States should conform as nearly as practicable, to that of the state in which they are sitting, that mode of proceeding is perhaps to be preferred which, from long established usage and practice, has become the law of the courts of the state." *(Italicics supplied.)* Taken alone, this would seem to be a direct authority for the constitutional validity of a statute denying the judge his com-

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41 110 U. S. 574 (1884).
42 13 How., 115 (1852).

43 Designed to relieve the confusion resulting from the conflict between the practice of code pleading in those states where that practice had been adopted, and the common law pleading followed in the federal courts, Congress passed the Act of June 1, 1872 (17 Stat. 197, § 5), which provided that "the practice, pleadings, and forms and modes of proceeding, in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be" to the same things "existing at the time in the courts of record of the state within which such circuit and district courts are held." Notwithstanding the recommendation of Chief Justice Taney in *Mitchell v. Harmony* (*supra*, note 42), the Supreme Court, in *Nudd v. Burrows*, 91 U. S. 426 (1875), held, that the Illinois Practice Act (the same provision involved in People v. Kelly), which prohibited the judge from commenting on the evidence, was not binding on the federal courts in Illinois. Swayne, J., said: "The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading, nor a form, nor a mode of proceeding within the meaning of those terms as found in the context (of the above statute)." This construction of the statute was re-affirmed in *Indianapolis, etc.*, R. R. Co. v. Horst, 93 U. S. 291 (1877), and in *Vicksburg, etc.*, R. R. Co. v. Putnam, 118 U. S. 545 (1886), where the court said: "The powers of the courts of the United States in this respect are not controlled by the statutes of the State forbidding judges to express any opinion upon the facts." And in *St. Louis, etc.*, R. R. Co. v. Vickers, 122 U. S. 360 (1887), counsel for the appellant cited the suggestion of Chief Justice Taney in the *Mitchell* case, but the court ignored it, saying: "A state Con-
mon law power to comment on the facts. Analyzed, and considered in the light of subsequent holdings of the Supreme Court, its weight as such an authority is measurably lessened.

In the first place, since the provisions of the Federal Constitution relating to trial by jury are not binding on the state courts, a state statute regulating jury trial can be declared unconstitutional only when it is in conflict with the state constitution. It is no novel proposition, therefore, that statutes abrogating the common law rule may be "adopted under the laws of Congress" by the several states. Whether such a statute may be adopted by the Federal Government is another question. "Under the laws of Congress" there is little doubt that such a statute might be adopted by the Federal Government, but the laws of Congress are not alone "the law of the land." There is also the Federal Constitution.

The Federal Constitution means what the Supreme Court says it means, and the Supreme Court has on numerous occasions said, that when the Sixth and Seventh Amendments provide for the preservation of trial by jury, they provide for the trial by jury as it existed at common law, and that there existing, the power of the judge to advise on the facts was an essential part of the institution. Against constitution (here that of Arkansas) cannot, any more than a state statute, prohibit the judges of the courts of the United States from charging juries with regard to matters of fact."

44 See supra, note 29.
45 Constitution of the United States, Art. VI, "This Constitution and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the land * * *." 46 There have been few points in the law on which the decisions of the Supreme Court have been more uniform. Well established in the early days of the Supreme Court [Smith v. Carrington, 4 Cranch 62 (1807)], the rule gained strength in the federal courts at a time when it was losing ground on every side in the states, and today, with a wealth of precedent behind it, it may be said to be stronger than ever. With none dissenting from it, perhaps the rule's most persistent champion was Mr. Justice Gray. His opinion in Vicksburg & Meridian R. R. Co. v. Putnam, 118 U. S. 545 (1886), has become the leading one: "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error." His definition of the common law right of trial by jury in Capital Traction Co. v. Hof (supra, note 20 and text), is the authoritative one in the federal courts. In that definition he included the right of the trial judge to advise the jury on the facts as one of the primary elements of
these explicit holdings stand only the purely negative authority of *Hopt v. Utah,*\(^4^7\) where the constitutionality of the statute was not the common law jury trial. In the course of his opinion in the Hof case, Mr. Justice Gray quoted with approval from the opinion of Sprague, J., in United States *v.* Bags of Merchandise, 2 Sprague 85 (1863): "Now the trial by jury was, when the Constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of the court. *This direction and superintendence was an essential part of the trial.*" (Italics supplied here and below.) Compare this last statement with that made by Hughes, C. J., in Herron *v.* So. Pac. R. R. Co., 283 U. S. 91 (1931), where he said: "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides." And again in the Quercia case (*supra*, note 1), the Chief Justice said: "Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the federal courts." In Patton, *et al.* *v.* United States, 281 U. S. 276 (1929), Sutherland, J., said: "What is embraced by the phrase 'trial by jury?' That it means a trial by jury as understood at common law (and applied), and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question. Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous."

With these direct holdings for authority, there is no need to resort to inferential arguments. However, it may be pointed out that the Supreme Court has several times declared that "the Seventh Amendment does not aim to preserve mere matters of form and of procedure, but substance of right," Brewer, J., in Walker *v.* N. M. & So. Pac. R. R. Co., 165 U. S. 593 (1897). And in Gasoline Products Co., Inc., *v.* Champlin Refining Co., 283 U. S. 494 (1931), Stone, J., said: "All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the Court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. Beyond this the Seventh Amendment does not go."

\(^4^7\) *Supra*, note 41. The provision of the Utah Criminal Code (§ 257) was passed in 1878. In 1877 the Utah court in People *v.* Lee, 2 Utah 441 (1877), had followed the common law rule. It should be noted that the statutory provision allows the judge to *state* the testimony and *declare* the law, but forbids him to *charge* the jury in respect to matters of fact. It would seem that even under the federal rule
brought into question, and the doubtful *dicta* of Chief Justice Taney, which, limited strictly to their exact terms, and read in the light of later decisions, are no authority at all for the proposition that a federal statute abrogating the common law power of the judge to advise the jury on the facts would be constitutional.48

the instruction of the trial judge in this case that "an atrocious and dastardly *murder* has been committed by some person" would be an abuse of his power to comment on the evidence, since it amounts (as the Supreme Court construed it) "to an instruction that the offence, by whomsoever committed, was *murder* in the first degree." Under the federal rule the judge has the power to *advise*, but he may not *direct* (see infra, note 49, where the test as laid down by Brandeis, J., is quoted), and the instruction in this case amounted to a direct charge that murder had been committed.

In connection with the fact that the constitutionality of the statute was not before the Supreme Court in this case, note that statutes are presumed to be constitutional, and are to be held invalid only when very clearly shown to be so. Henderson Bridge Co. *v.* Henderson, 173 U. S. 592 (1899); Fairbank *v.* United States, 181 U. S. 283 (1901); Adkins *v.* Children's Hospital, 261 U. S. 525 (1923). In Fletcher *v.* Peck, 6 Cranch 87 (1810), Marshall, C. J., said: "The question whether a law be void for its repugnancy to the constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case." And in Chicago & Grand Trunk R. R. Co. *v.* Wellman, 143 U. S. 339 (1892), Brewer, J., said: "Whenever in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of the courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals."

48 In 1929, the late Senator Caraway introduced a bill "to amend the practice and procedure in federal courts, and for other purposes," (S. 374, 71st Con. 1st Sess.), the first section of which provided that "hereafter in any cause pending in any United States court, triable by jury, in which the jury has been impaneled to try the issue of facts, it shall be reversible error for the judge presiding in said court to express his personal opinion as to the credibility of witnesses or the weight of testimony involved in said issue. *Provided*, That nothing herein contained shall prevent the court directing a verdict when the same may be required or permitted as a matter of law." Had this bill become law, the stage would have been set for a direct decision by the Supreme Court on its constitutionality. As it was, the bill passed the Senate, but failed in the House.
Whether the rule be federal or state, there are certain inherent limitations in both which frequently make application of the rule a close and difficult one. In the federal courts the difficulty lies chiefly in determining whether or not the trial judge has overstepped the bounds of propriety in the exercise of his discretionary power;\(^4\) in the state courts the difficulty is essentially the same, except that there the question is whether the judge has attempted to exercise a power which is denied him,\(^5\) rather than whether he has abused a

\(^4\)While the abuse in the Quercia case (supra, note 1), is an extreme one, it is by no means unique. In Malaga v. United States, 57 F. (2d) 822 (C. C. A. 1st, 1932), it was held by the majority to be reversible error for the trial judge to say: "Do you believe that story, gentlemen? To me it is perfectly plain that it is a lie." So also in Cook v. United States, 18 F. (2d) 50 (C. C. A. 8th, 1927), where the court said: "He didn't appear to me to be a frank witness; his evidence didn't appear to me as being truthful; it didn't appear to me that he really knew whether he would recognize his own writing or not." In Barham v. United States, 14 F. (2d) 835 (C. C. A. 8th, 1926), the trial judge said: "And my judgment is, as long as men like him wear a deputy sheriff's commission, why 15 year old girls will be at dances drinking liquor." The majority held this to be reversible error, but Stone, J., dissented. The United States Supreme Court held it error for the trial judge to charge the jury to the effect that no one who was conscious of innocence would resort to concealment, on the ground that such an instruction amounted to a charge that anyone who did resort to concealment was guilty. Hickory v. United States, 160 U. S. 408 (1896). Similarly in Allison v. United States, 160 U. S. 203 (1895), where the judge, speaking of the defendant's story of self-defense, said: "All men would say that. No man created would say otherwise when confronted by such circumstances." But in United States v. Philadelphia & Reading R. R. Co., 123 U. S. 113 (1887), the Supreme Court sustained the instruction: "In other words, while the court does not desire to control your finding, but submits the question to you, it is of opinion, that you should not, under the circumstances, find for the plaintiff." In Horning v. District of Columbia, 254 U. S. 135 (1920), Brandeis, J., lays down the following standard: "The judge may enlighten the understanding of the jury and thereby influence their judgment, but he may not use undue influence. He may advise; he may persuade; but he may not command or coerce. He does coerce when without convincing the judgment he overcomes the will by the weight of his authority." See also Reynolds v. United States, 98 U. S. 145 (1878), and Starr v. United States, 153 U. S. 614 (1894).

\(^5\)Under the state rule, improper remarks are not reversible unless prejudicial, Tulsa Hosp. v. Juby, 73 Okla. 243, 175 Pac. 519 (1918); so where the jury does not hear the remark, it is immaterial, State v. Baldwin, 178 N. C. 687, 100 S. E. 348 (1919). Stating the testimony of a particular witness has been held improper, Hill v. State, 194 Ala.
power which is indisputably his. Because it is a negative one, the state standard is often less elastic and more difficult of application than the looser federal standard.

However, the controversy as to which is the better rule is less a matter of inherent shortcomings, and more a question of policy. The case of the inarticulate judge *versus* the rubber stamp jury is an old one. Most of the discussion comes from the bar generally, but there are instances in which the courts themselves have spoken their minds. While the arguments on both sides are varied and prolific, they are, in the main, the familiar ones put forward for the abolition or retention of the jury system. Those who uphold the abrogation of the common law rule are those who believe the jury has a place in our modern system of administering the law, while the ones who favor the return of the old rule in those states which have abandoned it, are generally convinced that the jury system has outlived its usefulness. If the jury is to be given place, and if theirs

11, 69 So. 941 (1915); so instructions classifying witnesses as to credibility were held improper, Babb *v.* State, 18 Ariz. 505, 163 Pac. 259 (1917); and an instruction that evidence of police officers is to be received with caution is improper, Romero *v.* State, 101 Neb. 650, 164 N. W. 554 (1917); but the court may state a general rule for determining the credibility of witnesses, Darneal *v.* State, 14 Okla. Crim. 540, 174 Pac. 290 (1918). Statements by the court as to the materiality of a question is not a comment on the evidence, State *v.* Carabajal, 26 N. M. 384, 193 Pac. 406 (1920); but a remark that the prosecution has proved enough against the accused is improper, Richards *v.* Commonwealth, 24 Ky. 14, 67 S. W. 818 (1902); and use of the word 'alibi' in an instruction is reversible error, Watson *v.* Adams, 187 Ala. 490, 65 So. 525 (1914). In general, "all expressions of opinion, or comments, or remarks upon the evidence, which have a tendency to intimate the bias of the court with respect to the character or weight of the testimony, particularly in criminal cases, are watched with extreme jealousy, and are generally considered invasions of the province of the jury," per Staples, J., in Dejarnette *v.* Commonwealth, 75 Va. 867 (1881).


52 Thus in Crabtree *v.* Missouri & Pacific R. R. Co., 86 Neb. 33, 124 N. W. 932 (1910), Letton, J., said: "The writer is not much in sympathy with this view of the law (the rule in the majority of the states), but it is too firmly established in this state to warrant a change by mere judicial act." Contrast this with the dictum of Graves, J., in Laible *v.* Wells, 296 S. W. 428 (Mo. 1927): "Speaking, not as a prophet, but only as one who can hear the mutterings of
is to be the place of the fact-finding body, then in strict logic there is no reason for the common law rule. As a practical matter, juries being what they are today, when the judge gives them his opinion of what their decision ought to be, that opinion will very generally be their decision. It may well be that such a decision will more closely approximate the right than one arrived at by the jurors alone and unaided. If this proves the efficiency of the bench, it also proves the inefficiency and purposelessness of the jury. When, therefore, the National Committee on Law Observance and Enforce-

an oncoming storm and visualize the outcome thereof, it is safe to say that the present federal practices in this regard (right of the judge to comment on the facts) will be wiped out by statutes if not corrected by the courts. If we are to have jury trials at all, both court and jury should be kept strictly within their respective fields of action in the course of the trial."

52 Not always is this the case, however. Thus in 5 Wigmore, Evidence (2d. ed. 1923)- § 2551, the author says: "The prevalent state practice is an unfortunate departure from the orthodox common law rule. It has done more than any other one thing to impair the general efficiency of jury trial as an instrument of justice. Since it remains the law by grace of statute only, in most states, it can and should be readily abolished. A new birth of long life will then be opened for the great beneficial institution of Trial by Jury." But confer Dean Green (supra, note 51), where he says (at page 416): "As a formula for administering justice, trial by jury is merely a societal antique. But it typifies something back in the growth of society which has been gripped by man's emotions and they will not let it go. Its processes radiate a flavor of popular justice and a flourish of democracy. Those are still stout words. But the fact is that in the organism of society, as in the organisms of all life, there are structural parts which no longer serve useful functions. They reappear nevertheless in succeeding generations. They are sometimes removed from the physical organism by heroic surgery. To this the social organism seldom submits. Moreover, the intelligence that would do so in this instance would not stop with the jury's removal; it would demand more cutting.

But the social body as well as the physical one can isolate a useless part. In a thousand ways already and in others to come the social body is building the jury out of its anatomy. The jury's impotency is widely acknowledged. Informal bodies, courts with special jurisdictions, trial by judges, insurance, arbitration and other devices have already taken over some of its most important functions. Yet much remains to be done before the irritation can subside. The cost and the waste are without calculation. But life seldom counts cost; and neither does the law." And see Kolkman v. People, 89 Colo. 8, 300 Pac. 575 (1931).
ment declares: "It is significant that there is most satisfaction with criminal juries in those jurisdictions which have interfered least with the conception of a trial of the facts by jurors unburdened with further responsibility, and instructed as to the law and advised as to the facts by the judge," it is in effect indicting the jury system with failure. Where the common law rule has been abrogated, the theory of the jury system has been pushed to its logical extreme. If there it has failed to produce the best results, the fault would seem to lie in the theory itself.

F. C. N.

MALICIOUS PROSECUTION—Its Scope and Purpose.

Malicious prosecution is a specific tort, classified by Cooley and other writers as one of the wrongs affecting personal security. The legal duty imposed by this branch of the law can best be stated as a negative proposition, that every man owes to every other the legal duty not maliciously to institute proceedings against another when he has no probable cause to believe the proceedings justified. The tort has been defined as "A judicial proceeding instituted by one person against another, from wrongful or improper motives, and without probable cause to sustain it." The original proceeding may have been either criminal or civil, but it must have been judicial in

54 "All persons familiar with the trial of criminal cases have had occasion to observe with what anxiety a jury listens to catch from the court the slightest indications of its views. This is particularly true when matters of great doubt and difficulty are before them for decision. The more able and upright the court, the more likely are its intimations to have weight." Kingman, J., in Home v. State, 1 Kan. 47 (1862).

55 Report on Criminal Procedure (1931), pp. 23-28. In the Report on Prosecution (1931), p. 123, the same Committee, after noting surveys made in New York, Illinois, and Michigan, said: "All these (surveys) unite in recommending that in the State Courts, as now in the Federal Courts, the trial judge be given the right to comment on the facts and the evidence, and thus, to an increasing degree, influence the verdict of the jury." And the American Law Institute, in the Restatement of Criminal Procedure (1926), § 325 (1), states: "The court shall instruct the jury regarding the law applicable to the facts of the cause, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper administration of the cause. It shall if requested inform the jury that they are the exclusive judges of all questions of fact and, whether requested or not, the court shall so inform them if it comments on the evidence, the testimony or the credibility of any witness."

1 Cooley, Torts (4th Ed. 1932) 381.

2 Hicks v. Brantley, 102 Ga. 264, 268, 29 S. E. 459 (1897).
character. The civil proceedings which will form the basis of an action for malicious prosecution have not been clearly defined by the decided cases. At common law the action would lie for maliciously instituting a civil proceeding without probable cause, since before the Statute of Marlbridge the successful party to a civil suit could not recover his costs of suit. After the date of that statute, however, the successful defendant could recover of the plaintiff his costs of defense, and the English courts laid down the rule that there could be no recovery in an action for the malicious prosecution of a civil suit unaccompanied by either an arrest of the person or a seizure of his property or some other special injury. There is a definite conflict of authority in the American courts. Many follow the English rule and deny recovery unless the previous civil suit was accompanied by the arrest of the person, a seizure of his property, or some other special injury for which the recovery of his costs was not a sufficient compensation. Other American courts hold that the recovery of costs in the prior civil action is not a sufficient recompense to the person injured, and allow a recovery even in the absence of an arrest, seizure of property or other special injury.

The elements of malicious prosecution are four in number:
1. A suit or proceeding instituted by the defendant without probable cause.
2. The termination of that suit or proceeding in favor of the present plaintiff.
3. A malicious motive in instituting it.
4. Damage to the plaintiff.

These elements must exist together to constitute the wrong, and the burden is upon the plaintiff to show their existence before he can recover. Actions for malicious prosecution are not favored in the law, and they will be sustained only when it is shown that the prosecution was in fact actuated by malice, and that the party instigating it had no reasonable ground for causing its commencement. Harrison, J., in *Ball v. Rowles,* states the philosophy of the rule to be, that "it is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. For the purpose of protecting him in so

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3 52 Hen. III, c. 6 (1267).
4 Kolka v. Jones, 6 N. D. 461, 71 N. W. 558 (1897).
6 Smith v. Michigan Buggy Company, 175 Ill. 619, 51 N. E. 569 (1898); Wetmore v. Mellinger, 64 Iowa 741, 18 N. W. 870 (1884); cf. Shedd v. Patterson, 302 Ill. 355, 134 N. E. 705 (1922).
7 Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 78 So. 204 (1917); Eastin v. Stockton Bank, 66 Cal. 123, 4 Pac. 1106 (1884).
8 93 Cal. 222, 28 Pac. 337 (1892).
doing, it is the established rule, that if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted." Upon the grounds of public policy, therefore, the strict burden of proving the existence of all the elements of the tort rests upon the plaintiff, and he cannot succeed if he fail to establish any one of them.

The plaintiff must first show that the original proceeding was instituted against him by the defendant without probable cause, and, although the averment is a negative one in form and character, it is nevertheless, a material one, and must be proved by the plaintiff by affirmative evidence. The question as to the existence or non-existence of probable cause is a mixed question of law and fact. If the facts upon which the defendant acted are undisputed, the court must consider the question as one of law. Where the facts tending to show want of probable cause are in dispute, however, their existence is for the determination of the jury, but their effect when found is a question of law for the court. Probable cause in this connection has been defined as "such reasonable grounds for suspecting the plaintiff to be guilty of the offense charged as would warrant a cautious man in believing him guilty." The probable cause must exist, if at all, at the time the original proceedings were begun. If the probable cause did not exist, then it is no defense that the defendant later learned facts which would have constituted probable cause had he known them then. Thus it has been held that the question of probable cause is not dependent on the actual guilt or innocence of the plaintiff, and the test is the honest belief of the prosecutor in the existence of probable cause, based on reasonable grounds. However, the actual guilt of the plaintiff may be shown and is a complete defense to the action for malicious prosecution and the question of probable cause need not then be considered. Also, even though the plaintiff was acquitted in


12 Torsch v. Dell, 88 Md. 459, 41 Atl. 903 (1898).


14 Robitzek v. Daum, 220 Pa. 61, 64, 69 Atl. 96 (1908).

the prior proceeding, he may be shown to have in fact been guilty and
the rule applies.16 It is not essential to proof of probable cause that
the plaintiff be convicted in the prior proceeding, it is enough to show
that the defendant prosecuted the plaintiff in the honest belief that
he was guilty and that such belief was reasonable.17

In addition to proof of lack of probable cause, the plaintiff must also
show that the defendant acted through malice in instituting the
original proceeding.18 Malice necessary to sustain an action for
malicious prosecution has been defined by Gardner, J., in Parisian
Co. v. Williams,19 as, "whatever is done wilfully and purposely, whether
the motive be to injure the accused, to gain some advantage to the
prosecutor, or through mere wantonness or carelessness, if at the same
time wrong and unlawful within the knowledge of the actor." And in
Mitchell v. Jenkins,20 which was a case of an unlawful arrest by a
creditor, the court of King's Bench, speaking through Parke, J., de-
declared that "the term malice in this form of action is not to be con-
sidered in the sense of spite or hatred against an individual, but of
malius animus, and as denoting that the party is actuated by improper
and indirect motives."

Malice may be inferred from the want of probable cause,21 but the
converse of the proposition does not hold true, since, as has been
stated, the lack of probable cause must be proved without reference to
the element of malice.22 The Massachusetts Supreme Court in Falvey
v. Faxon,23 says, "While malice may be inferred from a want of proba-
ble cause, it is not a necessary inference, and the issues are distinct,
as, even if it be proved that the prosecution was without probable
cause, it is still a sufficient defense to show that it was instituted in
good faith, and in the honest belief of the guilt of the party charged.

The question of malice is always a question of fact for the jury.24 The
rule in most jurisdictions seems to be to the effect that if the defendant

16 White v. International Text Book Co., 156 Iowa 210, 136 N. W.
121 (1912); Parkhurst v. Masteller, 57 Iowa 474, 10 N. W. 864 (1881).
17 Taylor v. American International Shipbuilding Corp., 275 Pa. 229,
119 Atl. 130 (1922).
18 Crescent City Livestock, etc., Co. v. Butchers' Union Slaughter
House, etc., Co., 120 U. S. 141 (1887); Walker v. Smay, 108 Kan. 496,
196 Pac. 231 (1921); Shattuck v. Simonds, 191 Mass. 506, 78 N. E.
122 (1906).
19 203 Ala. 378, 83 So. 122 (1919).
20 5 B. & Adolph 588 (1833).
21 Cunningham v. Moreno, 9 Ariz. 300, 80 Pac. 327 (1905); cf. Leeker
v. Ybanez, 24 Ariz. 574, 211 Pac. 864 (1923); Stubbs v. Mulholland,
168 Mo. 47, 67 S. W. 650 (1902); Vladar v. Klopman, 89 N. J. L. 575,
99 Atl. 330 (1916).
23 143 Mass. 284, 9 N. E. 261 (1887).
24 Mitchell v. Jenkins, supra note 20; Stewart v. Sonneborn, supra
note 11.
shows that he sought the advice of proper counsel, made a full and fair disclosure of all the facts and circumstances of the case, and acting in good faith upon the advice received, instituted the proceedings, he has made out a good defense to the action for malicious prosecution. These decisions consider the question of the advice of counsel as one connected with the question of probable cause.\textsuperscript{25} However, as pointed out by Keigwin in his Cases on Torts,\textsuperscript{26} the question of probable cause is one of law for the consideration of the court, and it is difficult to see how the advice of any counsel can make probable cause where as a matter of law none exists. In this view of the question, the fact that the defendant first sought the advice of counsel goes to show that he acted in good faith and was in point of fact not actuated by malice. This view is supported by the Supreme Court of Missouri in Sparling \textit{v. Conway},\textsuperscript{27} where the court said, “The true office of the advice of counsel * * * is to relieve the prosecutor from the imputation of malice.” In Pennsylvania it has been held that the taking of the advice of counsel and acting thereon in good faith, rebuts the inference of malice arising from the want of probable cause.\textsuperscript{28}

The prior proceedings must have terminated in favor of the present plaintiff in order for him to sustain the action for malicious prosecution. The reason for the rule is that until the prior action has terminated it cannot be determined whether or not it was instituted with malice and lack of probable cause.\textsuperscript{29} In an action for malicious prosecution for incest it was held that the declaration was demurrable since it failed to state how the prosecution was disposed of, or that it was not still pending.\textsuperscript{30} Upon the question as to what will constitute such a termination as will support the later action, the authorities are not in complete harmony. The older cases seem to support the rule that the defendant in the prosecution must have been acquitted after a trial. However, the modern rule, and certainly the weight of authority is to the effect that any manner of termination is sufficient which puts an end to the proceeding and renders it incapable of being revived except by a new proceeding.\textsuperscript{31} Where a \textit{nolle prosequi} was entered without the consent or procurement of the plaintiff, and wholly by the order of the court at the request of the prosecuting attorney, and the action was dismissed, it was held a sufficient termination to support the action for malicious prosecution, the court stating: “The prosecution being ended, there can thereafter be no conviction of the accused in that proceeding, and therefore no opportunity to establish in that


\textsuperscript{26} \textit{Keigwin, Cases on Torts} (1929) 490.

\textsuperscript{27} 75 Mo. 510, 514 (1882).

\textsuperscript{28} McCarthy \textit{v. DeArmit}, 99 Pa. 63, 70.

\textsuperscript{29} Parker \textit{v. Langly}, 10 Mod. 209 (1714).

\textsuperscript{30} Fisher \textit{v. Bristow}, 1 Doug. 215 (1779).

\textsuperscript{31} Apgar \textit{v. Woolston}, 43 N. J. L. 57, 66 (1881).
proceeding the existence of probable cause for the prosecution. ** **
And, when the accused is deprived of a trial by the entry of a *nolle
prosequi*, injury he sustains from the malicious prosecution may be no
less serious or certain than if he had been acquitted on a trial." 32 In
*Halberstadt v. New York Life Insurance Company*, 33 the defendant's
agent had charged the plaintiff in a criminal court in Mexico with
embezzlement, and a warrant was issued for his arrest. The defendant
showed in its answer that the warrant had never been served on the
plaintiff, he having left Mexico and remained absent therefrom until
the proceedings were dismissed because of the lapse of time. The
court, while holding that for the purposes of an action for malicious
prosecution, the proceeding against the plaintiff in Mexico was insti-
tuted upon the issuance of the warrant despite the fact that it had
never been served upon him, decided that there was not such a termi-
nation of that proceeding as would support the principal suit. After
a thorough review of the authorities the court laid down two rules in
regard to the question. The first ** ** that where a criminal proceed-
ing has been terminated by judicial action of the proper court or
official in any way involving the merits or propriety of the proceeding,
or by dismissal or discontinuance based on some act chargeable to the
complainant, as his consent, or his withdrawal, or abandonment of his
prosecution, a foundation in this respect has been laid for an action
of malicious prosecution. The other and converse rule is that where
the proceeding has been terminated without regard to its merits or
propriety by agreement or settlement of the parties, or solely by the
procurement of the accused as a matter of favor or as the result of
some act, trick or device preventing action and consideration by the
court, there is no such termination as will support such an action.

The plaintiff is required to show, in addition to the other elements
of the action, that he has suffered damage by reason of the malicious
prosecution. The damages recoverable must be legal damages, that
is, such as the law can recognize, but the authorities are by no
means clear on the question of what these damages must be. Lord
Holt, in *Savill v. Roberts*, 34 states that the damages which may be
recovered are of three kinds: First, damage to a man's fame or
reputation if the matter whereof he is accused be scandalous; Second,
to his person, resulting from his imprisonment; Third, to his property,
whereby he is put to charges and expense. The rule is generally
recognized that where the person has been arrested and his person
detained, in either a civil or criminal proceeding, or his property has
been seized by an attachment, or his credit impaired by a proceed-
ing in bankruptcy, he is entitled to legal damages. 35 In the case of
*Quartz Hill Gold Mining Company v. Eyre*, 36 where the defendant
maliciously and without probable cause filed a petition to wind up

32 Douglas *v.* Allen, 56 Ohio St. 156, 46 N. E. 707 (1897).
33 194 N. Y. 1, 86 N. E. 801 (1909).
34 12 Mod. 208 (1699).
35 *Kolka v. Jones*, *supra* note 4, where authorities are collected.
the plaintiff company and the petition was dismissed upon the hearing, the court through Lord Justice Bowen, while recognizing that under the English law damages are not generally recoverable for the malicious prosecution of a civil suit not accompanied by either an arrest of the person or a seizure of his property, held, that the filing of a bankruptcy petition against a trader struck a direct blow at his credit, and that such impairment of credit was a sufficient basis of damage to allow recovery. The same question was directly involved in the case of Peerson v. Ashcraft Mills, and the court held that damages could be recovered by the plaintiff for the malicious prosecution of a civil suit where there had been no arrest or seizure of property. That case represents the view adopted by one line of American courts. In Smith v. Michigan Buggy Company, the contrary doctrine is expressed and, in accordance with the rule laid down in many American courts, the English rule is followed and recovery is denied without proof of arrest, seizure of property or other special injury.

G. A. C. Jr.

36 Supra note 5.
37 201 Ala. 348, 78 So. 204 (1917).
38 175 Ill. 619, 51 N. E. 569 (1898).
BANKRUPTCY—Discharge—Grounds for Denial.

In 1929 the respondent procured a contract for state highway construction. The petitioner gave bond to secure the respondent on this contract. The respondent failed, and the material man sued on the bond and recovered judgment against the principal and surety jointly. The surety paid and took an assignment of the judgment. The respondent having been declared a bankrupt in 1931 applied for discharge from his debts. The surety, the petitioner in this case, filed objections, contending that the bankrupt should not be discharged, because he had induced the petitioner to become surety by means of a materially false written statement regarding his financial condition. Held, the obtaining property on credit by a false financial statement in writing precluded the discharge in bankruptcy. Fidelity & Deposit Co. of Md. v. Arenz, 290 U. S. — (1933).

The Bankruptcy Act, § 14 as amended [11 U. S. C § 32 (b) 3 (1926)] requires denial of discharge if the bankrupt “obtained money or property on credit * * * by making * * * a materially false statement in writing respecting his financial condition.”

The respondent contended: 1. That a surety bond does not constitute “property” as that term is used in the above section of the Bankruptcy Act 2. That the securing of a surety bond does not constitute “obtaining” property on credit within the statutory meaning.

As between two meanings of a word, the ordinary and popular meaning is, in general, to be preferred and is most frequently in harmony with the subject matter and object of the enactment. * * * It is a canon of interpretation that all words, if they be general, and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular, if the intention be particular, that is, they must be understood as used in reference to the subject matter in the mind of the Legislature, and strictly limited to it. Wells Fargo & Co. v. Mayor, etc., of Jersey City, 207 Fed. 871, 876 (C. C. A. 3rd, 1915).

Property is a term of broad significance, embracing everything that has exchangeable value, or goes to make up a man’s wealth; every interest or estate which the law regards of sufficient value for judicial recognition. Samet v. Farmer’s and Merchants Nat. Bank, 247 Fed. 669, 671 (C. C. A. 4th 1917).

Property has been defined as anything of value, or anything which has debt-paying or debt-securing power. Pirie v. Chicago Title and Trust Co., 182 U. S. 438, 443 (1901).

Again, property is a vested right of action, in the same sense that tangible things are property, and is equally protected against arbitrary interference. Pritchard v. Norton, 106 U. S. 124, 132 (1882).

Under these definitions the court in the principal case was not without authority in holding the bond in question to be within the
term “property” as used in the Bankruptcy Act, although in doing so it overruled the decision in the cases of In Re Tanner et Ux, 192 Fed. 572, 574 (D. C. Wash. 1911); and In Re Ford, 14 F. (2d) 848 (D. C. Wash., 1926).

With reference to the term “credit,” it has been held that, “The accepted and customary definition of the term ‘creditor,’ the better reasons, and the greater weight of authority, all converge to establish and sustain the conclusion that an indorser, an accommodation maker, or a surety for a bankrupt is his creditor.” Swarts v. Stegal, 117 Fed. 13, 19 (C. C. A. 8th, 1902). To the same effect are the cases of Kobusch v. Hand, 156 Fed. 660 (C. C. A. 8th, 1907); and In Re Schleicher Printing Corp., 62 F. (2d) 503 (C. C. A. 2d, 1933). Bouvier defines a creditor as “one who has the right to require the fulfillment of an obligation or contract.” (BOUVIER LAW DICT. 435). These authorities support the holding that the bond in the principal case established a credit relationship between the respondent and the petitioner, although the Ford and Tanner cases, supra, are to the contrary.

Obtaining the bond by false representation and paying the obligee the amount of the loss should be regarded as all one transaction, which amounted to obtaining money on credit by false representation within the Bankruptcy Act. In Re Dunfee, 219 N. Y. 188, 114 N. E. 52 (1916).

Cases holding that there can be no discharge in bankruptcy where the bankrupt has obtained money on credit by making a materially false statement in writing respecting his financial condition, are numerous. Robinson v. Williston, 266 Fed. 970 (C. C. A. 1st, 1920); Samet v. Farmers' and Merchants' Nat. Bank of Baltimore, supra; Swift & Co. v. Fortune, 287 Fed. 491 (C. C. A. 8th, 1923).

The recent case of Wilensky v. Goodyear Tire and Rubber Co., Inc. et al., — F. (2d) — (C. C. A. 1st, 1933), carries this point even further. There the bankrupt, as officer of a corporation of which he was the sole stockholder, obtained credit for the corporation by means of a materially false statement as to the corporation's financial condition. Although nominally a financial statement of the corporation, it was held that the statement was in effect one of the bankrupt's own financial condition, and came within the above provision of the Bankruptcy Act so as to bar the bankrupt's discharge. The corporate entity was disregarded, the court holding that the Bankruptcy Act should not be so construed as to allow an escape from its intent by the device of interposing an artificial personality between the bankrupt and the lender.

R. B. F.

CONSTITUTIONAL LAW—Abatement and Revival—Attorney General.

An Act of the Arizona Legislature prohibits railroad companies in that state from operating trains of more than fourteen passenger
cars, or seventy freight cars, and provides that the Attorney General of the State shall bring suits for violation of this act. Two railroads brought suit against the then Attorney General of the State to enjoin institution of prosecutions under the act, claiming it to be unconstitutional as violating Art. I, § 8 of the United States Constitution and the due process clause of the Fourteenth Amendment. Before the hearing, Arthur T. La Prade succeeded to the office of Attorney General. The plaintiffs petitioned the court for an order to substitute him for his predecessor under the Act of Feb. 13, 1925, [43 Stat. 941 (1925), 28 U. S. C. § 780 (1926)]. La Prade insisted that there was no pleading that he himself had threatened to enforce the statute, and therefore no showing of any prosecution to be enjoined. The court granted the petition, heard the plaintiffs, declared the statute unconstitutional, and enjoined the Attorney General. The question here is whether or not the court had a right to substitute La Prade for his predecessor in office. Held, in proceedings by a State Attorney General to enforce an unconstitutional statute, he is stripped of his official authority and becomes personally liable. In such a case, the District Court cannot order substitution of the successor in office and direct a continuance of the suits against him. Ex Parte La Prade, 289 U. S. 444 (1933).

The statute cited above provides that: (a) Where a proceeding is brought by or against an officer of the United States or any of its territories or possessions relating to the present or future discharge of his official duties, and he ceases to hold office, the court may permit the cause to be continued by or against his successor in office, if it be substantially shown to the court within six months that there is a need for continuing the cause and obtaining an adjudication of the matters involved; (b) Similar proceedings may be taken where an action brought by or against an officer of a state is pending in a court of the United States at the time of separation from office; (c) Before substitution under this section the party affected, unless expressly consenting, must be given reasonable notice of the application and an opportunity to present any objection which he may have. In interpreting this statute, the court held that Congress cannot direct the conduct of state officials in suits by or against them, and cannot ordain that they be sued as representatives of the state and stand in judgment in its behalf. The statute authorizing substitution of a successor in a state office is permissive only and does not authorize imposition of liability or restraint upon the successor because of any illegal act done or threatened by his predecessor.

It is simply an illegal act on the part of the state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. The officer, in proceeding under such enactment, comes into conflict with the superior authority of the Federal Constitution, and he is stripped of his official or representative character and is subjected in his
person to the consequences of his individual conduct. *Ex Parte Young*, 209 U. S. 123 (1908). As the bill is framed upon the theory that the act is unconstitutional, and that the defendant, who is a public officer concerned with the enforcement of the laws of the state, is about to proceed wrongfully to the complainants' injury * * * it is established that the suit cannot be regarded as one against the state. *Truax et al. v. Raich*, 239 U. S. 33 (1915). See *Hopkins v. Clemson Agricultural College*, 221 U. S. 636 (1911); *Terrace v. Thompson*, 263 U. S. 197 (1923); *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146 (1910); *Herndon v. Chicago, R. I. & P. R. Co.*, 218 U. S. 135 (1910); *Phila. Co. v. Stimson*, 223 U. S. 605 (1912); *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278 (1913).

A suit to compel the commissioner of patents to issue a patent abates by the death of the commissioner and cannot be revived so as to bring in his successor, even upon consent of the latter. *U. S. ex. rel. Bernardine v. Butterworth*, 169 U. S. 600 (1898). [Upon the suggestion of the court in this case, subdivision (a) of the act in controversy was passed, 43 Stat. 941 (1925), 28 U. S. C. 780 (1926)]. A suit to enjoin a public officer from enforcing a statute is personal, and, in the absence of statutory provisions for continuing it against his successor, abates upon his death or retirement from office. The Act of Feb. 8, 1899 [30 Stat. 822 (1899), 28 U. S. C. § 780 (1926)] does not authorize the substitution of a county treasurer for his predecessor in a suit to enjoin the collection of taxes. *Irwin v. Wright*, 258 U. S. 219, (1922). (After this decision, subdivision (b) was annexed to the statute). There is no legal relation between the wrong committed or about to be committed by the predecessor and the personal liability of his successor when there is no privity between them. *Gorham Mfg. Co. v. Wendell*, 261 U. S. 1 (1923).

Congress has power to direct the conduct of Federal officers in proceedings brought by or against them, and may ordain that they sue or be sued as representatives of the United States and stand in judgment in its behalf, but Congress is not so empowered as regards state officers. *Interstate Commerce Commission v. Oregon Washington R. & Nav. Co.*, 288 U. S. 14 (1933). Therefore the court properly held in this case that the section is merely permissive and does not purport to authorize the imposition of liability or restraint upon a state officer because of any wrong (enforcement of an unconstitutional statute) done or threatened by his predecessor individually.

It is apparent that what the railroad companies really wanted was a declaratory judgment, passing upon the constitutionality of the Arizona Statute. This is clear from their insistence in proceeding with the case after the Attorney General had indicated his willingness to discontinue the proceedings instituted by his predecessor. The courts are reluctant to make such declarations, and only in exceptional cases will they relieve the petitioner by anticipation from the usual duty of setting up his legal defenses when sued. Borchard, *The Declaratory Judgment* (1918) 28 Yale L. J. 1, 105. And where such declarations are allowed, the courts are careful to verify
the fact that the controversy is a real and genuine one, that the parties have an active and immediate interest in its determination, and that the judgment of the court will finally decide and end the controversy. Borchard, Judicial Relief for Peril and Insecurity (1932) 45 Harv. L. Rev. 793. Federal courts cannot conceive of declaratory judgments as other than merely advisory, and therefore unconstitutional. Ex Parte Bakelite Corp., 279 U. S. 438 (1928). The courts will not declare future rights in anticipation of an event which may not happen, unless special circumstances appear which warrant an immediate decision, as, for instance, where present rights depend upon the declaration sought by the plaintiff. Reese v. Adamson, 297 Pa. 13, 146 Atl. 262 (1929); Cf. In re Cryan, 301 Pa. 386, 152 Atl. 675 (1930). But it must be borne in mind that when the decision in a federal court involves no federal question, and when the law invoked, whether common law or statutory law, is of a local character, and has become established as a part of the law of the state, a federal court will follow the decisions of the state court of last resort. Lubriko Co. v. Wyman, 290 Fed. 12 (C. C. A. 3rd, 1923). This principle is, therefore, probably the basis of this declaratory judgment in the lower court, inasmuch as a statute of the State of Arizona authorizes declaratory judgments in the courts of that state. Ariz. Code (Struckmeyer, 1928) § 4385; Craw- word v. Favour, 34 Ariz. 13, 267 Pac. 412 (1928).

W. H. S.

CONSTITUTIONAL LAW—Contempt—Due Process Of Law.

Upon commitment for contempt before a notary public, appellant applied for a writ of habeus corpus. As provided by the General Code of Ohio, a notary public is empowered to take depositions. The appellant, as witness in a suit, was notified of the taking of depositions. He appeared and was sworn. After answering some questions, he declined to answer others, and finally declared he would answer no further questions, basing his refusal on the ground that the questions were immaterial and irrelevant to any issue involved. He requested no consideration of his rights and was denied no hearing on the issue whether or not the questions infringed his personal privileges as a witness. The notary issued a commitment for contempt and the appellant was arrested and imprisoned. In the habeus corpus proceedings, the appellant contended that the statutes of Ohio authorizing his arrest and imprisonment without a prior judicial hearing deprived him of due process. Held, appellant's commitment for contempt without further hearing was no denial of due process. Bevan v. Krieger, Sheriff, 289 U. S. 459 (1933).

The General Code of Ohio [Ohio Gen. Code (Page, 1931) § 11510] provides that an unlawful refusal to answer as a witness may be punished as a contempt of the officer by whom the attendance or testimony of the witness is required. Section 11512 provides for
the punishment, and section 11514 provides that a witness so imprisoned by an officer may apply to one of the Superior courts for a hearing to pass on the legality of the commitment. In its decision the court was apparently influenced by the uniform decisions of the Ohio courts, which hold that, while the notary is not regarded as a judicial officer within the meaning of the State Constitution, he does have the power to commit a witness for contempt. *DeCamp v. Archibald*, 50 Ohio St. 618, 35 N. E. 1056 (1893); *Benokenstein v. Schott*, 92 Ohio St. 29, 110 N. E. 633 (1915). It is true, that in those states in which a notary is not vested with judicial power by the constitutions of such states, the grant of the power of taking depositions and the concurrent and necessary authority to commit for any contempt in the course of the proceeding, at first glance seems such an encroachment by the legislative body upon the judicial function as to make unconstitutional any statutes providing for the grant of such power. *Ex parte Krieger*, 7 Mo. App. 367 (1879); *Courtney v. Knox*, 31 Neb. 652, 48 N. W. 763 (1891); *In Re Huron*, 58 Kan. 152, 48 Pac. 574 (1897). But it is well established that the legislature may legislate to aid the efficiency of the judicial procedure so long as such legislation does not invade the judicial power to hear and make final disposition of the issues before it. *DeCamp v. Archibald*, supra. In Ohio, by section 11514, such provision is made. Nor can it be said that if, in the effectuation of the purpose of the statute, new officers or tribunals are created, such agents of the judiciary, acting in a quasi-judicial fashion, do, in the exercise of their office, deprive persons of due process because there is an intermingling of powers. For, in *Dreyer v. Illinois*, 187 U. S. 71 (1902), it was established that an intermingling of powers is not a violation of the due process clause of the Fourteenth Amendment. In the case of *Murray's Lessee v. Hoboken Land Co.*, 18 How. 272 (1855), it was further decided that an exhaustive judicial inquiry into the meaning of the words "due process of law" as found in the Fifth Amendment showed that they do not necessarily imply a regular proceeding in a court of justice.

In several states where there are statutes similar to the Ohio statutes, it has been held that such statutes granting the notary the power to commit for contempt do deprive a person of due process. These decisions are predicated on the theory that, since the notary acts merely as an agent of the court, and the contempt is against the court and not against the notary, he consequently has no power to punish. *Ward Baking Co. v. Western Union Tel. Co.*, 200 N. Y. Supp. 865 (1923); *In Re Huron*, supra. But in other states such power to commit for contempt has been held a necessary corollary of the power delegated to the notary to take depositions. *Ex parte McKee*, 18 Mo. 599 (1854); *Rottschild v. Steger*, 256 Ill. 196, 94 N. E. 920 (1912). And rightly so, for it is apparent that the power to take depositions is nugatory without the power to commit, the teeth of the legislative aid to the judiciary being removed when the commitment power is removed. If, as the appellant contended, it
should be held that after the notary has decided a contempt has been committed, the guilty party shall have a right to a hearing prior to commitment, the intent of the legislature in clothing the notary with this power is frustrated and the judicial procedure is encumbered rather than expedited. DeCamp v. Archibald, supra.

The court expressed no view on the adequacy of the hearing afforded after commitment by section 11514 of the General Code of Ohio, for the reason that the alleged deprivation of the appellant’s liberty was consequent upon his sweeping statement that he refused to answer any further questions, such an attitude evincing no desire for any further hearing upon the propriety of the questions but clearly constituting a direct contempt. In Re Rosenberg 90 Wis. 581, 63 N. W. 1065 (1895); I. C. C. v. Brimson, 154 U. S. 447 (1894); Cooke v. U. S., 267 U. S. 517 (1925).

Appellant’s refusal to answer any further questions on the ground that they were immaterial and irrelevant can not be supported, for the officer taking a deposition does not rule upon the relevancy or competency of the evidence, but it is taken subject to the reserved right of the parties to the suit, not the witness, to object at the trial. Sugg v. St. Mary’s Oil Engine Co., 193 N. C. 814, 138 S. E. 169 (1927); McLeod v. Miller & Lux, 40 Nev. 447, 153 Pac. 556 (1915). This right of the parties is so well established that it has been held to be reversible error to admit a deposition into evidence without giving the party an opportunity at the trial to object to the competency or relevancy of the question therein contained. Blum v. Jones, 86 Tex. 492, 256 S. W. 694 (1917); Rost v. Regal Storage Warehouse Inc., 182 N. Y. Supp. 816 (1920).

W. E. G. and A. F.

CONSTITUTIONAL LAW—Delegation of Authority—License Fees.

An ordinance of the City of Philadelphia required those conducting athletic contests or exhibitions at which an admission was charged to pay a license fee at the rate of $5.50 a man per day on the number of policemen or firemen deemed necessary by the Director of Public Safety adequately to police such contests. The American Baseball Club of Philadelphia and the Philadelphia National League Club applied for licenses and paid the fee under protest. The clubs then brought a bill in equity against the City of Philadelphia and its officers to have the ordinance declared invalid. The court decreed the ordinance invalid, restrained its enforcement, and directed repayment of the fees already paid. The city appealed. Held, the ordinance was a reasonable by-law and, therefore, valid. American Baseball Club of Philadelphia (Philadelphia National League Baseball Club, Intervener) v. City of Philadelphia et al., — Pa., —, 187 Atl. 891 (1933).

Application for a writ of certiorari was denied by the Supreme Court of the United States in American Baseball Club v. Philadelphia, 290 U. S. — (1933).

Where a statute or ordinance provides for the collection of a
sum of money, and the object of the statute is not to raise any additional revenue, but to raise enough money to compensate for some specific service, the charge is a fee, not a burden in the nature of a tax. *Cook Co. v. Fairbanks*, 222 Ill. 578, 78 N. E. 595 (1906); *Dalrymple v. City of Milwaukee*, 53 Wls. 178, 10 N. W. 141 (1881); *State v. Case*, 39 Wash. 177, 81 Pac. 554 (1905).

The court's action in construing the ordinance as providing for the collection of a license fee was clearly proper, since the amount of the fee was directly related to the amount of the services which were rendered and it was not patently excessive. *Point Bridge Co. v. Pittsburgh Railway Co.*, 240 Pa. 105, 87 Atl. 614 (1913); *Kittanning Borough v. Natural Gas Co.*, 26 Pa. Super. Ct. 355 (1904); *Gettysburg Borough v. Gettysburg Transit Co.*, 36 Pa. Super. Ct. 598 (1908).

To a certain extent the fee was discriminatory in favor of other contests or amusements to which the ordinance did not apply, but not so discriminatory as to be unconstitutional. In imposing a tax or a license fee, the legislative body is allowed to make a reasonable classification. *State v. Kievman*, 116 Conn. 458, 165 Atl. 601 (1933); *Roach v. City of Durham*, 204 N. C. 587, 169 S. E. 149 (1933); *Silver v. Silver* 280 U. S. 117 (1929); *Patsone v. Commonwealth of Pennsylvania*, 232 U. S. 138 (1914). There were sound practical reasons which justified the distinction between paid athletic contests and other types of amusement. A greater number of people congregate at paid athletic contests than are usually found or can be accommodated at theatres and like places of entertainment, and differences in the conduct of the people at such gatherings is further justification for the classification.

It was contended by the appellee that the ordinance involved a delegation of legislative authority to an administrative officer, in that the amount of the license fee was not fixed and determined by the ordinance, but was left dependent upon the number of men employed in performing the extra services for the appellee, the determination of this number being left wholly to the discretion of the Director of Public Safety. Thus it was pointed out that the amount of the license fee was in reality determined by the administrative officer and not by the legislative body. The majority of the court held that the ordinance was constitutional, since the means used to determine the amount of the license fees was similar to those involved in nearly all license legislation.

It was impractical for the city council definitely to fix the number of policemen and firemen necessary for the fluctuating attendance at each game. Any attempt at designating a number would be arbitrary. In authorizing the Director of Public Safety to fix the number, it was merely conferring administrative functions upon an agent. In designating the number of policemen and firemen necessary the administrative officer did not legislate; the city council had manifested its will in the ordinance, and had delegated power merely to fill up the details. This was not an unconstitutional delegation of legislative authority. *United States v. Grimaud*, 220 U. S. 506 (1911);

On August 19, 1933, acting under the authority of the National Industrial Recovery Act, the President approved the Code of Fair Competition for the Petroleum Industry. Rule 17 of Article V of the Code provides that persons engaged in the sale of petroleum products "shall not give away oil, premiums, trading stamps " or grant any special inducement in connection with the sale of petroleum products." Plaintiffs are four retail distributors of gasoline in Detroit, Michigan, and in the course of their business followed the practice of giving away to their customers coupons redeemable in merchandise. The Secretary of the Interior, defendant in this suit, threatened them with prosecution for violation of the provision of the Code. Plaintiffs sue to enjoin the defendant from interfering with their business, denying the applicability of the code provision to their business, and contending that in such an application of the code provision the N. R. A. is unconstitutional in that it attempts to control intrastate business. Held, the code provision is applicable, and is constitutionally valid. Injunction denied. Victor et al. v. Ickes, Sec'y of the Interior, 61 Wash. L. Rep. 870 (1933). See reference to this case, supra p. 207, note,* and p. 231, note 80.

The plaintiffs did not contend that the N. R. A. delegates legislative power to the President—consequently the Court gave but brief discussion to the point. In holding that there was no delegation of legislative power, the Court based its decision on the cases of Sears, Roebuck & Co. v. Federal Trade Comm., 258 Fed. 307 (C. C. A. 7th, 1919); Frischer v. Elting, 60 F. (2d) 711 (C. C. A. 2d, 1932);

The business practice of giving away premiums was held by the Court to be an unfair method of competition, under the authority of Rast v. Van Deman, 240 U. S. 342 (1915), and Lansburgh v. District of Columbia, 11 App. D. C. 512 (1897), and consequently a violation of the code provision. The code provision was held not to be a violation of the due process clause under Rast v. Van Deman, supra, and Highland v. Russell Car Co., 279 U. S. 253 (1929).

On the third point, namely, that in its application to the plaintiffs' business the N. R. A. was an unconstitutional interference with purely intrastate business, the Court said: "Upon the evidence I have found that the practice of plaintiffs imposes a direct burden upon interstate commerce in petroleum products and substantially and unduly obstructs the free flow of such commerce between Michigan and other states of the Union, and substantially and unduly diminishes the amount of such interstate commerce." Houston & Texas Ry. Co. v. United States, 234 U. S. 342 (1914); Swift & Co. v. United States, 196 U. S. 375 (1905); Stafford v. Wallace, 258 U. S. 495 (1922).

L. B. F.

CONTRACTIONS—Common Carriers—Airplanes—Limited Liability.

A corporation engaged in air transport service sold a ticket to one who was the sole occupant of the plane, other than the pilot, during transit. Due to the negligence of the pilot, the plane crashed and the passenger was killed. Held, the corporation was a common carrier and, as such, liable for damages in excess of the maximum amount stipulated in the passenger's ticket. Curtiss-Wright Flying Service, Inc., v. Glose, 66 F. (2d) 710 (C. C. A. 3rd, 1933). Certiorari was denied in 290 U. S. — (1933).

In arriving at the conclusion that the corporation was a common carrier it was necessary first to determine whether the decedent was a charterer of the plane or a passenger. The word "charterer" applies to persons who, in their own rights, are entitled to possess, use, and have the benefits resulting from the use of the thing chartered, and their rights must be acquired by contract with persons having such dominion over the thing chartered as enables them to confer on the charterer the right to use the thing chartered and have the benefits resulting therefrom. The ordinary meaning of the word "charterer" is that no person can hold that relation to property unless he has a personal interest in or right to it. Turner v. Cross, 83 Tex. 218, 18 S. W. 578 (1892).

To create a carrier-passenger relationship, the passenger must intend to avail himself of the transportation facilities of the carrier, and the carrier must expressly or impliedly accept him as a passenger. Matthews v. Central of Georgia Ry. Co., — Ga. —, 469 S. E. 41 (1933). In this relationship there is present a contractual element. A passenger is one who is conveyed for hire, and the relation of carrier and

The contract between the parties was evidenced by the ticket issued by the defendant. Whether a contract creating the relation of carrier and passenger exists depends largely on the facts of each case. Arneberg v. Chicago M. & St. Paul Ry. Co., 182 Wis. 85, 195 N. W. 844 (1923). In this case the ticket stated that "this ticket is valid only on the date written above," and referred to the consideration as a fare. It spoke of the origin of the ticket, as "Office of issue—Miami," language apt where a ticket is sold; inapt where a charter-party is made. It provided that the holder thereof agreed to the terms under which the company issuing the ticket carried "passengers" as printed on the back thereof, and it was signed by the holder over the printed words "passenger's signature." The terms of the ticket clearly evidenced the relation of passenger and carrier, and not that of a plane chartered.

The ticket provided "that in the event of the injury or death of the holder due to any cause for which the company is legally liable, the Company's liability is limited to ten thousand dollars ($10,000)." Is this limit of liability by defendant for its legal liability valid?

It is a settled policy of law that common carriers, in dealing with passengers, cannot compel them to so release their legal liability for their own negligence. Bank of Kentucky v. Adams Express Co., 93 U. S. 174 (1876); Kansas City Southern R. Co. v. United States, 282 U. S. 760 (1931); Delaware L. & W. R. Co. v. Ashley, 67 Fed. 209 (C. C. A. 3rd. 1895).

Was the defendant corporation a common carrier? The corporation received a charter from the state and it is a warranted presumption that its acts were done pursuant to the provisions of its charter. A common carrier is a quasi public agency enjoying public franchise or privilege. Sheridan v. N. J. & N. Y. R. Co., 104 N. J. L. 622, 141 Atl. 811 (1928).

The defendant corporation solicited the patronage of the traveling public, advertising schedules for routes, times of leaving, and rates of fare. In this respect it has the appearance of a common carrier. A common carrier is one who undertakes for hire to transport from place to place such persons or the goods of such as choose to employ it. Chicago & E. I. Ry. Co., v. Chicago Heights Term. Trans. R. Co., 317 Ill. 65, 147 N. E. 666 (1925).

But does the fact that the defendant corporation was engaged in air transit service exclude it from the category of a common carrier? The recent case of Smith v. O'Donnell, 215 Calif. 714, 12 P. (2d) 933 (1932) held that a person operating an airplane for the purpose of carrying for hire passengers applying for rides was a common carrier. This last case was decided under section 2168 of the Civil Code of
California (Deering, 1923) providing that, "Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry." The court expressly stated "that those airlines which are engaged in the passenger service on regular schedules on definite routes fall within the classification (of common carrier)."

The test of whether one is a "common carrier" by land, water, or air, is whether the carrier has held out that he would carry for hire, so long as he has room, all persons applying, or goods of every one bringing goods to him, for carriage. *North American Acc. Ins. Co. v. Pitts*, 213 Ala. 102, 104 So. 21 (1925). Although this last case held that the operator of an airplane was not a common carrier, it was not because the course of transit was through the air, but because there was no established business, it being operated only at the owner's convenience over week ends, and at such time, trips were made by arrangement and the operator did not and would not take all who applied. The case of *Brown v. Pac. Mut. Life Ins. Co.*, 8 F. (2d) 996 (C. C. A. 5th, 1925) goes off on the same ground, in holding that a passenger, killed by the fall of a hydroplane, was not killed in the conveyance of a common carrier within the double indemnity provision of an accident policy, since the owner of the plane carried only white people, and flew only when and under such conditions as he pleased.

These cases, however, are no authority for the defendant corporation's contention. It has held itself out to the public as one conducting the business of a common carrier, and must be governed accordingly. As a common carrier, the corporation's attempt to limit its legal liability for negligence was invalid. *Bank of Kentucky v. Adams Express Co.*, *Kansas City Southern R. Co. v. United States, Delaware, L. & W. R. Co. v. Ashley*, all *supra*.

P. D.

**CONTRACTS—Restraint of Marriage.**

The policy of the defendant, a fraternal insurance company with a membership restricted to Catholics, provided that "any member entering into a 'civil' contract of marriage thereby *ispo facto* expelled himself from the Union." The plaintiff, a member of the Union, by civil contract remarried while her first husband was still living and for this was expelled by the defendant. Plaintiff contends that the provision in the policy was void as in restraint of marriage and that she is entitled to damages for deprivation of benefit of membership in the Union. Held, the policy here was no bargain not to marry, nor an attempt to prevent marriage either by promise or provision for a condition, and, therefore, it was not necessary even to question the reasonableness of the restraint. *Koresic v. Grand Catholic Union*, — Kan. —, 25 P. (2d) 355 (1933).

The law with regard to restraint of marriage has had a long and interesting development. Under the Civil Law, all conditions re-
straining marriage, whether precedent or subsequent, and however restrictive, were absolutely void. Pothier Pand, Lib. 35, title 1, n. 35; Dig. tit. 1, L. 22, 64, 72; Godolph Orph. Leg. P. 1, c. 15; 2 Jarmon, Wills (7th ed. 1930) p. 1496.

This rule became part of the common law of England, but toward the end of the 17th century it began to be modified. In Scott v. Tyler, 2 Dick. 712, 717 (1788), Lord Thurlow said: "By that (Canon) law, undoubtedly, all conditions which fell within the scope of this objection, the restraint of marriage, were reputed void. But toward the end of the last and the beginning of the present century, the matter is more loosely handled."

It seems to be the settled law today in other countries that a condition against marriage outside a particular religion is not an illegal restraint of marriage.

In Hodgson v. Halford, 11 Ch. D. 959 (1879), a condition in a will of forfeiture in case of the legatee's marriage to any person who did not profess the Jewish religion was held valid. In Haughton v. Haughton, 1 Moll. 611 (Ireland), a condition not to marry against the order and established rules of the Quaker religion was not an illegal restraint. Renaud v. Lamothe, 32 Can. Sup. Ct. 357 (1902), held a testator may validly impose as a condition of a legacy that a marriage be solemnized according to the rites of the church.

In the United States, Maddox v. Maddox's Adm'r, 11 Grattan 804, (Va. 1854) has passed upon this point. There a testator devised personally to his niece for life, and forever, "if she remain a member of Friends Society." By the rules of that society any member marrying outside the society thereby forfeited his membership. The court expressly refused to follow the principle laid down in Haughton v. Haughton, supra, and held that a condition restricting marriage to a religious sect was against public policy.

But the more recent decision of In re Weif's Estate, 205 N. Y. Supp. 779 (1925), has reached an opposite view. In this case a clause directing forfeiture of the share of any child marrying a person not of the Hebrew faith was held valid.

The law of contracts at present with regard to restraint of marriage is well stated in Law of Contracts Restatement (Am. L. Inst. 1932) § 581: "A bargain not to marry, or to be subject to loss or deprived of profit in case of marriage, or a bargain to hinder or prevent the marriage of another, is illegal, unless the bargain is otherwise reasonable and the restraint is incidental to another lawful purpose of the bargain."

Therefore, the rule seems to be: Where a contract has for its primary object some lawful purpose, the fact that restraint of marriage is incidental to the main object will not render the contract void or against public policy. Grimison v. Bd. of Education of City of Clay Center, 136 Kan. 511, 16 P. (2d) 492 (1932); Fletcher v. Osborn, 282 Ill. 143, 118 N. E. 446 (1918); King v. King, 63 Ohio St. 363, 59 N. E. 111 (1900). Contra, Lowe v. Doremus, 84 N. J. L. 658, 87 Atl. 459 (1913).

C. J. M.
CORPORATIONS—Statutory Liability of Directors for Unlawful Payment of Dividends.

This was a suit by the chancery receiver of the W. B. Foshay Company, a Delaware Corporation, to recover from the directors of the said corporation the amounts of dividends alleged to have been unlawfully declared and paid, in violation of the provisions of sections 34 and 35 of the General Corporation Law of the state of Delaware. (Del. Rev. Code (1915) § § 1948, 1949, as amended by 35 Del. Laws, c. 85 § § 16, 17). Held, that the District Court for the District of Minnesota properly held itself bound by the construction placed on the statute by the highest court in the state of Delaware, to the effect that the right to sue for such amounts is given exclusively to the creditors of the corporation if the corporation be insolvent, and that in such case, the chancery receiver cannot sue in their behalf for the liability created in their favor by the statute, as there is no provision in the statute giving the receiver any such authority. Rockwood v. Foshay, 66 F. (2d) 625 (C. C. A. 8th, 1933).

The pertinent part of the statute in question, as amended, reads: "In case of any willful or negligent violation of the provisions of this section, the directors, under whose administration the same may happen, shall, in their individual capacities, jointly and severally, be liable in an action on the case at any time within the period of six years after paying any such unlawful dividend to the said corporation, and to the creditors thereof or any of them in the event of its dissolution or insolvency to the full amount of the dividend * * *." The statute further provides that a director who was absent or dissented from the declaration of the dividend might exonerate himself by causing his dissent to be introduced on the books containing the minutes of the meeting, or by having it published in a newspaper in the county in which the corporation has its principal office.

At common law the only liability of directors to the corporation for the payment of dividends out of capital arose in those cases where they had acted in bad faith, or were guilty of gross negligence or inattention. 6 Fletcher, Corporations (1919) § 3741, p. 6223. This was on the theory of a breach of trust. Robinson v. Smith, 3 Paige (N.Y.) 222, 24 Am. Dec. 212 (1832); Bird Coal and Iron Co. v. Hume, 157 Pa. St. 278, 27 Atl. 750 (1893). This liability also accrued to the creditors in equity. Boyd v. Schneider, 131 Fed. 223 (C. C. A. 7th, 1904); Excelsior Petroleum Co. v. Lacey, 63 N. Y. 422 (1875). At the present time this liability is defined by statutes in most of the states. Some of these statutes declare that the director's liability is absolute, regardless of the good faith of the declaration, and make knowledge of the exact condition of the corporation on his part immaterial. Roke v. Thomas, 56 N. Y. 559 (1874); Patterson v. Thompson, 86 Fed. 85 (C. C. Ore. 1898); Fell v. Pitts, 263 Pa. 314, 106 Atl. 576 (1919). Others hold that the liability does not attach if the payment is made in good faith in reliance on the books of the corporation. Stratton v. Bertles, 263 N. Y. Supp. 466.
(1933); Swartley v. Oak Leaf Creamery Co., 135 Iowa 573, 113 N. W. 496 (1907); Hofkin v. U. S. Smelting Co., 266 Fed. 679 (C. C. A. 3rd, 1920); Parsons v. Rinard Grain Co., 186 Iowa 1017, 173 N. W. 276 (1919). The Missouri statute uses the word knowingly. Shields v. Hobart, 172 Mo. 491, 72 S. W. 669 (1903). Other courts hold that the directors will not be liable unless they are guilty of negligence in not knowing the true state of the financial condition of the corporation. Whitters v. Soules, 31 Fed. 1 (D. C. Vt. 1887); Davenport v. Lines, 77 Conn. 473, 59 Atl. 603 (1905); Moore and Co. v. Murchison, 226 Fed. 679 (C. C. A. 4th, 1915); McGill's Adm'x v. Phillips, 243 Ky. 768, 49 S. W. (2d) 1025 (1932); Chick v. Fuller 114 Fed. 22 (C. C. A. 7th, 1902). Under the Wisconsin statute they are liable unless they had information that would reasonably lead them to believe that there were sufficient funds. Williams v. Brewster, 117 Wis. 370, 93 N. W. 479 (1903). Still other statutes do not attach this liability to the directors unless their conduct in declaring dividends amounts to either an actual or constructive fraud, or unless their conduct is tantamount to a tort. Ebelhar v. German-American Security Co.'s Assignee, 28 Ky. 1144, 119 S. W. 220 (1909).

Some statutes hold that only the directors who vote in favor of the unlawful dividend shall be liable. Van Dyck v. McQuade, 86 N. Y. 38 (1881). Others impose liability on all who were present at the meeting when the illegal payment was ordered. Baldwin v. Miller and Lux, 152 Cal. 454, 92 Pac. 1030 (1907); Hutchison v. Curtis, 92 N. Y. Supp. 70 (1904); Brenaman v. Whitehouse, 85 Wash. 355, 48 Pac. 24 (1915). In some cases they are released from liability if they voice their dissent in writing and have it placed in the minutes of the meeting. Stoltz v. Scott, 23 Idaho 104, 129 Pac. 340 (1912); Wesp v. Muchle, 120 N. Y. Supp. 976 (1910). In others, when it is placed in the minutes and published in county newspapers. Selman v. Electric Vehicle Co., 72 N. J. Eq. 403, 65 Atl. 910 (1907); Appleton v. American Matling Co., 65 N. J. Eq. 375, 54 Atl. 454 (1903). If the director was not present, but subsequently ratified the declaration of the unlawful dividend, he is liable. City Investing Co. v. Gerken, 202 N. Y. Supp. 41 (1924). If a director did not vote, but participated in its benefits, he is liable. Williams v. Brewster, 117 Wis. 370, 93 N. W. 479 (1903).

It being definitely determined by the statute to whom the liability attaches, the question is raised who may enforce this liability? Obviously the statute must govern. Only the class or classes of persons for whose benefit the liability is imposed by the statute may maintain an action to enforce it. As the case turns on the construction of a statute, the only study that can be made is by comparing the construction placed on similar statutes by other courts.

Similar statutes have been held to have the same effect as that given to the one in the present case. Stoltz v. Scott, supra; Brenaman v. Whitehouse, supra.

The corporation is dissolved within the meaning of such a pro-
vision when it ceases to do business because of insolvency and goes into the hands of a receiver, and there need not be a voluntary dissolution declared by a court of competent jurisdiction in order to render the statute applicable in favor of the creditors. Stoltz v. Scott, supra.

Under the Oklahoma statute dissolution of the corporation is a condition precedent, whether the recovery is in behalf of the corporation or its creditors. Stevirmac Oil & Gas Co. v. Smith, 259 Fed. 650 (D. C. Okl. 1919).

Under a similar statute in North Carolina the trustee in bankruptcy may enforce the liability in behalf of the creditors. Claypoole v. McIntosh, 182 N. C. 109, 108 S. E. 433 (1921).

Many of the statutes in terms make the offending directors liable to the corporation and, of course, when such is the case, it may sue. However, if the liability is extended only to the creditors, they alone may sue. Collins v. Penn-Wyoming Copper Co., 203 Fed. 726 (D. C. Wyo. 1912); Excelsior Petroleum Co. v. Lacey, supra; Childs v. Adams, 43 Pa. Super. Ct. 239 (1910); Seeg-Watson v. Day, 249 Fed. 177, (C. C. A. 7th, 1918). However, there is authority for the holding that where the liability runs to the creditors, the action may be maintained by a receiver of the corporation, as the representative of the creditors. Brenaman v. Whitehouse, supra; Cox v. Leahy, 204 N. Y. Supp. 741 (1924).

In conclusion, although there are rulings to the contrary, the holding of the Delaware court in this case is not without authority. Moreover, the construction placed on the statute is logical inasmuch as after insolvency, the amount recovered would not become an asset of the company, but would constitute a fund for the payment of creditors, who, it would seem, should have in such a case the right to enforce the liability without the intervention of a receiver of the insolvent corporation.

G. O'H. and J. W.

COURTS—General and Special Appearances.

Plaintiff instituted an action against the defendant in the District of Columbia municipal court on January 28, 1929. The defendant was not served with process in the cause until March 21, 1932, although he had continuously resided in the District during the interval, and had maintained an office there. After being served the defendant filed a motion, (professing to appear for the sole purpose of the motion and for no other purpose whatsoever), in which he moved the court to vacate the service of process and to dismiss the cause for the following grounds: "1. That the said alias summons was improvidently issued. 2. Because of the lack of diligence on the part of said plaintiff in prosecuting said action, which lack of diligence has worked a discontinuance thereof. 3. And for other matters apparent on the face of the record." The court overruled the defendant's motion, and, on his failure to file an
affidavit of defense, gave judgment for the plaintiff. On writ of error obtained by the defendant the judgment of the municipal court was affirmed. Held, by his motion to vacate the service of process and to dismiss the cause "for other matters apparent on the face of the record" the defendant attacked the merits of the plaintiff's case, thereby entering a general appearance and submitting to the jurisdiction of the court. Manning v. Furr, 66 F. (2d) 807 (App. D. C. 1933).

If a defendant desires to question the power of the court to hear and determine a cause on the ground that it has not acquired jurisdiction over his person he must do so by a "special appearance" limited to that purpose. Mahr v. Union Pac. R. Co. 140 Fed, 921 (E. D. Wash. 1906). Appearances are presumed by the courts to be "general" in nature, and to avoid having what purports to be a special appearance construed as a general one, the pleader must confine himself solely to a challenge of the court's jurisdiction over his person. The rule is stated thus: "A defendant appearing specially to object to the jurisdiction of the court must, as a general rule, keep out of court for all other purposes. In other words, he must limit his appearance to that particular question, or he will be held to have appeared generally and to have waived the objection." 4 C. J. 1318. To ask the judgment of the court on any question other than that of its power to hear and determine the cause is to enter a general appearance therein. Jones v. Andrews, 10 Wall., 327 (1870); Thompson v. Pfeiffer, 66 Kan. 368, 71 Pac. 828 (1903).

It is a fundamental principle of construction that "the question of a general appearance is one of intent, actual or implied," and in order to defeat the expressed intent of the special appearance, the defendant's conduct must be clear and unequivocal. Dahlgren v. Pierce, 263 Fed. 841 (C. C. A. 6th, 1920). The determination of whether an appearance is general or special does not depend upon the form of the pleading, but upon its substance, and if the only question raised therein is that of the court's jurisdiction to try the cause the appearance will be construed to be a special one, even though it is not actually so denominated. Haynes v. City National Bank of Lawton, 30 Okla. 614, 121 Pac. 182 (1912); Brumleve v. Cronan, 176 Ky. 818, 197 S. W. 498 (1917).

The foregoing principles are well established in the law, but their application often presents difficulties. What, for example, constitutes asking the judgment of the court on a question non-jurisdictional in nature?

Generally speaking, a general appearance is entered when any pleading is filed or any proceeding had which raises questions non-jurisdictional in character and involving the merits of the case, and such action waives all objections as to the regularity of service whether taken before or after judgment. City National Bank v. Sparks, 50 Okla. 648, 151 Pac. 225 (1915). A request for a continuance has been held to constitute a general appearance in the cause. Costello v. Palmer, 20 App. D. C. 210 (1902). And a general appearance is
entered by appearing in person or by attorney to deny the court’s jurisdiction over the subject matter of the controversy. Fitzgerald v. Fitzgerald, 137 U. S. 98 (1890); Muslusky v. Lehigh Valley Coal Co., 159 N. Y. Supp. 571 (1916). Contra, Porter v. The Chicago and Northwestern Railway Company, 1 Neb. 14 (1870). The filing of a disclaimer to a proceeding in rem by a party defendant who has not been served with process has been held a general appearance. Fowler v. Brown, 51 Neb. 54, 71 N. W. 54 (1897). Any action which recognizes the case as in court constitutes a general appearance, even in the face of a declared contrary intention. Gravelin v. Porier, 77 Mont. 260, 250 Pac. 823 (1926).

On the question of whether or not a motion, filed by the defendant appearing specially, to quash the summons and to dismiss the action for want of jurisdiction is in and of itself a general appearance, there is a conflict of authority. Holding such an appearance to be general is the case of Bucklin v. Strickler, 32 Neb. 602, 49 N. W. 371 (1891). In its decision the court said: “The motion is too broad. It is to dismiss the action. The most that can be done in any case where the only objection is that the service is defective is to quash the summons. In such case the appearance must be limited to that purpose, otherwise it is general.” Contra, Neuss, Hesslein and Co. v. L. Van der Stegen, 2 Extraterritorial Cases 792 (1926).

A leading case on the subject of general appearance is that of Jones v. Andrews, supra. Although not personally served with process, the non-resident defendant appeared specially, attacking the jurisdiction of the court for that “1. The bill did not show the requisite diversity of citizenship. 2. The bill contained no equity.” This was held to be an attack of the case upon its merits, and by such appearance the defendant subjected himself to the jurisdiction of the court and enabled it to render an in personam decree binding upon him. An objection to the jurisdiction coupled with other grounds is a general appearance. Silver City Mercantile Co. v. District Court of Utah County, et. al., 57 Utah 365, 195 Pac. 194 (1920); King, et al. v. Ingels, et al., 121 Kan. 790, 250 Pac. 306 (1926).

General appearances may also be entered in other ways. Since each state has plenary power over remedies and procedure in its own courts it is competent for it to inhibit special appearances altogether, and to require the defendant to submit wholly to the jurisdiction of the court if he asks it to determine any question, even that of service. York v. Texas, 137 U. S. 15 (1890). And the defendant’s cross examination of a witness as to the merits of a cause was held to convert a special appearance into a general one. Laura v. Puncerelli, 91 N. J. L. 38, 102 Atl. 433 (1917). A general appearance was entered by the defendant where his attorneys signed a motion to vacate service of process without limiting their agency to “attorneys for the purposes of this motion only.” Phelps v. Phelps, 32 Hun 642 (N. Y. 1883). Contra, Lake v. Kels, 11 Abb. Pr. (N. S.) 37 (N. Y. 1869).
EQUITY—Bills of Discovery—Federal Equity Rules.

The respondent company loaned to the petitioner company an experimental still for cracking petroleum oils to produce gasoline. By written agreement, any improvements in the apparatus, made by the petitioner's engineers, were to belong to the respondent. Improvements were made by an employee of the petitioner, to whom a patent on the device was issued. The employee assigned the patent to the petitioner. The respondent claims the patent on the ground that it was an improvement of the original invention loaned by it to the petitioner. A bill for specific performance, brought by the respondent, was dismissed with leave to amend by turning the cause of action into one for the recovery of damages. This action at law being at issue, the plaintiff prays in the equity side for a discovery, alleging in its bill that the evidence of the facts to be discovered, by which its damages could be proved, is contained in voluminous books and documents which could not be inspected or proved upon a trial at law without confusion and delay. The District Court dismissed the bill on the ground, inter alia, that a bill of discovery will not lie when the facts to be discovered relate to damages only. The decision of the District Court was reversed by the Court of Appeals, one judge dissenting, and the case came to the Supreme Court of the United States on writ of certiorari. Held, where an action is at law and triable by a judge and jury, so that both the right and the amount of recovery are established by the verdict, a bill of discovery relating to damages will lie in advance of trial, under Federal Equity Rule 58. Sinclair Refining Company v. Jenkins Petroleum Process Company, 289 U. S. 689 (1933).

Before the present federal equity rules were adopted (November 4, 1912), discovery was had by including in the bill the desired interrogatories to which the opponent responded in his answer. McFarland v. State Savings Bank, 132 Fed. 399 (C. C. D. Mont. 1904).

A radical change effected by the new Rule 58 is that the interrogatories are no longer any part of the pleadings, but are contained in a document separate from the bill. The purpose of this, and other reformations in the present rules, is to simplify the pleadings, to facilitate the proof and to expedite judicial determination by presenting an admitted state of facts. Bronk v. Charles H. Scott Co., 211 Fed. 338 (C. C. A. 7th, 1914); Luten v. Camp, 221 Fed. 424 (E. D. Pa. 1915); American Mills Co. v. American Surety Co., 260 U. S. 360 (1922). These alterations, however, have been held not to affect the substantive law of discovery, but only the procedure. Speidel Co. v. Barstow Co., 232 Fed. 617 (D. R. I. 1916); J. H. Day Co. v. Mill Co., 225 Fed. 622 (E. D. Tenn. 1915).

By the substantive law, where intricate details of evidence are required to be investigated in advance, damages may be proved with the aid of a discovery. Moodalay v. Morton, 1 Brown Ch. 469

The federal rule regarding the examination of books and papers before trial in aid of an action at law is, that the remedy is still by a bill in equity, even though the jurisdiction of the courts of law has been enlarged so as to make the equitable remedy unnecessary in some instances. Carpenter v. Winn, 221 U. S. 533 (1911); Colgate v. Compagnie Francaise du Telegraphe, 23 Fed. 82 (S. D. N. Y. 1885); Pressed Steel Car Co. v. Union P. R. Co., 240 Fed. 135 (S. D. N. Y. 1917). Cf. Durant v. Goss, 112 F. (2d) 682 (C. C. A. 6th, 1926); Johnson v. Davis, 36 F. (2d) 481 (D. Mass. 1929).

The principal case does not alter the federal law on the subject, as is borne out by two recent federal decisions: Zolla v. Grand Rapids etc., Corp., (Bill of discovery alleging that a contract on which suit was based was wrongfully withheld, so that the plaintiff's insistence under the circumstances on being allowed to inspect the contract prior to trial was reasonable), 47 F. (2d) 611 (S. D. N. Y. 1930); Puget Sound Nav. Co. v. Associated Oil Co., (Bill of discovery, alleging overpayment under a contract, states a good reason for discovery of facts by inspection of documents, since not to allow it would protract the trial beyond reason), 56 F. (2d) 605 (W. D. Wash. 1932).

In the states which have adopted the reformed procedure, the general rule is that bills of discovery to obtain evidence are unnecessary and not maintainable, since the parties to the action may in some instances be examined before trial and in others are competent and compellable to testify on the trial. Strom v. Montana Central Ry. Co., 81 Minn. 346, 84 N. W. 46 (1900); Commercial Pub. Co. v. Beckwith, 68 N. Y. Supp. 600 (1901); Ellinger v. Insurance Co., 125 Wis. 643, 104 N. W. 811 (1905).

P. T. S.

HABEAS CORPUS—Burden of Proof in Extradition Proceedings.

Appellee was taken into custody on a warrant of extradition issued by the governor of North Carolina. He was held as a fugitive from the state of South Carolina, being charged with the commission of murder in that state. Appellee secured a writ of habeas corpus, and at the hearing evidence was offered which tended to show that he was not within the demanding state at the time the murder was alleged to have been committed. Evidence to the contrary was presented by the state of South Carolina, witnesses to the crime identifying the appellee as a participant. The state court of North Carolina released the appellee, holding that the demanding state had failed to show probable cause for holding the accused in custody. On appeal this was reversed. Held, one arrested on an extradition warrant should not be released on a writ of habeas
corpus on grounds of absence from the demanding state at the
time of the crime unless such fact appears beyond a reasonable

The power which independent nations have to surrender criminals
to other nations as a matter of favor or comity is not possessed
by the states of the Union. Hyatt v. People, ex rel Corkran, 188 U. S.
691 (1903). The authority of one state to deliver up a fugitive from
justice to another state depends solely upon Article 4, § 2, par. 2,
302 (1793), 18 U. S. C. § 662 (1926)], which was passed to supplement
the constitutional provisions. This act makes it the duty of the
executive officer of one state to deliver up to another state a fugitive
who has taken refuge in his state, upon presentation of an indictment
or affidavit charging the accused with a crime in the demanding
state, which demand has been certified as authentic by the governor
of the demanding state, Hyatt v. Corkran, supra.

The governor upon whom the demand is made must determine for
himself, in the first instance, at least, whether the party charged
is in fact a fugitive from justice. Cook v. Hart, 146 U. S. 183 (1892).

However, the warrant of the governor is not conclusive against
the accused and it is open to the latter on habeas corpus proceedings
to show that he was absent from the demanding state at the time
the alleged crime was committed. Robb v. Connolly, 111 U. S. 624
(1884); Bruce v. Rayner, 124 Fed. 481 (C. C. A. 4th, 1903); Levy

It is well settled that the issuance of the governor's warrant
makes out a prima facie case against the accused that he is a
fugitive from the demanding state, and the burden of overcoming
this presumption is on the accused. Appleyard v. Massachusetts, 203
U. S. 222 (1906); Biddinger v. Commissioner of Police, 245 U. S.
128 (1917); Hogan v. O'Neill, 255 U. S. 52 (1921).

The court will not discharge a prisoner arrested under a governor's
warrant where there is merely contradictory evidence on the sub-
ject of presence in or absence from the demanding state. Munsey
v. Clough, 196 U. S. 364 (1905); Hyatt v. Corkran, supra.

The accused is not to be discharged from custody unless it is
clearly and satisfactorily made to appear that he is not a fugitive
from justice within the meaning of the Constitution and Laws of

W. L. M.

HABEAS CORPUS—Extradition Proceedings.

This was an application for a writ of habeas corpus in an inter-
state extradition proceeding. Crawford, a negro, was indicted for
murder in Virginia. The Governor of Massachusetts issued a war-
rant and Crawford was arrested. Crawford applied to the District
Court of Massachusetts for a writ of habeas corpus. Evidence that

1 This case is noted infra, page 370.
the Fourteenth Amendment to the Constitution was violated in
drawing a grand jury was admitted at the hearing, subject to exception.
The District Court ruled that the indictment was void and ordered
Crawford discharged. Upon appeal the decision was reversed. Held,
in a habeas corpus case arising out of a rendition proceeding, evidence
of the character here involved is not admissible. The question to
which it is addressed is not open to review and determination on a
habeas corpus proceeding in a federal court, but it is one to be
heard and determined by the trial court in the first instance where
the indictment was found. Hale v. Crawford, 65 F. (2d) 739 (C. C.
A. 1st, 1933). Application to the United States Supreme Court for
writ of certiorari was denied. Crawford v. Hale, 290 U. S. — (1933).

The question whether or not in a habeas corpus proceeding arising
out of interstate rendition, a state can inquire into the selection and
organization of the grand jury which found the indictment in the
demanding state, has never been passed upon. An act of Congress
[1 Stat. 91 (1789), 18 U. S. C. § 591 (1926)] authorizes the arrest
and removal of a person charged with crime in a federal district
other than the one in which he is arrested. Under this statute,
if the indictment is prima facie valid on its face and certified by a
proper officer, a court is not authorized to go into evidence which
may show, or tend to show, violations of the United States statutes
in the drawing of the grand jurors composing the grand jury which
found the indictment. Matters of this nature are to be dealt with
in the court where the indictment is found. Greene v. Henkel, 183
U. S. 249 (1902).

Congress did not intend that the federal courts should, by writs
of habeas corpus, obstruct orderly administration of the criminal
laws of a state through its own tribunals. In re Wood, 140 U. S. 278
(1891). The rule is well established that the trial court in the
first instance where the indictment was found has jurisdiction to
decide all questions concerning the constitution, organization, and
qualification of the grand jury. Ex parte Harding, 120 U. S. 782
(1887); In re Wood, supra; In re Wilson, 140 U. S. 575 (1891);
Pearce v. Texas, 155 U. S. 311 (1894). See also, Beavers v. Henkel,
194 U. S. 73 (1904); Benson v. Henkel, 198 U. S. 1 (1905); Haas
v. Henkel, 216 U. S. 462 (1910); Pothier v. Rodman, 291 Fed. 311
(C. C. A. 1st, 1923); Fitzgerald v. United States, 6 F. (2d) 156 (C. C.
A. 1st, 1925); and Hardy, Removal of Federal Offenders, (1929) pp.
42-47. If the rendition papers are regular on their face and prima facie
valid, the accused on habeas corpus proceedings may show that he
is being held without probable cause. Proof of such controverted
fact must be beyond reasonable doubt. Hyatt v. People, ex rel
Corkran, 188 U. S. 691 (1903); People ex rel McNichols v. Pease,
207 (U. S. 100 (1907); South Carolina v. Bailey, 289 U. S. 412 (1933).\(^1\)

\(^1\) This case is noted supra, page 369.
facts or law of the matter to be tried.” *Drew v. Thaw*, 235 U. S. 432 (1914).

The court in *Hale v. Crawford*, supra, extends the principal as laid down in the case of *Greene v. Henkel*, supra, to apply in a habeas corpus case, whether it arises out of a rendition proceeding or a removal one. In doing so the court said, “In removal cases the chief reason for rejection of the evidence seems to be that the matter to which it relates is one for the trial court to decide in the district to which the removal is sought. * * * * We see no reason why the reasoning applied in removal cases involving such question is not applicable in a rendition case involving the same or like question.”

B. N.

**INSURANCE—Interpretation of the Vacancy Clause in Fire Policy.**

The dwelling insured was rendered uninhabitable by fire. The insurance company had the right, under the policy, to repair, rebuild, or pay the loss. While negotiations for a settlement were pending, and after the expiration of the the permitted period of vacancy, a second fire destroyed the building. The company denied liability for the loss caused by the second fire because the house had been unoccupied for more than forty consecutive days, as provided in the policy. *Held*, insurer is liable for the second fire. The vacancy clause was not intended to cover a building rendered uninhabitable by a first fire, and boarded up pending the insurer’s exercise of an option to rebuild or pay the loss. *American Central Insurance Co. of St. Louis v. McHose*, 66 F. (2d) 749 (C. C. A. 3rd, 1933).

The question involved in this case regarding the vacancy clause in fire insurance policies has been considered in only three other reported cases in this country. Should the clause be strictly construed, so that vacancy for whatever reason, even though without the fault of the insured, and, indeed, beyond his power to remedy, would nullify the policy? The Supreme Court of Nebraska was first to decide the question and held for a liberal construction, seeking to give the clause an interpretation both reasonable and just. “The plaintiffs could not have made the building habitable without trenching on the insurer’s rights. They were not responsible for the fact that the property was vacant. But, aside from this consideration, we think it very clear that there was no forfeiture under the clause above quoted. It could not have been contemplated by the parties that the building should be occupied when, as a result of its partial destruction by fire, it became unfit for occupancy.” *Lancashire Insurance Co. v. Bush*, 60 Neb. 116, 82 N. W. 313 (1900).

The Supreme Court of New Jersey repudiated the Nebraska case declaring that it is the *fact* of vacancy, rather than its *cause*, which makes the provision operative, and that to give the vacancy clause the construction sanctioned by the Nebraska court would be materially to alter the written instrument. *Kupfersmith v. Delaware Insurance Co.*, 84 N. J. L. 271, 86 Atl. 399 (1913).
Two years later the Nebraska Court reiterated the doctrine which it had laid down in the earlier case. *Schmidt v. Williamsburg City Fire Insurance Co.*, 98 Neb. 61, 151 N. W. 920 (1915).

With these three decisions before it, the court in the present case adopts the Nebraska view. One judge, however, dissented, finding himself "moved by the legalistic logic of the New Jersey decision, as well as by the general observation that it is not the province of a court to make a contract for parties to a suit, or to modify the one which they have themselves deliberately made because it may appear that they might have made one that would have been more equitable or more advantageous."

In interpreting a contract, the intention of the parties is controlling. The court "will look through the whole contract to the real intention of the parties at the time of the execution of the contract, and give it such construction as will impute to them a reasonable intent." Atkinson, J., in *Clay v. Phoenix Insurance Co.*, 97 Ga. 44, 25 S. E. 417 (1895). A contract includes that which is necessarily implied from the language used. *Wildman Manufacturing Co. v. Adams Top Cutting Machine Co.*, 149 Fed. 201 (C. C. A. 3d, 1906). Was it the understanding of the parties that to preserve the insurance an uninhabitable building must be occupied? The court said: "We do not think that the provision as to vacancy was intended to cover or did cover an unoccupiable building."

Undoubtedly, the parties would have the right to contract that the insurance would cease when the vacancy period expired, the property remaining vacant. The New Jersey court and the dissenting judge in the present case take that to be the parties' intention. Indeed, the words, exactly support such a construction, the clause providing that, "this Company shall not be liable for loss or damage occurring * * * while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days," extended by another section of the policy to forty days. However, "The contract must not only have a reasonable construction, but as its provisions are inserted for the benefit of the company, it should be construed most strongly against the insurer." *Gash v. Home Insurance Co. of New York*, 153 Ill. App. 31 (1910). In that case the court held that the unoccupancy clause in a fire policy was not violated by the enforced absence of the tenant, a flood having rendered the property uninhabitable.

The Alberta Supreme Court has held that the vacancy clause contemplates vacancy or desertion of the building in its ordinary, undestroyed condition, and not after it has been rendered untenable by fire. If anything else is meant by the clause, according to that court, it is neither just nor reasonable, and therefore void under the Alberta Insurance Act. *Moran v. North Empire Fire Insurance Co.*, 33 D. L. R. 461 (1917).

Where the insurer exercised the option to pay the loss rather than to repair, and the insured afterwards allowed the premises to remain vacant longer than the period permitted in the policy,
it was held there could be no recovery. *Globe and Rutgers Fire Insurance Co. v. Green*, — Miss — 146 So. 889 (1933). The court there found it unnecessary to consider whether or not it approves the Nebraska doctrine.

If the insurer had intended the vacancy clause to cover the uninhabitable building, it would have been an easy matter expressly to include that provision in the policy. It should not complain if a reasonable construction is given to the words in the absence of such clear intendment.

The scarcity of decisions on this point is an indication of the modern practise of most insurance companies to meet losses in a liberal spirit, without attempting to avoid them through technical and strict interpretation of their contracts.

R. T. L.

**INTERSTATE COMMERCE—Power of Interstate Commerce Commission to Regulate Intrastate Rates.**

By an order of the Interstate Commerce Commission in 1931 (*The Fifteen Per Cent Case*, 178 I. C. C. 539; 179 I. C. C. 215), the railroads of the country were authorized to increase their rates in varying amounts on different commodities, no increase to exceed 10% of the basic rate. To conform with this ruling most of the states authorized corresponding increases in their intrastate rates. The state of Louisiana, however, refused to allow the increase in intrastate rates on certain commodities. The undue discrimination against interstate commerce resulting from these lower intrastate rates led the appellant carriers to invoke the aid of the Interstate Commerce Commission. The Commission prescribed increases in the Louisiana intrastate rates to equalize them with the interstate rates. (*Increase in Intrastate Rates*, 186 I. C. C. 615). The Louisiana Public Service Commission secured an interlocutory decree staying this order of the Interstate Commerce Commission, and this is an appeal from the decree making that interlocutory decree permanent. *Held*, the prescribed increases in the intrastate rates were valid. *Interstate Commerce Comm., Texas & New Orleans R. R. Co. v. Louisiana Public Service Commission*, 290 U. S. — (1933).

The appellees contended the rates were void for three reasons: First, that the findings of the Commission, raising the intrastate rates, would not, as to each commodity, be just and reasonable; Second, the prescribed rates were unsupported by any finding that the increased rates would produce increased revenue; Third, the order of the Commission was invalid because the earlier order (*The Fifteen Per Cent, supra*) did not require the carriers to increase their rates interstate, but permitted them to do so at their option.

Under the earlier Interstate Commerce Acts, the Commission received the power to order carriers to desist from discrimination against interstate shippers by intrastate rates. *The Shreveport Case*, 234 U. S. 342 (1914). While the Commission was thus empowered to act
indirectly on intrastate rates by acting on persons and localities, rather than on the rates themselves, they had no power to regulate the rates directly, prior to 1920. In that year the Transportation Act enlarged the authority of the Commission so as to enable it to deal directly with intrastate rates where they are found to be unduly discriminatory against interstate commerce. Section 416 of the Act of 1920 amended section 13 of the original Interstate Commerce Act of Feb. 4, 1887 (24 Stat. 383) to read as follows:

"Whenever in any investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination. * * *" [41 Stat. 456, 484 (1920), 49 U. S. C. § 13 (4) (1926)].

The courts have consistently held that the above section is to be construed in the light of section 15a (2) of the Interstate Commerce Act of 1887, as amended by the Act of June 29, 1906, which follows:

"In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income, equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, that the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country." [34 Stat. 590 (1906), 49 U. S. C. § 16 (1926)].

In other words, the extended power over intrastate rates given the Interstate Commerce Commission by section 416 of the Act of 1920 is to be given a liberal construction, so that the broad purpose of section 15a (2) of the Act of 1887 (as amended) may be more readily effectuated. Wisconsin Ry. Comm. v. C. B. & Q. R. R., 257 U. S. 563 (1922); New York v. United States, 257 U. S. 591 (1922); Louisiana Pub. Ser. Comm. v. Texas & New Orleans R. R., 284 U. S. 125 (1931).

Under such a construction, the power of the Commission to adjudicate the rates in a large territory, on evidence deemed typical of the whole rate structure, cannot be severely restricted by requiring it to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule. This does not mean that
the Commission may fix rates which, in individual cases, may exceed the bounds of reasonableness. Rather is it a question of procedure: In the interest of commerce to receive swift relief when it is urgently demanded, the Commission is empowered to prescribe increases of general reasonableness over a wide field, reserving to the individuals the right to secure modification of any particular rate when demonstratively unreasonable. Thus the effect of the case is to shift the burden of proof, requiring the individual to prove the unreasonableness of a particular rate, and relieving the Commission of proving the reasonableness of each specific rate.

On the appellee's second point, that the prescribed rates were unsupported by findings that the increased rates would produce increased revenue, it is clear that any finding of undue prejudice to interstate commerce, based upon the failure of prevailing intrastate rates to contribute their fair share to the support of a national transportation system, must necessarily rest upon a prediction that an increase in the intrastate rates will result in an increase of revenue. There are no formal requirements for the findings to be made by the Commission in arriving at their conclusion of what rates to prescribe. * Manufacturers R. R. Co. v. United States, 246 U. S. 467 (1918); The Fifteen Per Cent Case, supra; Montana v. United States, 2 F. Supp. 448 (D. C. Mont. 1933); Kentucky v. United States, 3 F. Supp. 778 (W. D. Ky. 1933); Wisconsin R. R. Comm. v. C. B. & Q. R. R., supra."

Finally, the fact that the order of the Commission in the Fifteen Per Cent case was permissive only does not affect the validity of its subsequent order prescribing minimum intrastate rates. When the option was exercised, and the interstate rates increased, they became the lawful rates, and interference with their lawful exercise by discriminatory intrastate rates was amenable to the correction of the Commission under the authority of section 416 of the Act of 1920. By providing that the order (Increase in Intrastate Rates, supra) should be effective only so long as the surcharges upon interstate rates should be maintained by the carriers under the order of the Fifteen Per Cent Case, the Commission precluded any unauthorized interference with state regulatory power, and confined itself within the limits of its statutory authority.

F. X. V.

JUDGES—Salaries—Reduction During Term of Office.

Under the law existing at the time of his election, Justice Riley was entitled to a monthly salary of $625. The Oklahoma Legislature fixed the amount to be paid to justices and provided that "in no case shall the salary * * * of any public official be changed after his election. * * *" It also prohibited the payment of public funds except pursuant to "an appropriation by law." Under an economy program the Legislature cut its appropriations for judicial salaries to $500 a month. The State auditor refused to allow petitioner's
claim for $625 and sought to justify his decision upon a statute which made it unlawful for him to make any disbursements in the absence of an appropriation by the Legislature. Held, that since the Constitution fixed the judges' salaries with a limitation that they should be neither changed nor increased, the Constitution, ex proprio vigore, made the necessary "appropriation by law" and no legislative act is required. Riley v. Carter, State Auditor, et al., — Okla. —, 25 P. (2d) 666 (1933).

Apart from the point that constitutional provisions under certain aspects are self-executing, without any super-added legislative intervention, the decision serves also to illustrate another indirect attempt by the Legislature to diminish the compensation of the judiciary by a failure to make sufficient appropriations. Thomas v. Owens, 4 Md. 189 (1853); State v. Weston, 4 Neb. 216 (1876); Reynolds v. Taylor, 43 Ala. 420 (1869); State v. Hickman, 9 Mont. 370, 23 Pac. 740 (1890); People v. Goodykoontz, 22 Colo. 507, 45 Pac. 414 (1896). With respect to the attempt of Congress to employ the federal income tax as a means of reducing a judge's stipend indirectly, see Evans v. Gore, 253 U. S. 245 (1920); Miles v. Graham, 268 U. S. 501 (1925); (1925) 14 Georgetown Law Journal 123.

Following a long series of decisions which have denied the legislative department the right to reduce, directly or indirectly, the compensation of the judicial body, the court in the principal case resorts to the argument frequently advanced, that by maintaining the judges secure against the influence of the executive and legislative branches, a more effective administration of justice will be insured to those who seek the aid of the courts. O'Donoghue v. United States, 289 U. S. 516 (1933); (1933) 22 Georgetown Law Journal 96. But see Lowndes, Taxing Income of the Federal Judiciary (1932) 19 Va. L. Rev. 153, 159. And better to effectuate this purpose, the Oklahoma Constitution prevents the compensation from being either diminished or increased, while the limitation in the Federal Constitution (Art. III, § 1) goes only to the diminution of salaries. To allow the Legislature to deprive the judges of their full salary by inadequate appropriations, would militate against the constitutional provisions designed to guard against the existence of a subservient and dependent judiciary. Thomas v. Owens, supra.

Constitutional stipulations that the compensation of public officers shall be inviolate, at least during their incumbency, are a declaration of policy. Greenlee County v. Laine, 20 Ariz. 296, 180 Pac. 151 (1919). And where an office is created and its salary determined by the organic law of the State, no appropriation by legislative act is necessary to authorize the payment of the salary. Thomas v. Owens, supra; State v. Hickman, supra; State v. Kenney, 10 Mont. 485, 26 Pac. 197 (1891), State v. Burdick, 4 Wyo. 272, 33 Pac. 125 (1893). Some courts achieve the same effect even where the office is purely a creation of statute. Reynolds v. Taylor, supra; Nichols v. Comptroller, 4 Stew. & P. (Ala.) 154 (1833); Carr v. State, 127 Ind. 204, 26 N. E. 778 (1891).
However, there are many other courts which take the opposite stand on the point, and, although in favor of maintaining an independent and uninfluenced judiciary, they refuse to adhere to the proposition that constitutional provisions are self-executing, where the Legislature has failed to make sufficient appropriation for the payment of salaries. *Myers v. English*, 9 Cal. 341 (1858); *Pickle v. Finley, Comptroller*, 91 Tex. 884, 44 S. W. 480 (1898); *Shattuck v. Kincaid*, 31 Ore. 379, 49 Pac. 758 (1897); *Kingsbury v. Anderson*, 5 Idaho 771, 51 Pac. 744 (1898). And justification for their holding is found in the fact that “there may arise exigencies, in the progress of human affairs, when the first moneys in the treasury would be required for more pressing emergencies, and when it would be absolutely necessary to delay the ordinary appropriations for salaries.” *Myers v. English*, supra.

A. M. T.

**PATENTS—Interpretation of Claims in Light of Specification.**

A suit was brought for an infringement of a patent for the control of heavier-than-air craft. The specification described three species of the one broad invention, one of which showed a lever to be pushed forward for a descent and pulled backward for ascension, while the other two show opposite arrangements. The details in each case were fully set out in the specification and one species was particularly pointed out and expressly claimed, as required by 46 Stat. 376 (1930), 35 U. S. C. § 33 (1933). Held, claims valid but not infringed, and limited to the specific control structure disclosed. No prior art was shown to so limit the claims, but the instinctive use by the operator, of the control levers of an aeroplane in pushing forward to descend and pulling backward to ascend, could not be claimed as part of the invention, because the patent made no claim that this operation was preferred to the opposite one. The patent laid no emphasis upon either directional response in preference to the other, although it was conceded that it was inherent in one of the embodiments. *Esnault-Pelterie v. Chance Vought Corp.*, 66 F. (2d) 474 (C. C. A. 2d, 1933).

To support its conclusion, the court cited *Permutit Co. v. Graver Corp.*, 284 U. S. 52 (1931), which decided that a patent was void for want of compliance with the statutory requirements in not particularly pointing out and distinctly claiming the invention. An examination of this case discloses quite a different set of circumstances from the present case. In that case the court said: “While drawings may be referred to for illustration and may be used as an aid in interpreting the specification or claims, they are of no avail where there is an entire absence of description of the alleged invention or a failure to claim it.”

It should be noted that the statute not only requires the patentee to explain the principles of operation and to describe it in such terms that any person skilled in the art to which it appertains may
construct and use it after the expiration of the patent, but also to inform the public during its life of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not. Merrill v. Yeomans, 94 U. S. 568, 573 (1876); Seymour v. Osborn, 11 Wall., 516, 541 (1870). Both of these characteristics are to be found in this case, whereas both were lacking in the Permutit case, and therefore it is clear that the latter is not an authority for the present decision in holding these claims valid but not infringed, as contrasted with the holding in that case that the patent was void.

The court in this case seems to have based its decision on the assumption that only the one specie particularly pointed out in the description as the preferred embodiment could be the subject of a valid specie claim. Such an hypothesis might seem the correct one from the case of American Lava Co. v. Steward, 215 U. S. 161, 166 (1909), in which the Supreme Court stated, in effect, that where the essence of an invention is the location, form or other characteristic of the means employed, the patentee must distinctly specify the peculiarities in which his invention is to be found. Then, too, the courts have said that the claims in a patent are a measure of the invention, but must be construed in the light of the specification, which may limit but cannot expand them. Miller Rubber Co. v. Behrend, 242 Fed. 515 (C. C. A. 2d, 1915); Crystal Percolator Co. v. Landers, Frary & Clark, 258 Fed. 28 (D. C. Conn. 1919); Harvey Hubbell, Inc. v. American Brass & Copper Co., 296 Fed. 47 (C. C. A. 2d, 1924). These decisions, however, state only a part of the law and are to be strictly limited to a set of facts similar to the facts of those cases.

It has repeatedly been held that claims must be construed in the light of the specification. Aluminate Co. v. Akme Flue, Inc., 50 F. (2d) 921 (D. C. Md. 1931); Thorpe v. William Filene's Sons' Co., 52 F. (2d) 445 (D. C. Mass. 1931); Westinghouse Electric & Mfg. Co. v. Quackenbush, 53 F. (2d) 632 (C. C. A. 6th, 1931). However, claims of a patent should be liberally construed so as to uphold the rights of the inventor. National Battery Co. v. Richardson Co., 63 F. (2d) 289 (C. C. A. 6th, 1933). Where a patented structure contains a new mode of operation and produces new results, the failure of the patent to state these merits does not prevent consideration of them in determining novelty, but the patentee is entitled to all the advantages which such structure possesses over prior structures intended for a similar purpose. Blake & Knowles Steam Pump Works v. Warren Steam Pump Co., 163 Fed. 263 (C. C. A. 1st, 1908). The specification and claims must be read together to get an accurate comprehension of the government's intention in making the grant. H. K. Regan & Sons v. Scott & Williams, 57 F. (2d) 242 (S. D. N. Y. 1932); United Drug Co. v. Ireland Candy Co., 51 F. (2d) 226 (C. C. A. 8th, 1931). In further contrast to the apparent assumption of the court in this case is the holding in American Dunlop Tire Co. v. Erie Rubber Co., 66 Fed. 558 (W. D. Pa. 1895), that a statement in the
specification that in the best methods of applying the invention, the 
patentees use a supplemental device (therein described), cannot be 
read as a limitation into a claim which contains no reference to it. 
The only reasonable conclusion that can be drawn from these cases 
is that a patentee is entitled to all that is validly set forth in his 
claim, interpreted in the light of the description and the advance-
ment in the art by the invention.

In *Ex parte Eagle*, 1870 Com. Dec. 137, the Commissioner of Pat-
ents interpreted Rule 41 of the Patent Office Rules of Practice and 
held that "an applicant can show and describe as many different 
forms of his invention as can be covered by a generic claim, and 
also claim specifically the preferred form of his invention. But 
more than that he is not entitled to do." See also, *Ex parte Howland*, 
1877 Com. Dec. 120; *Ex parte Heaton*, 1879 Com. Dec. 95; *Ex parte Cook*, 
1890 Com. Dec. 81. From this rule, well established before the 1928 
revision (Patent Office Practice Rule 41), and the claims in this 
case, it is clear that the inventor did particularly point out his 
preferred form by his choice in his specie claims.

It appears that the court has attempted to rule that the wording 
of patent claims must be limited to the vocabulary developed by 
the description, and broader phraseology in claims will not be 
broadly construed, even though no prior art is found to limit their 
scope. In the light of the other decisions on this rule it seems 
that this is an extreme position which is not supported by authority, 
and one which deprives an inventor of the full benefit of his patent.

A. C. H.

PERSONAL PROPERTY—Dead Bodies—Right of Testamentary 
Disposition.

Before his execution, Lee, a condemned convict, was induced to sign 
a paper in the form of a will, bequeathing his dead body to his 
attorney, Ades. Intending to take it to New York City for exhibition 
at a demonstration, Ades demanded possession of the body. The 
warden of the prison refused to comply with the demand, and justified 
his refusal under the Code provision [Md. ANN. CODE (Bagby, 1924) 
art. 27 § 412], which gives to the State the right to bury executed 
persons, where no surviving spouse, or next of kin is to be found. 
Ades obtained a temporary injunction restraining the warden from 
proceeding with the burial, and petitioned for a permanent restrain-
ing order. *Held,* temporary injunction dissolved, and permanent 
injunction ordered against Ades, restraining him and his agents from 
ever interfering with the proper disposal of the body of Lee. *Ades 

Though but a *nisi prius* decision, this case is interesting because 
it gives apt illustration to an unusual point in the law—the right 
of property in dead bodies. It is well established that, as far as 
the strict commercial sense of the term "property" is concerned, 
there are no property rights in a dead body. *England v. Central*
Pocahantas Coal Co., 86 W. Va. 575, 104 S. W. 46 (1920); In re Wong Wung Quy, 2 Fed. 624 (C. C. Cal. 1880); Finlay v. Atlantic Transport Co., 220 N. Y. 249, 115 N. E. 715 (1917). While property in a commercial sense cannot be said to exist in a dead human body, there are quasi property rights therein to which certain persons may assert claims. These rights are derived from the duties imposed upon certain persons in connection with a dead body. When a man dies, public policy and a regard for public health, as well as a universal sense of decency, require that a proper disposition of the body be made. These duties must fall upon someone and must, of necessity, carry with them the rights incidental to their fulfillment. Litteral v. Litteral, 131 Mo. App. 306, 111 S. W. 172 (1908); Wilson v. Read, 74 N. H. 322, 68 Atl. 37 (1907). This general subject is given a thorough historical treatment in Matter of Beekman Street, 4 Bradf. (N. Y.) 503 (1875).

Under the common law doctrine, no property rights whatever existed in a dead human body. This rule resulted in some rather fine distinctions, as in the holding that the taking of a dead human body was not larceny, but the conversion of a shroud of the deceased was. Wonson v. Sayward, 13 Pick. (Mass.) 402 (1832). The leading English case on this question is Handyside's Case, 2 East. P. C. 635 (circa 1750), wherein it was held that an action of trover would not lie for the dead bodies of two children, joined together at birth, because of the absence of property right in a dead body. This rule was evidently the result of the complete jurisdiction which the Ecclesiastical Courts of England exercised over matters concerning burial. Matter of Beekman Street, supra. However, such a rule as was laid down in Handyside's Case, supra, does not rest upon a sound foundation and is not sustainable as a general proposition. Inasmuch as there is a right of custody, control and disposition of a dead body, recognized and enforced by the law, and since these are the essential attributes of ownership, it would be more accurate to say that a dead human body is a subject of property, but only such property as is subject to a trust, limited in its scope to the duty out of which it arises. Pettigrew v. Pettigrew, 207 Pa. 313, 56 Atl. 879 (1904); Wynkoop v. Wynkoop, 42 Pa. 293, 82 Am. Dec. 506 (1862); Danahy v. Kellogg, 126 N. Y. Supp. 444 (1910).

A related point involves the right of a person to make testamentary disposition of his dead body. There is no settled law on this question. In England it would seem that a person cannot dispose of his dead body by will. Williams v. Williams, 20 Ch. Div. 659 (1882). This view is sustained by some jurisdictions in the United States. O'Donnell v. Slack, 123 Cal. 285, 55 Pac. 906 (1899); Enos v. Synder, 131 Cal. 68, 63 Pac. 170 (1900). However, the majority view in America is clearly to the contrary. Scott v. Riley, 16 Phila. 106 (1883); Commonwealth v. Susquehanna, 5 Kulp. (Pa.) 195 (1889); Wynkoop v. Wynkoop, supra; Thompson v. Deeds, 93 Iowa 222, 61 N. W. 842 (1895). To what extent the wishes, or even the express directions, of the decedent are to prevail must also be regarded as
an unsettled point. Many courts hold that such wishes or directions must prevail so long as they do not interfere with public policy or with the general laws respecting health and morals, and all authorities agree that the decedent’s desires should in any case be given respectful consideration when the question arises in a court. Pierce v. Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667 (1872); Johnston v. Marinus, 18 Abb. N. C. 72 (1882); Pettigrew v. Pettigrew, supra.

On the question of jurisdiction, since property in a pecuniary or commercial sense does not exist in a dead body, it would seem that the equity courts would be without jurisdiction, Chappell v. Stewart, 82 Md. 323, 33 Atl. 542 (1896). It is well settled, however, that, independently of property rights, it is a special office of equity to settle disputes arising out of matters concerning a dead body. Weld v. Walker, 130 Mass. 422 (1881). In the discharge of this office, the court of equity is bound by no fixed rules, but is restricted only to the exercise of sound discretion. In the principal case, the court acted quite within its discretionary powers in ruling that considerations of public policy stood in the way of the court’s giving effect to the deceased’s testamentary disposition of his body.

E. B.

TAXATION—Things in Transit—Livestock.

The plaintiff bought livestock in the open market at a large stockyard. In the regular course of his business practically all of the cattle he purchased were sold and shipped to persons outside the state, though at times sales were made within the state, the plaintiff having the sole power of disposition. The cattle in question came to the stockyards from without the state; were purchased by the plaintiff on April 30th; were taxed by the state on May 1st, the regular tax date, and on that same day and the day following were sold and shipped to points outside the state. The state court, in view of the Packers and Stockyards Act of 1921, [42 Stat. 159 (1921), 7 U. S. C. 181 (1926)], denied the validity of the tax. Held, where there occurs a break, independent of the journey, in transit of property through two or more states, such property becomes subject to non-discriminatory taxation in the state of rest. State of Minnesota v. George Blasius, 290 U. S. — (1933).

The Packers and Stockyards Act of 1921, supra, gives the federal government far-reaching control and regulatory powers over the nation’s stockyards and all dealings connected therewith. Points of concentration for redistribution of national commodities are not considered as places of rest or final destinations, and dealers at these points are deemed necessary to the flow of interstate commerce. Stafford v. Wallace, 258 U. S. 495 (1922); Eureka Pipe Line Co. v. Hailanan, 257 U. S. 265 (1921); Swift & Co. v. U. S., 196 U. S. 375 (1905). The status of property as interstate commerce is not affected by a change in title during transportation. Gulf, Colorado & Santa Fe Railway Co. v. Texas, 204 U. S. 403 (1907); Connecticut
River Lumber Co. v. Columbia, 62 N. H. 286 (1882). The usual procedure in the course of business is the governing factor, and, so long as the goods are in actual flow, the sale of small portions within the state is not sufficient to destroy the status of the goods as interstate commerce, upon which the state can impose no direct burden. United Fuel Gas Co. v. Hallanan, 257 U. S. 277 (1921); Lemke v. Farmers Grain Co., 258 U. S. 50 (1922); Eureka Pipe Line Co. v. Hallanan, supra.

Property awaiting shipment to another state is subject to taxation in the state of origin unless previously turned over to a carrier. Coe v. Errol, 116 U. S. 517 (1886); Diamond Match Co. v. Ontonagon, 188 U. S. 82 (1903). Stops or interruptions necessary to the transit do not deprive a shipment of exemption to which it is entitled as interstate commerce. The privilege is lost only when the break is independent of the transit and brought about for the pleasure, interest, or benefit of the owner. Champlain Co. v. Brattleboro, 260 U. S. 366 (1922); Ohio Railroad Comm. v. Worthington, 225 U. S. 101 (1912); Texas & New Orleans Railroad Co. v. Sabine Tram Co., 227 U. S. 111 (1913); Coe v. Errol, supra. But, property brought from another state, taken from the carrier, and held by the owner subject to his disposition becomes liable to a non-discriminatory local tax. Bacon v. Illinois, 227 U. S. 504 (1913); General Oil Co. v. Crain, 209 U. S. 211 (1908); Susquehanna Coal Co. v. South Amboy, 228 U. S. 665 (1913); American Steel & Wire Co. v. Speed, 192 U. S. 500 (1904). The deciding feature to be considered in connection with intrastate or interstate commerce is continuity of transit. Carson Petroleum Co. v. Vial, 279 U. S. 95 (1929). And the purpose of the halt, rather than the duration, governs. General Oil Co. v. Crain, supra. Other points which influence the decision as to whether property is in intrastate or interstate commerce are: Whether the place levying tax is the domicile of the owner; whether the property taxed is beginning or ending the journey, and whether the property is a vehicle or its cargo. Powell, Taxation of Things in Transit (1920) 7 Va. L. Rev. 167, 245, 429, 497.

However, the fact that property is in interstate transit will not, in itself, exempt it from state taxation. Gloucester Ferry v. Pennsylvania, 114 U. S. 196 (1885); Marye v. B. & O., 127 U. S. 117 (1888); American Refining Co. v. Hall, 174 U. S. 70 (1899); Union Tank Line Co. v. Wright, 249 U. S. 275 (1919). The power of a state to tax interstate commerce does not depend upon whether the property is still in interstate transit, but upon whether or not such local taxation will conflict with the federal power to control that commerce. Brown v. Maryland, 12 Wheat., 419 (1827); Brown v. Houston, 114 U. S. 622 (1885). As to state taxation of interstate commerce the law amounts to a segregation of improper from proper methods of taxing such commerce. Powell, Taxation of Things in Transit, supra. J. T. W.
BOOK REVIEWS


To appraise this little volume properly the reader must bear in mind the background against which it is written. The author was formerly the chairman of the House Ways and Means Committee and of the Joint Committee of the House and Senate on Taxation. This is not a profusely documented academic treatise on the philosophy of taxation. Nor is it a detailed manual of tax practice. It is the accumulated reflections of one who has had a rich experience in trying to transmute abstract theories into concrete laws, and who is appealing for sympathetic understanding to the taxpaying public.

At the core of the author's observations is the proposition that tax systems cannot be constructed in a vacuum. The problem of the legislator is not what system of taxation is ideally best, but what system will achieve the best results under the conditions of the given time and place. Proceeding from this practical postulate, the author analyzes in some detail the current system in the United States in comparison with the systems of the principal European countries. Perhaps it is needless to add that he makes out a strong case in favor of the American system.

The author's approach is particularly interesting for the stress which is laid upon the fact that the prime function of a tax is to produce revenue—something apt to be overlooked in more doctrinaire discussions.

The book will repay the time devoted to it. It is lucidly though not elegantly written. In simple non-technical terms it explains the reasons for the various federal tax laws. The myriad detail of the federal tax system emerges as the coordinated product of scientific planning. The tax acts lose their arbitrary appearance and the reader is afforded an inspiring insight into an informed and intelligent legislative process which is acutely conscious of
the theories of the science of taxation and genuinely eager to apply them in practice.

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CASES ON THE LEGAL PROFESSION AND ITS ETHICS (2d ed.)—

George Washington, in a letter of September 27, 1789, wrote to his future Attorney General of the United States, Edmund Randolph of Virginia, that: “Impressed with a conviction that the true administration of justice is the firmest pillar of good government * * * the selection of the fittest characters to expound the laws and dispense justice has been an invariable subject of my anxious concern.” A successor of Edmund Randolph, the present Attorney General of the United States, Homer L. Cummings, declared in an address of September 11, 1933, approximately a century and a half later, that one of the greatest difficulties in the enforcement of justice is that:

“Many so-called rackets are skillfully organized on a basis of business efficiency, with adroit lawyers under retainers and with social and other contacts developed to such an extent that they can readily enlist aid from respectable citizens including office holders in attempts to influence those charged with administering justice. This frequently results in the escape of the racketeer from conviction or punishment. Many of the safeguards provided by our law for the protection of a person accused of crime, in the hands of skilled counsel, often degenerate into gross abuse. The right of habeas corpus, the right of appeal, and the application of our parole and probation practices, are frequently and, at times, flagrantly debauched in order to shield habitual criminals from well-deserved punishment.”

Returning to the subject in an address of October 12, 1933, Attorney General Cummings said:

“There is another matter to which I invite your serious attention. I refer to unscrupulous lawyers who aid and abet criminals in their unlawful undertakings and employ every unworthy artifice in their defense. There is reason to believe that in

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many localities certain members of the Bar are in touch with and regularly employed by the criminal element. These men are the scavengers of the Bar and are unworthy of the profession they disgrace. Their elimination is a part of the problem of crime."

The President of the American Bar Association, Earle W. Evans, in a recent vigorous address to the Chicago Bar Association charged that there were lawyers in league with criminals and characterized such lawyers as "money changers in the Temple of Justice." He demanded that they be whipped therefrom.

The first session of the 73rd Congress saw the managers on the part of the House of Representatives prosecuting impeachment at the Bar of the United States Senate against a Federal judge and, even though he was acquitted, some of the Senators who voted for acquittal roundly condemned his ethics in the appointment of receivers.

The Supreme Court of the United States in an unanimous opinion of January 2, 1929, reported as Weil v. Neary, condemned in a bankruptcy case a contract for certain division of fees, as not only being contrary to the bankruptcy rules, but "contrary to public policy—plainly so." Also, that such contract was "in violation of public policy and professional ethics," and "calls for judicial condemnation." The lawyer who set up such a contract was no neophyte in the legal profession. It is a fact that the court in one of our largest cities has become so disgusted with the handling of receivership and bankruptcy cases by the members of the Bar that a bank has been appointed receiver in all such cases in an attempt to protect the court against undesirable practices on the part of receivers.

Plainly, the practices publicly condemned by Attorney General Cummings, President Evans, members of the Senate, Judiciary Committee of the House of Representatives, and the Supreme Court of the United States show that some members of the legal profession have strayed far afield—at least in their conduct—from the belief of President Washington "that the true administration of justice is the firmest pillar of good government," for law-

1 278 U. S. 174 (1929).
yers as well as judges are priests of justice. The signs are not wanting—if one will but read the editorials in newspapers and magazines—that there is a growing resentment against the legal profession which may reach the proportions of the resentment in some of the colonies during our colonial period. In fact, the excuse given for the terrible crime of lynching—that reversion to savagery—is that the machinery for the administration of justice has broken down, and it is a matter of common knowledge that some great cities of this country are helpless in the grip of racketeers allied with crooked lawyers and politicians. It is a known fact that a certain official declined an invitation of newspaper men to make available to reporters the file of every criminal where lawyers or politicians sought favors for such criminals, accompanied by a memorandum setting forth the facts with names of the individuals making such intercessions.

A public service of no mean proportion has been performed by the West Publishing Company in bringing out this second and enlarged edition of Professor Costigan’s Cases and other Authorities on the Legal Profession and its Ethics, containing a vast amount of material from English and American sources as to the proper legal, ethical, and moral conduct of members of the Bar. Professor Costigan has stated in the preface to this second edition that, “The idea back of it has been to give history and etiquette the emphasis to which they are entitled and yet to stress, in the main, the fundamental professional practices and moral problems which govern and frequently confront the lawyer of today.” In the judgment of this reviewer, the idea back of the book has been satisfied, for the work of selection and arrangement of the material has been admirably done. Also, that no law student should be permitted to graduate from any of our law schools without having had lectures of at least one hour a day, one day a week, for a full scholastic year based on this or a similar casebook.

The law is no money-grubbing trade. It is a profession second to none, and there have been lawyers who have not hesitated to risk both their lives and their property—as did Malasherbes, the great lawyer who went to the guillotine
in the French Revolution—in defense of the ideals and
duties of our profession. The beloved Justice Wendell
Phillips Stafford said of the legal profession:

"Clothe it with the richest imagery; surround it with the
noblest names, the proudest associations. If you were an artist,
you would think of Phidias, and Raphael, and Michael Angelo.
If you were a preacher, you would think of Savonarola, and
Whitfield, and Bossuet, and Brooks. If you are a lawyer, think
of Marshall, and Webster, of Erskine, and Coke, of Selden, Ul-
plan, Demosthenes. These, not the hucksters and shysters of
the day, stand for your art. Lift it to the level of your highest
thought; dignify it by your noblest effort; then if you fail to
fulfill your ideal, your very failure might be success for one
who strove less nobly."

Lawyers sometime fail to appreciate that their profes-
sion is not a money-grubbing one; they fail to catch the in-
spiration which we know Mr. Justice Stafford has for the
legal profession; and they fail to avoid disgrace to them-
selves and their profession through sheer ignorance of the
ideals which have characterized the great lawyers back
through the ages to Gaius and Papinian or even earlier.
This casebook will give the law student materials on which
such ideals have been based and will enable the law student,
when he comes to the Bar, to avoid dangerous paths which
may beckon him astray. The enthusiastic teacher might
well supplement the casebook by extracts from biographies
of outstanding judges and lawyers whose careers are proof
that such ideals may be attained in our work-a-day world.

The material is arranged in ten chapters with an ap-
pendix. The chapter headings give some indication of the
topics treated therein by extracts from English rules,
American rules, and decided cases in the courts or by com-
mittees of Bar Associations. These chapter headings are:
The History and Organization of the Legal Profession in
England and in the United States; The Lawyer's Qualifica-
tions; The Admission and Discipline of Lawyers; The
Ethical Duties of Lawyers to Courts; Ethics of Legal
Employment in General; Solicitation of Legal Business;
The Ethical Duties of Lawyers in Criminal Cases; The
Ethical Duties of Lawyers in Civil Cases; Pecuniary Relations of Lawyers and Clients; and Miscellaneous Topics, such as lobbying, transfers of property in fraud of creditors, countenancing future violations and evasions of law, duties to clients, their relatives and to third persons. The appendix contains Hoffman's resolutions in regard to professional deportment, canons of professional ethics of the American Bar Association, oath of admission to the Bar, canons of judicial ethics, and the rules or canons of professional ethics for both the California and Minnesota Bars. The latter are, of course, of local interest only but the lecturer could substitute the rules or canons of professional ethics for the local Bar association of the State where the book is used.

The professor of law who recently wrote an article warning the Supreme Court of the United States against holding so-called recovery legislation of the Federal government unconstitutional, should certainly read the material in chapter five concerning lawyers "unfairly influencing, threatening and objectionably criticising judges and juries." Not that a court might not commit error—because courts do err—but rule by law means that the legal profession should render the courts all assistance possible, and then abide by the decisions which the courts may in their wisdom render, or secure a change in the law—even in the Constitution if necessary. Certainly this should be the mental approach of a teacher of law to such a problem.

This casebook does not attempt to meet the serious problems confronting the American people of ill prepared students being admitted to the Bar; the admission of lawyers lacking cultural background concerning our institutions; the overcrowding of the profession, with economic necessity annually leading certain lawyers into practices condemned by the morals, ethics, etiquette, and law of the profession; and the establishment of procedure to replace our present cumbersome and creaking machinery for the discipline—even to disbarment—of lawyers who prove faithless to the public, the courts, and their clients. Yet,
knowledge of the contents of this casebook should be of aid in the solution of these problems also.

O. R. MCGUIRE.*

Washington.


The reviewer still recalls his surprise, when he first read Hall’s great treatise, at the particularity with which that eminent and usually most practical-minded writer set out the canons of interpretation of treaties.1 A few years later he was to find in Professor Hyde’s treatise a far simpler and more satisfactory statement of the guiding principle.2 Dr. Chang’s book, if one may judge from the imprint and the acknowledgments to Professors Hyde and Jessup, was work done toward a doctorate in the Columbia University international law seminar. As such it cannot be said to be inspired—few doctoral dissertations attain the brilliance, for instance, of Woodrow Wilson’s Con- gressional Government3—but it shows a lawyer-like grasp of the subject and in its scholarly precision reflects creditably on its distinguished sponsors.

Dr. Chang begins by doubting the practical usefulness of the classical canons of construction, as set out by Vattel and others, and after a brief glance at Wigmore on the nature of legal interpretation,4 points out that it is the duty of a tribunal “to find out precisely what was actually agreed upon by the parties, but not to add anything to it” (p. 21). A chapter on the respect ordinarily paid by courts to the “clear meaning” of treaties, with examples

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2 Hyde, International Law (1922) § 530-535, pp. 61-72.

3 At the Johns Hopkins, 1885. For the genesis of this remarkable book, see R. S. Baker, Woodrow Wilson (1927) Vol. I, p. 168 et seq.

4 Wigmore, Evidence (1905) § 2458, p. 3470.
drawn mainly from the Permanent Court and the United States Supreme Court, points out that in resorting to “clear meaning” courts are trying to ascertain the design of the contracting parties, and that where evidence of such design can be found in external facts it has been accepted. It still remains to be seen, however, what will happen when there is a direct conflict between “clear meaning” and extrinsic evidence. The now famous Cayuga Indians Claims case,\(^5\) in which the clear meaning was followed although contrary to the evidence of the treaty negotiations that the provision was merely “nominal,” would constitute an exception to the general rule, but for the questionableness, Dr. Chang thinks, of the evidence offered by the United States. In Asherberg Hopwood & Crew, Ltd. v. Quaritch,\(^6\) the Anglo-German Mixed Arbitral Tribunal openly disregarded external evidence clearly contrary. When the text of a treaty appears doubtful, tribunals generally resort to various sources of extrinsic evidence, and, it is concluded, are reluctant to apply the rule of construction resulting in a minimum burden on either of the contracting parties, when their design is ascertainable. Likewise, where the general purpose of a treaty is deducible from its preamble or its provisions as a whole, courts are unwilling to allow a construction tending to thwart this manifest design. Such was the rule followed by the Supreme Court in construing the liquor treaty with Great Britain of 22 May, 1924.\(^7\)

Considerable space is devoted by Dr. Chang to the consideration of the admissibility of preparatory work. The United States Supreme Court, apparently, has never hesitated to employ the prior negotiations in reaching the intent of the parties, and has never indicated that deductions drawn from the text itself have any superior probative value to those furnished by other evidence. The Permanent Court and other international tribunals usually resort to the negotiations for corroborative evidence and

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\(^5\) Amer. and Brit. Cl. Arbitration, Awards 1-84 (Washington, 1924-1926).


\(^7\) Ford v. United States, 273 U. S. 593 (1927).
there have been few instances like the Asherberg case, supra, where a real conflict between text and negotiations has led the tribunal to exclude the latter. Notwithstanding frequent dicta on "clear meaning," therefore, little authority exists in fact to support such a rule of exclusion. The Permanent Court's construction of Art. 3 of the Washington Labor Convention, holding that the prohibition on the night employment of women was not restricted to manual workers, is of interest as showing two opposite methods of approach. The majority found the text "clear"; Judge Anzilotti, dissenting, thought a text could not be clear without having read into it the general intent of the Convention. Both resorted to preparatory work, the majority to corroborate a "clear meaning," the minority to find the general intent: and both reached opposite conclusions!

The final chapters are devoted to the question of versions of the treaty in differing languages and to the so-called "rule of liberal construction." The cases considered reveal the practice of courts dealing with a two-language treaty again to seek the general intent of the parties, either from the text of the treaty as a whole or from external evidence; and when these sources fail, to steer a middle course which will harmonize both versions. If one language has been used in the negotiations, however, it will be declared "basic" and followed even against the contrary meaning of the other equally authoritative text. As to the "liberal construction rule," which Mr. Justice Field's dictum in Geofroy v. Riggs, has made so familiar, an analysis of the Supreme Court decisions shows the interesting fact that while the court has most generally paid lip-service to this as a fixed "rule" of construction, the same decision would ordinarily have been reached on the broader principle of giving effect to the design of the parties. Its recurrence, therefore, while expressive of a

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9 133 U. S. 258 (1889).
10 Tucker v. Alexandroff, 133 U. S. 424 (1901), is probably a true instance of the rule's application, but in Terrace v. Thompson, 263 U. S. 197 (1923), the court definitely rejected liberal construction because of external evidence to the contrary. In the recent extra-
lofty purpose, cannot justify it as a rule of construction.

Dr. Chang concludes that the Permanent Court has made few, if any, new rules of treaty interpretation, and surprising as it may seem at first in the face of the classical canons of construction, he finds, that all that courts generally do is simply to discover from all the sources available the real intention of the parties. This conclusion, it is interesting to note, is substantially the same reached by Professor Hyde over a decade ago.11

As already said, the author has performed his task in a neat and orderly fashion. His analyses are generally accurate, his conclusions succinctly stated, and he has throughout given the treaty texts discussed in their original language. Misprints were noted at pp. 5, 24, 38, 101, 103, 107, 168 and 187.

It may be regretted that the Columbia Press condones the practice used by some publishers to make a book seem longer, of starting the Arabic pagination from the half-title instead of from the first page of the text.

MANGUM WEEKS.*

Washington.


From one-third to two-thirds of the cases in the civil courts of New York involve personal injury or property damage due to the operation of automobiles, and in about half of these cases some payment is made. If the automobile owner be uninsured, the chances of getting anything are about one in four. These and similar statements, equally striking, based on carefully analyzed statistics, make clear the imperative need for adequate relief as depicted by Dr. French in his recent study of the subject. Ways and means of denaturing the automobile,

dition case of Factor v. Laubenheimer, — U. S. —, decided Dec. 4, 1933, the rule is again invoked in the majority opinion of Stone, J., although the treaty's diplomatic history, also relied on, it is believed would have been sufficient.

11 Op. cit. supra, note 2, at Id.

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robbing it of all its ferociousness, and, at the same time, saving all its power for service, are continually under discussion. Dr. French has based his conclusions on statistics gathered in New York State, but they are applicable in virtually any American jurisdiction. His book is divided into five chapters, with a bibliography of eight pages and an index of six pages, making a volume of 262 pages in all. Congestion of civil calendars with the attendant injustice to all litigants, the fact that conditions are growing progressively worse, the disbarment of "ambulance-chasing" lawyers, and other factors in the situation are discussed in the first chapter. To meet the difficulty, Dr. French proposes that all automobile personal injury cases be tried by an administrative board, not bound by common law rules as to damages or negligence, and the inauguration of a system of compulsory financial responsibility among automobile owners. That such a plan is constitutional is discussed in Chapter Three, upon the analogy to Workmen's Compensation Legislation. The automobile could be classified as a "dangerous instrumentality" and regulated upon this theory. Dr. French concedes that "American courts have seldom put motor vehicles in this special class of dangerous articles."¹ In fact, only one jurisdiction has done so explicitly, that of Florida, though the whole thesis of the Family Automobile Doctrine is that an automobile is, in effect, a dangerous instrumentality. The author is of opinion that, without a statute, consent to use his car by the owner cannot be implied from ownership alone.³ But in some jurisdictions the courts permit an inference of consent, prima facie, from proof of ownership in the defendant. Doran v. Thomsen,⁴ cited at page 98, has been virtually overruled in Missell v. Hayes.⁵ The most interesting part of the book is Chapter Four, where the author discusses "The Workability of the Plan," relying largely on the report

¹ P. 93.
² Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So., 629 (1920); Engleman v. Traeger, 102 Fala., 756, 136 So., 527 (1931).
³ P. 100.
⁴ 76 N. J. L. 754, 71 Atl, 796 (1908).
⁵ 86 N. J. L. 347, 91 Atl. 322 (1914).
of the Columbia University’s Committee to Study Compensation, and related material. The Legal Aspect of the Plan is very carefully analyzed in Chapter Five, and the book concludes with a chapter on the place of the Plan in American Administration Law. In the list of books on the general subject, the reviewer misses a reference to Harold M. Stephens’ penetrating study, Administrative Tribunals and the Rules of Evidence.6

Dr. French has made a valuable contribution to one of the most rapidly growing fields of administrative regulation.

HUGH J. FEGAN.*

Georgetown University School of Law.


One is confronted at the outset with the unusual sense in which the word Jurisprudence appears in the title of this most recent collection of cases on the law of Equity. Jurisprudence is the science of law. Law may consist only of those rules which are used by the courts; there is also a theory of positive law represented in England by Austin, Holland and Oppenheim, and in the United States by the writings of the late Professor Gray. If the purpose and reasonableness of a law be considered and tested by an ideal, as, for example, the rights of man as set forth in the Declaration of Independence, there is also a philosophy of law which may be the subject-matter of Jurisprudence. There is no more justification for speaking of Equity Jurisprudence than there is for Bills and Notes Jurisprudence or American International Law.

As a teacher and writer Professor Keigwin has achieved a foremost position in the fields of Equity and Pleading. As learned and profound as Langdell, he, too, is an exponent of the historical view of law, and this despite a possible retort from him that there are no schools of law, 6

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nor any problems in the law, expressions which astonish only the uninitiated, uttered as they are with a twinkle of the eye. Professor Keigwin is not only a learned man, but one who has digested his learning. He is unsurpassed in his ability to express the essence of a case; he has also the gift of making cases live in the minds of his students as he draws out the facts in Johnsonian language, and distinguishes the case from its predecessor after the discussion has been concluded.

Professor Keigwin views the field of Equity as encompassing more than the doctrine of Specific Performance, important as that doctrine is, as shown by the extent to which it is stressed in the collection of cases published by the late Dean Ames. It is related that Professor Ames was set upon limiting the application of the Statute of Frauds by extending the doctrine of part-performance. The case books which follow Ames’—those of Professor Cook and Professor Durfee—have widened the ground covered in a one-year course in Equity, and Professor Keigwin has extended this scope. His major emphasis is not upon Specific Performance, therefore, but upon the analysis and development of the theme that Equity acts in personam. This is clearly shown in the Editor’s treatment of constructive fraud, a topic overlooked, or not included for other reasons, in preceding casebooks. The maxims of Equity, in the writer’s opinion, have their place, and in Book II they are illustrated by the authorities. As the Editor is wont to say, the maxims may be ignored by some teachers of Equity, but never by the chancellors.

Dean Pound has spoken of the crystallization of Equity and of its decline for that reason. Surely the body of decisions evolved from a consideration of the cases seeking equitable relief against injuries to personality indicate a capacity for growth. Thirty years ago in the case of In re Telescriptor Syndicate\(^1\) Lord Justice Buckley remarked: “This court is not a court of conscience.” More recently the late President Roosevelt assigned as his reason for not continuing the study of law an assertion that there

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\(^1\) 2 Ch. 195 (1913), cited in 5 Holdsworth, History of English Law (1924) 338.
was too much *caveat emptor* about it. To be sure the conscience of the chancellor is now bound by precedent, and yet it must not be allowed to become artificial in the sense that matters of conscience or good faith are foreign to his jurisdiction.

Trusts are omitted from this collection. This most notable and important development of Equity, in Maitland's opinion, must be considered in a separate course because of the element of time. It is the chief one of the "embarrassment of riches" to which the Editor has alluded in his preface.

The teacher of Equity who would give a well-balanced course may not use this singularly excellent collection of cases, but he will necessarily follow a similar arrangement and subject-matter. With pardonable bias this reviewer regards the work as the best in its field.

*Lewis C. Cassidy.*

*Professor of Law, Georgetown Law School.*

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The author is the Deputy Clerk of the United States District Court at Boston and, as might be expected, is thoroughly familiar with what goes on in court and how it gets there. The text covers only 536 pages of the book, the remainder being made up by selected forms, the Bankruptcy Act, equity rules, bankruptcy rules and a comprehensive useful index. There is no table of cases.

The text is made up of 21 chapters, at the beginning of each of which is placed a summary synopsis giving in a page or two the essential things one should know in connection with the subject. Thus one who goes into the Federal Courts for the first time, or one who wishes hastily to review the general phases of federal procedure, may, by reading 40 or 50 pages, get a complete synopsis of the subject, including, of course, other subjects of litigation than bankruptcy, although emphasis is placed upon bankruptcy. One chapter, for instance, gives a short out-
line of Venue and Service, and then proceeds to go into the various phases of the subject in detail in about twenty sections. It is thus possible for one, who has a particular phase of procedure to consider, to get a general view of the matter as a foundation for setting in the particular detail being investigated.

Much litigation at the present time involves claims of one sort or another against the Government. The Bar generally, therefore, will find of interest the Treasury Department statements which appear in the appendix indicating the procedure for obtaining payment of judgments in the Court of Claims and in the United States Courts including suits against Collectors of Internal Revenue and other revenue officers. This indicates the machinery which must be set in motion after the litigation as such is terminated.

Where the author feels he has not room to elaborate matters he does not hesitate to refer to other text-books or books of forms; and any lawyer having to do with the Federal Courts will find the book of value.

Karl Fenning.*

Washington.


This is the fourth volume in this most useful series of digests, and, covering the years 1923 and 1924, completes the survey from the end of the Great War through the year 1928—a decade of judicial activity of great significance, both in national and international courts, because of the transitions and adjustments in world affairs which followed the war and the peace settlement. The writer reviewed the earlier volumes in the pages of this Journal,"
and can testify that the present volume does not fall below its predecessors.

The present volume contains digests of some 50 decisions of international tribunals and 200 of national courts, Professor Edwin Dickinson fortunately continuing to report American decisions. It includes the earliest judgments and advisory opinions of the Permanent Court of International Justice—The Wimbledon, the Eastern Carelia case, the Tunis and Morocco nationality decrees, the Mavrommatis case, the case of the German settlers in Poland—and also the work of the German-American Mixed Claims Commission, in which the late Judge Parker acted as Umpire. The Wimbledon case is of interest. In it the majority of the Permanent Court rejected the German contention favored by Judge Schücking for a restrictive interpretation of Art. 330 of the Treaty of Versailles on the ground that the treaty in effect imposed an international servitude on Germany as to the Kiel Canal. The Court stated its desire to avoid a "question, which is moreover of a very controversial nature, whether in the domain of international law there really exist servitudes analogous to the servitudes of private law." Avoidance was possible as the majority felt that the plain words of the treaty must override any evidence of intent founded only on a canon of interpretation, but the dictum as to international servitudes is of significance in view of the numerous burdens in the nature of servitudes imposed on the Central Powers by the Treaty of Versailles.

The range of interesting legal questions which the cases cover may be suggested by mention of a few others: Immunity of states engaged in non-governmental functions, interest on international claims, sovereignty over mandated territory, effects of American non-recognition of the Russian government (3 New York and 2 Federal cases), state succession as to tort liability, and the municipal effect of a Concordat as an international treaty (a Colombian case).


The writer has discussed some of these questions in this Journal in a review of a recent treatise on the subject, Reid, International Servitudes (1933), Book-review (1933) 22 Georgetown Law Journal 123.
A suggestion may be proper here. The increase of secondary citations of cases, in addition to the official report, would be helpful. Cases are often reprinted in full or in part in the American Journal of International Law and other leading international law reviews, as well as in case books, which are likely to be at hand often when the original reports are not. Professor Dickinson apparently has had this consideration in mind and has supplied many such supplementary citations.

This volume, it must be repeated, by completing the survey for the first post-bellum decade enables us to see the function and scope of the Digest in true perspective; and whether or not codification of international law is likely to go forward rapidly in the near future—in spite of brave efforts, The Hague Conference of 1930 showed only too well the obstacles to be overcome—generalizations based on judicial precedents must go on, and for this purpose the reviewer agrees heartily with the editors, that “these four volumes are in effect an authoritative treatise from which very little is absent that is of practical importance for the ascertainment of the rules and problems of present-day international law.”

Mangum Weeks.*

Washington.

SHALL CHINA HAVE A UNIFORM LEGAL SYSTEM—By Charles S. Lobingier (1933). 39 Case and Comment 32.

This issue of Case and Comment contains a valuable article by former Judge Charles S. Lobingier—Shall China Have a Uniform Legal System. The career of this distinguished jurist in the Philippines and in China is well known both here and abroad, for he has long been regarded as our most eminent interpreter of colonial law. He has edited the decisions of the United States Court for China under the title Extraterritorial Cases. The first volume was published in Manila, 1920, and the second in Shanghai, 1928. The second volume contains the opinions delivered by Judge Lobingier when he served as judge of

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4 Preface x.
the United States Court for China, he being the first judge to serve the full term of ten years.

At the present time in China, if a Chinese merchant sue an American citizen, the United States laws govern the action be it \textit{ex contractu} or \textit{ex delictu}. If he sue an English subject, or a French subject, the matter is governed by the English and French laws, respectively. In order to remedy this unhappy situation and to produce uniformity, so that, for example, a contract made by a Chinese may in every extraterritorial court be interpreted, applied and enforced alike, Judge Lobingier very properly advocates the amendment of section 4 of the Act creating the United States Court for China so that the "written laws of China" be applied in lieu of "the laws of the United States." It is unlikely that anyone can dissent from one of the concluding statements of Judge Lobingier: "* * * such a concession, initiated by the United States, would greatly enhance our prestige with China and be regarded as a real step toward the much desired, and long discussed, abolition of extra-territoriality." Surely such an undertaking as proposed by Judge Lobingier would be within the spirit with which the tasks of the Montevideo Conference will be solved.

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BOOKS RECEIVED


