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CAPITAL INSECURITY UNDER THE CONSTITUTION
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INTRODUCTION

The present urge in the United States for economic security has taken for granted that private capital itself needed none or already amply enjoyed it. The assumption has been that in this capitalistic country, governed by a written Constitution predicated upon private property and interpreted by a more or less conservative Supreme Court, capital possessed a haven of refuge which, added to its natural advantages, gave it ironclad protection and superior power in the production of wealth and in the affairs and conduct of government. Was not the United States a “government of laws and not of men” because of the compelling sanctions of the Constitution which, like a sword of Damocles, gave the political rulers of America no alternative but to protect the fundamental rights of all, and particularly of property? This popular view was shared by those politicians in control of government who, in order to redeem promises, often voted for enactments personally distasteful to them when capital was unduly controlled or restricted, in the confident expectation that in due course of time the Supreme Court in a proper case or controversy would invalidate in whole or in part the objectionable or unsound features. In my opinion, the assumption that private capital in the United States enjoys or possesses numerous safeguards under the Constitution to maintain it as a way of life, is unsound; on the contrary, steady inroads have been made upon these traditional safeguards, so that only by reliance upon other and non-constitutional forms of protection can capital as we have known it maintain and perpetuate itself

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in our country. It cannot continue to obtain these safeguards under the Constitution as it has been and is being interpreted in the present, or as it is now regarded by an apparent majority of our people. In many directions today the Constitution reigns, but does not govern.\(^1\) We appear to be moving farther and farther away from certain constitutional controls and protections, and, in the process, private capital and private property rights in general are receding or weakening.\(^2\) At the same time, we are consuming our capital, with a consequent reduction in the production of wealth and a lower standard of living. Exploration of this trend is the subject matter of inquiry.

LIMITED CHARACTER OF CAPITAL PROTECTION BECAUSE OF INHERENT CONSTITUTIONAL LIMITATIONS

Too often the narrow scope of constitutional limitations is overlooked in the United States, the assumption being that all forms of human activity giving rise to juristic relationship, including those affecting private capital, are within the purview of the Constitution. This is clearly incorrect. The controls of the Constitution, by its express terms, operate only upon some phase of governmental activity, federal or state, and not upon that of private individuals not acting in an official governmental capacity or under so-called "color of authority."\(^3\) Thus, if groups of workers, acting by pre-concerted arrangement, strike against their employer causing damage to his invested capital, his only recourse, if any, is against the alleged wrongdoers in a private or civil action; he would not be able, ordinarily, to invoke any constitutional protection for his capital in such controversy. If, however, the alleged wrongful acts of the workers tied up substantially and without legal justification the employer's interstate or foreign trade, additional grounds might be found upon which to predicate a complaint and the federal courts might have jurisdiction of the controversy.\(^4\) The essential point is that no constitutional protection to the employer's capital could be invoked unless also some act of Government—Federal or State—could be shown which immunized or justified the allegedly wrongful acts of the strikers.

Again, while not presenting the same juristic problem as that enunci-

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\(^1\)For a discussion in greater detail, see Albertsworth, *The Mirage of Constitutionalism* (1935) 29 ILL. L. REV. 608.

\(^2\)The extent to which emphasis upon property rights, to the neglect of so-called human rights, occurs repeatedly in modern times is well discussed in the Encyclical *Rerum Novarum* (Leo XIII) of May 15, 1891, and an equally forceful one in 1932 *On The Reconstruction of the Social Order* (Pius XI).

\(^3\)Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278 (1913); Iowa-Des Moines Bank v. Bennett, 284 U. S. 239 (1931).

ated in the trades disputes example—because entered into by voluntary act on both sides of the legal relationship—the lack of constitutional protection to capital is witnessed in certain types of restrictive covenants placed upon transfer of realty. If these prohibit sale of the premises to parties of certain races or creeds, a prospective buyer within one of these classes, ready, willing, and able to buy, could invoke no constitutional claim of discrimination because there had been no act of government which gave sanction to the covenants in the first instance. These covenants were the acts of individuals, not those of government, and hence no constitutional question could be raised.\textsuperscript{5} Even if the covenants had been sustained by the highest court of the several states, or by some federal court, as not violative of public policy,\textsuperscript{6} nonetheless no "act of the State" was present within the constitutional meaning. Self-imposition of restrictive covenants upon private capital was and is justified on the ground that public policy in general, in order to maintain values of property, encourages a maximum of liberty among individuals in this respect, apart from state interference because of some higher social right.

The vast number of juristic claims, therefore, which arise between private parties in the American commonwealth must be settled by private civil action without possibility of appeal to the Constitution, and, \textit{a fortiori}, without protection from the Constitution. In this respect, then, the claims of capital, even in a capitalistic society such as ours, receive no greater or wider recognition and protection under the Constitution than those based upon so-called "human rights". Non-action of government effectually removes all claim of constitutional protection;\textsuperscript{7} stated otherwise, the elusive "federal question" alone translates a purely private law claim into one with constitutional possibilities.

A contributing factor making for added capital insecurity under our Constitution is the lack of legal machinery, within the framework of present government, of a prophylactic character against harmful legislation being enacted without apparent regard for constitutional inhibitions or limitations.\textsuperscript{8} Under the prevailing American philosophy of division of governmental power, it is thought to be violative of the balance of power to obtain from the judicial branch an anticipatory opinion—an advisory judgment—upon the constitutional merits of pro-

\textsuperscript{5}Corrigan \textit{v.} Buckley, 271 U. S. 323 (1926).

\textsuperscript{6}In Gandolfo \textit{v.} Hartman, 49 Fed. 181 (C. C. S. D. Calif. 1892), such a covenant was held to be void as against public policy.


\textsuperscript{8}Brandeis, J., in Ashwander \textit{v.} Tennessee Valley Authority, 297 U. S. 288, 346-348 (1936), summarizes the principles, created by the Court, under which legislative acts will be reviewed by the Court.
posed legislation. Thus, a Bill is enacted into law by the Congress or by one of the several states; yet a “case or controversy” must be formulated, by way of obtaining judicial review of the legislation, in order to test the limits of power of the enacting body as well as the scope and meaning of the law; in the interim, however, private capital affected by the law is often harmed, made idle, or driven into hiding until judicial determination possessing finality can be had upon the measure. If some sound and workable solution of this apparent defect in our governmental structure could be devised, it is safe to say that greater capital protection would be made possible.

Likewise, under American constitutional machinery, there is no legal avenue available to American capital invested abroad, but placed in jeopardy by action of foreign powers, to compel American governmental officials—in the Department of State or in foreign service, for example—to take steps, if possible, in protection of its rights or claims. Perhaps a simple Act of Congress could give greater protection here than now exists. Obviously, questions of national policy and welfare might militate against the inauguration of such machinery, or the taking of steps under it were it available, so that the present method of non-legal devices might be preferable. I merely call attention to the fact that, under our Constitution, American capital invested abroad does not have any claim of a legal nature upon its government to protect it, but must depend upon non-legal or non-constitutional devices.

GRADUAL EROSION OF CONSTITUTIONAL PROTECTION TO CAPITAL

As, then, only acts of government can raise questions of constitutional protection to capital, it becomes pertinent to explore briefly to what extent these have occurred. In a capitalistic country, the undiscriminating student might infer that they have been the exception rather than the rule, or that only in periods of actual or fanciful emergency, such as war or economic depression, or declared emergency, have serious invasions been made upon private capital. Such a view, however, it not founded upon fact. Even in periods of normalcy, and of course more so in actual or factual emergencies, we witness in the United States a steady,

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9 This refers, of course, primarily to the practice in the federal scheme, and not to such isolated opposite instances as are to be found in a few of the several state constitutions.
but persistent inroad upon the claims of private capital, especially during the past half century. Legislative enactments—and, therefore, acts of government within the constitutional meaning—have become increasingly more numerous in their restrictive prohibitions upon capital. They take the form of (a) limitations upon the return of capital, and/or (b) restrictions upon its use, and/or (c) prohibitions upon its combination with other capital. From the Interstate Commerce Act of 1887 and the Sherman Anti-Trust Act of 1890, through the Federal Trade Commission and Clayton Acts, various railway transportation Acts, to the Public Utility Holding Company Act of 1935, there is increasing governmental control over capital within the sense already indicated. By “recapturing” earnings in the railway field, so that those beyond a permissible limit might be impounded for the benefit of weaker railroads; by empowering federal agencies to prohibit or sanction declaration of dividends; by fixing prices of resale of products in certain types of businesses; by heavily taxing certain forms of businesses; and by compelling banks to subscribe to central funds for the protection of weaker banks, we see a steady invasion of government into policies of finance and management of private and public corporations in the United States. While the judiciary through interpretation or application may have emasculated, and administrators in control of law enforcement

12It should be borne in mind in this discussion that the author is describing a tendency, not expressing an opinion upon the merits of the various legislative enactments.


20As in the Public Utility Holding Company Act of 1935.


did not always enforce, some of these laws, nonetheless precedents were established, with the result that the claim on the part of private capital to constitutional protection was often denied.

Steady enlargement of the concept of businesses "affected with a public interest" had for its avowed objective fixation by government of rates to be charged to the public, with necessary limitation of return to the capital invested. Prescription of zoning areas in the use of property; debtor and homestead exemptions; requirement of a minimum capital in undertaking certain types of business; exaction of bonded protection of passengers by carriers; compulsory insurance of businesses against industrial hazards of employees—these are but a few of the numerous developments in the industrial society of the United States resulting in governmental control of private capital of wider and wider scope. Police power has been the usual legal justification or formula behind much of this legislation, which is but another way of stating that a moratorium of constitutional inhibition has taken place. The significance of this trend is that it has not been haphazard or irregular, an isolated phenomenon, but a regular recurrence in American economic life. Much of this was to be expected as the United States moved farther along the road of industrial mechanization, with consequent growth of population and its dependence upon a regulated governmental control to protect against harmful machinations of capital. On the other hand, growth in the political power of the "masses," through widening of the suffrage, gave increased impetus to movements to control capital, if not to "creeping collectivism" itself.

In this connection, the powerful influence in the United States of governmental monetary manipulation upon the earning power of private  

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30D'Ortega, Rise of the Masses (1928) traces this stream of development on the European Continent.
capital must be emphasized. Great powers have been for some time vested by Congress in various federal agencies to control the interest rates of both time and call money and the earning capacity of banks subject to federal control.81 Through power over the rediscount rate and by means of "open market" operations in the sale and purchase of government obligations, interest rates can be forced up or down almost at the will of government. The effects upon economic society in the United States are incalculable. In the present period, savings accounts carry such low interest that investors dependent upon such income have difficulty maintaining their standard of living. Refunding operations by large corporate debtors taking advantage of low money rates further complicate the problem of return to the investor with capital. Apparently a chief beneficiary is the Federal Government itself, in that it can borrow money in large sums at low rates of interest; this may be socially desirable so long as the public debt steadily increases due to governmental attempts to break the backbone of the economic depression through a policy of spending and lending of federal funds. However, whether it would be possible for a private litigant, claiming constitutional protection to his capital because of these monetary manipulations, to raise a justiciable issue and challenge exercise of these powers under the present Constitution is quite doubtful, in view of the fact that he has, conceivably, no proof of special damage apart from that sustained by all similarly situated persons.82 Even if such challenge were judicially possible, there is strong likelihood that these vast powers over money and its earning power would be sustained on their merits against constitutional attack. However, criticism of these powers of administrative agencies over money has been frequent in our country;83 yet, until Congress itself changes this policy—if ever—there is no remedy under the Organic Act, with resultant reduction in capital's earning power. When private capital does not function adequately, because of its reduced earning power, there is stifling of trade with increased reliance upon public or governmental "capital" if it is available, and eventual enlargement of governmental domination over the borrowers.

81There is paucity of judicial authority on the extent of these powers. However, the powers are broad. Cf. Norman v. Baltimore & Ohio R.R., 294 U. S. 240 (1935); Westfall v. United States, 274 U. S. 256 (1927); Smith v. Kansas City Title & Trust Co., 255 U. S. 180 (1921); Hanna, Currency Control and Private Property (1933) 33 Col. L. Rev. 617.

82Within the doctrine of Massachusetts v. Mellon, 262 U. S. 447 (1923), and Williams v. Riley, 280 U. S. 78 (1929).

83An outstanding critic has been the Reverend Father Coughlin in numerous radio addresses during the past few years.
CONFISCATION OF CAPITAL IN PERIODS OF ECONOMIC EMERGENCY

Thus far I have sought to show that, even in periods of economic normalcy, capital has had its difficulties despite the existence of constitutional safeguards. Such difficulties have been those affecting capital, largely indirectly, in the sense that capital has not been directly taken by government. In periods of economic emergency, such as we have been experiencing during the past few years, and still are when measured by the non-repeal of these emergency legislation powers coupled with widespread unemployment, more directly harmful results to capital are witnessed. Devaluation of the dollar through congressional enactment, with subsequent Supreme Court endorsement, amounted to a capital levy of forty-one percent in favor of the Treasury of the United States; while repeal of the gold clauses in public and private obligations made it difficult, if not impossible, for private capital adequately to enter into long-term commitments with certainty and safety. Both steps made possible monetary inflation with consequent reduction in the purchasing power of capital, and the United States, although having a written Constitution, followed the same course as that of France and England without these so-called written guarantees of an Organic Act. This is not the place to discuss the wisdom of these measures—their efficacy in preventing further deflation of prices, thus enabling debtors to repay their obligations, aiding the country in foreign trade, or even preventing the complete destruction of private capitalism as such—but rather to emphasize them as having occurred under a Constitution in a capitalistic country with approval by—at that time—a fairly conservative Supreme Court.

An important point to remember is that, thus far, these emergency measures have not been repealed by Congress, nor has the nation returned to a gold standard for its currency, although it possesses more gold than all the other countries of the world combined, with more than

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35In my opinion, it is unsound to argue that money, since it is merely a medium of exchange, is not capital, for all capital has value only because of its purchasing power. The fact remains that the Treasury of the United States profited by two and one-half billion dollars from monetary devaluation.

36The judicial decisions in dollar devaluation and removal of gold clauses were rendered in the first Roosevelt Administration, prior to the Judiciary Bill of February, 1937, and thus were before the Court had rendered a few so-called "liberal" decisions.

37The majority of these measures were to be terminated by presidential proclamation, or by expiration of definite time limits. No such proclamations have been announced; however, a considerable number of the measures expire in 1939, unless Congress extends them.
ample coverage for its present currency. Unless such emergency measures are shortly repealed, we shall be confronted with the ironical situation of a permanent emergency, a contradiction in terms, which in itself continues to make for uncertainty of protection to capital and its resultant sterilization in the arteries of trade and commerce.

A no less striking confiscation of private capital in this period of emergency has taken place in the field of taxation, for the most part with constitutional sanction in the judiciary. I have reference to graduated income taxation, heavy inheritance levies, and taxes upon undistributed surpluses of corporations. By means of these methods private capital has been "redistributed", or, in other words, taken away from those who had accumulated and saved it, and handed over to those who did not ever possess it and would not be entitled to it under any civilized form of government if taken directly without governmental action. The distributees largely consumed the capital, because that which reached them in the form of government aid or subsidy was sufficient only for purposes of existence. Although their purchasing power stimulated so-called consumer businesses, it did not aid materially the "heavy" industries producing capital goods, which industries depend in large part upon long-term financing and unclouded economic skies, or eventually, also, upon government credit if such policies of government lending and spending continue. Furthermore, continual expansion in the public debt of the United States is itself a menace to private capital in that deficit financing puts in jeopardy the validity of the dollar through further devaluations, or the debt itself in which private capital is largely invested.

These methods of outright confiscation through the taxing power could only with difficulty be challenged, under the Constitution, by those affected. Even had the Supreme Court, in an appropriate case, been able to check these tendencies in government—wherein tax moneys were used, not for purposes of carrying on the expenses of government as generally practiced in this country, but, rather, for distribution to those in the lower brackets of earning power—it might have hesitated to do so in view of the temper of the times and of the recipients of the governmental subsidies and their political power. The essential point, however, is that the Constitution itself apparently sanctioned these steps of confiscation through taxation, both under the express terms of the Sixteenth Amendment and under the authority generally given to levy taxes irrespective of the question whether such moneys would be used for carrying

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on the costs of orthodox government or for some other public purpose. On such matters the Constitution is silent, and, as a result, judicial interpretation has given tax laws wide construction and government latitudinarian powers in these fields. Except for taxes which are discriminatory, or invade the reserved power of the states, or are outright penalties, it is well known that the federal taxing power has no particular ceiling in so far as the judiciary may in appropriate cases challenge it.

Now an equally great harm to capital, because of these methods of redistributing it, lay in the inevitable crippling of individual initiative of those directly affected. It also sterilized some capital, which sought havens of refuge from excessive taxation in government obligations, federal and state, because these were entirely tax-exempt; a factor which caused some recognition to be taken by government of a plan to remove such tax-exempt features in future. From the standpoint of the various governments seeking additional markets for their obligations, however, such results were desirable; from that of revival of private industry in a long-term sense, they were, in my opinion, not desirable. Due to this crippling of private capital, increased government credit is made necessary to revive trade, and to keep it functioning. This involves more government control over the recipients of the credit. In fact, under the policy of spending and lending of federal funds, it would seem quite possible for the Federal Government to become the eventual owner of numerous industries in the United States in the event these were unable to discharge their obligations to the Government on loans incurred, or if the Government should instead adopt an outright purchase policy of the majority ownership of the securities of the corporations of the United States in the event it desired control of certain basic industries in order to direct their internal management.

In this connection—although not logically pertinent, perhaps—mention must be made of the "confiscation" of private capital by governmental exaction in certain businesses that employees organized into unions must not be discharged or discriminated against, with conse-

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42Under the so-called "spending" power of the Federal Government, it would be difficult for a justiciable issue to be raised over these methods; hence, if there were no act of Congress controlling administrative action, such policies could be executed under the Constitution. Cf. Corwin, Constitutional Aspects of Federal Housing (1935) 84 U. of Pa. L. Rev. 131; Post, The Constitutionality of Government Spending for the General Welfare (1935) 22 Va. L. Rev. 1.
43As enunciated in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937), and related cases.
quent compulsion to pay higher wages and maintain shorter work-hours, resulting in increased costs of doing business and reduction in earning power of the capital invested,—unless the consumer be persuaded to shoulder these costs by paying higher prices, with resultant higher costs in turn to the employee. This is no place to urge the merits of trade unionism as American economic society is at present organized—and I fully appreciate the importance and necessity of unions—nevertheless, the important fact is that in recent years we have observed in our country governmental sponsorship of strong trade unions, with Supreme Court endorsement in appropriate cases and controversies. This necessarily has the effect of distributing larger earnings of capital to the workers and less to the capital employed. While I recognize that it is not accurate to predicate this governmental sponsorship entirely upon emergency conditions and powers, nonetheless, in so far as the Congress has legislatively stated that it eliminates industrial strife and makes for smoother functioning of the industrial machine in prevention of disruption of interstate and foreign commerce during depression as well as in periods of normalcy, it may be said to rest in part upon such emergency. How far a policy of governmental compulsion in the field of trades disputes will succeed in the United States, without at the same time also placing restrictions upon coercive and wrongful activities of trade unions, remains for future determination. Suffice it to say that precedents have been created which, in the hands of an administration not so friendly to labor, might impose such restrictions in the interest of also keeping open the channels of trade, and thus equalize the duties of employer and employee under the law. If such steps were taken in future, private capital might be more assured in its lawful activities than it is at present, and it might also prevent in part the recurrence of false swings in trade activity brought on by attempts on the part of businesses


Such as federal regulation of unions in interstate commerce business. Cf. Mason, Limits as to the Effective Federal Control of the Employer-Employee Relationship (1936) 84 U. of Pa. L. Rev. 277. Precedents, such as those under the Public Utility Holding Company Act, the Securities and Exchange Commission Act, and the National Labor Relations Act, appear to have laid the foundations for such regulation in the future.

President Roosevelt himself in one of his recent addresses stated that already in his Administration “instruments of power” had been created which, in the hands of other than a people’s government, could be used harmfully. I do not mean to say, however, that regulation of unions to safeguard the public against coercive and illegal acts would result in harm either to the unions or to the general public.

The Supreme Court of the United States has quite generally followed a judicial philosophy of keeping open the channels of interstate and foreign trade against the illegal acts of employers, unions, and the several states. Cf. Albertsworth, The Federal Supreme Court and Industrial Development (1930) 16 A. B. A. J. 317.
to build up large inventories in the fear that labor disputes resulting in trade tie-ups would occur. However this may be, it is clear that there is a close relationship between the activity of private capital and the acts of government either sponsoring or holding in reasonable check the activities of powerful trade unions.

'CAPITAL FEAR'S THAT THE CONSTITUTION CAN NOT INSURE JUDICIAL INDEPENDENCE

There is nothing that private capital more appreciates than certainty and stability in the institutions of society and government.\textsuperscript{48} The chief reason for this is that it permits capital to make plans for the future reasonably far in advance, thus safeguarding its earning power as well as reassuring its return. In a capitalistic society such as ours, if confidence in the Constitution, or in its interpretation by an independent Supreme Court, is undermined, capital will go into hiding and await return of clearer economic skies. This may be excessive timidity on the part of private capital in the United States, for in other civilized countries, in which the judiciary cannot overthrow acts of the legislative or executive branches, we do not usually find this state of mind of dependence upon the judiciary as a protective agency. However, in this country operating under a written Constitution predicated upon certain so-called basic rights thought to be beyond legislative or executive encroachment, the viewpoint has been that the Supreme Court always stood as the bulwark of these rights.\textsuperscript{49} It came as a shock, therefore, to private capital of this generation to realize that the Court could, under the permissive authority of the Constitution itself,\textsuperscript{50} be enlarged by a majority vote of Congress, and that a personnel could be appointed that would be sympathetic, if not obedient, to the views of such majority, or to the Chief Executive nominating and to the Senate confirming them. If there had not already been in the United States a gradual undermining of and limitation upon private capital by governmental acts, and markedly so by those\textsuperscript{51} ad-

\textsuperscript{48}Like the late Mr. Justice Holmes, I hold the opinion that certainty and stability do not seem to be obtainable in mundane matters, but that approximation toward them is the extent of realization.

\textsuperscript{49}This viewpoint probably also explains why there is a feeling that in courts only, rather than in administrative or legislative bodies, can a better measure of justice be obtained. This gives rise to judicial review of such agencies. Crowell \textit{v.} Benson, 285 U. S. 22 (1932); Dickinson, \textit{Judicial Review of Administrative Determination of Questions of Constitutional Fact} (1932) 80 U. of \textit{Pa. L. Rev.} 1055.

\textsuperscript{50}It is unquestioned, in my judgment, that, under the express power given Congress in the Constitution to determine the appellate jurisdiction of the Court, there is the ancillary authority to fix the number of justices. \textit{Cf. Ex parte} McCardle, 7 Wall. 506 (U. S. 1869).

\textsuperscript{51} Particularly as exemplified in the Public Utility Holding Company Act, the Securities and Exchange Commission Act, and numerous other acts of cumulative character.
vocating enlargement of the Court’s personnel, it is likely that recognition by private capital of this probability of control of the Court would not have been viewed with alarm. However, in the opinion of many of those with private capital, destruction of the independence of our supreme judiciary would leave no checks upon excessive or absolute power in the legislative or executive branch except the electorate, and the latter struggling with economic depression were not likely to champion the claims of capitalism. For it had been the influence, in large part, of the debtor class that had been instrumental in enacting into law many of the measures controlling capital in this period, and it seemed apparent that this class, in coalition with farmers and workers, would still further seek, through legislation, advantages at the expense of private capital.

While defeat of the attempt to enlarge the Court gave some assurance to private capital, on the other hand the Court itself began to interpret certain provisions of the Constitution more favorably to the non-capital class; and, with the death and resignation of a number of incumbents, it appeared to private capital that the general direction of the Court was now indefinitely changed. The door seemed open, then, to further restrictions upon capitalistic society through legislative enactments. It seems doubtful whether prediction of this trend is possible. Suffice it to say that, as long as economic depression continues, private capital is none too assured of constitutional safeguards in the present picture of constitutionalism. The real safeguard would be a substantial shift in public opinion of a considerable majority of the American people in favor of the “right of property” as opposed to the claim of the state to over-regulate or control it. When such shifts have occurred in times past in our national history, the Supreme Court in its interpretation of the Constitution has usually gone with the tide; as a result capital felt re-assured and a period of trade revival and prosperity resulted.

**DANGERS TO PRIVATE CAPITAL FROM THE SOCIALISTIC STATE**

It is a matter of debate whether, in those civilized countries in which there is government ownership of certain basic industries, capital and labor in these ventures are more successful in the production of wealth and the maintenance of a high standard of living than in countries like ours. Nevertheless, in recent years, because of governmental attempts through spending and lending of its moneys in dealing with economic

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62 Such as moratoria laws, devaluation of the dollar, price fixing, re-organization of corporate debtors, etc.
depression, we have witnessed in America a steady march toward state socialism with inability of private capital to meet such competition without incurring substantial losses in earnings and markets. With the laudable objective of stimulating employment, government could afford to enter into competitive business with private capital regardless of profit or loss to itself,\textsuperscript{55} making up the latter in taxes. Obviously, this placed private capital at a disadvantage. Making attractive loans on a long-term basis to prospective home builders\textsuperscript{56}—another laudable undertaking—placed at a disadvantage the existing home owner who, although desirous of selling his property, could not, because of limited resources, present similar attractive terms to the prospective buyer. Another serious situation for private capital was presented when the government loaned and granted large sums to municipalities and counties with which to build electric utilities in competition with existing private facilities, or when it more directly competed in these fields by means of its own property at water sites already built or expressly built for such purposes.\textsuperscript{57} Private capital, therefore, did not seek investment channels in these fields, so that, again, government credit alone could supply the needed capital for plant expansion. Government subsidies to other businesses, particularly railroads, have resulted in a fear that eventually the government would own outright these businesses, with, perhaps, non-recognition of minority interests invested in earlier days on the ground that this capital had not been “prudently” invested or that the structure was in fact over-capitalized. This condition again has made for further extension of government credit as the main source of new capital, with resultant further domination by government. In some quarters, as a result of these policies, predictions are made that eventually in the United States most, if not all, of the various forms of privately owned utilities will be owned and operated by government. Even though public debt in the United States is at a very high level\textsuperscript{58} and is slowly increasing, this fact alone would not seem to militate against effectuation of complete


\textsuperscript{56}Corwin, supra note 42.


\textsuperscript{58}There appears to be general concensus of opinion that the public debt limitation of $45,000,000,000, as determined in the Second Liberty Loan Act, 40 Stat. 288 (1917), 31 U. S. C. §§ 747 et seq. (1934), is the danger line for public credit. The present public debt, approximately $39,000,000,000, is approaching this point steadily.
ownership of these basic utilities where the device of "revenue" bonds issued against the properties is legally and constitutionally possible.

In its attempts to aid debtors in meeting their obligations, incurred prior to economic depression, when the general price structure was favorable to repayment, which later because of depression it was not, government has during the past several years taken various steps that have furthered this trend toward socialism. This is partially seen in legislative attempts to permit re-organization of corporations heavily over-capitalized with bonded indebtedness and therefore unable to meet their obligations in full. Private capital invested in bonds, which heretofore were regarded as special liens upon the debtor's assets, became transmuted by this process of debtor assistance into ordinary general claims of creditors. A similar development occurred when moratoria laws were enacted for farm debtors. Far-reaching inroads upon the creditor class took place as a result. From this tendency it followed that private capital in future hesitated to lend credit to farmers, who in turn continued to look to government for financial assistance, as they were already doing in connection with efforts by government to regulate production of crops and animals through subsidies. Thus the trend to state socialism received added impetus. I do not condemn these methods of state assistance where they seek to create a parity of equality between creditor and debtor and do not unduly favor one over the other; I merely cite these tendencies, with their inevitable interaction, as evidence of weakening of the safeguards to private capital while at the same time increasing the strides toward socialism. I do not mean to say that these methods will be permanent; but, they create precedents, and precedents tend to enlarge themselves unless checked by public opinion or economic law.

CAPITAL HANDICAPS IN AMERICAN AGRICULTURE

That the clouded outlook for capital in the United States is not confined to strictly industrial undertakings is seen by the situation in present-day agriculture. Our agrarian problem has not been one of large holdings, as in Mexico; on the contrary, it has been one of commodity surpluses and low prices, so that the return upon capital invested has not been adequate or fair. This is not the place to discuss the causes of these surpluses or low commodity prices—whether due to general dislocation of world markets and economic depression, or to other factors. The point is that the farmer in America has been producing in an individualistic regime, while industry in general has been coming more

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69As in Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 (1935), and such related decisions as Wright v. Vinton Branch Bank, 300 U. S. 440 (1937).

68Jennings and Sullivan, Legal Planning for Agriculture (1933) 42 Yale L. J. 878.
and more under governmental control or has been coöperating by means of trade agreements of various sorts. The farmer has been producing his crops and animals more or less in isolation, being motivated largely by the existing or probable future price level in cultivating his soil or raising his animals; "planned economy" was a phrase unknown to the average American farmer until recent times. Moreover, the farmer sold his products in an unprotected market,61 to a large extent; whereas he bought his own required commodities and farm implements in a protected one, from industries protected by tariffs, patents, and quasi-monopolies. Hence, there has been disparity in prices, affecting the farmer's purchasing power. The situation became more complicated when, in times of prosperity, the farmer, receiving high prices for his crops and animals, added to his land holdings by way of mortgage which he was unable to repay in later times of economic depression. With this steady decline in farm income due to low commodity prices, there was not only an unfortunate impact upon industry in general, but capital invested in agriculture gradually depreciated in value, with consequent drop in farm prices.

During the past decade in the United States numerous and varied attempts have been made to deal legislatively with this problem of farm surpluses and low commodity prices, and the farm problem, like the tariff, has become a political one. The notion has become prevalent in our country that the Federal Government must endeavor either to control farm production in the first instance, or to formulate some plan to dispose of surpluses, with the hope of maintaining the price of farm products at some level that would give a fair profit to the farmer.62 In the "processing tax" scheme,63 the farmer-recipient by contract withheld certain acreage from production or raised fewer animals, according to Government allotment, and received in return a subsidy from the Government. More and more crops were brought under this method of control in order to prevent the recipient from producing other crops on the withheld acreage which would cause over-production in other commodities. Many recipient farmers evaded even these methods by using the subsidies for purchase of farm machinery or fertilizer and intensively cultivating the allotted acreage, often producing as much thereby as on the larger acreage. Surpluses continued and prices kept declining. The lending of Government funds was also tried, by which the farmer was guaranteed by the Government a basic sum, and, when the general price

61Hart, Processing Taxes and Protective Tariffs (1936) 49 Harv. L. Rev. 610.
62Morris Duane, Marketing Agreements under the A.A.A.: Their Contents and Constitutionality (1933) 82 U. of Pa. L. Rev. 91.
level broke below the guaranty, the Government took the loss by permitting the farmer to repudiate his loan contract, or, when the price level rose, the farmer paid his loan and sold the security in the market. Continual pressure was brought on Government by organized farmers to increase the guaranteed amount, with heavier costs to the Government where it yielded. In the case of some commodities, it was found that this practice by Government raised the domestic price level above that in world markets, with consequent loss of American markets in that commodity unless price concessions were given. Still surpluses continued and still the general price level either did not substantially rise or it fell, with no appreciable increase over a period of years in general farm income.64

Other methods have been suggested, but not always carried into execution in dealing with this problem of agriculture. Placing heavy taxes upon the sale of farm commodities produced in excess of the allowable quota and fixation of criminal penalties have not been generally carried out, being regarded as too drastic. Compelling the interstate shipper of certain commodities, declared by federal law to be a surplus, to contribute a percentage of the commodity to a central pool, which had power to distribute the percentage to those in need or otherwise use it, is another method employed, and now in process of litigation. Outright purchase by government of existing surpluses, oftentimes distributing them to those on government relief, has been a practice widely employed at the present time. Governmental attempts to furnish a cushion to prices, at critical intervals when huge surpluses came upon domestic markets, by government entry into the futures markets, has been another practice.67 Despite all these efforts, however, the problem of farm surpluses still confronts the nation, and there are increasing numbers of students of our farm problem who now believe that it would be preferable for the nation’s welfare in general, and for the farmer’s in particular,

64This is the assertion, based upon factual studies over a period of years from 1923-25, made in the Report of the National Industrial Conference Board, for September, 1938. But, if we take a period of very low income, such as that in 1932, by way of comparison, and contrast it with 1936, a considerably higher income for American agriculture is obtained. It appears that American farmers received about a billion dollars less income during 1938 as compared with 1937.

65For these would be regarded as penalties, within the reasoning of Carter v. Carter Coal Co., 298 U. S. 238 (1936), and numerous other similar decisions.


67This method was followed by the Hoover administration as well as by the present New Deal regime.
to permit economic law to operate\textsuperscript{68} rather than to continue legislative experiments in a field where nature so often upsets the best intentioned plans, and theoretically admirable laws, of men.

Not only has agriculture undergone these difficulties of depreciation of capital investment and low return, but accompanying economic depression in general, with millions of laborers upon relief who would not leave the relief rolls, has made for scarcity of labor in some localities. The high price of farm labor in general has not made for lower costs to the farmer-producer already selling his commodities at low prices. Coupled with these problems have been those flowing from a transportation system burdened with high taxation and labor costs, due to a strong coalition between government and organized labor, so that the farmer’s products could not be carried cheaply by such transportation facilities to the consumer. Moreover, trades disputes in maritime commerce, and in important and necessary terminal facilities,\textsuperscript{69} have likewise prevented a free flow of agricultural products from the farm to the consumer, thereby causing them either to join the ranks of surpluses or even not to be harvested. Had a vigorous federal enforcement of anti-trust and interstate commerce hindrance laws been undertaken in such trades disputes, the channels of trade would have been kept open, and many of these problems of disposal of surpluses avoided. However this may be, I believe enough has been shown of the farmer’s general plight to prove that capital invested in agriculture cannot look to the Constitution for its alleviation, but must look elsewhere for its permanent improvement. Indeed, many of these evils disappear once farm prices are sufficiently high to bring an adequate return to the producer; the large problem is whether or not this can be done by positive law or only by the operation of economic law.

WHERE CAPITAL PROTECTION LIES WHEN CONSTITUTIONAL PROTECTION IS UNAVAILABLE

The Supreme Court has occasionally said that in some instances it could not adequately protect the private claim against governmental action under the Constitution as it exists, that the sole remedy was with the legislative branch in the first instance, in not enacting an oppressive law.\textsuperscript{70} A step beyond this—the most effective of all—is the electorate itself, the source of all power in a constitutional democracy. When the

\textsuperscript{68}Basic farm commodity prices have declined from 13% to 55% today as contrasted with a general average for the years 1923-24-25. Cf. the Report, \textit{supra} note 64.

\textsuperscript{69}I refer in particular to those affecting the harbor facilities of San Francisco in 1934 and 1938, and the sit-down strikes in Michigan and Pennsylvania in 1937.

\textsuperscript{70}As in the oleomargarine cases, notably \textit{McCray v. United States}, 195 U. S. 27 (1904).
latter is indifferent or even hostile to private capital, that protection is of little worth. I believe such has been, and is now, a widespread condition in American society due to its long struggle with economic depression. Apparently, only by a substantial change in the popular outlook can private capital be assured of adequate protection in the production of wealth and improvement in the standard of living. General well-being is inseparably linked with fluidity and protection of private capital and with a maximum of private initiative consistent with police power. Political domination over capital and political solution of economic depression are, in my opinion, not the soundest methods in the long run for restoring and maintaining economic well-being. This is because of the absence of the profit motive on the part of such political rulers, and the impossibility of executing a policy of "planned economy" for a nation of such diverse industries and large population as the United States.

Besides reliance upon a sound public opinion shared by a majority of our people, private capital has one more foundation upon which to stand, and that is the inexorable requirements of economic law. As I see the problem of economic depression, we have in the United States prolonged our difficulties by not realistically facing the situation and permitting economic law to operate. On the contrary we have tried by governmental methods to prevent deflation to a price level attractive to the vast number of consumers who could and would buy American products. Through artificial restrictions by law, we have endeavored to follow a policy of scarcity to bring about "the more abundant life". Shorter hours, while socially desirable, increased costs; higher wages, while equally desirable, equally increased costs; high taxes, in order to redistribute income, meant higher costs just as inexorably. With a low national income due to the depression, there were not markets, as in former days, for American products; and this was further complicated by unsettled economic conditions abroad.

If we are to continue indefinitely in the future to attempt solution for our economic problems by government, I think it indispensable that there be at all times the two-party system of political parties\(^1\) in active participation, the one furnishing a foil to the other through opposition. Stated otherwise, I think it socially undesirable that a one-party system such as has prevailed during the past six years and other periods in the United States should exercise supreme governmental power. This condition makes impossible a middle-of-the-road government; on the contrary,

\(^{1}\)I am none too sanguine that even reliance upon political parties can give private capital assured protection, for political parties act from expediency and popular approval, not from the standpoint, ordinarily, of economic law or "justice."
it permits experimentation with the rights of property and capital, or with so-called "human" rights, dependent upon the viewpoint of the one-party government in power, uncontrolled by an intelligent and alert opposition party. For if private capital is not encouraged and protected by government I can see no permanent prosperity for the United States. That the Constitution is powerless to guarantee this protection, I think, has been shown in this discussion. An equilibrium of property and human rights is highly desirable in any civilized State, but it is likely only an ideal toward which positive law and government can only approximate.
IF THAT alone is to be viewed as law which furnishes a fairly dependable basis of prediction of future decision, it is mild hyperbole to describe as "law" the court's efforts of this past decade to delimit the jurisdiction of the states to tax. Few instances can be found in other fields where endeavors to plot from contemporaneous trends the course of cases to come have proved so hazardous; where attempted deductions of principle from decisions recently rendered have been so radically outmoded by others but a short time later. But the cases on multiple taxation brought more than an unusual unpredictability of the future; the doubts they cast on the legitimacy of past decisions not expressly disowned, but left to appear hopelessly discordant, heightened confusion to a degree paralleling that which now surrounds the problem of reciprocal immunities. One such decision, the integrity of which had been regarded as impeached beyond rehabilitation, was Maguire v. Trefry. Today the case stands with greater vitality than it ever before possessed, and its resurrection seems to carry a moral.

When (in Maguire v. Trefry) Massachusetts levied a tax on the income received within its borders by one of its residents from a trust administered in Pennsylvania, the United States Supreme Court experienced little difficulty in sustaining the validity of the tax, nor did its

*We shall unite in viewing as law that body of principle and dogma which with a reasonable measure of probability may be predicted as the basis for judgment in pending or in future controversies. When the prediction reaches a high degree of certainty or assurance, we speak of the law as settled, though, no matter how great the apparent settlement, the possibility of error in the prediction is always present. When the prediction does not reach so high a standard, we speak of the law as doubtful or uncertain. Farther down is the vanishing point where law does not exist, and must be brought into being, if at all, by an act of free creation." Cardozo, The GROWTH OF THE LAW (1924) 44.

*281 U. S. 12 (1920).
decision evoke more than casual and perfunctory comment. Though actually there appears to have been no double taxation of the trust income—once by Pennsylvania and a second time by Massachusetts—

the Court showed complete indifference to the possibilities of such a thing as the consequence of its decision. Mr. Justice McReynolds alone dissented (without opinion), but his dissent was a curse at the cradle as after events were to prove.

In 1920, when the case was decided, the crusade by the court against multiple taxation by the states had at least five years to await the initial stages of its organization, and nearly ten years before reaching full swing. True, fifteen years before, the Court had pronounced a prohibition against taxation of tangibles in the form of a property tax at any place but where the tangibles were permanently situated, but no further steps were taken to press the principle forward for another score of years. Then, in 1925, the Court extended the prohibition from the field of property taxes into one section of excise taxation, and held that death taxes could be laid on tangibles at one place only, and that the place of their situs.

In 1929 came Safe Deposit and Trust Company of Baltimore v. Virginia, a case wherein securities were held in trust in Maryland

*Certain securities going to make up the trust had been taxed in Pennsylvania; others had gone free of tax. It was the income from the latter only that the Supreme Judicial Court of Massachusetts held properly taxable under the statute. Maguire v. Tax Commission, 230 Mass. 503, 120 N. E. 162 (1918). Though the section of the statute directly applicable was broad enough to cover the entire trust income, it was construed in the light of the general tax laws of Massachusetts to apply only to income from securities not taxed in the state of the trust’s situs. (No distinction was taken between the type of tax in Pennsylvania—a personal property tax, and that of Massachusetts—an income tax. This is to be explained, perhaps, by the fact that only the year before, in 1917, the same Court had held the income tax to be a property tax on the property producing the income in Tax Commissioner v. Putnam, 227 Mass. 522, 116 N. E. 904.) The Court’s approach remarkably foreshadows the spirit of things to come in the United States Supreme Court: “Our income tax law is founded upon interstate comity in this regard. It taxes only residents of this Commonwealth in respect of property in which they have a beneficial interest. It exempts resident trustees, although manifestly within the legal scope of its power, from taxation upon funds for the benefit of non-resident cestuis que trust. But it taxes resident cestuis que trust in respect of income actually received by them from trust property held in other states and not there taxed. This principle of taxation, just in itself and based upon recognition of like rights in sister States and manifestly aimed at the elimination of duplicate taxation upon the same property in different States, does not seem to us to violate any guaranty of the Fourteenth Amendment to the Federal Constitution.” Rugg, C. J., at 513, 120 N. E. at 167.

*In Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905).


*280 U. S. 83 (1929).
(where the trust was administered by a corporate trustee) for the benefit of the two infant sons of the settlor, residents of Virginia. Income accruing to the trust was to be accumulated, and one-half such accumulations, together with one-half the principal of the trust corpus, was to be paid to each of the sons upon his reaching the age of twenty-five. In the event either son died before receiving his share, his children, if any he left, were to succeed to his share, and if he died without issue his surviving brother was to succeed. Virginia undertook to lay a property tax on the entire value of the corpus of the trust, seeking to collect the tax from the trustee in Maryland. The Court, through Mr. Justice McReynolds, held the tax bad in an opinion that has much to say about the evils of double taxation. Mr. Justice Stone, with whom concurred Mr. Justice Brandeis, agreed that the attempt of Virginia to tax the Maryland trustee with a property tax on the trust assets was invalid, but he thought the discussion concerning double taxation altogether unnecessary, and ventured the suggestion that a property tax laid on the equitable interest of the beneficiaries in Virginia (particularly if restricted to the value of their limited interests) would be quite legitimate. Mr. Justice Holmes thought the tax valid as it stood. 8 The point

8Compare the position taken by Mr. Justice Holmes in Brooke v. Norfolk, 277 U. S. 27 (1928), decided but a few months before the Safe Deposit case. There a trust was established in Maryland, (again with the Safe Deposit and Trust Company of Baltimore as trustee), by the terms of which the income was to be paid to the petitioner for life, remainders over to others. Here, instead of levying upon the trustees (as was attempted in the Safe Deposit case), Virginia sought to tax the petitioner not merely on her income from the trust (this tax, under the Virginia income taxing laws, was paid without protest), but on the entire value of the trust corpus in the form of state and local personal property taxes. Speaking for an unanimous Court, Mr. Justice Holmes said: "... No doubt in the case of tangible property lying within the State and subject to a paramount lien for taxes, the occupant actually using it may be made personally liable.... But here the property is not within the State, does not belong to the petitioner and is not within her possession or control. The assessment is a bare proposition to make the petitioner pay upon an interest to which she is a stranger. This cannot be done...." At pp. 28-29.

In the Safe Deposit case Mr. Justice Holmes thought that there the interest of the beneficiaries was properly regarded by the Virginia taxing officials and courts as that of sole and complete ownership. He said: "The Special Court of Appeals was plainly right in holding that the deed of trust conferred an absolute gift upon the two beneficiaries, perhaps, though I doubt it, subject to be divested upon a condition subsequent.... If the beneficiaries could be taxed at all they could be taxed for the whole value of the property, because the whole title was in them, even if liable to be divested at some future time in a not very probable event." 280 U. S. 83, 96 (1929) (Italics supplied).

At the beginning of the first year during which the challenged taxes were levied, the ages of the two beneficiaries were nine years and three months, and five years and eleven months, respectively. Under the terms of the trust, as has been already noted, neither of the beneficiaries was to receive anything until attaining twenty-five years of age.

Mr. Justice Stone (Brandeis, J., concurring) agreed with Mr. Justice Holmes that Vir-
decided in *Maguire v. Trefry* was expressly reserved in the majority opinion, where the case was denied the dignity of discussion, being barely cited twice, and then once not altogether appropriately.

The movement reached its full stride in 1930. Led by Mr. Justice McReynolds, protagonist of the cause, the Supreme Court decided that the principle of the *Frick case*, limiting death taxation of tangibles to Virginia might have taxed the beneficiaries on the entire value of the trust corpus, but noted that the attempt actually made was to lay a tax not on the beneficial interests in Virginia, but on the trust property itself which was outside Virginia. "It may be," said Mr. Justice Stone, "that Virginia, following its own view of the nature of vested and contingent interests, might tax the interest of these beneficiaries as though they were the whole, but it is sufficient for present purposes that it has not assumed to do so. In the face of the present record we are not required to speculate how far a tax, forbidden because assessed upon property beyond the jurisdiction, may be upheld because it may be passed on to the beneficiaries in Virginia and the equitable interest thus reached by indirection." At pp. 95-96. To which Mr. Justice Holmes replied: "I do not understand that any merely technical question is raised on the naming of the trustee instead of the *ceustis que trustent* as the party taxed." At p. 98.

"The power of Virginia to lay a tax upon the fair value of any interest in the securities actually owned by one of her resident citizens is not now presented for consideration. See *Maguire v. Trefry . . .*," McReynolds, J., 280 U. S. 83, 92 (1929). In view of this express restriction it is difficult to understand the statement of the Court in the recent case of New York v. Graves, 300 U. S. 308, 313 (1937): "In any case we may assume, for present purposes, that New York may not levy a property tax upon appellant's interest (in New Jersey real estate), whether it be legal or equitable," citing *inter alia* the *Safe Deposit case*, and later in the same opinion: "It (a state) may tax net income from bonds held in trust and administered in another state, *Maguire v. Trefry, supra*, although the taxpayer's equitable interest may not be subjected to the tax, *Safe Deposit & Trust Co. v. Virginia, supra.*" (Parenthetical notes added.) Weight is added to the difficulty upon observing that the statement just quoted from the *Cohn case* was made by Mr. Justice Stone who, in his concurring opinion in the *Safe Deposit case*, carefully pointed out that there was no question in the case of an attempt to tax the interest of the beneficiaries.

The same effect was given to the *Safe Deposit decision* by the Maryland Court of Appeals in Mayor and City Council of Baltimore v. Gibbs, 166 Md. 364, 171 Atl. 37 (1934), where it was held that Maryland could not lay a property tax on a resident of that state on the value of her beneficial interest in a trust administered in Pennsylvania and taxed in that state (in the way of personal property taxes) to the trustees. The *Safe Deposit case* was construed to prohibit such double taxation, and to confer the power to levy property taxes on trust assets exclusively upon the state of the trust's situs.

When cited in support of the following: "Ordinarily this Court recognizes that the fiction of *mobilia sequuntur personam* may be applied in order to determine the situs of intangible person property for taxation. *Blodgett v. Silberman*, 277 U. S. 1. But the general rule must yield to the established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice, whether through double taxation or otherwise. *State Board of Assessors v. Comptoir National d'Escompte*, 191 U. S. 388, 404; *Buck v. Beach*, 206 U. S. 392, 408; *Liverpool & L. & G. Ins. Co. v. Orleans Assessors*, 221 U. S. 346, 354; *Maguire v. Trefry*, 253 U. S. 12, 17." McReynolds, J., 280 U. S. 83, 92 (1929). The second citation mentioned in the text appears in that portion of the opinion quoted in note 9, *supra.*
the place of their situs, should be extended to apply to intangibles which, it was held, were taxable exclusively at the domicil of their owner.\footnote{Farmers' Loan and Trust Co. v. Minnesota, 280 U. S. 204 (1930).} Mr. Justice Stone again concurred specially, stating it as his opinion that, as in the \textit{Safe Deposit case}, all that the majority opinion had to say generally about multiple taxation was superfluous to the point up for decision; that, in his view, it was sufficient to limit the holding to decide that only that state may tax the privilege of transferring property upon death whose laws confer and effect such transfer, and that this, in the case of intangibles, was exclusively the state of the owner's domicil. He concluded, and the conclusion is of greater significance today than when it was made:

"Hitherto the fact that taxation is 'double' has not been deemed to affect its constitutionality, and \textit{there are}, I think, \textit{too many situations in which a single economic interest may have such legal relationships with different taxing jurisdictions as to justify its taxation in both to admit of our laying down any constitutional principle broadly prohibiting taxation merely because it is double, at least until that characterization is more precisely defined.}"

Mr. Justice Holmes (joined by Mr. Justice Brandeis, who now leaves Mr. Justice Stone with whom he stood in the latter's special concurrence in the \textit{Safe Deposit decision}) dissented, protesting strongly against the action of the majority in its express over-ruling of \textit{Blackstone v. Miller.}\footnote{Id. at 215. Italics supplied.} In none of the three opinions of Justices McReynolds, Stone, or Holmes is mention made of \textit{Maguire v. Trefry.}

Nor is any express reference to be found in the decisions that now followed in rapid succession in \textit{Baldwin v. Missouri,}\footnote{188 U. S. 189 (1903). This was a decision rendered for the Court by Mr. Justice Holmes in one of his earliest United States Supreme Court opinions, where the Court sustained a death tax laid by New York on the value of a debt owed by debtors in New York to a decedent who died domiciled in Illinois.} \textit{Beidler v. South Carolina Tax Commission,}\footnote{281 U. S. 586 (1930). Here the Court, again through Mr. Justice McReynolds, held invalid an inheritance tax laid by Missouri on bank deposits, bonds, and promissory notes all physically present in that state, but belonging to a decedent resident in Illinois where alone, it was held, death taxes on the property could be laid. The dissenting opinion of Mr. Justice Holmes carried the concurrence of Justices Brandeis and Stone, and the separate dissent of Mr. Justice Stone had the agreement of Justices Holmes and Brandeis.} and somewhat later the climactic \textit{First National Bank of Boston v. Maine.}\footnote{282 U. S. 1 (1930). In this case South Carolina was held without jurisdiction to lay an inheritance tax on an amount of unsecured indebtedness owed by a South Carolina corporation to an Illinois decedent who had been a principal stockholder in the corporation. There were no dissents registered.} It was in the \textit{Baldwin case}, where...
Wheeler v. Sohmer\textsuperscript{17} fell the victim of an express over-ruling, that Mr. Justice Holmes called upon the majority for an "Index Expurgatorius"\textsuperscript{18} of all the old landmarks which were to be taken as definitely outlawed by the new trend of decision. Had the list of proscribed cases been drafted at this time it is altogether possible that Maguire v. Trefry would have found place among them.\textsuperscript{19} A hint of this may, perhaps, be found in what was said by Mr. Justice Sutherland in the First National Bank case:

"... That decision (Blackstone v. Miller) was overruled by the Farmers' Loan Company case, and with it, of course, all intermediate decisions so far as they were based on Blackstone v. Miller. ... A review of these decisions would serve no useful purpose.\textsuperscript{20} While in some of them a restatement of the doctrine of Blackstone v. Miller was unnecessary to a determination of the points presented for consideration, and in others the facts might be distinguished from those of the present case, nevertheless the authority of the Blackstone case was accepted by all ... instances of such approval, whether express or tacit, with the overthrow of the foundation upon which they rested, have ceased to have other than historic interest. ..."\textsuperscript{21}

Definite proscription of Maguire v. Trefry came three years later. During this period the movement against double taxation was at a standstill, but in 1935 it showed signs of renewed force when the Court decided Senior v. Braden.\textsuperscript{22} There the petitioner, resident in Ohio, owned a beneficial interest in lands held under declarations of trust, some parcels of which were located in Ohio, and others in Illinois. The Ohio taxing laws provided for a tax on all investments and other intangible

Maine corporation owned by a domiciliary-decedent of Massachusetts was held bad by a majority of six, this time led by Mr. Justice Sutherland. The views of the dissenting Justices Holmes, Brandeis, and Stone were expressed by Mr. Justice Stone.

\textsuperscript{23}33 U. S. 434 (1914). This was another of Mr. Justice Holmes' decisions, wherein it was held that the physical presence in New York of promissory notes owed a non-resident creditor by a non-resident debtor was in itself a sufficient basis to support an inheritance tax levied by New York on the value of the notes.

\textsuperscript{19}Id. at 596.

\textsuperscript{21}Nevertheless nearly two years later Maguire v. Trefry is found cited (without discussion) by Mr. Justice Stone in his opinion for the Court in Lawrence v. State Tax Commission of Mississippi, 286 U. S. 276 (1932). See note 40, infra.

\textsuperscript{22}Save, of course, to furnish Mr. Justice Holmes, and others far more perplexed than he, with an authoritative list of the cases discarded by the prevailing views of the majority of the Court.

\textsuperscript{23}284 U. S. 312, 322 (1932). This, obviously, is somewhat short of an implied rejection in toto of cases like Maguire v. Trefry. The repudiation goes only so far as Blackstone v. Miller was recognized as good law in such cases. If, of course, the decision in those cases was made to rest on the prop of Blackstone v. Miller, then the withdrawal of the support inevitably toppled the whole structure. But this was not the case in Maguire v. Trefry as will be indicated presently. See note 24, infra.

\textsuperscript{24}295 U. S. 422 (1935).
property of residents to be measured (in the case of productive investments) by the income yield, the amount of the tax to equal five per cent of such yield. In argument to defeat the petitioner's attack on the validity of the tax as applied to his equitable interests, counsel for the State admitted (in what Mr. Justice Stone, dissenting, characterized a "Delphic concession") that if the tax were to be construed as one levied on an interest in land it would be invalid in its application to the Illinois real estate because of the land's location beyond the borders of the taxing state, and likewise invalid as applied to the Ohio real estate because in violation of state constitutional provisions requiring the taxing of land according to a uniform rate by valuation. This was held by the majority to be the only proper construction, and the tax was accordingly declared invalid. Mr. Justice McReynolds, once more assuming the lead, dealt a back-handed blow to Maguire v. Trefry:

"Maguire v. Trefry . . . much relied upon by appellees, does not support their position. There the Massachusetts statute undertook to tax incomes; the securities (personalty) from which the income arose were held in trust at Philadelphia; income from securities taxable directly to the trustee was not within the statute. The opinion accepted and followed the doctrine of Blackstone v. Miller . . . and Fidelity & C. Trust Co. v. Louisville . . . . Those cases were disapproved by Farmers Loan & T. Co. v. Minnesota . . . . They are not in harmony with Safe Deposit & T. Co. v. Virginia . . . . and views now accepted here in respect of double taxation. See Baldwin v. Missouri . . . .; Beidler v. South Carolina Tax Commission . . . .; First Nat. Bank v. Maine. . . ."24

24Id. at 440.
25295 U. S. 422, 431-432 (1935). (Italics supplied.) This disapproval of Maguire v. Trefry seems stronger by the Court's express recognition of the fact that actually no question of double taxation was there involved. But the attempt to orphan the case was not completely successful. When he says that Blackstone v. Miller was "accepted and followed" in Maguire v. Trefry, Mr. Justice McReynolds is somewhat wide of the mark. Rather was that case distinguished when, after stating its result, Mr. Justice Day (in Maguire v. Trefry) said: "In the present case we are not dealing with the right to tax securities which have acquired a local situs, but are concerned with the right of the State to tax the beneficiary of a trust at her residence, although the trust itself may be created and administered under the laws of another State." 253 U. S. 12, 16 (1920).

Similar distinction was made (by Mr. Justice Day) of Fidelity & Columbia Trust Company v. Louisville, 245 U. S. 54 (1917), where it was held that the decision in Blackstone v. Miller, allowing the debtor's state to tax the debt to the non-resident creditor did not inferentially prohibit a tax by the creditor's state although the debt (bank deposits) was physically located in another state. No disapproval was registered in Maguire v. Trefry of either the Fidelity or Blackstone cases for the very good reason that no disapproval was necessary, neither case being in point with the matter involved in the principal case, viz., the taxation of a resident on the receipt of income within the taxing state. The over-ruling of Blackstone v. Miller in the Farmers' Loan & Trust Co. case was not accompanied by an over-ruling of the Fidelity & Columbia Trust Co. case. Indeed, the latter was not even mentioned in the opinion of Mr. Justice McReynolds, and
Clearly unnecessary seems this discrediting of a decision easily distinguishable from what the Court had before it in Senior v. Braden. Maguire v. Trefry was available as a support for the validity of the Ohio tax only so far as the Ohio law might be construed as an income taxing measure, a construction completely untenable in the face of the statutory language and legislative intent evidenced thereby. Nor was the case an appropriate one for the application of the Court's naive distinction between subject and measure, between a tax on income and a tax on something else measured by income. However sophistical the distinction may have been in its invention, the Court has not seen fit to discard its principle. But this was not a case like Flint v. Stone Tracy, where power existed to tax the corporate franchise but not the corporate income, and a tax on the franchise measured by the income was sustained. Here power was held lacking to tax the subject sought to be taxed—the equitable interest in Ohio and Illinois realty. This non-taxable subject could not be reached by the employment of a measure—income from the interest—which might properly have been taxed directly had the Ohio Legislature so desired. While, therefore, Maguire v. Trefry was decidedly floored by the opinion of the majority in Senior v. Braden, it seemed to have an outside chance of survival if given the long count. Mr. Justice Stone, however, apparently thought it time to throw in the towel. Dissenting, he said:

"The fact that it is now thought by the Court to be necessary to discredit or overrule Maguire v. Trefry... in order to overturn the tax imposed here, while, no doubt, the tenor of the Fidelity decision is incompatible with views adopted in 1930, its result was altogether consistent with the result of the later cases, since it held the state of the creditor's domicil empowered to tax the debt, just as Farmers' Loan and Trust Co. held only the state of the creditor's domicil could levy death taxes on debts owed him. The Fidelity case was cited, without discussion, in conjunction with Maguire v. Trefry, in Mr. Justice Stone's opinion for the Court in Lawrence v. State Tax Commission, 286 U. S. 276 (1932), decided nearly two years after Farmers' Loan & Trust Co. v. Minnesota.


**220 U. S. 107 (1911).** In 1909 Congress passed a measure taxing the franchises of corporations in an amount equal to one per centum of the net income of the corporation in excess of five thousand dollars. A tax on the income itself stood prohibited (unless apportioned according to population) by the decision of the Court in Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429 (1895), and, on rehearing, 158 U. S. 601 (1895). A tax imposed on the exercise of corporate privileges, measured by net income, was found by the Court (in the *Flint case*) to be quite different from a tax on the income itself, and its validity was sustained.
should lead us to doubt the result, rather than the authority which plainly challenges it, and should give us pause before reading into the Fourteenth Amendment so serious and novel a restriction on the vital elements of the taxing power.”  

Yet, in spite of the odds against it, *Maguire v. Trefry* bounced back in 1937 to prove altogether too premature what was said about it by the majority in *Senior v. Braden*, and what was said by the minority in interpreting what the majority had there said. For in *New York ex rel. Cohn v. Graves* we find Mr. Justice Stone now writing for the majority and citing *Maguire v. Trefry* as though its integrity had never been challenged at all:

“It (a state) may tax net income from bonds held in trust and administered in another state, *Maguire v. Trefry*, . . . although the taxpayer’s equitable interest may not be subjected to the tax, *Safe Deposit & Trust Co. v. Virginia*. . . .”

Nor was any exception taken to the validity of the citation by the dissenting Justices Butler and McReynolds. Rather were their objections centered on the action of the majority in sustaining the validity of a tax laid by New York on income received by a New York resident from rents of land in New Jersey and from interest on bonds physically located in New Jersey and secured by mortgages on land in that state. The minority were of the view that so much of the tax as was laid on income derived from land was in effect a tax on the land itself, and to that extent the tax represented an invalid attempt on the part of New York to reach extra-territorial property. But there is not a syllable in the dissent concerning double taxation, and in the majority opinion Mr. Justice Stone merely notes that there was nothing in the record to indicate that New Jersey had taxed the income involved, to which he later adds this word of answer to the objection that New Jersey had laid property taxes on the land from which the rents were derived, as well as on the land held under the mortgage deeds:

“The imposition of these different taxes (that is, income and property) by different states, upon these distinct and separable taxable interests, is not subject to the objection of double taxation, which has been successfully urged in

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\(^{28}\) *Senior v. Braden*, 295 U. S. 422, 436 (1935) (Justices Brandeis and Cardozo concurred in the dissent). Mr. Justice Stone’s supposition of the demise of *Maguire v. Trefry* was anticipated some years before by Judge Learned Hand in *Allen v. Commissioner of Internal Revenue, 49 F. (2d) 716, 718 (C. C. A. 2d, 1931)* where he remarked: “But *Brown v. Fletcher* . . . decided that he (the cestui que trust) has a present equitable interest in the res, and so perhaps did *Maguire v. Trefry* . . . so far as it has not been overruled by *Safe Deposit and Trust Co. v. Virginia*. . . .” (Italics and parenthetical note added.)

\(^{29}\) *300 U. S. 308* (1937).

\(^{30}\) *Id. at 313.*
those cases where two or more states have laid the same tax upon the same property interest in intangibles or upon its transfer at death.31

It was on March 1, 1937, that Cohn v. Graves indicated that Maguire v. Trefry was not yet hors de combat. Just four weeks later the Court granted certiorari in a case that was to compel definite determination of the winner of the battle.32 On November 7, 1938, the Court raised the hand of Maguire v. Trefry in token of victory, and, with poetic justice, the unanimous decision33 of the referees was announced by Mr. Justice McReynolds. Unfairly does the winner's name go without express mention, but the triumph is nonetheless complete for all that.

Guaranty Trust Company v. Commonwealth of Virginia is Maguire v. Trefry with a vengeance. Certain income accruing to a trust established in New York by the late Thomas Fortune Ryan was, according to the terms of his will setting up the trust, to be paid to the wife of the settlor by the trustees as they in their sole discretion might determine to be necessary and proper for care and support during her life, and in such installments and at such intervals as, again in their sole discretion, they might deem desirable. In 1930, 1931, and 1932 income derived by the trust from interest on bonds and dividends of corporations was paid to Mrs. Ryan, then resident in Virginia.34 The trustees in New York paid an income tax to that state on the identical income distributed to Mrs. Ryan. No objection was taken to this tax, but when Virginia, under its income taxing laws, sought to tax Mrs. Ryan, as a resident of that Commonwealth, on the amounts received by her from the trust, the power of the taxing authorities to make the levy was immediately challenged. After protested payment of the tax, suit was brought for refund. The claim was denied by the trial court and this was affirmed on appeal to the Supreme Court of Appeals. There was in the case a preliminary question of the proper construction to be placed upon the taxing statute. The general scheme of the Virginia law was very similar to that of the New York law, and provided that in the case of the ordinary trust (where there is no discretion in the trustee

31Id. at 314-315. (Italics and parenthetical note added.)
3359 Sup. Ct. 1 (1938).
34Apparently the income was distributed to the beneficiary in the years during which it was received by the trust. At any rate the Virginia Court of Appeals was able to say: "No question is raised here as to whether the payments to Mrs. Ryan constitute income," Ryan v. Commonwealth of Virginia, 169 Va. 414, 416, 193 S. E. 534, 535 (1937). Mrs. Ryan died pending the litigation and, by order of the Virginia Court of Appeals, her executor, the Guaranty Trust Company of New York, was substituted in her place as petitioner.
to withhold payments of income from the beneficiary), the trustee, in reporting the trust income for purposes of taxation, should be allowed deductions for amounts of income distributed to or held at the disposal of the beneficiary. In the case of the discretionary trust (where payments may be withheld from the beneficiary in the discretion of the trustee), under both New York and Virginia law the trustee was obliged to pay tax on the entire trust income without deduction for any amounts that the trustee in the exercise of his discretion might actually distribute to the beneficiary. Counsel for the taxpayer contended that in the case of the discretionary trust, the tax on the trustee should be considered the only tax intended by the statute to be levied, and that this construction was the proper one even in the case where the trust and trustee were not within the taxing reach of Virginia. The construction contended for was rejected and both trial and appellate courts held the tax to have been validly levied under that section of the statute defining gross income to include "gains or profits and income derived through estates or trusts by the beneficiaries thereof, whether as distributive or as distributable shares." The fact that one tax had already been paid on the trust income (though to New York, rather than Virginia) was held not to defeat the construction determined upon by the courts. Nor was the fact that this construction permitted a second tax to be laid on the same income (though to a different party) considered sufficient to invalidate the tax under the due process clause of the Fourteenth Amend-

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"In this latter respect the federal law differs in that it taxes to the beneficiary exclusively all amounts actually distributed, or held for his withdrawal, and to the trustee only such amounts as are actually withheld, that is, not made available for withdrawal by the beneficiary. Revenue Act of 1938, §§ 161, 162, 52 Stat. 517 (1938).

VA. CODE ANN. (Michie, 1936) § 24. The Virginia law carried no express provision covering the taxability of resident beneficiaries of non-resident trusts as do the laws of some states, as, for example, Massachusetts. See Maguire v. Tax Commission, 230 Mass. 503, 120 N. E. 162 (1918), note 4, supra, construing the earlier provisions of the Massachusetts law, the modern counterpart of which is found in Mass. Gen. Laws (1932) c. 62, § 8 (d). Corresponding provisions are also found in Mass. Gen. Laws (1921) c. 62, § 11. The Virginia Court refused to decide the question whether a Virginia resident would be obliged to pay an income tax on amounts of trust income received from a discretionary trust in the case of a Virginia trust, where the trustee would already have paid one tax on such income to Virginia. Counsel for the petitioner argued that if such were the case there would be unequal protection of the laws resulting from the discrimination between the discretionary trust (whose income would be doubly taxed, once to the trustee, and again to the beneficiary upon the latter's receipt of it), and the ordinary trust (where the only tax would be on the beneficiary). Such was not the case before it, the Virginia Court held, and therefore there was no question of violation of the equal protection clause of the Fourteenth Amendment since it was conceded that so far as Virginia beneficiaries of non-resident trusts, whether ordinary or discretionary, were concerned, all were treated alike. The same view was taken by the United States Supreme Court.
ment of the Federal Constitution. The Supreme Court decisions prohibiting double taxation were all distinguished as cases involving either property taxes37 or death taxes. Maguire v. Trefry was cited with approval, but the strongest reliance was placed upon New York ex rel. Cohn v. Graves,38 and two earlier cases involving the taxation of income, Shaffer v. Carter,39 and Lawrence v. State Tax Commission of Mississippi.40 On the authority of these cases the Virginia Court of Appeals thought that the protection enjoyed by Mrs. Ryan in the receipt and enjoyment of the trust income in Virginia gave that state a clearly sufficient basis for the tax levied. And, while it reserved definite opinion in the matter, the Court thought it altogether possible that the New York tax might also be sustained:

37 Whereas the Virginia income tax had been held to be an excise tax in Hunton v. Commonwealth, 166 Va. 229, 183 S. E. 873 (1936).
38 300 U. S. 308 (1937). See note 29, supra and accompanying text.
39 252 U. S. 37 (1920). There the Court sustained a tax levied by Oklahoma on the amount of income received by a resident of Illinois from oil properties owned by him in Oklahoma. Through Mr. Justice Pitney, it said: "... we deem it clear, upon principle as well as authority, that just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein, enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders." At p. 52. Nothing was said concerning the possibilities of double taxation. It should be noted that the case was decided in 1920, shortly before Maguire v. Trefry, and, as in that case, the decision was by a Court in complete agreement save for the lone dissent (without opinion) of Mr. Justice McReynolds.
40 286 U. S. 276 (1932). The taxing authorities of Mississippi levied an income tax on amounts received by the petitioner, a citizen and resident of Mississippi, from work done by him in the construction of public highways in Tennessee. The tax was sustained by the Court in an opinion by Mr. Justice Stone, who said: "... domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government. ... Taxation at the place of domicile of tangibles located elsewhere has been thought to be beyond the jurisdiction of the state ... but considerations applicable to ownership of physical objects located outside the taxing jurisdiction, which have led to that conclusion, are obviously inapplicable to the taxation of intangibles at the place of domicile or of privileges which may be enjoyed there. ... The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received." At pp. 279, 280, 281. Nothing was said of the possibilities of double taxation arising from the decision in the principal case when taken with the decision in Shaffer v. Carter, yet the opinion of Mr. Justice Stone commanded the adherence of the entire court except that Mr. Justice Van Devanter disagreed with so much of it as concerned the discriminatory characteristics of the Mississippi taxing law in relieving domestic corporations from tax on income derived
“It is argued with considerable force by the Attorney-General that both the New York and the Virginia income taxes can be sustained since they are levied on different taxable interests. The New York tax, it is said, is incident to the receipt of the income by the trustees in that State, while the Virginia tax is based upon Mrs. Ryan's receipt and enjoyment of the income in the latter State. The protection offered to the trustees and to the property handled by them in New York does not extend to the receipt and enjoyment of the income by Mrs. Ryan in Virginia. Each of these separate taxable interests should bear its proportionate part of the expenses of the governments of the respective States. Hence it is claimed neither of these taxable interests can complain of the levy on the other.

“This argument finds some support, we think, in the reasoning in Lawrence v. State Tax Commission . . . and in People of the State of New York v. Graves. . . .

“Whether this view is sound and whether the validity of the tax levied by the State of New York on the trustees can be sustained, we need not decide since the validity of that tax is not before us. What we do decide, and all we decide, is that the domicile and residence of Mrs. Ryan in the State of Virginia is sufficient to sustain the validity of the tax levied against her by this State.”

“Why,” queried counsel for the taxpayer, “should there be any difference in the application of the Fourteenth Amendment to prevent double taxation on tangibles and intangibles than in its application to prevent double taxation on income? Is the citizen any more hurt by double taxation on one than on the other?” After being denied favorable answer by the state courts, he pressed the question on the United States Supreme Court. Lack of precedent acknowledged, it was argued that the principle of the decisions prohibiting the levy by more than one

from activities carried on outside the state, but providing no corresponding exemption for individuals similarly situated. The majority of the Court (Van Devanter, J., dissenting) rejected the contention that this discrimination violated the equal protection clause of the Fourteenth Amendment.

*Ryan v. Virginia, 169 Va. 414, 423, 193 S. E. 534, 538 (1937).*

*Transcript of Record, p. 20.*

“Petitioner has been unable to find any decision of this Court which directly decides the question involved.” Brief for petitioner on petition for certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia. *Id.* at 5. “The only case we can find dealing with the question of taxation of income by the State of residence of a beneficiary of a trust, when such income is received from the trust of another state, is the case of *Maguire v. Trefry, supra*, which, as shown, held that the state of the residence of the beneficiary could tax income *to the extent that it had not been taxed by the state of the trust*, and which holding, however, was disapproved, as shown above, in the case of *Senior v. Braden, supra.*” *Id.* at 19.

state of property taxes on tangibles and death taxes on intangibles should be expanded to lay a similar ban on double income taxation. *Shafer v. Carter*, *Maguire v. Trefry*, *Lawrence v. Tax Commission*, and *New York ex rel. Cohn v. Graves* were all distinguished by pointing out that in none of them was it shown that double taxation of the same income had actually been involved.45

This was recognized by counsel for the Commonwealth, but the argument was pressed beyond factual distinctions:

"The validity of so-called double taxation of income has never been before this court for determination. It is submitted, however, that, as has been said the true test is whether there is a legitimate basis for the imposition of the challenged tax. If there is a legitimate basis for the tax, then it may be imposed and this basis is not made unsound by reason of what another State may do or because such other State may also have a legitimate basis for a tax imposed upon the same income. If there is no legitimate basis for the tax, then it may not be laid, and the fact that no other State taxes the income does not make good a basis which is otherwise bad. . . .

"If *Lawrence v. Mississippi*, *supra*, and *New York ex rel. Cohn v. Graves*, *supra*, are to be allowed to stand, then Virginia has a legitimate basis for the imposition of its tax against Mrs. Ryan. It is true the record in those two cases did not disclose an income tax levied by any other than the State of domicile, but on principle the conclusions would not have been different. Will Mississippi's tax, sustained in *Lawrence v. Mississippi*, *supra*, become invalid should Tennessee impose a tax (as this court has said in *Shafer v. Carter*, *supra*, it may do) on Lawrence's income from business carried on in that State? Does the validity of New York's tax on the income of its resident from New Jersey real estate (sustained in *New York ex rel. Cohn v. Graves*, *supra*) rest upon the insecure foundation of whether or not New Jersey elects to tax such income? Not all of the States impose an income tax.46 If the validity of the tax upon its residents, otherwise good, of any one of the States that has adopted such a system of taxation is made to depend in any particular case upon the tax statutes of one or more of her sister States, the confusion and uncertainty which would result cannot be estimated. This is all the more obvious when consideration is given to the fact that business is now being transacted on an increasingly national scale."47

45 Moreover it was thought that *Maguire v. Trefry* could be considered as eliminated from the picture by *Senior v. Braden*: "The fact that there was a dissenting opinion (in *Senior v. Braden*) shows that the matter was thoroughly argued out by the Court among themselves and that the holding in *Maguire v. Trefry* was in fact overruled, and deliberately overruled." Transcript of Record, at p. 17, Ryan v. Virginia, 169 Va. 414, 193 S. E. 534 (1937).

46 "See note 110, infra.

47 "Brief on behalf of the Commonwealth of Virginia, at pp. 16-18, Ryan v. Virginia, 169 Va. 414, 193 S. E. 534 (1937), "The conclusion (of taxpayer's counsel) that the income was taxable only at the domicile of the trust loses its strength when it is considered that, so far as a diligent search reveals, no court has yet said that the same principles that are applicable to taxation of real estate, tangible property and intangible property, govern also the taxation of income." *Id.* at 11.
Out of these opposing arguments the Supreme Court distilled the essence of the question, and stated it as follows:

"... Whether the State of Virginia has the right, under the provisions of the Fourteenth Amendment to the Constitution of the United States, to assess an income tax on income received by the said Mary T. Ryan for the years in question, when the identical income in the hands of her Trustees had been assessed with income taxes by the State of New York, and which said taxes had been paid there, thus imposing two State taxes on the same income."

The issue of double taxation could not have been more bluntly recognized. It is as brusquely resolved. "Has there been denial of Due Process—," rhetoricizes Mr. Justice McReynolds, and he hurries the answer as though anxious to rid himself of it:

"The insistence is that the challenged assessment was upon the identical income already rightly taxed by New York; that under numerous decisions by us two or more states may not tax the same subject; this would amount to double taxation and infringe the Due Process clause. . . .

"Those cases go upon the theory that the taxing power of a state is restricted to her confines and may not be exercised in respect of subjects beyond them. Here, the thing taxed was receipt of income within Virginia by a citizen residing there. The mere fact that another state lawfully taxed funds from which the payments were made did not necessarily destroy Virginia's right to tax something done within her borders. After much discussion the applicable doctrine was expounded and applied in Lawrence v. State Tax Commission . . ., and New York ex rel. Cohn v. Graves. . . . The attempt to draw a controlling distinction between them and the present cause, we think has not been successful."

Such Holmes-like dispatch engenders the short-changed feelings of one left holding the ticket-stub to an expensive ringside seat after a fifteen second "battle of the century." Even more upsetting is the Hollywood outcome of the engagement, with a much discounted has-been registering a dynamic comeback. Undoubtedly the smart money, after New York ex rel. Cohn v. Graves, was on the survival (or, better, revival) of Maguire v. Trefry, but the utter collapse of all opposition on the Court failed of prediction by the keenest.

Canny, if not keen, is he who shifts his speculative instincts from


[60 Sup. Ct. 1, 3 (1938). The opinion is devoid of discussion of any prior decision of the Court, and Maguire v. Trefry is not even cited.]}
these double taxation conflicts to fields of more stable percentages. Mr. Justice Holmes is supposed to have written that "It is only after a series of determinations on the subject matter, that it becomes necessary to 'reconcile the cases', as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape..."\(^{51}\) And though it was this same Justice who, as far back as 1930, called for a reconciliation of the cases on jurisdiction to tax,\(^{52}\) it appears now, in the light of what has passed since that time, that any effort at abstraction of a general rule would have been work wasted. Shorn of significance today most certainly would stand any rule declaring a blanket prohibition against double taxation among the states, yet, from 1925 to 1932, that seemed the direction in which the tide of decision was running, and running strongly. Whether or not it is more than mere coincidence, the trend toward restricting the jurisdiction of the states to tax came at the time the sun was about to set on the period of "plenty", while the current in the opposite direction seems to have set in as the stress of the depression, with its concomitant shrinking of state revenues, approached its most critical point. In the pattern of most foresworn crusades, abandonment of the campaign by judicial fiat to eliminate the acknowledged evil of multiple taxation was not a sudden thing, but gradual, with now and then an occasional flare-up of the old spirit to show by the stubbornness of its passing the strength that once it possessed.

*First National Bank v. Maine,*\(^{58}\) in 1932, stands as the movement's last important victory. Close on its heels came *Lawrence v. Tax Commission,*\(^{54}\) which, though it was not so importantly regarded at the time it was decided, now, in the perspective of six or seven years, suggests itself as the first indication of a shift in the trends. *Yet Senior v. Braden*\(^{55}\) loomed in 1935 as somewhat potently symptomatic of renewed strength that might presently be thrown against the front of multiple income taxation, and *Wheeling Steel Corporation v. Fox,*\(^{56}\) in 1936.

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\(^{51}\)Holmes, *Codes and the Arrangement of Law* (1870) 5 AM. L. REV. 1. This article, which appeared without signature or other formal indication of authorship, is ascribed to Mr. Justice Holmes by Professor Frankfurter in his *Bibliography of Early Writings of Oliver Wendell Holmes* (1931) 44 HARV. L. REV. 797.


\(^{53}\)1932. See note 16, *supra.*

\(^{54}\)1932. See note 40, *supra.*

\(^{55}\)1935. See note 22, *supra,* and accompanying text.

\(^{56}\)1936. Here a Delaware corporation directed the operations of manufacturing plants in Ohio from its central offices in West Virginia. Sustaining the validity
gave promise of collapsing the possibilities of double taxation concentrated behind the fortification of the business situs doctrine. But the threat of the first case was blasted by *New York ex rel. Cohn v. Graves*, and the teeth of the other embryonically stunted by *First Bank Stock Corporation v. Minnesota* and *Schuylkill Trust Company v. Pennsylvania*. The retreat becomes precipitate in *Guaranty Trust Company v. Virginia*.

of an *ad valorem* property tax laid by West Virginia on accounts receivable and bank deposits belonging to the corporation, the Court rejected the contention of the taxpayer that the property, as intangibles, could be taxed only at the place of organization of the corporation, i.e., Delaware. The decision, that of an unanimous court, was made to rest upon the business situs doctrine. "A careful reading of the Chief Justice's opinion in *Wheeling Steel Corporation v. Fox*, the pioneer case to invoke the corporate domicil-business situs doctrine, leaves one with a vague impression that intangibles taxed on this basis are not taxable elsewhere." Lowndes, *The Supreme Court on Taxation*, 1936 Term (1937) 86 U. of Pa. L. Rev. 1, 30.


*301* U. S. 234 (1937). The principle of *Wheeling Steel Corporation v. Fox* was here applied to sustain a property tax levied by Minnesota on shares of stock in state banks of Montana and North Dakota owned by a Delaware corporation which was engaged in the banking business in Minnesota. Unlike the *Wheeling Steel Corp. case*, however, there was clear evidence of double taxation here, since the shares of stock in the Montana banks had been taxed by Montana, and those in the North Dakota banks had been taxed by that state. Mr. Justice Stone's opinion, expressing the decision of the unanimous court of eight (Mr. Justice Butler did not participate in the consideration or decision of the case) is eloquently indifferent to this aspect of the case. See note 59, *infra*.

Nearly four months prior to its decision in the *First Bank Stock Corp. case* the Court decided *New York ex rel. Whitney v. Graves*, 299 U. S. 366 (1937), where it held that New York had jurisdiction to lay an income tax on the profits derived from the sale of a seat on the New York Stock Exchange owned by a partnership in Massachusetts, of which the taxpayer, Whitney, was a member. (All members of the partnership were resident in Massachusetts and, hence, were potentially liable to income taxation in that state although there was no evidence that such taxation had actually been incurred). The New York tax was sustained by the Court (once more unanimous, in an opinion by the Chief Justice) on the business situs theory, although it appeared that the Massachusetts partnership conducted no operations of its own on the Exchange, but placed its orders through New York brokers, with, however, the advantage of the lower rate charged members of the Exchange in their dealings through fellow members. There is no mention in the Court's decision of the possibility of sustaining the tax on the "source of income" theory laid down in *Shaffer v. Carter*, 252 U. S. 37 (1920), note 39, *supra*.

*302* U. S. 506 (1938). A tax by Pennsylvania laid on persons holding stock in Pennsylvania corporations (collected, however, from the corporation which had the option of passing it on to its stockholders, or of paying it out of the corporate funds without assessing the stockholders for reimbursement) was attacked on various grounds, one of which was the application of the taxing statute to non-resident share-holders. The tax was sustained on the authority of *Corry v. Baltimore*, 196 U. S. 466, decided in 1905, where Maryland was held empowered to levy taxes on non-resident stockholders on the value of their stock-holdings in Maryland corporations. In 1914 the Court held valid a tax
To assert that we are in for recognition of another "era of error,"160 and that the cases from Safe Deposit and Trust Company v. Virginia61 to Senior v. Braden62 are on their way out through the door of reversal, would be to ignore the lesson learned from the experience of past predictions in this field. Yet a few conclusions may be ventured whose validity must fade the instant they leave the law that is to suggest the law that may be.

There is no evidence of weakening in the decisions (like Union Refrigerator Transit Company v. Kentucky)63 limiting jurisdiction to levy laid by a municipality of Massachusetts on stock owned by its residents in corporations of other states. Hawley v. Malden, 232 U. S. 1 (1914). Upon its being pointed out to the Court in the Schuylkill case that the Corry and Hawley cases (whose joint effect is to permit double taxation to the same person of the same property interest) were decided long before the Court undertook to cut down multiple taxation of intangibles, Mr. Justice Roberts (for the unanimous Court) answered:

"The property right so represented (by the shares of stock) is of value, arises where the corporation has its home, and is therefore within the jurisdiction of that state; and this, notwithstanding the ownership of the stock may also be a taxable subject in another state." 302 U. S. 506, 576 (1933). Italics and parenthesis supplied.

Thus the Court answers the question left open by Mr. Justice Stone in the First Bank Stock Corp. case, when he said:

"But we do not find it necessary to decide whether taxation of the shares in Montana or North Dakota is foreclosed by sustaining the Minnesota tax. Nor need we inquire whether a nonresident shareholder, by acquiring stock in a local corporation, so far subjects his investment to the control and laws of the state which has created the corporation as to preclude any objection, on grounds of due process, to the taxation of the shares there, even though they are subject to taxation elsewhere at their business situs. We leave those questions open." First Bank Stock Corp. v. Minnesota, 301 U. S. 234, 239-240 (1937).

It should be noted that the effect of the two decisions, taken together, is to allow taxation of shares of stock in a corporation by the state of the corporation's organization, and again by the state where the stockholder has acquired a business situs. Where the stockholder is itself a corporation, may the state of its incorporation also tax the shares of stock, on the suggestion of the Schuylkill case (and the direct holding in Hawley v. Malden) that a tax may be laid by the state of the stockholder's domicil, as well as by the state creating the corporation in which the stock is held? Or, with the factual situation in the First Bank Stock Corp. case, after the shares of stock have been taxed by the states where the corporations issuing the stock were enfranchised (the validity of this tax being established by the Schuylkill case), and taxed a second time by the state where the stockholder has acquired a business situs (the taxable situation actually sustained in the First Bank Stock Corp. case), may the state of the stockholder's domicil, i.e., Delaware, validly impose a third tax? Or will the implications of Wheeling Steel Corporation v. Fox finally be resolved into a holding that when a person or a corporation has acquired a business situs in a state other than the state of his domicil, the taxing power of the latter state must give way to that of the former?

*As in Erie R. R. Co. v. Tompkins, 304 U. S. 64 (1938).
*280 U. S. 83 (1929). See note 7, supra, and accompanying text.
*295 U. S. 422 (1935).
*199 U. S. 194 (1905).
property taxes on tangibles to the place where the tangibles are permanently situated (and, in lieu of such fixed situs anywhere, then at the domicil of the owner). Nor has anything appeared to gainsay the strength of the cases restricting the death taxation of tangibles to the place of their situs (though here, too, there may arise difficulties in determining the question of situs, so that if no independent situs may be found for them, then presumably such tangibles will remain subject to the death taxes laid by the state of the owner's domicil).

As for the present potency of the decisions extending the principle of the Frick case to prohibit double death taxation of intangibles, the rationale of Mr. Justice Stone's special concurrence in Farmers' Loan

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Footnotes:

64 New York Central R. R. Co. v. Miller, 202 U. S. 584 (1905); Southern Pacific S. S. Co. v. Kentucky, 222 U. S. 63 (1911). In Johnson Oil Refining Co. v. Oklahoma, 290 U. S. 158 (1933), an Illinois corporation, operating an oil refining business in Oklahoma, owned a number of oil cars which were continuously employed in shipping oil to various points outside Oklahoma. The Court noted that the owner's domicil was in Illinois, and recognized the power of that State to tax such cars as had not acquired a taxable situs elsewhere, thus affirming the principle of Southern Pacific S. S. Co. v. Kentucky, supra. Further, however, it held that so far as the cars had acquired a taxable situs outside Illinois, that state was without power to tax, in accordance with the decision in Union Refrigerator Transit Co. v. Kentucky, supra, note 63. Finally, the fact that no particular cars could, in view of their almost uninterrupted movement, be found to have a permanent situs at any particular place, did not preclude (the Court held) their acquiring an "average situs" in some state where they were regularly in use. Accordingly Oklahoma was held empowered to tax not the entire number of cars owned by the taxpayer (though all were used in the state at one time or another), but the average number of cars found to be habitually within its limits. Compare N. Y. Central R. R. Co. v. Miller, supra, where, in the absence of any showing that the taxpayer's cars had acquired a taxable situs, i.e., a permanent situs for specific cars or an "average situs" (or, perhaps, a series of average sites), outside New York, that State was held authorized to include the value of all the cars in computing the value of the railroad's capital stock for tax purposes.


66 With the Frick case, where the "Frick Art Collection" was held to have acquired a permanent situs in New York and, therefore, could not be reached by death taxes laid by the state of the owner's domicil, compare City Bank Farmers' Trust Co. v. Schnader, 293 U. S. 112 (1934), in which Pennsylvania was held empowered to lay death taxes on the value of paintings loaned for an indefinite period to a Pennsylvania Art Gallery by their owner, Thomas B. Clarke, a domiciliary of New York.

67 Whether or not control over a debt at the domicil of the debtor gives jurisdiction to tax the debt . . . we are not here concerned with a property tax, but with an excise or privilege tax imposed on the transfer of an intangible . . . and to sustain a privilege tax the privilege must be enjoyed in the state imposing it. . . . It is enough, I think, to uphold the present decision that the transfer was effected in New York by one domiciled there and is controlled by its law . . . granting that the continued existence of the contract rested in part on the law of Minnesota, the relation of that law to the transfer in New York, both in point of theory and in every practical aspect, appears to me to be too attenuated to constitute any reasonable basis for deeming the transfer to be within the
and Trust Company v. Minnesota\textsuperscript{68} would seem to have as much validity as ever. The death tax being regarded as an excise, having as the subject of its incidence the exercise of the "privilege" of leaving one's own property at death (estate taxation), or the "privilege" of succeeding to the property of another person upon such other person's death (inheritance or succession taxation), only that state\textsuperscript{69} may tax the "privileges" whose laws confer them and provide the machinery (probate, etc.) for their legal enforcement. In the case of tangibles that is the state of the tangibles' situs;\textsuperscript{70} with intangibles it is the domicil of the owner.\textsuperscript{71} It may be that the Court, in abandoning its efforts to eliminate multiple taxation among the states, will go to the length of completely restoring the status quo prior to its decisions of the late twenties and early thirties by expressly over-ruling those cases relating to death taxation of intangibles.\textsuperscript{72} Present indications, however, point rather to a gradual devitalization of those cases, ultimately to result, it may be, in their consignment to the limbo of forgotten cases, a fate doubtfully to be preferred to the forthright damnation of express reversal. In this direction of desuetude the wind certainly seemed to be blowing when the Court decided Worcester County Trust Company v. Riley,\textsuperscript{73} and there is nothing of more recent date to suggest any shifting.

taxing jurisdiction of Minnesota.\textsuperscript{74} Stone, J., in Farmers' Loan and Trust Co. v. Minnesota, 280 U. S. 204, 214, 215 (1930).

\textsuperscript{68}280 U. S. 204 (1930). See note 11, supra, and accompanying text.

\textsuperscript{69}The argument that only that jurisdiction conferring a privilege may tax its exercise does not apply against the Federal Government. It was discursively but definitely discarded by Mr. Justice White in Knowlton v. Moore, 178 U. S. 41 (1900), where the Court sustained the Spanish War Inheritance Tax laid by the Federal Government in 1898. Similarly, in Flint v. Stone Tracy, 220 U. S. 107 (1911), it was urged that corporations could be taxed only by the jurisdiction whose laws made the corporate existence possible, but the Court disposed of the point in short order:

"If the mere fact of state incorporation, extending now to nearly all branches of trade and industry, could withdraw the legitimate objects of Federal taxation from the exercise of the power conferred, the result would be to exclude the National Government from many objects upon which indirect taxes could be constitutionally imposed. . . . 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." Day, J., at pp. 157, 158.

\textsuperscript{70}Frick v. Pennsylvania, 268 U. S. 473 (1925).

\textsuperscript{71}Farmers' Loan and Trust Co. v. Minnesota, 280 U. S. 204 (1930).

\textsuperscript{72}With the pressing need for public revenue and a drift in the Court toward the so-called 'liberal' point of view, it is by no means impossible, nor even improbable, that double taxation of intangibles may again find judicial favor. It would certainly be rash to conclude that the issue is settled or that the Court may not again reverse itself, as it did at the beginning of the decade." Lowndes, The Supreme Court on Taxation, 1936 Term (1937) 86 U. of PA. L. REV. 1, 30.

\textsuperscript{73}302 U. S. 292 (1937). Here the Court refused to allow the State of California to be
Finally, the situation with which Guaranty Trust Company v. Virginia is most concerned, the multiple taxation of intangibles in some form other than death taxes, presents the problem of the most interesting possibilities of all. It is unnecessary to tag these "other than death taxes" save to say that they will be taxes laid either on the person, or on property, or on the doing of something other than leaving or succeeding to property at death, unless it is necessary (and it certainly seems to be) to add to Mr. Justice Field's classic classification a fourth category consisting of a blend of the property and excise tax. Nothing is to be gained by rehearsing here the battle that has raged, and yet rages, to pigeon-hole the income tax. One might as well try catching

drawn unwillingly into interpleader proceedings with the State of Massachusetts (in the Federal District Court for the District of Massachusetts) to determine which of the two states had the superior (sic) right to levy death taxes on intangibles of a decedent whose domicil was claimed by both states. To the possible consequence of its decision that double taxation might ensue should the courts of Massachusetts hold the decedent a domiciliary of that State, and those of California find for a domicil there, the Court, through Mr. Justice Stone significantly, was altogether apathetic: "Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries." At p. 299. The Court's action here proved consistent with its position in the Dorrance controversy, where it allowed to stand decisions by the highest courts of Pennsylvania and New Jersey establishing the theoretical impossibility of double domicil, as a consequence of which Pennsylvania collected an inheritance tax of some fourteen and a half millions of dollars, and (on the identical property) New Jersey harvested approximately fifteen and a half millions (including interest) in inheritance taxes. For a protracted discussion of the protracted litigation in this case, see Nash, And Again Multiple Taxation? (1938) 26 GEORGETOWN LAW JOURNAL 288. The dilemma of the Dorrances has recently been duplicated in the case of Nevin v. Martin, 22 F. Supp. 836 (D. N. J. 1938), where a three judge Federal court refused to interfere with the collection of inheritance taxes by New Jersey on property left by Walter Ross McShea, claimed by New Jersey to have been a domiciliary of that state, after taxes had previously been collected in Pennsylvania on the theory that the decedent was a domiciliary of Pennsylvania (and the validity of the taxes, as well as the theory on which they were assessed, had been sustained by the Pennsylvania courts). Following the Dorrance and Riley cases, the Court said: "This court is constrained to the conclusion that the refusal of New Jersey to be bound by the Pennsylvania decrees is not violative of the full faith and credit clause of the Constitution." Forman, D. J., at p. 839. Nor was the Court able to find the double taxation violative of the Fourteenth Amendment, a conclusion compelled by the decision of the Supreme Court in the Riley case.

49 Sup. Ct. 1 (1938).

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways." State Tax on Foreign Held Bonds, 15 Wall. 300, 319 (U. S. 1873).

7In most states the income tax is regarded as an excise (Ark., Ga., Idaho, Ind., Me.,
eels with his toes. The significant thing is that the Court's decisions outlawing multiple taxation of intangibles unexceptionally dealt with death taxes. Only the Wheeling Steel Corporation case\textsuperscript{77} came at all close to an extension of the principle of the death tax cases into other fields—more specifically, there into the field of property taxation, by suggesting inferentially that only one state may levy a property tax on intangibles, and where a business situs has been acquired, with which the intangibles are connected, the state of such business situs is the state having the exclusive power. But, as has been seen, the actual decision did not go so far, and whatever implications might have been latent in the case to be brought at some future time to the fruition of the proposition just stated, their potency has been sterilized for a time at least by the decisions in the First Bank Stock Corporation\textsuperscript{78} and Schuykill Trust Company\textsuperscript{79} cases. Nevertheless the double death tax cases are richly studded with statements strongly suggesting it to be (or to have been) the Court's view that the principles prohibiting double death duties are applicable in four square fashion to cases involving property and other taxes laid on intangibles.\textsuperscript{80} The issue is to

Miss., Mo., Mont., N. C., Va., Wis.); in some it is viewed as a property tax, considering the income itself as the property (Ala., Del.); in others it is held to be a property tax on the property producing the income (Mass., Ore., Pa., Wash.); and in at least one state (S. C.) it is treated as a personal tax. See Hale v. Iowa State Board of Assessment, 302 U. S. 95 (1938), for a review of some of the state cases. Cf. Brown, The Nature of The Income Tax (1932) 17 MINN. L. REV. 127.

Responsible for most of the confusion is Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429 (1895), and, on rehearing, 158 U. S. 601 (1895), where a divided Court held the Income Taxing Act of 1894 was, in its application to rents from real estate, and income from personal property, so strongly suggestive of a direct tax on the property itself as to necessitate its apportionment according to population as required by the Constitution (Art. 1, § 9, cl. 4). Because the tax had not been so apportioned it was held invalid. Subsequent interpretation and application of the decision by the courts, federal and state, has forced the case into the role of a chameleon, changing complexion with each succeeding citation. See Brushaber v. Union Pacific R. R. Co., 240 U. S. 1 (1916); Bromley v. McCaughn, 280 U. S. 124 (1929); and especially Hale v. Iowa State Board of Assessment, supra. In New York ex rel. Cohn v. Graves, 300 U. S. 308 (1937), the argument was urged that the income tax laid on the rents received by the New York resident from New Jersey real estate was in substance and effect a tax on the realty itself, and as such void because of complete lack of jurisdiction over the property taxed. The argument was found persuasive by the minority of Justices Butler and McReynolds, and in his dissent, Mr. Justice Butler cited the Pollock case as controlling. Rejecting the argument, Mr. Justice Stone cited the Pollock case in support of the views of the majority.

\textsuperscript{77}298 U. S. 193 (1936). See note 56, supra.

\textsuperscript{78}301 U. S. 234 (1937). See note 58, supra.

\textsuperscript{79}302 U. S. 506 (1938). See note 59, supra.

\textsuperscript{80}Thus the unmistakable import of the majority opinion in Farmers' Loan and Trust Co. v. Minnesota, 280 U. S. 204 (1930), is that double taxation of intangibles, whatever the
some extent brought into the open by Mr. Justice Stone in the *First Bank Stock case*:

"The rule that property is subject to taxation at its situs, within the territorial jurisdiction of the taxing state, readily understood and applied with respect to tangibles, is in itself meaningless when applied to intangibles which, since they are without physical characteristics, can have no location in space. . . . The resort to a fiction by the attribution of a tax situs to an intangible is only a means of symbolizing, without fully revealing, those considerations which are persuasive grounds for deciding that a particular place is appropriate for the imposition of the tax. . . ."81

Actually the decision in this case permitted double property taxation of intangibles consisting of shares of stock. The same result was viewed without alarm in the *Schuylkill Trust Company case*. And while, in *New York ex rel. Cohn v. Graves*,82 there was no evidence that New Jersey had taxed the income,83 so as to make the New York tax work double taxation, there is nothing in the Court's opinion to indicate that the result would have been different had it been possible to demonstrate such a thing. Indeed, a preference of one state over the other would have compelled the reversal of either *Shaffer v. Carter*84 or *Lawrence v. State Tax Commission*.85 On the source theory, New Jersey would seem

form of the tax, is to be frowned upon. The case involved a death tax, it is true, but all that Mr. Justice McReynolds says is as applicable to property taxes, at no point in his opinion being delimited to apply only to the precise type of tax actually being tested before the Court. "We have determined that in general intangibles may be properly taxed at the domicile of their owner, and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles." At p. 212. This statement was quoted with approval by the Chief Justice in his opinion for the court in *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 209 (1936), which, it will be remembered, was a case involving a property tax. See note 56, *supra*.

In *Wheeler v. Sohmer*, 233 U. S. 434 (1914), *supra* note 17, overruled in *Baldwin v. Missouri*, 281 U. S. 586 (1930), *supra* note 14, the Court split in a curious fashion. Justices Holmes, Day, Hughes, and Lurton thought the New York death tax on the debts there involved could be sustained on the common law theory of chattelizing choses in action, *i.e.*, the physical presence within the taxing state of the objective evidences of the debts was in itself sufficient to post jurisdiction to tax, although the state was the domicile of neither the creditor nor the debtor. Justices McKenna and Pitney *limited their concurrence in this view to the peculiarities of inheritance taxes* (compare the position of Stone, J., in his limited concurrence in *Farmers' Loan and Trust Co. v. Minnesota*, *supra* note 67 and accompanying text). Chief Justice White, and Justices Lamar and Van Devanter dissented.

81301 U. S. 234, 240-241 (1937). (Italics supplied.)
82300 U. S. 308 (1937). See note 29 *supra*, and accompanying text.
83Although it did appear that New Jersey had laid real property taxes.
84252 U. S. 37 (1920). See note 39 *supra*.
85286 U. S. 276 (1932). See note 40 *supra*. 
clearly entitled to tax non-residents on income produced by New Jersey realty, yet New York's power would remain on the equally defensible domicil theory. As New Jersey protects what produces the income and is entitled to charge accordingly, so New York protects the one who receives the income in the receipt, possession, and enjoyment of it, and for such services rendered it may tender another bill. Principles so oft and vigorously iterated are not lightly to be discarded. They would seem to have compelled the decision in Guaranty Trust Company v. Virginia. The fact remains that no prior case actually involved a decision sustaining a tax on the domicil theory where a tax had already been levied at some other place on the source theory (and vice versa).

It is not wholly unimaginable that some future attempt by more than one state to tax identical income to an identical taxpayer may be

84"That the State, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement, That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible. Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay." Pitney, J., in Shaffer v. Carter, 252 U. S. 37, 50-51 (1920). Of course the one state may tax both the land and the income arising from it. This may be double taxation in the economic sense, but it is not such in the legal sense. See note 31, supra, and accompanying text.

85"That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the state. To them and to the equitable distribution of the tax burden, the economic advantage realized by the receipt of income and represented by the power to control it, bears a direct relationship." Stone, J., in New York v. Graves, 300 U. S. 308, 312, 313 (1937). Compare the very similar statement of the same Justice in the Lawrence case, quoted in note 40, supra.

86"Moreover, the shares represent a property interest, an aliquot proportion of the whole corporate assets. The shareholders, whether domestic or foreign, depend for the preservation and protection of this property upon the law of the State of the corporation's domicil. The property right so represented . . . is therefore within the taxing jurisdiction of that state; and this, notwithstanding the ownership of the stock may also be a taxable subject in another state." Roberts, J., in Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 302 U. S. 506, 516 (1938). See note 59, supra. Compare the asseverations of Mr. Justice Stone in First Bank Stock Corporation v. Minnesota, 301 U. S. 234 (1937), note 58, supra.

87Sup. Ct. 1 (1938).
frustrated through distinction of the *Guaranty Trust Company* case on the point that there the tax was in fact imposed by two different states upon identical income but on different taxpayers. Such a distinction will need bolstering in view of the identity of interest that the Court itself has said exists in the case of the trustee and *cestui que trust*.

Certainly the analogy of corporation and stockholders, urged by counsel for the Commonwealth in the *Guaranty Trust Company* case, limps badly on its way to be applied to the trustee-beneficiary relationship.

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90 See McReynolds, J., in Senior v. Braden, 295 U. S. 422 (1935), note 22, supra, and accompanying text. An interesting variation of the problem, where the interest of the trustee and *cestui que trust* were treated as identical in a matter of taxation, is Stone v. White, 301 U. S. 532 (1937). It should be observed that taxing laws generally treat the trust as an entity quite distinct from the beneficiary, not, however, in the usual situation, to the extent of taxing the same property to both. See notes 35 and 36, supra, and accompanying text.

91 However the economist and man of the street may regard it, the law keeps distinct its ideas concerning double taxation from the situation where the corporate assets are taxed to the corporation and the corporate stock to the stockholder. "There is no doubt that a State may tax a corporation and also tax the holders of its stock. . . . The owners are different and, although the appellant calls it a mischievous fiction, the property is different." Holmes, J., in Klein v. Board of Tax Supervisors, 282 U. S. 19, 23 (1930).

"Of course, we do not enter into a consideration of the question, so much discussed by political economists, of the double taxation involved in taxing the property from which these securities arise, and also the burdens upon such property, such as mortgages, shares of stock and the like—the securities themselves." Brown, J., in Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 205-206 (1905). Compare Stone, J., in Susquehanna Power Co. v. Tax Commission, 283 U. S. 297 (1931).

92 Argument of counsel for the Commonwealth was limited to the analogy of a Virginia stockholder in a foreign corporation: "A Virginia stockholder of a corporation which carries on its business in another state and is taxed there on its income, receives dividends the source of which is, of course, the income of the corporation in such other State. To be consistent, petitioner must say that Virginia may not tax its resident on account of the receipt of these dividends from income which has previously been taxed. The income which Mrs. Ryan received in Virginia in the sole discretion of the trustees is closely analogous to dividends declared by the directors of a corporation and paid to the stockholders." Brief on behalf of the Commonwealth of Virginia, p. 19, Guaranty Trust Co. v. Virginia, 59 Sup. Ct. 1 (1938). The argument was given brief approval in the trial court, but it was not considered in the Virginia appellate court, nor in the United States Supreme Court.

93 A corporation is an entire and separate entity from a stockholder, it owns its assets and the income and can use the income as it sees fit for general expenses, expansion, advertisement, or such other purposes, and only transfer to the stockholders so much of the income or surplus as the corporation may think wise. The stockholder has no right to dictate or direct the use of the income of the corporation, except in cases of gross disregard of the interests of the stockholders or illegal action by the corporation.

The case is very different with a trust. There the trustee simply holds the legal title. The property itself belongs to the beneficiaries who are the real owners. The trustee cannot use either principal or income for anything but specific trust purposes, and he must
Still more faltering is any comparison utilizing the situation where mortgaged land is taxed to the mortgagor and the mortgage is taxed to the mortgagee.\textsuperscript{94} It must be acknowledged, however, that the New York tax on the trustees in the Guaranty Trust Company case is not expressly justified on the source theory of \textit{Shafer v. Carter}, when the Court somewhat cryptically says:

"The mere fact that another state lawfully taxed funds from which the payments were made did not necessarily destroy Virginia's right to tax something done within her borders."\textsuperscript{95}

It may be that the New York tax can be supported on the same theory used to sustain the Virginia tax, viz., domicil, since the trustees apparently were domiciliaries of New York, and in holding legal title to the trust estate they received the protection of the New York laws. In this way the compulsion of precedent might formally be avoided in a case where, but one taxpayer being involved, there would be possible no showing of double domicil,\textsuperscript{96} and only the source theory would be available to sustain the tax by the state of the situs of the income producing property. Instances of more palpable sophistry are to be found in the decisions of the Court. Such strainings are not to be looked for, however, until the Court experiences another \textit{volte face} and returns to its now seemingly forgotten siege against multiple taxation. Such a return might come with a revisitation of a period of prosperity when gestures like those of the Court's decisions in the late twenties and early

\textsuperscript{94}In Kirtland v. Hotchkiss, 100 U. S. 491 (1888), the Court held that a resident of Connecticut, holding a mortgage on land in Illinois, was taxable on the full amount of the debt secured by the mortgage. In Savings & Loan Society v. Multnomah County, 169 U. S. 421 (1897), the mortgagee, a resident of California, was held taxable on the value of the mortgage by Oregon, where the mortgaged property was located, notwithstanding, under \textit{Kirtland v. Hotchkiss}, the mortgagee might also be taxed on the debt by the state of his residence. The Court said: "The State may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land." Gray, J., at p. 427.

\textsuperscript{95}McReynolds, J., in Guaranty Trust Co. v. Virginia, 59 Sup. Ct. 1, 3 (1938). (Italics supplied.)

\textsuperscript{96}Saving, of course, a situation like that in the \textit{Dorrance case} where the Court would still refuse to interfere. See note 73, \textit{supra}.
thirties wound the feelings of the abjured states more than their pocket-books. One seems about as likely to occur as the other.

It is not unfair for tax laws to put a premium on provincialism, but the premium must not run too high. Apart from such things as phantasomagoric privileges and immunities, and theoretical freedom from protective tariff barriers at state boundary lines, it is lacking in common sense to make a man pay a price for venturing ever so little from his own back yard. In other words, it is not possible for the Court to wash its hands completely of the multiple taxation problem. Some day, perhaps, it must determine whether the adoption of a business situs in one state, with retention of domicil in another, is sufficiently an enjoyment of double advantage to warrant double taxation. In this connection it would seem pertinent to assign some place on the scales to the consideration of how possible it is, under modern business conditions, to confine

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\(^{97}\) What was referred to by Mr. Justice Stone in his dissenting opinion in Colgate v. Harvey, 296 U. S. 404, 443 (1935), as "the almost forgotten privileges and immunities clause of the Fourteenth Amendment," was relied upon by the majority (in an opinion of Mr. Justice Sutherland) in support of its holding invalid provisions of the Vermont income tax law exempting from the tax interest on money lent within the state at a rate of interest less than five per cent, but including within the tax all interest received on loans made outside Vermont, and all interest on loans made within the state at a rate higher than five per cent. These provisions were held to be unreasonably discriminatory in violation of the equal protection clause of the Fourteenth Amendment, but the majority sought to bolster its decision on this ground by pressing into service the privileges and immunities clause of the same amendment, finding that this, too, had been offended by the provisions of the Vermont law. Justices Brandeis and Cardozo joined in the dissent of Mr. Justice Stone.

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\(^{98}\) Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin," Cardozo, J., in Baldwin Farms, Inc. v. Seelig, 294 U. S. 511, 527 (1935), where the Court held invalid provisions of the New York milk licensing law requiring retailers of milk, as a condition prerequisite to their procurement of licenses without which they were prohibited under criminal penalties from selling milk in New York, to agree to pay not less for milk purchased from producers outside New York than they would be obliged to pay producers in New York under the minimum prices established by the milk law. But compare the opinion of the same Justice (again for an unanimous Court) in Henneford v. Silas Mason Co., 300 U. S. 577 (1937), where the Court sustained a so-called "use" or "compensating" tax imposed by the State of Washington on persons purchasing goods outside the state and bringing them for consumption into the state, it being the purpose of the measure to protect the Washington sales tax imposed on purchases made within the state. For an interesting description of the extent to which such "customs barriers" have been established at state lines, recalling the situation that existed among the Colonies under the Articles of Confederation, see an article by Mr. John T. Flynn, *Shove Thy Neighbor*, Collier's Weekly, April 30, 1938.
operations to one place, and while it is quite unlikely that the Court, in resolving these problems, will ever permit itself to become involved in the task of proportioning costs to benefits to any greater, if as great, an extent as it does in the case of the fee,\textsuperscript{99} or the special assessment,\textsuperscript{100} it would seem unavoidably necessary to set some value on the retention of domicil, corporate or individual, in one state while carrying on a business in another. Perhaps the value may be found great enough to support a tax on the net income, but not enough to support taxes on the intangibles employed in the production of the income, just as the ownership of stock in a corporation is enough to give the state of corporate domicil the power to lay property taxes on the stock of non-resident shareholders,\textsuperscript{101} but not enough to support it in a levy of death taxes on the transfer of the stock.\textsuperscript{102} Some day, too, the Court may be called

\textsuperscript{99}To justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power. . . . \textit{The burden rests on appellee to show that the fee is excessive for the declared purpose . . . ,}” Stone, J., for the unanimous court in Ings v. Morf, 300 U. S. 290, 294, 296 (1937). (Italics supplied.) Compare the opinion of the same Justice (again for an unanimous Court) in Morf v. Bingham, 298 U. S. 407 (1936), where it was stated: “As the tax is not on the use of the highways but on the privilege of using them, without specific limitation as to mileage, the levy of a flat fee not shown to be unreasonable in amount, rather than of a fee based on mileage, is not a forbidden burden on interstate commerce.” (At p. 412). See also Bourjois, Inc. v. Chapman, 301 U. S. 183 (1937), where it was said by Mr. Justice Brandeis (and once more the Court was unanimous) that, “Even if it had been necessary under the rules applied in Foote & Co., Inc. v. Stanley . . . , and Great Northern Ry. Co. v. State of Washington . . . , \textit{for the State to establish that the fees here charged are not excessive}, the State must be deemed to have sustained that burden. The fact that the fee for registration is only 50 cents suggests that it may prove inadequate rather than excessive. The case was heard shortly after the statute became operative. It was obviously impossible then to determine whether the fees would prove to be in excess of the administrative requirement, and in this situation it is sufficient if it is shown that the charges are not unreasonable on their face.” At p. 187. (Italics supplied.)


\textsuperscript{101}Schuykill Trust Co. v. Pennsylvania, 302 U. S. 506 (1938), \textit{supra} note 59.

\textsuperscript{102}First National Bank of Boston v. Maine, 284 U. S. 312 (1932), \textit{supra} note 16. But the state of incorporation may lay a special excise tax on the transfer of shares of stock on the books of a corporation from one person to another. “Undoubtedly, the state of incorporation may tax the transfer of stock of a nonresident decedent, and the issue of a new certificate to take the place of the old, under the power generally to impose taxes of that character. But, plainly, such a tax is not a death duty which flows from the
upon to decide how much in the way of taxes a state may charge a trust on its income simply because it happens to be the domicil of all or some of the trustees, and whether the state of a trust's situs may levy death taxes on the transfer of an interest in the trust from one non-domiciliary beneficiary to another.

104 Power to control the succession; it is a stock transfer tax which flows from the power of the state to control and condition the operations of the corporation which it creates." Sutherland, J., in the First Nat. Bank case, supra, at p. 330. Obviously, the amount of the stock transfer tax may not be so great as to equal the entire value of the stock, which was what Maine was seeking to levy upon under the form of an inheritance tax.

105 In Hutchins v. Long, 272 Mass. 422, 172 N. E. 605, 71 A. L. R. 677 (1930), a number of testamentary trusts had been established by non-residents of Massachusetts (three different cases were decided together), all consisting of intangible property the physical location of which was not disclosed. In none of the trusts were the beneficiaries presently ascertainable, it being provided according to the terms of the trust that income accruing to the trust should be accumulated by the trustees for the benefit of unborn persons, or presently unascertained remaindermen, or persons with contingent interests. In such a situation the taxing laws of Massachusetts provided that in the event any one of the trustees was an inhabitant of the state, then the trust income would be considered to be accumulated by him for the benefit of inhabitants of Massachusetts, and would be subject to the income tax of that state. Certain of the trusts were established in New York, and the [court held the] record established the fact that these trusts had acquired a situs in New York for purposes of the New York income tax. Accordingly, it was held, with respect to the New York trusts, that, since they had acquired a taxable situs in New York, the trust income could not be taxed in Massachusetts, notwithstanding both trustees in one of the cases, and two of three trustees in the second (two cases involved New York trusts, the third involved a trust in the District of Columbia, as to which see note 115 infra) were residents of Massachusetts. "We think that it is within the competency of New York to require that the intangible personal property of one of its deceased residents, whose will has been allowed by its court acting as the court of the domicil of the decedent, in the custody of fiduciaries appointed by such court to hold and administer that intangible personal property according to the will of the deceased resident and being so held and administered by such fiduciaries with responsibility for accounting to that court, shall have and continue to have a situs for taxation within its jurisdiction. . . . That conclusion does not rest upon any general theory of official residence of the fiduciary within the jurisdiction of his appointment, but it rests upon the power of the State to establish a situs for purposes of taxation over a testamentary trust fund created by its deceased residents in intangible personal property being administered by appointees of its own court, under its own laws, and thus to continue for practical purposes within its jurisdiction all control over the trust and especially control for purposes of taxation. The conclusion rests also upon interstate comity which except in unescapable circumstances would not permit taxation in this Commonwealth of property thus within the jurisdiction of another State." Rugg, C. J., at pp. 427, 428. (Italics supplied.) Compare the views of the same Justice in Maguire v. Tax Commission, supra note 4.

106 An original proceeding has recently been instituted in the United States Supreme Court whereby the Commonwealth of Massachusetts seeks to secure a final determination of this matter in connection with the following situation: On July 12, 1935, Madge Barney Blake died domiciled in Massachusetts leaving a gross estate somewhat in excess of $1,800,000 consisting principally of intangibles held in trust in St. Louis, Missouri, by
It seems premature to evaluate the new approach. Indeed, it is to
the St. Louis Union Trust Company as trustee. There were three deeds of trust, executed
at different times, by the terms of which property was transferred by the decedent to the
Trust Company to hold in trust, with a life interest in the income accruing to the trust
reserved in the settlor, and various remainders over. In two of the trusts the settlor ex-
pressly reserved sole powers of revocation; the third was irrevocable. The decedent left
a will which was probated in Massachusetts, with letters testamentary issuing to the
Boston Safe Deposit and Trust Company, a corporation of Massachusetts. The value of
the assets comprising the estate of the decedent held for administration in Massachusetts
aggregated a gross of $12,646.02. A federal estate tax of $53,753 was paid by the executor
and trustees; additional federal estate taxes totalling $15,274.56, claimed owing by the
Commissioner of Internal Revenue, were in the process of litigation before the Board of
Tax Appeals. Inheritance taxes totalling $137,000 were claimed by Massachusetts on
the value of the three trusts, it being asserted that the settlor's reservation of a life
interest in all three trusts and a reservation of a power of revocation in two, ren-
dered the trust property subject to death taxation as gifts intended to take effect
in possession or enjoyment at or after the death of the settlor. Omitting the value
of the trust in which only a life interest was reserved, the Massachusetts claim
was reduced to $127,000. Similar claims were asserted to be forthcoming from Missouri,
its jurisdiction based on the fact that it was the state of the trust's situs, there being
(apparently) no dispute that the settlor's domicile at the time of her death was in Massa-
echusetts. The Missouri tax totalled $182,349.69 when levied upon all three trusts; when
levied only upon the two trusts in which there was retained a power of revocation as
well as a life interest in the settlor, the tax was computed at $168,151.93. (The Inheritance
Tax Law of Missouri was laid on gifts intended to take effect in possession or enjoyment
at or after death; further provisions, corresponding to those of the present federal law,
expressly declared taxable any transfer whereby the transferor retained a life interest in
the income from the trust property.) A preliminary issue raised in the petition of Massa-
echusetts concerned the constitutionality of any tax upon the irrevocable trust wherein the
settlor retained only a life interest in the income derived from the corpus. This question
was recently determined by the Supreme Court in connection with the Federal Estate Tax.
In May v. Heiner, 281 U. S. 238 (1930), it was held that a transfer in trust irrevocably
with the reservation of a life interest in the settlor was not taxable under general taxing
provisions referring to gifts in contemplation of death, or gifts intended to take effect in
possession or enjoyment at or after death. By the Joint Resolution of March 3, 1931,
the federal estate taxing law was amended expressly to provide for a tax on "a transfer
under which the transferor has retained for his life or any period not ending before his
death (1) the possession or enjoyment of, or the income from the property. . . ."
46
297 (1938), the application of these provisions to a transfer made after the passage of
the Joint Resolution was sustained by the Court. Mr. Justice Roberts delivered the opinion
of the unanimous Court, and said in part: "The legislative history of the Joint Resolution
. . . demonstrates that the purpose of the legislation was to prevent avoidance of estate
taxes. . . . As applied to a trust created after its enactment the Joint Resolution does
not violate the Fifth Amendment." At pp. 301-302. Decided the same day was Hassett
v. Welch, 303 U. S. 303 (1938), wherein the Court held the legislative history of the
Joint Resolution disclosed an intention on the part of Congress that its provisions should
be applied only to transfers prospectively made, and accordingly denied the validity of
the tax as applied to a transfer made prior to the passage of the Resolution. The perti-
nency of these decisions to the matter of the taxes sought to be laid by Massachusetts
be guilty of the very rashness previously foresworn to say that the form
and Missouri in the principal case is not altogether clear. In the case of the Missouri
tax it will be observed that the Missouri laws carry provisions much like those of the
Joint Resolution of 1931, but it does not appear whether the provisions are to be applied
retroactively as well as prospectively. The recent decision of the Court in Welch v. Henry,
59 Sup. Ct. 121 (1938), sustaining an unusually severe retroactive application of the
Wisconsin income taxing laws, may lend some support to a retroactive application of the
Missouri statute if there is found an intent on the part of the Missouri legislature that
such an application should be given. To the Massachusetts tax, resting as it does on the
general provisions of its taxing laws relating to transfers intended to take effect in pos-
session or enjoyment at or after death, the decision in May v. Heiner would seem a serious
obstacle. Nevertheless three years after that case was decided the Court sustained the
validity of a succession tax laid by the state of Connecticut on the value of a transfer
wherein the decedent had retained a life interest, although the only basis for the tax in
the Connecticut statute was to be found in provisions taxing transfers intended to take
effect in possession or enjoyment at or after death. These provisions had been construed
by the Supreme Court of Connecticut as properly to include the transfer of an interest
with the reservation of a life interest and this construction was held binding on the United
States Supreme Court. Guaranty Trust Co. v. Blodgett, 287 U. S. 509 (1933). There
was no question of retroactivity in the case, distinguishing it from the decision of the
Court in Coolidge v. Long, 282 U. S. 582 (1931), where the Court held invalid an attempt
to apply provisions of the Massachusetts law very similar to those of the Connecticut
statute to a transfer made prior to the passage of the law. If the integrity of the Coolidge
decision (Justices Roberts, Holmes, Brandeis and Stone dissented) remains unimpaired
by the more recent decisions of the Court on the problem of retroactivity (with Welch v.
Henry, supra, compare Binney v. Long, 299 U. S. 280 (1936), involving a retroactive
death tax), the net result would seem to be that a tax on a transfer of property in trust
with a reservation of a life interest in the settlor would be sustained (even under general
provisions taxing gifts intended to take effect in possession or enjoyment at or after death,
if these provisions are construed by the state courts to include such transfers, as they
were by the Massachusetts court in Coolidge v. Long, and by the Connecticut court in the
Blodgett case) provided the transfer was made after the passage of the taxing act. In
the principal case each of the three trusts was established subsequent to the passage of
the taxing law of Massachusetts, and the validity of the tax on this point seems assured.
Next there is the question whether the state of the settlor's domicil may tax the testa-
mentary transfer (assuming, as seems valid here, that the transfer was really testamentary)
in a situation where the property transferred has acquired a situs for tax purposes in
another jurisdiction. It seems difficult to deny Missouri, the state of the trust's situs,
the power to tax in view of the protection it affords, and the fact that it is under its
laws that the trust is held and administered. While Massachusetts, in its petition, claims
the exclusive power of taxation, the case seems one where two states may properly
be held to have valid claims, so that the admission of the validity of the one ought not
to preclude the sustaining of the other. Nevertheless Massachusetts is faced with the
decision of its own Supreme Judicial Court in Maguire v. Tax Commission, 230 Mass. 503,
120 N. E. 162 (1918), supra note 4, frowning down taxes by Massachusetts on income
received by a resident beneficiary from property held in trust in another state and taxed
there (the actual holding in the case, however, concerned itself with the determination of
the proper construction of the taxing statute, rather than any outright holding on the
power of the legislature). Further embarrassment may be experienced by Massachusetts
because of the strong language of its own court in Hutchins v. Long, 272 Mass. 422, 172
of any new approach is yet clearly discernible, however dimly the outline

N. E. 605 (1930), supra note 103 (see also note 115, infra), supporting the power of the trust's situs to levy income taxes. In evaluating the claims of Missouri and Massachusetts it is important to note that while First National Bank of Boston v. Maine, 284 U. S. 312 (1932), held that, generally, intangibles are subject to death taxation exclusively at the domicile of the owner, the Court was careful to reserve decision on a question like the one here: "We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. . . . That question heretofore has been reserved, and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration," Sutherland, J., at p. 331. (Italics supplied.) In its petition Massachusetts now seeks to present the question to the Court for the consideration thus withheld. To the fact that, technically, Massachusetts is not the domicile of the owner of legal title to the property, whereas Missouri is, add the consideration of the importance played by the laws of Missouri in effectuating the transfer brought about by the death of the settlor, and the attempt of Massachusetts to claim exclusive jurisdiction to levy death taxes appears of doubtful merit.

Moreover, in view of present trends on the Court in matters of double taxation, there is no compelling reason why Massachusetts should deny the power of Missouri in order to sustain the validity of its own. Both states confer substantial benefits; both states may therefore be found to have power to tax. Narrowing the case down by the elimination of (1) the question of the existence of a sufficient testamentary transfer to support a death tax in the case of the irrevocable trust with reservation of a life interest in the settlor (so far as no aspect of retroactivity appears this question demands an affirmative answer), and (2) the issue of double taxation (which Guaranty Trust Co. v. Ryan, and the present attitude of the Court toward such matters generally, seems to resolve in favor of the power of both states), there remains (3) the perplexing problem of collecting the presumably valid tax levied by Massachusetts.

In its petition Massachusetts alleged facts showing that there were no sufficient assets in Massachusetts out of which the tax liability might be satisfied. Moreover there appeared to be no person or corporation in the State upon whom service might be secured to sustain an action in the courts of Massachusetts reducing the tax claim to judgment. The corporate executor appointed in Massachusetts was unavailable for the purpose because "the Statute of the Commonwealth purports to levy and assess succession taxes upon the trustees with respect to the trust property and not upon the executors." Bill of Complaint of Commonwealth of Massachusetts, pp. 13-14. That such service is necessary is well established. Compare Dewey v. Des Moines, 173 U. S. 193 (1899), with Nickey v. Mississippi, 292 U. S. 393 (1934). That the dilemma of Massachusetts would be solved were it possible to reduce the tax claim to a valid judgment on which an action in debt could be brought in the Federal court in Missouri so as to render available against the trust assets in Missouri the processes of execution, is demonstrated by the decision of the Court in Milwaukee County v. M. E. White Co., 296 U. S. 268 (1935), holding that a judgment for a tax claim of one state is entitled to full faith and credit when sued upon in courts sitting in another state. "Assuming, of course, that the taxing state had jurisdiction of the taxpayer and was, therefore, in a position to recover a judgment in personam, it would seem to follow that if recovery could be had on that basis by such claiming state, then there would be no controversy between the states which would enable the Supreme Court to take jurisdiction of an original bill." Third Report of the Committee of the National Tax Association on Double Domicile in Inheritance Taxation (1937), p. 6. The fact that Massachusetts is unable to acquire this requisite in personam jurisdiction to sup-
of the old has faded. But, soon or late, the mugwump finds fence-strad-
port an action in its own courts does not, in itself, seem a quite sufficient basis for an
original suit against Missouri. There appears nothing in the petition of Massachusetts to
explain the unwillingness of that State to attempt litigation in some court within Missouri
where personal jurisdiction over the trustees could be acquired. That such a suit might
be rejected by the court in Missouri, as the New York Court of Appeals rejected the
similar suit of Colorado in State of Colorado v. Harbeck, 232 N. Y. 71, 133 N. E. 357
(1921), is a possibility the mere existence of which affords no persuasive justification for
failure to make the attempt. Moreover there is much in the opinion of the Court in the
White case to indicate that the power of the courts of one state summarily to reject such
a suit when brought by another state is doubtful. "Whether one state must enforce the
revenue laws of another remains an open question in this Court. See Moore v. Mitchell,
281 U. S. 18, 24," Stone, J., in Milwaukee County v. M. E. White, supra, at 275. And
again, "The objection that the courts in one state will not entertain a suit to recover taxes
due to another or upon a judgment for such taxes, is not rightly addressed to any want
of judicial power in courts which are authorized to entertain civil suits at law. It goes
not to the jurisdiction but to the merits, and raises a question which district courts are
competent to decide. . . . That defense is without merit if full faith and credit must be
given the judgment. But even if full faith and credit is not commanded there is nothing
in the Constitution and laws of the United States which requires a court of a state to
deny relief upon a judgment because it is for taxes. A state court, in conformity to state
policy, may, by comity, give a remedy which the full faith and credit clause does not
compel. . . . A suit to recover taxes due under the statutes of another state has been
allowed without regard to the compulsion of the full faith and credit clause. . . . The
privilege may be extended by statute. See N. Y. Laws 1932, chap. 333. Where suits to
enforce the laws of one state are entertained in the courts of another on the principle of
comity, the federal district courts sitting in that state may entertain them and should if
they do not infringe federal law or policy." Id. at 272. (Italics supplied.) The possi-
bility that a suit by Massachusetts might be received by a court in Missouri in the spirit
of comity and reciprocity encouraged by this emphatic hint from the Supreme Court might
well be tested before the original jurisdiction of the Supreme Court is invoked in a suit
brought by one state against a sister state which is very doubtfully in adversary interest
against the claim asserted. This, as is obvious from the facts showing that there were more
than ample assets in the estate to meet the payment of taxes claimed by both Massachu-
setts and Missouri (after the claim of the Federal Government has been satisfied), is not
like the Green case. (See note 109, infra.) Even there Massachusetts questioned the exist-
ence of a controversy between several states, when it was sought to be drawn in by
Texas on a much stronger showing of facts. (See note 109, infra.) If the claim by Texas
that on the facts of the Green case there was established a suit between states within the
original jurisdiction of the Supreme Court could have been regarded as in any respect of
doubtful merit, the basis of the present suit sought to be brought by Massachusetts against
Missouri seems far more feeble.

The petition discussed above is entitled Commonwealth of Massachusetts v. State of
Missouri et al. (The trustees of the Missouri trusts are the other parties named with
Missouri as defendants.) The petition takes the form of a motion for leave to file a bill
of complaint, and is accompanied by the bill of complaint. On November 7, 1938, the
Court issued a rule ordering Missouri et al. to show cause why the leave requested should
The rule was made returnable on December 12, 1938, but an extension was granted post-
poning the return to January 11, 1939.
dling too chafing to endure. The strongest criticism of the decisions restricting death taxation of intangibles to one state came from the debtor states which thought they were unfairly discriminated against in favor of the creditor states.\textsuperscript{105} The so-called new approach does not eliminate the necessity of some discrimination between the states, but it does reduce it to a minimum. Complete non-partisanship being impossible under the Constitution, the jungle law that existed under the Articles of Confederation is hardly to be preferred. The weakness in the old approach lay in the failure to recognize that all cases of double taxation could not be subjected to one rule. Assuming that the essence of due process is common sense fairness, and that some cases of double taxation lack such fairness, it fell into the not uncommon error of leaping too quickly from the particular to the general. As the saying goes, dogma was substituted for decision until it was discovered that such absolutism would not work.

Double taxation is not essentially unfair. If Mrs. Cohn desires a New York residence, and at the same time wishes to hold investments in New Jersey real estate,\textsuperscript{106} it would seem not unfair to tax her doubly for hers is double privilege. If Thomas Fortune Ryan preferred New York trustees, or New York trust law, to those and that of Virginia, while Mrs. Ryan preferred attachment to her Virginia residence,\textsuperscript{107} it

\textsuperscript{106}{In the United States the accumulation of wealth in certain areas has led to what may be called debtor and creditor states, that is, states in which there are a surplus of creditors. Roughly speaking, the older Eastern states are creditor states; the newer, developing Western states are debtor states. The bearing on jurisdiction to tax is that a decision defining the creditor's domicil as the uniform base for the taxation of debts necessarily involves a discrimination in favor of the creditor states at the expense of the debtor states. The elimination of multiple taxation in this connection involves ultimately a balance of undesirables; either the taxpayer must be harassed by paying two taxes on the same legal interest, or a bounty must be conferred on one class of states to the detriment of another. There is no clause in the Federal Constitution explicitly enjoining equal protection of states, but some such admonition seems fairly inferable from the Supreme Court's position as the umpire of the federated system. However much the Court may desire to aid the harassed taxpayer, it seems doubtful whether it should do so at the expense of discrimination between the states themselves." Lowndes, \textit{Jurisdiction To Tax Debts} (1931) 19 \textit{Georgetown Law Journal} 427, 436-7.}

\textsuperscript{107}{New York \textit{ex rel.} Cohn v. Graves, 300 U. S. 308 (1937), \textit{supra} note 29 and accompanying text.}

\textsuperscript{108}{Guaranty Trust Co. v. Virginia, 59 Sup. Ct. 1 (1938). It will be noted that throughout this discussion the terms "domicil" and "residence" are used interchangeably. While there are well recognized distinctions between the two, most taxing statutes fail to make plain an intention to use either of the two terms in the technical sense that will distinguish it from the other. And sometimes the taxing law speaks of "inhabitants." (See Mass. Gen. Laws, (1932) c. 62, § 10.) This necessitates construction of the statutory language, and may raise questions of significance. Residence apart from domicil was held to be a
was not unfair that such preferences should have had their higher price. Instead of half that sum, Dr. Dorrance paid thirty million dollars to leave his Campbell Soup fortune to his family when he died, because he wanted to maintain his old home in New Jersey while yet satisfying his wife's desires for a more fashionable home in a Philadelphia suburb. And the only reason the estate of the late Colonel Green is (presumably) to escape a like fate, paradoxically enough seems to be

sufficient basis for the federal income tax in Bowring v. Bowers, 24 F. (2d) 918 (C. C. A. 2d, 1928), where the taxpayer, who for many years had lived and worked in New York, claimed the country of his citizenship (Great Britain) as his domicil. (While the term "resident" as used in the federal income tax laws was here given a construction distinguishing it from technical domicil, the same term, as used in the federal estate tax law, is construed as being the equivalent of domicil. "A resident is one who, at the time of his death, had his domicile in the United States..." U. S. Treas. Reg. 80, Art. 5, pertaining to the Federal Estate Tax. And the same is true of the Federal Gift Tax: "A resident is one who has his domicile in the United States... at the time of the gift." U. S. Treas. Reg. 79, Art. 4.) Possibilities of double taxation, where the term "residence" is construed in its technical sense as something distinguishable from "domicil", are obvious. Thus, while in theory at least a man may have but one domicil (though in exceptional cases litigation of conflicting claims in several states may result in one person having assigned to him domicils in two different places, as in the Dorrance case, supra note 73), instances are not infrequent where a person has, say, a "winter residence" in one state, and a "summer residence" in another. May each jurisdiction levy income taxes against such an individual? The question has been litigated in Massachusetts where, in Levy v. Long, 245 Mass. 174, 139 N. E. 496 (1923), a person resident in Massachusetts at the end of the year was held taxable on income received by him outside the state earlier in the year before he had acquired his Massachusetts residence. But in Kennedy v. Commissioner, 256 Mass. 426, 152 N. E. 747 (1926), it was held that to construe the taxing statutes in such a way as to make possible recurrence of the result in the Levy case would raise constitutional difficulties, and accordingly the statute was construed to exclude income received prior to the establishment of the Massachusetts residence. Cf. Lowndes, State Jurisdiction to Tax Income (1932) 6 Temple L. Q. 486, 494: "One thing is certain. It is desirable definitely to fix either domicile or residence as the uniform base for levying the tax. Residence leaves less leeway for tax evasion by acquiring a technical domicile in a jurisdiction where taxes are low or there is no income tax, although it is not the center of the taxpayer's activities. A man may have a number of residences, however, but only one domicile, so domicile, perhaps, is a more equitable though less realistic basis for the tax."

In finding that the domicile of Dr. Dorrance at the time of his death was in Pennsylvania, and sustaining thereupon the inheritance tax levied by that state, the Supreme Court of Pennsylvania attached strong significance to evidence in the record indicating that the insistence of Dr. Dorrance that his real home (i.e., domicile) remained in New Jersey notwithstanding the removal of his family to a million dollar estate in Pennsylvania, appeared to have been motivated (at least in part) by the decedent's desire to escape the personal property taxes levied annually by Pennsylvania on residents of that state. (The decedent's one hundred per cent interest in the stock of the Campbell Soup Company was exempt from taxation in New Jersey.) In re Dorrance's Estate, 309 Pa. 151, 162, 163 Atl. 303, 306 (1932). See note 73, supra.
because his nomadic tendencies far surpassed those of Dr. Dorrance, while his purse was not so fat.\textsuperscript{109}

Are, then, the states to have the play of the entire field of income taxation with no limit but the horizon? That it is the field of greenest pastures is a fact of which the states, though slower than the federal

\textsuperscript{109}In Texas v. Florida \textit{et al.}, 300 U. S. 643 (1937), each of four states (Florida, Massachusetts, New York and Texas) claimed to be the domicile of Edward H. R. Green at the time of his death, and as such to have the exclusive jurisdiction to levy death taxes on his net estate of $42,000,000 (consisting chiefly of intangibles). To the request of Texas that it accept the controversy and determine the issue of domicile the United States Supreme Court was indifferent until it was made to appear that, should the question be left to the determination of the courts of the four states involved, it was far from an impossible eventuality that four domicils might be found to have existed, resulting in the sustaining of death taxes in each of the four states, the total of which, when added to the $20,800,000 federal tax, would far exceed the $42,000,000 subjected to the taxes. When these facts were made to appear in the bill filed by Texas, and the possibility demonstrated of a genuine conflict among the states in their efforts to establish priority of claims, the Supreme Court agreed to accept the dispute. The insistence by the Court that these facts be shown before it would interfere indicates an attempt on the Court's part to protect itself against a flood of double domicile controversies like the \textit{Dorrance case} (where, after paying death taxes to the Federal Government and the states of Pennsylvania and New Jersey, totalling in excess of $37,000,000, more than $78,000,000 still remained in the estate). "Another question which has not yet been settled in the Green case, and may not be finally settled in that case, is the extent of the jurisdiction of the Supreme Court in such a double domicile case. From colloquies between Court and counsel at the preliminary argument in the Supreme Court, which resulted in the filing of an amended bill of complaint by the State of Texas, it appeared that one factor—or possibly the only factor—which induced the Supreme Court to take jurisdiction was the fact that the death tax claims of the four states exceeded the total estate, so that as to the excess there was a real conflict between the states. If this is the extent of the jurisdiction, the method of proceeding by an original bill in the Supreme Court is very limited because it will seldom occur that the tax claims of the states will exceed the total estate; and, if so, this method of procedure will not be available in most cases of double domicile. \ldots" \textit{Third Report of the Committee of the National Tax Association on Double Domicile in Inheritance Taxation} (1937) pp. 5-6.

The Report of the Special Master (Mr. John S. Flannery, of Washington, D. C.), appointed by the Supreme Court to take evidence in the case (Texas v. Florida, 301 U. S. 671 (1937)), which was made on November 5, 1938, presents a most interesting picture of one who might well be called a man without a domicile. The travels of Gulliver himself pale in comparison with the peregrinations of the picturesque Colonel Green. With a $7,000,000 estate in Massachusetts, a $1,500,000 winter home in Florida, and an apartment in New York at an annual rental of $27,000, Green during his lifetime maintained that his domicile was in Terrell, Texas, where his claim of residence was for some time based on the slender support of a room rented by a friend at a rental of five dollars a month. Green never occupied this "residence," but sought to demonstrate the attachment he felt for it by sending his landlady a vest and a pair of pants belonging to him with the expressed desire that they be kept in the room. At the time of his death even this avowed hearthstone had been abandoned. As in the case of Dr. Dorrance, Green's stated choice of domicile was largely colored by the comparative attractiveness of the taxing laws of
government in their appreciation, now seem fully aware.\textsuperscript{110} Obviously the favored jurisdiction. Double, or even multiple, taxation in such a case as that presented by the detailed evidence of the Special Master's Report would appear to be only the natural and fair consequence of the decedent's own contrivance. Nevertheless the Master's recommendation for a decree was that on all the circumstances of the case the claim of Massachusetts as the state of the decedent's domicil was the best founded of the four. It is interesting as a bit of mild irony that the state thus favored by the Master's recommendation was the only state of the four to deny the existence of a controversy within the original jurisdiction of the Supreme Court. "This respondent denies the allegations . . . that the case purported to be set forth in said bill (that is, the complaint of Texas) is of a civil nature between two or more sister States and between a State and citizens of another State, and that it is within the original jurisdiction of this Court." Answer of the Commonwealth of Massachusetts, at pp. 1-2. (Parenthetical note supplied.) However, Massachusetts did not stand upon this objection, but submitted itself to the jurisdiction of the Court, praying that "this Honorable Court may determine, declare and adjudge that the said Edward H. R. Green, for the purposes of transfer, legacy and succession or inheritance and estate taxes, was domiciled at the time of his death within the Commonwealth of Massachusetts, and not within the State of Texas, the State of Florida, or the State of New York, and further may determine, declare and adjudge that the Commonwealth of Massachusetts, and it alone, has exclusive right and jurisdiction to impose and collect such taxes upon the intangible personal property owned by said decedent at the time of his death. And the respondent further prays for all other, further, different and additional relief as this Honorable Court may deem expedient, and offers to do all equity as this Honorable Court shall require." \textit{Id.}, at 14-15.

\textsuperscript{110}Income taxation by the states on any important scale is a very recent phenomenon. While it may be, as noted by counsel for the Commonwealth in Guaranty Trust Co. \textit{v.} Virginia, 59 Sup. Ct. 1 (1938), (\textit{supra} note 33, and accompanying text), that "evidences of an income tax (in Virginia) are found as early as the Revolutionary period," (evidences in Massachusetts are to be found as early as 1634), and "Since 1869 the tax has been imposed on the entire net income (above the personal exemption) of its residents from all sources," (Brief on behalf of the Commonwealth of Virginia, at p. 7n.), the fact remains that in 1914 a personal income tax was imposed by but two states (Virginia being joined by Wisconsin in 1911). "The number of states imposing the personal income tax effectively grew from two in 1914 to eight or nine at the end of 1920." \textit{Facing the Tax Problem} (1937) \textsc{Twentieth Century Fund} 34. "The income tax spread rapidly among the states during the depression. At the end of 1929, only fourteen were imposing personal income taxes; on January 1, 1937, the number was twenty-nine. Neither figure includes the restricted income taxes of New Hampshire, Ohio, and Tennessee (in these three states the personal income tax is restricted to income from intangibles only). Corporate income taxes were on the books of sixteen states in 1929 and thirty on January 1, 1937." \textit{Id.}, at 45. (Parenthetical note added.) During the Civil War period the Federal Government levied income taxes under a series of Acts of Congress commencing in 1861, and progressing through Acts, or amendments of prior Acts, in 1862, 1863, 1864, 1867, and 1870, which last Act by its own terms expired in 1872. See \textit{Magill, Taxable Income} (1936) 293 \textit{et seq.} The income tax was again employed by Congress in 1894, but that measure was short-lived, being invalidated in 1895 by the decision of the Court in \textit{Pollock v. Farmers' Loan and Trust Co.}, \textit{supra} note 76. Then came the disguised income tax levied on corporations only by the Act of 1909 (see \textit{Flint v. Stone Tracy}, \textit{supra} note 27), and finally, on February 25, 1913, the ratification of the Sixteenth Amendment was completed upon which Congress passed the Income Taxing Act of 1913, 38 STAT. 114 (1913),
the exaction of tribute as a return for "protection" may assume the proportions of a racket. It requires no unusual fertility of the imagination to conjure up some pretty awful possibilities. The income of the trust in the Guaranty Trust Company case was derived from interest on bonds and dividends from corporations. Assume that one of these, the XYZ corporation, is engaged in a business like that of the corporation in the First Bank Stock Company case, and that it pays its dividends out of a special fund fed by interest and dividends which it receives on stocks and bonds held by it in other corporations. It may be called upon to pay taxes on these stockholdings to (1) the state of its own incorporation,\(^{111}\) (2) the state where it has acquired a business situs,\(^{112}\) (3) the states where the corporations in which it holds stock are incorporated.\(^{113}\) What is left of the special fund after these tax liabilities are satisfied is passed on to the trust as one of the XYZ corporation's own stockholders. There, to make the case incredibly fantastic, let it be supposed that, unlike the situation in the Guaranty Trust Company case, the trustees are domiciled in states other than the place of the trust's administration, specifically New Jersey and Connecticut (the trust being administered in New York). Exercising their discretionary powers, the trustees determine to distribute the income to the Virginia beneficiary. Taxes on the trust income are sought (1) by New York on the seat of administration theory (a variation of business situs),\(^{114}\) (2) New Jersey and Connecticut, each on one-half, since each is the domicile of but one of the two holders of legal title,\(^{115}\) (3) by Virginia, 

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43 U. S. C. § 152 (1934) (effective from March 1, 1913). Since 1913 there has been a succession of Revenue Acts keeping constantly in force a federal income tax with rate schedules steadily on the upgrade.


\(^{112}\) First Bank Stock Corporation v. Minnesota, 301 U. S. 234 (1937), supra note 58.


\(^{115}\) Ibid. In one of the cases decided in conjunction with the Hutchins case the testator died a resident of the District of Columbia. There were three trustees, all deriving their appointments from the court of the District of Columbia, one of whom was a resident of California, the second of New York, and the third of Massachusetts. The trust was being administered by the District of Columbia court under the appropriate District laws, and here, as in the other cases, the trust income was being accumulated by the trustees for presently unascertained beneficiaries. It was sought by Massachusetts to tax the entire trust income to the trustee who was a Massachusetts resident. The Court distinguished the New York trusts involved in the Hutchins case from the District of Columbia trust, holding that while the former had acquired a taxable situs in New York (and hence could not be taxed in Massachusetts), no showing had been made that the same was true of the District of Columbia trust. (The grounds upon which the Court based this distinc-
as the domicil of the beneficiary.\textsuperscript{116} Fairly plausible arguments, based on the protection theory, can be made for all the taxes paid by the corporation directly, and all the taxes on the trust income as well, excepting, perhaps, the taxes of New Jersey and Connecticut on the trustees.\textsuperscript{117}

Like comic strips, such phantasies are entertainingly pointless. They

\textsuperscript{116} Guaranity Trust Co. v. Virginia, 59 Sup. Ct. 1 (1938), supra note 33, and accompanying text.

\textsuperscript{117} Hutchins v. Long, 272 Mass. 422, 172 N. E. 605 (1930), as considered in note 103, supra.
presume an inflexibility of application possible with few principles of constitutional law that may be called sound. As with questions of interstate commerce, due process is largely a question of degree, and it is not improbable that the Court's rejection of the rigid yardstick of precedent as the sole determinant of the limits of federal jurisdiction in matters of commerce, and of the scope of the police powers of the states in such matters as minimum wage legislation, will find counterpart in some new solution of the problem of multiple taxation. The probability grows stronger as Mr. Justice Stone is allowed to assume the lead in working out a solution, for he has consistently recognized

118 The theory of interstate commerce that viewed certain activities (such as mining, farming, manufacturing, etc.) as per se local and so beyond the power and control of the Federal Government for all purposes prevailed as majority law for the last time (apparently) in Carter v. Carter Coal Co., 298 U. S. 238 (1936). Now cases presenting matters of interstate commerce are governed by more elastic standards whereby the effect of the activity, rather than its intrinsic nature, is the important consideration (being treated altogether as a question of degree), together with the concept that the nature of the regulation sought to be effected must be regarded as a most important determinant of the power of the federal government, Congress having authority, perhaps, to take certain measures with respect to particular activities while yet lacking plenary power for all purposes. National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1 (1937); Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453 (1938), wherein Schechter Poultry Corporation v. United States, 295 U. S. 495 (1935), is cited with approval in support of the following statement by the Chief Justice: "The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several states. The expansion of enterprise has vastly increased the interests of interstate commerce, but the constitutional differentiation still obtains." At p. 466; Consolidated Edison Co. v. National Labor Relations Board, 59 Sup. Ct. 206 (1938), in which the Chief Justice reiterates the viewpoint of the Jones & Laughlin and Santa Cruz cases: "In determining the constitutional bounds of the authority conferred, we have applied the well-settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion. . . . And whether or not particular action in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise."

119 The constitutional provision invoked is the due process clause of the Fourteenth Amendment . . . the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrovertible liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." Hughes, C. J., in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 391 (1937), over-ruling Adkins v. Children's Hospital, 261 U. S. 525 (1923).
that the employment of the protection theory as a justificant of jurisdiction to tax must, if the doctrine is to have a sound development, be treated as a purely relative proposition. In *Farmers' Loan and Trust Company v. Minnesota* he recognized that Minnesota, as the state of the debtor's domicil, afforded some protection to the debt interest, but not enough, he thought, to warrant the price of inheritance tax that Minnesota desired to charge. In *Lawrence v. State Tax Commission*, with-

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120 See the quotation from his concurring opinion in note 67, *supra*. Are the views there expressed altogether consistent with the views of his dissenting opinion in *First National Bank of Boston v. Maine*? By his concurrence in the *Farmers' Loan and Trust Co. case*, Mr. Justice Stone agreed with the majority that Minnesota lacked jurisdiction to levy death taxes on the value of debts owned by a non-resident, but on the ground that the protection afforded by Minnesota, as the state of the debtor's domicil (the debts consisted of bonds and certificates of indebtedness issued by the State of Minnesota, and the cities of St. Paul and Minneapolis), was too "attenuated" a basis to support the exaction of death taxes. *Farmers' Loan and Trust Co. v. Minnesota*, 280 U. S. 204, 215 (1930). His dissent in the *First National Bank case* indicates the view that when the state of a private corporation's organization seeks to levy death taxes on the value of stock owned by a non-resident decedent the basis becomes less attenuated, becomes, indeed, substantial enough to support the tax. "But, as the stockholder could secure complete protection and effect a complete transfer of his interest only by invoking the laws of both states, I am aware of no principle of constitutional interpretation which would enable us to say that taxation by both states, reaching the same economic interest with respect to which he has sought and secured the benefits of the laws of both, is so arbitrary or oppressive as to merit condemnation as a denial of due process of law." *First Nat. Bank of Boston v. Maine*, 284 U. S. 312, 333 (1932). Where lies the difference between the case of a state wherein are organized public corporations, (like St. Paul and Minnesota in the *Farmers' Loan and Trust Co. case*), which have issued bonds and certificates of indebtedness held by a non-resident decedent, and the case of a state wherein is organized a private corporation, (as in *First Nat. Bank of Boston v. Maine*), which has issued stock owned by a non-resident decedent? Apart from the difference already noted, between the natures of the corporations, whereby the transfer of stock of the private corporation requires a transfer on the books of the corporation as governed by the law of the state of incorporation, whereas the transfer of the bonds and certificates of indebtedness of the state and its municipal corporations required no such detail of bookkeeping, there would appear to be none. Is it this detail, then, that renders that which was attenuated in the one case sufficiently substantial in the other? See note 102, *supra*. Justices Holmes and Brandeis thought the basis sufficient in both cases. "The right to tax exists in this case because the party needs the help of Minnesota to acquire a right, and that state can demand a quid pro quo in return. Holmes, J., dissenting (Brandeis, J., concurring) in *Farmers' Loan and Trust Co. v. Minnesota*, *supra* at 218. Nevertheless it seems possible to conclude that even in the *First Nat. Bank case*, as in *Farmers' Loan and Trust Co. v. Minnesota*, Mr. Justice Stone regarded the questions as altogether one of degree. This is indicated by the following statement from his dissenting opinion in the former case: "Affirmance of this judgment involves no declaration that the tax may be imposed by three or more states instead of two, and, under the decisions of this Court, there is no ground for supposing that it could be, *See Rhode Island Trust Co. v. Doughton*, 270 U. S. 69." *First Nat. Bank of Boston v. Maine*, *supra* at 334. In other words, while the state
out denying the merits of the claim of Tennessee, as the state of the income's source, he thought Mississippi, as the state of the income-owner's domicile, rendered services compensating for the tax it exacted.\textsuperscript{121} The possibility that more than one state may have meritorious claims was again recognized by him in \textit{New York ex rel. Cohn v. Graves}.\textsuperscript{122} And holding the protection afforded by the state of business situs important enough to support an exercise of the taxing power (in \textit{Joint Stock Bank Corporation v. Minnesota}), he carefully reserved the measuring of other states' claims for another time.\textsuperscript{123}

In conclusion, what the Court seems to propose is not abandonment of the problem but adoption of a different plan of attack. The new approach holds little promise of proving administratively simpler than the old. The simplest rule to apply would have been what the Court appeared to be seeking a decade ago—a blanket prohibition against double taxation among the states. But the price of simplicity is sacrifice of all equity, and here it proved to be too high. Fairer and more flexible is the new approach in that it recognizes different qualities of double taxation, some to be allowed, and others banned. The double taxation that is to be permitted may be met in other ways—self-help by the individual through restriction of his multi-state activities, unless willing to pay the higher but reasonable price for wider privilege, and, what is most important, by reciprocity between the states.\textsuperscript{124} Thus much of

of the stockholder's domicile and the state of the corporation's domicile might both have sufficient bases of jurisdiction in the protection afforded the stockholder and the stockholder's interests, it would not follow that other states, such, for example, as those in which the corporation held tangible property, could demonstrate similarly sufficient bases. Theirs would appear as attenuated as that of Minnesota in the \textit{Farmers' Loan and Trust Co. case}.\textsuperscript{125}

\textsuperscript{121} 286 U. S. 276 (1932), supra note 40.

\textsuperscript{122} 300 U. S. 308 (1937), supra note 29, and accompanying text.

\textsuperscript{123} 301 U. S. 234 (1937), supra note 58. The measuring of the claims of one other state, viz., the state of organization of the corporation whose stock is held by the owner at his domicile in another state, came in Schuylkill Trust Co. v. Pennsylvania, 302 U. S. 506 (1938), supra note 59.

\textsuperscript{124} A step in the direction of this reciprocity was recently taken by New York in adopting an amendment to the State Constitution, which is of exceptional interest in connection with the result reached in the \textit{Guaranty Trust Co. case}. The amendment (section three of Article XVI, made a part of the first, or so-called "omnibus" amendment, which, out of the nine amendments submitted to the voters of New York on November 8, 1938, was one of the six to be adopted) provides as follows: "§ 3. Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and, if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, \textit{provided that if no other state has jurisdiction to subject such property held in trust to death
the headache is returned to where it belongs.125
taxation, it may be deemed property having a taxable situs within this state for purposes
of death taxation. . . .” (Italics supplied.) Compare the provisions of the Massachusetts
law, taxing Massachusetts trustees on income accruing to the trust, excepting “Such part
of the income received by trustees or other fiduciaries as is payable to or accumulated
And with the sympathy for reciprocity evidenced by such constitutional and statutory
provisions, compare the no less emphatic willingness of the Massachusetts courts to attempt
the achievement of the same end, as demonstrated in Maguire v. Tax Commission, 230
Mass. 503, 120 N. E. 162 (1918), supra note 4, and Hutchins v. Long, 272 Mass. 422,
172 N. E. 605 (1930), supra notes 103 and 115.
126“So far as is practicable, the elimination of duplicate taxation of income is manifestly
an end to be desired. But this advantageous economic result should not be accomplished
by the abandonment of constitutional principles firmly established by prior decisions of
this court. It is a matter which should be left to the legislatures of the several States.
Virginia has gone far in this direction. Not only do its laws provide a credit under pre-
scribed conditions for income taxes paid other States by its residents (section 39 of Tax
Code of Virginia), but they also allow a credit for income taxes paid other States by
non-residents who may receive income from Virginia sources. See section 40 of Tax Code
of Virginia. . . . Many other States imposing income taxes have statutes substantially
similar to one or both of these Virginia statutes. New York, for example, grants a credit
similar to that granted by section 40 of the Virginia Tax Code. Section 363 of New York
Tax Laws, Laws of New York, 1921, Chapter 477. Therefore, if New York had taxed
Mrs. Ryan as a non-resident on account of income she received from the trust, that State
would have allowed credit on its tax for the tax paid to Virginia as a resident on the
same income. However, Mrs. Ryan paid no tax to New York (the tax being laid there
on the trustees), and in this particular case the facts were not such as to invoke the
reciprocity provisions.” Brief on behalf of the Commonwealth of Virginia, p. 20, Guaranty
Trust Co. v. Virginia, 303 U. S. 632 (1938). (Italics supplied.)
With the italicized portion of the above compare the following observation taken from
the dissenting opinion of Mr. Justice Stone in First National Bank of Boston v. Maine,
284 U. S. 312 (1932), supra note 120: “Even if it be assumed that some protection from
multiple taxation, which the Constitution has failed to provide, is desirable, and that this
Court is free to supply it, that result would seem more likely to be attained, without injustice
to the states, by familiar types of reciprocal state legislation, than by stretching the due
process clause to cover this case. . . . We can have no assurance that resort to the 14th
Amendment, as the ill adapted instrument of such a reform, will not create more difficulties
and injustices than it will remove.” At p. 334. This minority opinion of 1932 seems to
have undergone a metamorphosis out of which it emerges to represent the views of a
majority (perhaps even an unanimous Court) in 1938.
ON DECEMBER 5, 1938, the Supreme Court handed down a most important decision on the National Labor Relations Act\(^1\) in *Consolidated Edison Company of New York, Inc. v. National Labor Relations Board*.\(^2\) As a result of the ruling of the Court, the jurisdiction of the National Labor Relations Board has been found to extend to entities engaged in intrastate activities where unfair labor practices of the employer would lead to strife which, in turn, would have a substantial effect upon interstate commerce. In addition, the Court held that the administrative agency lacked the power to declare invalid a contract between an employer and an *independent* labor organization without giving the latter notice and an opportunity to be heard. The case arose upon petition for a writ of certiorari\(^3\) following a decision in the Circuit Court of Appeals for the Second Circuit,\(^4\) in which the entire order of the National Labor Relations Board directed to the employer was upheld.\(^5\)

Mr. Chief Justice Hughes, for the Court, considered four questions presented by petitioners: (1) whether the Board had jurisdiction of the matter; (2) whether the procedure followed by the administrative agency conformed to the requirements of due process of law; (3) whether the findings of the Board and the orders founded upon them were adequately supported by evidence; and (4) whether the Board was authorized to declare invalid contracts between the petitioners and the intervenors.

Petitioners contended that the Board lacked jurisdiction because the company and its affiliates were engaged in intrastate commerce, and were under the supervision of agencies of the State of New York. The Court, however, applied the doctrine, laid down in *National Labor Relations Board v. Jones & Loughlin Steel Corp.*\(^6\) and followed in *Santa Cruz...*
Fruit Packing Co. v. National Labor Relations Board,\(^3\) that the effect upon interstate commerce of unfair labor practices and the consequential strife, rather than the source of damage to such commerce, was determinative.\(^8\) By its application of this principle in the instant case, the Court added another to a series of decisions which quite clearly define the jurisdiction of the Board. In Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board,\(^9\) this standard was found to govern an enterprise in which the employer was entirely engaged in interstate commerce and the effect of the unfair labor practices would be appreciable. The same test was found to bring within the purview of the statute an employer engaged predominantly\(^10\) in interstate commerce and importantly affecting such commerce in the Jones & Laughlin case. It was held in the Santa Cruz case that the National Labor Relations Board had jurisdiction over a corporation not engaged predominantly\(^11\) in interstate commerce, but where unfair labor practices had resulted in complete obstruction of the movement of goods into the channels of interstate trade. The instant case extends the authority of the Board to a firm itself not at all engaged in interstate commerce, but seriously affecting it.\(^12\) In the light of these decisions and those in National Labor Relations Board v. Friedman-Harry Marks Clothing

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\(^{3}\)303 U. S. 453 (1938).

\(^{8}\)The Court deemed it unnecessary to consider the fact that petitioners purchased considerable quantities of fuel produced outside the State of New York, and chose to determine the question by reference to the effect upon commerce.

\(^{8}\)301 U. S. 142 (1937).

\(^{9}\)Approximately 70%, by volume, of the raw materials used by the respondent and a like proportion of its products were transported to and from, respectively, the state in which the plant was located. The firm is the fourth largest producer of steel in the United States and the Aliquippa plant is a tremendous establishment, at which ten thousand men are employed. In the Matter of Jones & Laughlin Steel Corporation and Amalgamated Association of Iron, Steel & Tin Workers of North America, Beaver Valley Lodge, No. 200, 1 N. L. R. B. 503, 504 et seq. (1936).

\(^{10}\)All of the raw materials were processed in the state of origin and only 37% of the product was transported across state lines. This company operates one of the largest canning establishments in the State of California. In the Matter of Santa Cruz Fruit Packing Company and Weighers, Warehousemen & Cereal Workers Local 38-44, International Longshoremen's Association, 1 N. L. R. B. 454, 457 (1936).

\(^{11}\)Expressed concisely, a labor dispute between the respondents and their employees interrupting the respondents' operations would not only affect the flow of the large quantities of coal and oil which they receive in interstate commerce, but might be substantially equivalent to the effect on interstate and foreign commerce and communication which would be caused by simultaneous labor disputes in the respondents' business and in all the businesses served by the respondents that are engaged in operating the instrumentalities of interstate and foreign commerce and communication and all the businesses engaged in shipping and receiving commodities in interstate or foreign commerce.” 4 N. L. R. B. 71, 83 (1937).
Co.,\textsuperscript{13} and National Labor Relations Board v. Fruehauj Trailer Co.,\textsuperscript{14} it would seem that the source of injury to commerce is considered by the Court only as the seriousness of the effect diminishes. The result of this decision may well be the inclusion within the sphere of the power of the Board of all public utilities in large industrial and communication centers, other than local traction companies.

The Court refused to allow petitioners' contention that the prosecution was within the jurisdiction of the New York State Labor Board, although it granted that the existence of state legislation was a factor to be considered. No state statute was in effect when the present proceedings were instituted and no attempt was made to apply it once it was promulgated. In view of the preceding considerations, the Court held that the National Labor Relations Board had jurisdiction of the controversy.

The decision in this case, however, leaves open the important question whether a complaining union may have an election of remedies and appeal either to state or federal agencies, as it may suit its interests, or whether it will be required to exhaust local remedies, where they are available. Mr. Justice Butler, in a separate opinion, differed with the majority view on this phase of the matter. He contended that there was no conflict between federal policy and the state law which would justify the intrusion of federal regulation, since the latter was essentially similar to the National Labor Relations Act. He, therefore, concluded that, in the interest of the preservation of our dual form of government, the field of state jurisdiction should not be encroached upon. It is possible that the question just presented was in the mind of the dissenting justice, although his opinion on this point is expressed in general terms, and there is no specific ground for such conclusion.\textsuperscript{15}

The Court was not disposed to give any appreciable weight to petitioners' allegations of denial of procedural due process. It declared that amendments to pleadings for the purpose of conforming them to proof

\textsuperscript{13}301 U. S. 58 (1937). Practically all the raw materials came from outside the state in which they were converted to finished goods, over 80\% of which were sold to purchasers outside the state. The employer was a comparatively small operator. In the Matter of Friedman-Harry Marks Clothing Co., Inc. \textit{and} Amalgamated Clothing Workers of America, 1 N. L. R. B. 411, 424 (1936).

\textsuperscript{14}301 U. S. 49 (1937). By value, 50\% of the materials used in the construction of trailers were drawn from outside the state and 80\% of the products were shipped across state lines. While the company is the largest of its kind, the plant is relatively small. In the Matter of Fruehauj Trailer Co. \textit{and} United Automobile Workers Federal Labor Union No. 19375, 1 N. L. R. B. 68, 69 (1935).

\textsuperscript{15}Mr. Justice Butler also contended that the rulings in Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935), and Carter \textit{v.} Carter Coal Co., 298 U. S. 238 (1936), to the effect that local activities were not subject to federal regulation, were applicable in the present instance.
were made under discretionary rulings of the trial examiner and, accordingly, might not serve as a basis for an attack upon the validity of the hearing. The Court further found that the employer was estopped from raising any question concerning its right to present testimony of certain witnesses excluded by the respondent Board, since petitioner had made no request in the court below for leave to adduce additional evidence, although the Court characterized the conduct of the administrative agency as arbitrary and unreasonable. The allegation that petitioners were denied due process by failure of the respondent to grant oral argument was given no consideration, since the employer had failed to avail itself of a right which it should have known it possessed. On the authority of *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, the Court found that failure to issue an intermediate report did not constitute denial of due process, since the issues, other than that relating to the contracts, were clearly defined and known to the employers. Consequently, it was held that the proceedings conformed to the requirements of due process.

At the outset of his discussion of petitioners' contention that the evidence presented by the Board was insufficient to support its findings and orders, the Chief Justice stated that the provision of Section 10 (b) of the Act that the rules of evidence prevailing in courts of law and equity shall not be controlling could not be construed to mean that orders might be made which were not founded on evidence having rational probative force. He added that "Mere uncorroborated hearsay or rumor does not constitute substantial evidence." However, on the basis of the record, he concluded that the findings of the Board and the orders founded thereon had the requisite support of substantial evidence, with the exception of the order invalidating the contracts between petitioners and intervenors.

In approaching the problem raised by the Board's requirement that the employers cease and desist from giving effect to their contracts with the International Brotherhood of Electrical Workers, Mr. Chief Justice Hughes enumerated three considerations which conditioned the view adopted by the Court: (1) The Brotherhood and its locals are affiliates of the American Federation of Labor and are not under the control of the employers; (2) The contracts recognize the right to collective bargaining and recognize the Brotherhood as the collective bargaining agent for its members; and (3) The contracts contain important provisions relative to hours, working conditions, wages, sickness, disability, strikes, lockouts and arbitration of disputes.17

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17 304 U. S. 333 (1938).
The Board, in its proceedings in the case at bar, relied upon the fact that in *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, the Supreme Court had held that the union there involved was not entitled to notice or hearing because the prosecution ran against the employer and only incidentally affected the labor organization. However, the Court distinguished the *Greyhound case* on the ground that there the third party was a company union, while in the instant case it was an independent labor organization. Mr. Justice Reed did not deem it necessary to differentiate between a company-dominated and a company-favored union. His objection to the failure of the majority to follow the principle of the *Greyhound case* revolved about the fact that the position of each in respect to the practices of the employer was similar, in that each profited by the coercive power exercised by the employer, no matter how deviously, and the effect of the Board’s action upon each was the same.

In answer to the contention of the Board that the Brotherhood, in fact, had adequate notice of the proceedings, and had failed to exhaust the available remedy of petition to the circuit court of appeals for leave to adduce additional evidence because adequate notice had not been given, the Chief Justice declared that to so hold would be to assume that this would constitute adequate relief. It would appear that to assume anything else would be to controvert the ruling in the *Jones & Laughlin case* that the procedure provided by the statute afforded adequate protection to the parties. This, in turn, would mean that the very constitutionality of the Act might again be questioned. Mr. Justice Reed supported the position taken by the Board.

The Court further declared that the record showed that the validity of the contracts was not in issue. It considered without substance the Board’s contention that they were under attack because the unfair labor practices, including assistance to the Brotherhood in its organizing campaign, which preceded the negotiation of the contracts, were in controversy. Associate Justice Reed was of the opinion that the record clearly supported such a conclusion.

Furthermore, the controlling opinion stated that since the Act gives the Board no express authority to invalidate contracts with independent labor organizations, the conduct of the Board must have had as its basis the authority of Section 10 (c) of the Act to order such affirmative action as would effectuate the policies of the Act. This power, it was declared, was remedial, not punitive, and might not be exercised

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account in formulating the remedy to be applied, but that they should have no weight in the determination of the power of the National Labor Relations Board.

18303 U. S. 261 (1938).
in such a manner as to constitute a penalty for committing unfair labor practices. A persuasive influence in the enunciation of this conclusion was the fact that the rights of persons who joined the Brotherhood without coercion would be affected by the abrogation of the contracts. In view of the considerations here discussed, the Court held that "there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease and desist any more effective." Mr. Justice Reed stated that the record supported the finding and order, citing a portion of the decision of the Board.\textsuperscript{19} He regarded the holding as a withdrawal of the specific authority, granted by the Act, to take affirmative action in order to protect the workers' right of self-organization. In his opinion, the Board's order would prevent the employers from profiting by acts which the Board had found to be illegal.

The Court declared that the complaint should have been amended to contain an allegation that the execution of the contracts was a device to give effect to the employers' opposition to the United Electrical & Radio Workers of America, notice given to the Brotherhood, and proof submitted to substantiate the charge. In the absence of such procedure, an election should have been held.\textsuperscript{20} The conclusion of the majority was that the entire order should be enforced, with the exception of those portions directed against giving effect to the contracts.\textsuperscript{21}

HARRY B. MERICAN.

SEARCH AND SEIZURE WITHOUT WARRANT—DISCLOSURE OF INFORMER

A search and seizure, without search warrant, and based on confidential information, was held not unreasonable in \textit{Scher v. United States},\textsuperscript{22} where federal officers pursued an automobile operated by the defendant, carrying untaxpaid liquor, into an open garage within the curtilage of the defendant, and there made the arrest and seizure.

\textsuperscript{19} N. L. R. B. 71, 83 \textit{et seq.} (1937).

\textsuperscript{20} In this event, annulment of the contracts would have to be based upon the right of the United Electrical Workers to exclusive representation of the employees.

\textsuperscript{21} Associate Justices Butler and McReynolds concurred with the Chief Justice and Associate Justices Brandeis, Roberts and Stone in refusing to enforce abrogation of the contracts, while Associate Justices Black and Reed dissented. As to all other sections of the order of the Board, Mr. Justice Butler and Mr. Justice McReynolds dissented from the views expressed by the Chief Justice, with which Associate Justices Black and Reed concurred.

\textsuperscript{22} 59 Sup. Ct. 174 (Dec. 5, 1938).
The curtilage has heretofore been considered inviolable without authority of a search warrant and although the search of automobiles without warrant has been permitted no case until the present has gone so far as to hold that an automobile might be pursued and so seized within the curtilage. The decision seems to make at least one exception to the curtilage doctrine, but the exception appears limited to a seizure made after a continuous pursuit originating elsewhere. In this case the pursuit and the arrest appeared, on the facts, to constitute one continuous transaction, leaving open the question of the degree of continuity required to make the search and seizure conform to the requirements of the Fourth Amendment.

The Court also held that the Government need not disclose the identity of its informer unless such disclosure is essential to the defense. Although this view has been firmly established in the lower federal courts, this is the first case in which the Supreme Court has expressly adopted it. The Supreme Court however has not indicated under what circumstances a disclosure will be considered essential to the defense.

EQUAL PROTECTION—EXCLUSION OF NEGROES FROM STATE UNIVERSITY

In Missouri ex rel. Gaines v. Canada, the Court held that the refusal of the curators of the University of Missouri to admit the petitioner, a negro, to the Law School of the University was a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment. It has been established by the Court that the states must afford to negroes substantially the same opportunity to acquire higher education as is enjoyed by white students in state institutions and that this obligation is fulfilled if the state maintains a separate school for negroes substantially on a par with the schools provided for white students.

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27Two earlier opinions of the Supreme Court intimated that such would be the decision if the question was squarely presented. Vogel v. Gruaz, 110 U. S. 311 (1884); In re Quarles and Butler, 158 U. S. 532 (1895).
28Several holdings of lower federal courts indicate the scope of this exception. United States v. Blich, 45 F. (2d) 627 (D. C. Wyo. 1930); Wilson v. United States, 59 F. (2d) 390 (C. C. A. 3d, 1932).
29Plessy v. Ferguson, 163 U. S. 537 (1896); McCabe v. Atchison, Topeka and Santa Fe
The State of Missouri had attempted to meet this obligation by an act of the legislature authorizing the establishment of a law school for negroes when, in the opinion of curators of Lincoln University, a negro school maintained by the State, such action should be deemed advisable. The State had further attempted to meet the problem by authorizing the payment of reasonable tuition fees and expenses for the attendance at schools maintained for negroes by other states. The Court, however, held that neither of these steps was sufficient to meet the requirements of the Fourteenth Amendment. In the first instance the mere intention to establish a school in no way provided for the education of negroes, and the establishment of the school was entirely discretionary. With respect to the payment of tuition charges for attendance at schools outside of the State, it was held that education in such manner not only did not provide equal opportunity for negroes, but amounted to a direct discrimination. The Court held that the question was not whether the facilities provided for such an education outside the State were of a quality equal to those provided in the State but whether all residents in the State, regardless of color, were treated equally with respect to educational opportunity within the State. Furthermore, the fact that only one negro has applied for local education does not relieve the State since the rights guaranteed by the Fourteenth Amendment are personal and are not to be withheld merely because the demand for them is not great.

Based on this opinion it appears that several states will be forced to revise their educational systems if negroes apply for admission to state universities. The states face the alternative of either admitting negroes to their established universities or providing separate ones for them. From the opinion in the principal case it appears that when the state offers educational facilities, even if of a professional nature, nothing short of substantial equality for all students, regardless of color, will satisfy the requirements of the Fourteenth Amendment.

JAMES G. BOSS*

Ry., 235 U. S. 151 (1914); Gong Lum v. Rice, 275 U. S. 78 (1927).

*Assisted by Cary M. Euwer.
THE importance of capital stocks and bonds in modern economic and legal life is too well known to need description.

In general, there are two types of markets in which these securities are traded, viz., the several national stock exchanges and the numerous so-called “over-the-counter” markets. Although the importance of the stock exchanges is generally appreciated, the size and significance of the over-the-counter markets are not so well known. Their importance, however, may be better understood when it is realized that these markets are many times as extensive as all of the exchange markets combined; that the primary distribution of new securities takes place over-the-counter; that almost all transactions in the securities of banks and insurance companies are over-the-counter; that in virtually every industry there is outstanding a large volume of securities which are not admitted to trading on any exchange and, therefore, can be bought and sold only in the over-the-counter market; that the great bulk of trading in obligations of the Federal Government, the States, and their local sub-divisions normally takes place off the exchanges, i.e., over-the-counter; that many issues traded on exchanges are actively traded in the over-the-counter markets, particularly high-grade bonds and preferred stocks.

The principal functions of the over-the-counter markets have been described, in general terms, by William O. Douglas, Chairman, Securities & Exchange Commission, as two-fold: (1) Trading—providing a mechanism whereby investors may purchase or sell outstanding securities through the medium of brokers and dealers; (2) investment of capital—to provide the principal channel for the flow of the public’s savings into new financing.

It is but natural to expect certain abuses to exist in such a large and important field, abuses which can be corrected only by effective regu-

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1 Under the Securities Exchange Act of 1934 all transactions in securities which are effected otherwise than on a national securities exchange are deemed to be in the over-the-counter markets; 83 Cong. Rec. (app.) 68 (1938); H. R. Rep. No. 2307, 75th Cong., 3d Sess. (1938) 2.


3 83 Cong. Rec. (app.) 68 (1938).
lation and supervision. The policy of the Securities & Exchange Commission has been to proceed slowly in this hitherto largely unregulated field and to seek in the initial stages of regulation the elimination of only the most flagrant types of abuses. The wide-spread abuses which have continued to exist despite the regulation provided under Section 15 of the Securities Exchange Act of 1934, as amended, and the size and importance of the over-the-counter markets are sufficient justification for a reasonable system of regulation; however, there is also present another factor which makes effective regulation of these markets imperative, and that is the evasion of stock exchange regulation through use of the over-the-counter markets.

The problem of over-the-counter regulation has three aspects: (1) Prevention of dishonest and unfair practices; (2) prevention of unethical methods that are technically outside the area of definite illegality; and (3) providing the investor with an economic service whose efficiency will be commensurate with its economic importance. There are, in turn, two alternative programs by which this problem can be met: (1) A detailed, minute, and rigid regulation of business conduct

\textsuperscript{1}Id. at 69.

\textsuperscript{2}In 1937, e.g., the Securities & Exchange Commission made investigations in three areas outside the largest financial centers—in Cleveland, Detroit, and the Pacific Northwest. A few attorneys and accountants were sent to those areas to inquire into certain complaints and to make a brief survey. In the space of a few months 13 individuals were criminally convicted, 16 others were placed under indictment, 17 corporations and 41 more individuals were enjoined, and 2 firms were expelled or obliged to withdraw from national securities exchanges, all for elementary violation of the law. The Commission believes that the situation revealed thereby exists in other regions as well. \textsc{Sen. Rep. No. 1455, 75th Cong., 3d Sess. (1938) 3; H. R. Rep. No. 2307, 75th Cong., 3d Sess. (1938) 4.}

\textsuperscript{3}3d Cong. Rec. (app.) 68, 789-790 (1938); moreover, in \textsc{Sen. Rep. No. 792, 73d Cong., 2d Sess. (1934) 6}, which accompanied the bill that later became the Securities Exchange Act of 1934, the following statement was made: “It has been deemed advisable to authorize the Commission to subject such activities (\textit{i.e.}, trading in the over-the-counter markets) to regulation similar to that prescribed for transactions on organized exchanges. This power is vitally necessary to forestall the widespread evasion of stock-exchange regulation by the withdrawal of securities from listing on exchanges, and by transferring trading therein to ‘over-the-counter’ markets where manipulative evils could continue to flourish, unchecked by any regulatory authority”. Similarly, \textsc{H. R. Rep. No. 1383, 73d Cong., 2d Sess. (1934) 16}, accompanying the House bill for the regulation of exchanges, quotes with approval the following statement from the report of the Twentieth Century Fund on Stock Market Control: “To leave the over-the-counter markets out of a regulatory system would be to destroy the effects of regulation of the organized exchanges.” \textit{Cf. also H. R. Rep. No. 2307, 75th Cong., 3d Sess. (1938) 3 and Sen. Rep. No. 1455, 75th Cong., 3d Sess. (1938) 2.}


\textsuperscript{5}See \textsc{3d Cong. Rec. (app.) 976 (1938).}

\textsuperscript{6}See note 7, supra.
by law;\textsuperscript{10} and (2) cooperative regulation,\textsuperscript{11} in which the task will be
largely performed by representative organizations of investment bankers,
dealers, and brokers, with the Government (through the Securities &
Exchange Commission) exercising general supervision and supplementary
powers of direct regulation in the public interest.\textsuperscript{12} The second program
is embodied in the Maloney bill,\textsuperscript{13} which became law on June 25, 1938\textsuperscript{14}
when approved by President Franklin D. Roosevelt.

In its essential aspects, the Act amends Section 15 of the Securities
Exchange Act of 1934,\textsuperscript{15} as that Section was amended on May 27, 1936,\textsuperscript{16}
and provides for more specific regulation of the over-the-counter markets
than heretofore. Under the original Section 15 these markets were dealt
with in general and brief terms—\textsuperscript{17}—which was necessary at that time

\textsuperscript{10}For a discussion of the difficulties involved in such a program see 83 Cong. Rec. (app.)
75th Cong., 3d Sess. (1938) 4.

\textsuperscript{11}Cooperative regulation is described by Chairman Douglas of the Securities & Exchange
Commission as effective self-government under governmental supervision; 83 Cong. Rec.
(app.) 68-69 (1938). Also see id. at 4451 for discussion of the meaning of this term.

\textsuperscript{12}Chairman Douglas of the Securities & Exchange Commission cites the following advan-
tages of this type of regulation: "Self-discipline is always more welcome than discipline
imposed from above. From a broad public viewpoint, such regulation can be far more
effective here, as it can be in the case of exchanges. This type of self-regulation can be
pervasive and subtle in its conditioning influence upon business practices and business
morality. By and large, government can operate satisfactorily only by proscription.
That leaves untouched large areas of conduct and activity; some of it susceptible of govern-
ment regulation but in fact too minute for satisfactory control; some of it lying beyond
the periphery of the law in the realm of ethics and morality. Into these large areas self-
government, and self-government alone, can effectively reach. For these reasons, such self-
regulation is by far the preferable course from all viewpoints." Id. at 69.

\textsuperscript{13}S. 3255, H. R. 9592, 75th Cong., 3d Sess. (1938).


\textsuperscript{17}It shall be unlawful, in contravention of such rules and regulations as the Commission
may prescribe as necessary or appropriate in the public interest and to insure to investors
protection comparable to that provided by and under authority of this title in the case
of national-securities exchanges, (1) for any broker or dealer, singly or with any other
person or persons, to make use of the mails or any means or instrumentality of interstate
commerce for the purpose of making or creating, or enabling another to make or create,
a market, otherwise than on a national-securities exchange, for both the purchase and
sale of any security (other than an exempted security or commercial paper, bankers' ac-
cceptances, or commercial bills, or unregistered securities the market in which is pre-
dominantly intrastate and which have not previously been registered or listed), or (2) for
any broker or dealer to use any facility of any such market. Such rules and regulations
may provide for the regulation of all transactions by brokers and dealers on any such
market, for the registration with the Commission of dealers and/or brokers making or
because of the lack of information concerning this subject,\textsuperscript{18} and the well-nigh insurmountable difficulties which would have been encountered in working out in detail a suitable plan of regulation.\textsuperscript{19} After a year and a half of administrative experience under the original Section 15,\textsuperscript{20} such experience was incorporated into law under the aforesaid amend-
ment of May 27, 1936.\textsuperscript{21} The Maloney Act embodies the results of the experience of the succeeding year and a half.\textsuperscript{22}

The Act is designed to provide for the recognition of brokers' and dealers' associations that are so constituted as to bring about, under the supervision of the Securities & Exchange Commission, effective self-

creating such a market, and for the registration of the securities for which they make or create a market and may make special provision with respect to securities or specified classes thereof listed, or entitled to unlisted trading privileges, upon any exchange on the date of the enactment of this title, which securities are not registered under the provisions of section 12 of this title." 48 STAT. 895, 15 U. S. C. § 78o (1934). For further discussion of the general and brief character of this regulation, cf. 83 CONG. REC. (app.) 789-790, 976 (1938) and SEN. REP. No. 1455, 75th Cong., 3d Sess. (1938) 4.

\textsuperscript{18}The Commission and apparently everyone else, with perhaps some exceptions, had very little authentic information regarding over-the-counter markets, which were regarded as a sort of \textit{terra incognita}; see 83 CONG. REC. 4450, 976 (app.) (1938).


\textsuperscript{20}For a summary of the activities of the Commission under this section, see 1 S. E. C. 18 (1935).

\textsuperscript{21}49 STAT. 1377, 15 U. S. C. § 78o (Supp. 1936). The amendment had four subsections, of which (a), (b), and (c) related to the registration of over-the-counter brokers and dealers and to the regulation of over-the-counter trading. In the main, these subsections incorporated into statutory law the administrative program put into effect by the Securities & Exchange Commission under § 15 in its original form, except in the following respects: (1) The old concept underlying registration, \textit{i.e.}, the concept of making or creating a market for both the purchase and sale of any security, other than exempted securities, was abandoned, and the registration requirements were now applied to brokers and dealers who used the mails or the instrumentalities of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any securities, except such as were specifically exempted, in an over-the-counter market; (2) under the former rules an exemption was provided for brokers and dealers whose transactions in securities were limited to securities that had a predominantly intrastate market, whereas the amended Section provided exemption for brokers and dealers whose business was exclusively intrastate. Thus, it became the scope, rather than the character, of the broker's or dealer's business which determined whether or not he was entitled to exemption. Subsection (d) related to the issuer's filing supplementary information in the registration statement under the Securities Act of 1933. 2 S. E. C. 20 (1936).

\textsuperscript{22}H. R. REP. No. 2307, 75th Cong., 3d Sess. (1938) 5; SEN. REP. No. 1455, 75th Cong., 3d Sess. (1938) 4. A long-time study was made by the Commission during this interval, during which there was a continuing consultation with representatives of the industry, particularly with committees of the Investment Bankers' Association and the Investment Bankers' Conference, Inc. 83 CONG. REC. 4450 (1938).
regulation of the over-the-counter markets. It contains five Sections. The first two relate to formation, regulation, and supervision of the over-the-counter markets; the last three amend Sections 29, 32, and 17, respectively, of the Securities Exchange Act of 1934, as amended, and such amendatory changes are supplementary to the provisions of the first two sections. In view of the fact that the last three Sections deal with chiefly the changes made necessary by the provisions of the first two, the following exposition is concerned with only Sections 1 and 2.

Section 1 provides for a system of cooperative regulation of the over-the-counter markets, through the activities of voluntary associations of investment bankers, dealers, and brokers doing business in these markets under governmental supervision. It is patterned upon the method of organization and regulation of exchange trading, in that associations

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28Hearings before the Committee on Banking and Currency on S. 3255, 75th Cong., 3d Sess. (1938) 43.

29Subsection (b) of section 29 of such Act is amended by inserting before the period at the end thereof a colon and the following: 'Provided, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 15 of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 15 of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation' Pub. L. No. 719, 75th Cong., 3d Sess. (June 25, 1938) § 3, 15 U. S. C. A. § 78cc(b) (Supp. 1938).

30Section 32 of such Act, as amended, is amended by adding at the end thereof the following new subsection: '(c). The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of section 15 of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact.' Id. at § 4, 15 U. S. C. A. § 78ff(c) (Supp. 1938).

31Subsection (a) of section 17 of such Act, as amended, is amended by inserting immediately after the words 'every broker or dealer who transacts a business in securities through the medium of any such member,' the words 'every registered securities association,' Id. at § 5, 15 U. S. C. A. § 78q(a) (Supp. 1938).


33Amends § 15 of the Securities & Exchange Act of 1934 by inserting a new section, § 15A, immediately after the former § 15. Id. at 2.

34Cf. § 6(a) of the Securities & Exchange Act of 1934, as amended. But note certain distinctions: Exchanges are business organizations; they have always been regarded as necessarily exclusive in character; membership is a property right in the sense that it may be transferred when an individual drops out or is expelled; exchanges have certain features that may be regarded as monopolistic because of their exclusive organization. Associations,
may register with the Commission either as national securities associations or as smaller associations affiliated with national securities associations, under stated terms and conditions, by filing registration statements containing certain prescribed information,\textsuperscript{80} which must be kept current.\textsuperscript{81} However, it differs from the registration provisions of national securities exchanges in that associations which do not register are not denied the use of the mails or instrumentalities of interstate commerce.\textsuperscript{82} Moreover, membership by a broker or dealer does not supersede the obligation of individual brokers and dealers to register under Section 15 of the Securities Exchange Act of 1934.\textsuperscript{58}

The Section provides that associations must meet certain conditions to qualify as national securities associations.\textsuperscript{84} Thus, such an association (1) must be actually nation-wide in scope, or should represent a substantial and economically cohesive region; (2) must satisfy the Commission that its general pattern of organization and its general character are such that it will be able to discharge its functions of carrying out the purposes of the new Section 1.

Section 1 also provides that a particular association may, by its rules, restrict membership therein on certain specified bases, such as geographical region or type of business,\textsuperscript{85} although the broad purpose is to enable all brokers and dealers who conduct an honest and responsible business to be eligible for membership in some association. Under this Section the registered association is also given authority, through its rules, to exclude from membership a broker or dealer who has disqualified himself by improper conduct,\textsuperscript{86} although such action is subject to the


\textsuperscript{81}Id. at § 1(j), 15 U. S. C. A. § 78o-3(j) (Supp. 1938).

\textsuperscript{82}Thus, the formation of associations and application for registration by them are matters of voluntary choice. H. R. Rep. No. 2307, 75th Cong., 3d Sess. (1938) 6.

\textsuperscript{83}No broker or dealer (other than one whose business is exclusively intrastate) shall make use of the mails or of any means of instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances or commercial bills) otherwise than on a national securities exchange unless such broker or dealer is registered in accordance with subsection (b) of this section." 49 Stat. 1377, 15 U. S. C. § 78o (Supp. 1936).


\textsuperscript{85}H. R. Rep. No. 2307, 75th Cong., 3d Sess. (1938) 6. This prevents formation of private clubs, a monopolistic franchise, or growth of a guild system operating above the law. See 83 Cong. Rec. (app.) 69 (1938).

\textsuperscript{86}Improper conduct includes expulsion or suspension from another registered securities
approval of the Commission. Under the bill as first presented, improper conduct included, among other things, a permanent or temporary injunction by any court of competent jurisdiction, against engaging in or continuing any conduct or practice in connection with the purchase or sale of any security. This provision, however, was stricken out by the Senate Committee on Banking and Currency, and in its stead there was inserted a provision to prevent evasion of the requirements of Section 1 (b) (4).

There are also provisions for the following: Reasonable representation of each member in all phases of the registered associations' operations: equitable allocation of dues among members to defray reasonable expenses of administration; statement of functions for the accomplishment of which the associations must accept responsibility; disciplinary action by associations for violations of rules; and rules of procedure to be

association, or from a national securities exchange, for a serious infraction of its rules or of a Commission order currently in effect denying or revoking registration pursuant to § 15 of the Securities Exchange Act of 1934; improper conduct is also manifested by a Commission order currently in effect expelling or suspending him from membership in a registered securities association or a national securities exchange, if his conduct while employed by, acting for, or directly or indirectly controlling or controlled by a broker or dealer, was a cause which contributed to any suspension, expulsion, or order of the character described above.

Cf. Committee Print No. 3 of S. 3255, 75th Cong., 3d Sess. (1938) § 1 (b) (4) (C).

Thus, a broker or dealer is ineligible for membership in a registered securities association if any person who is currently a partner, officer, director, or branch manager of such broker or dealer (or who currently occupies a similar status or performs similar functions), or who concurrently controls or is controlled by such broker or dealer, is subject to any suspension, expulsion, or order of the kind described above (note 36 supra), or was a cause of any such suspension, expulsion, or order which is currently in effect, or by his conduct while employed by, acting for, or directly or indirectly controlling or controlled by, a broker or dealer, was a cause of any suspension, expulsion, or order of the character described as constituting improper conduct. Pub. L. No. 719, 75th Cong., 3d Sess. (June 25, 1938) § 1 (b) (4), 15 U. S. C. A. § 78o-3(b)(4) (Supp. 1938). But note that to prevent unnecessary harshness, the Commission may, in the public interest, modify this provision so as to permit membership in a registered association.

To be eligible for registration, the rules of an association must be designed to prevent fraudulent and manipulative acts and practices, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and remove impediments to, and perfect the mechanism of, a free and open market. As safeguards against abuse, and for consistency with the operation of free and open markets, the Act provides that the rules of an association may not be designed to permit unfair discrimination between customers, or issuers, or brokers, or dealers, nor to impose any schedule of prices, nor to fix minimum rates or impose any schedule of commissions, allowances, discounts, or other charges. Id. at § 1 (b) (7), 15 U. S. C. A. § 78o-3 (b) (7) (Supp. 1938). Also cf. H. R. Rep. No. 2307, 75th Cong., 3d Sess. (1938) 7.

followed in such actions.41

Provision is made for associations to affiliate with national securities associations.42 For registration as affiliated securities associations, local associations must meet certain requirements,43 which parallel those for national associations in general, but also include additional requirements applicable only to local associations. The mechanics of denying or granting registration of associations as national or as affiliated securities associations are provided,44 and provision is made for withdrawal of a securities association from registration.45

The Commission is given review powers over any disciplinary action taken by a registered securities association against any member, and over any action denying admission to an applicant for membership,46 and the methods of procedure in such actions are outlined.47 Application to the Commission for review, or the institution of review proceedings by the Commission on its own motion, automatically stays the action of the association pending review.48

The incentive for brokers and dealers to join registered associations has received careful study, and it is provided in the bill that a registered association may, by its rules, stipulate that non-members (i.e., non-members of any registered association, rather than any particular one) shall be dealt with on the same terms and conditions as are accorded the

41Id. at § 1(b)(9), 15 U. S. C. A. § 78o-3(b)(9) (Supp. 1938). The exact procedure is to be defined by the rules of the association, but must include bringing of specific charges, proper notification, opportunity to defend against charges, appropriate records and statements giving full details.
42Id. at § 1(c), 15 U. S. C. A. § 78o-3(c) (Supp. 1938).
43Id. at § 1(d), 15 U. S. C. A. § 78o-3(d) (Supp. 1938).
44Id. at § 1(e), id. at § 78o-3(e).
45A registered securities association may, upon such reasonable notice as the Commission may prescribe, withdraw from registration by filing a written notice of withdrawal in due form. Id. at § 1(f). As reported by the Senate Committee on Banking and Currency, this subsection included a provision that such withdrawal should be subject to such appropriate terms and conditions for the orderly liquidation of such association as the Commission might prescribe. But this provision was stricken out by the House Committee on Interstate and Foreign Commerce. H. R. Rep. No. 2307, 75th Cong., 3d Sess. (1938) 15.
47Id. at § 1(h), 15 U. S. C. A. § 78o-3(h) (Supp. 1938). Note that the Commission has the power to dismiss the proceeding, set aside the action of the association, cancel, reduce, or require the remission of any penalty imposed upon a member.
48As originally contained in the bill, application to the Commission for review, or the institution of review proceedings by the Commission itself, did not operate as a stay of such action unless the Commission so ordered. This was changed by the Senate Committee on Banking and Currency. Corrected Committee Print No. 2 of S. 3255, 75th Cong., 3d Sess. (1938).
general public. Thus, exclusion from membership in a registered association may be attended and implemented by economic sanctions, which are depended upon to make effective discipline within the association possible. Exclusion from such associations would be comparable in effect to expulsion from a national securities exchange. But it is to be noted that an association is not authorized by its rules to prescribe any uniform differences (to which members of the association must adhere) between prices charged or discounts allowed to brokers and dealers, on the one hand, and members of the public, on the other hand. In this general connection, moreover, it is important to observe that special measures have been taken to prevent possible conflict between any provisions of this Section and those of any law of the United States in existence on the date when this bill takes effect; for it is specifically provided that in the event of any such conflict the provisions of this Section shall prevail.

The supervisory powers of the Commission over the rules of a registered association are specifically enumerated. Thus, the Commission may by order abrogate any rule, if, after appropriate notice and opportunity for hearing, it appears necessary or appropriate to assure fair dealing by the members of the association; or if it appears necessary to assure a fair representation of its members in the administration of its affairs or otherwise to protect investors or effectuate the purposes of Section 1. The Commission is also authorized to alter or supplement the rules of an association with respect to four subjects, enumerated below, each of which relates to the organization and operation of the association as such, and not to the business conduct of the individual members. The four subjects are: (1) The basis for, and procedure in connection with, the denial of membership or the disciplining of members; (2) the method for adoption of any change in or addition to the rules of the association; (3) the method of choosing officers and direc-

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51 Ibid.
54 Id. at § 1 (k)(2), 15 U. S. C. A. § 780-3(k)(2) (Supp. 1938). But note that the Commission must first request in writing the registered association to adopt the changes, and only if the association fails to do so within a reasonable time, is the Commission authorized so to alter or supplement the rules. For further discussion see H. R. Rep. No. 2307, 75th Cong., 3d Sess. (1938) 10.
tors; and (4) affiliation between registered securities associations. The bill as originally drafted granted the Commission authority to alter or supplement the rules of registered associations to an extent not permitted in the bill as passed by the House and Senate.\textsuperscript{55} The earlier and greater authority given to the Commission was not in favor with representatives of the Investment Bankers Conference, for the authority only extended to members of a registered securities association; non-member firms in the over-the-counter markets were not affected.\textsuperscript{58} As a result of the many criticisms of these provisions,\textsuperscript{57} the Commission was given more direct powers, under a new Section 2 of the bill, which included brokers and dealers in these markets regardless of whether or not they were members of a registered association.

In addition to its supervisory powers over the rules of a registered association, the Commission is given disciplinary powers over registered associations and individual officers and members of such associations. These disciplinary powers are designed to prevent abuse and to enable the Commission effectually to discharge its role in this scheme of cooperative regulation. Specifically, the Commission is authorized, when it deems such action necessary or appropriate and after opportunity for

\textsuperscript{55}The following provisions were eliminated from this subsection of the bill: (1) The prevention of fictitious quotations; (2) the prevention of fraudulent or manipulative acts or practices; (3) safeguards against unreasonable profits or unreasonable rates of commissions or other charges, provided that nothing contained in such subsection should authorize the imposition of any schedule of minimum or maximum prices, discounts, commissions, allowances, or other charges; (4) safeguards against unfair discrimination between customers, or issuers, or brokers, or dealers; (5) safeguards with respect to the financial responsibility of members and against the evasion of financial responsibility through the use of corporate forms, special partnerships, or other devices; (6) the manner, method, and place of soliciting business; (7) the time and the method of making settlements, payments, or deliveries; (8) the collection, recording, and dissemination of information relating to the over-the-counter markets; and (9) similar matters. Committee Prints Nos. 1, 2, and 3 of S. 3255, 75th Cong., 3d Sess. (1938); Pub. L. No. 719, 75th Cong., 3d Sess. (June 25, 1938) § 1 (k)(2), 15 U. S. C. A. § 78o-3(k)(2) (Supp. 1938); Hearings before Committee on Banking and Currency on S. 3255, 75th Cong., 3d Sess. (1938) 5, 25.

\textsuperscript{58}Hearings before Committee on Banking and Currency on S. 3255, 75th Cong., 3d Sess. (1938) 25.

\textsuperscript{57}Such greater powers for the Commission would not have affected over-the-counter firms which chose to avoid membership in an association—a provision inconsistent with the fundamentals of self-regulation in that it would place members of a registered association under broader regulatory powers of the Commission than non-members (hence, at a potential disadvantage competitively), it might require the associations to take over the work of enforcing the criminal law (which was said to be more appropriately the Commission’s function), and the broad powers which the provision gave the Commission over the rules might deter firms from joining such an association. Cf. 83 CONG. REC. (app.) 977 (1938) and Hearings before Committee on Banking and Currency on S. 3255, 75th Cong., 3d Sess. (1938) 25, 39, 41, 46, 49, 53.
hearing, to suspend or revoke by order, the registration of a registered securities association; to suspend or expel members from such associations; or to remove any officer or director from such association.\textsuperscript{58}

An important exemption from the provisions of Section 1 is created in favor of transactions in exempted securities.\textsuperscript{59}

Section 2\textsuperscript{60} was not included in the original draft of the bill,\textsuperscript{61} but was introduced by the Senate Committee on Banking and Currency as a substitute for various provisions which had been eliminated from the original subsection (k) (2) of Section 1.\textsuperscript{62} It is not restricted in its application to over-the-counter brokers and dealers who are members of registered securities associations (as is Section 1), but applies with equal force to all over-the-counter brokers and dealers regardless of whether they are members.

As first proposed,\textsuperscript{63} Section 2 extended the powers of the Commission

\textsuperscript{58}Pub. L. No. 719, 75th Cong., 3d Sess. (June 25, 1938) § 1 (l), 15 U. S. C. A. § 78o-3(l) (Supp. 1938). Note that authority extends to any member who is found to have violated the Securities Exchange Act of 1934, as amended, or who is found to have willfully violated the Securities Act of 1933, or has aided another in doing so. The Commission is not empowered to suspend or expel a member for violation of an association’s rules, but it may remove from office any officer or director of a registered association who is found to have willfully failed to enforce the rules of the association or has willfully abused his authority. 83 Cong. Rec. (app.) 977 (1938).

\textsuperscript{59}Pub. L. No. 719, 75th Cong., 3d Sess. (June 25, 1938) § 1 (m), 15 U. S. C. A. § 78o-3(m) (Supp. 1938). Exempted securities are defined by § 3 (a)(12) of the Securities Exchange Act of 1934, as amended, to include various forms of government, state, municipal, and other public securities. Thus, municipal brokers and dealers are exempt from the various provisions of § 15A. This question of exemption was hotly debated in committee hearings on the bill; a provision exempting such brokers and dealers was introduced by Senator Bankhead, and found great favor with most of the members of the Senate Committee on Banking and Currency, although it was included over the protest of the Securities & Exchange Commission. As pointed out by Commissioner Robert E. Healy in an address before the New York Security Dealers’ Association on March 10, 1938, 83 Cong. Rec. (app.) 978 (1938), the bill never did provide for, and the Commission never sought control over, municipalities or over the issuance of securities by them. No valid reason exists, however, for excluding those men who make their money through buying and selling municipal securities from the provisions which apply to those who make money through trading in private corporate issues. No valid reason exists why the investor buying a municipal issue should not know whether the man handling the purchase for him is his agent or acting as a principal. Why should municipal dealers claim a “holier-than-thou” attitude? If they engage in fraudulent practices, should they escape regulation? Cf. also 83 Cong. Rec. (app.) 790 (1938).

\textsuperscript{60}Amends subsection (c) of § 15 of the Securities Exchange Act of 1934, as amended, by inserting two new paragraphs, (c)(2) and (c)(3). The former subsection (c) becomes (c)(1) under the amendment. H. R. Rep. No. 2307, 75th Cong., 3d Sess. (1938) 10.

\textsuperscript{61}Committee Print No. 1 of S. 3255, 75th Cong., 3d Sess. (1938).

\textsuperscript{62}83 Cong. Rec. (app.) 977 (1938).

\textsuperscript{63}The powers granted the Commission under § 2 as first proposed applied to brokers and dealers whose business was exclusively in municipal securities; \textit{ibid}. 
beyond those found in the final draft. As it was finally passed, this Section contains three subsections. The first merely incorporates the former subsection (c) of Section 15 of the Securities Exchange Act of 1934, as amended; the last two are new and extend the powers of the Commission. Subsection (1) contains provisions prohibiting any broker or dealer subject to federal jurisdiction from effecting any transaction in, or inducing the purchase or sale of, any security (other than commercial paper, bankers’ acceptances, or commercial bills) in the over-the-counter markets by means of any manipulative, deceptive, or other fraudulent device or contrivance. It does not exclude transactions by a broker or dealer in any exempted security from its provisions (as did Section 1), and thus it applies to municipal dealers.

Under subsection (c) (2) of this Section 2, over-the-counter brokers and dealers subject to federal jurisdiction are prohibited from engaging in any fraudulent, deceptive, or manipulative act or practice, or from making any fictitious quotation. But transactions in exempted securities are specifically exempt from the provisions of this subsection, and hence municipal dealers are excluded from these provisions.

The provisions of subsection (c) (3) are similar to those of the preceding subsection except that brokers and dealers are prohibited from engaging in business in contravention of such rules as the Commission may prescribe to safeguard the financial responsibility of brokers and dealers. As in the second subsection, transactions in exempted securities are specifically exempt from these provisions.

To summarize: The Act provides for a system of regulation of the over-the-counter markets by registered securities associations, which are permitted, to a large degree, to work out their own self-regulation, subject to the supervision of the Commission. The authority of the Commission over brokers and dealers in over-the-counter markets subject to federal jurisdiction is extended beyond its previous scope and applies to such brokers and dealers regardless of whether or not they are members of any registered securities association. This policy of self-regulation, with certain limitations, is believed to be the more practical solution to the problem of over-the-counter regulation, but its success will be largely dependent upon the seriousness with which the associations assume their new responsibilities.

WINSTON S. BROWN

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BANKRUPTCY UNDER THE CHANDLER ACT: LEGISLATIVE HISTORY AND SUMMARY*

IN THE present exposition an attempt will first be made to trace briefly the legislative history of the amendatory bankruptcy act of 1938, popularly known as the “Chandler Act”.1 A general summary of the new Act will then be presented.

LEGISLATIVE HISTORY

The Chandler Act, it is believed, marks the beginning of a new era of bankruptcy legislation and administration.

Consideration of the legislative channels through which this Act passed may suitably begin with the introduction of H. R. 103822 on January 20, 1936 by Congressman Chandler of Tennessee. This bill embodied the results of thorough studies and research conducted by the National Bankruptcy Conference (in which organization the Commercial Law League of America and the National Association of Referees in Bankruptcy have been active driving forces), the McAdoo Committee,3 the United States Treasury Department, and the Securities and Exchange Commission, which collaborated with the Conference in the drafting of Chapter X (“Corporate Reorganizations”). Detailed attention to amendments and revisions previously proposed had been thoroughly considered in the preparation of it. These included: (1) The “Boston draft”, prepared at the first meetings of the National Bankruptcy Conference, held

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*A predecessor paper, entitled Bankruptcy under the Chandler Act: Background and prepared by the same writer, appeared in the immediately preceding issue (December 1938) of the GEORGETOWN LAW JOURNAL.


2H. R. 10382, 74th Cong., 2d Sess. (1936). As a result of the House hearings (Hearings before the Subcommittee on Bankruptcy of the House Judiciary Committee on H. R. 10382, 74th Cong., 2d Sess. (1936)) and continued study by the National Bankruptcy Conference, several sections of H. R. 10382 were revised. The reprinted bill was then introduced on May 28, 1936 by Congressman Chandler as H. R. 12889 (74th Cong., 2d Sess.).

at the home of Robert A. B. Cook of Boston during June, 1932; (2) the proposals presented by the American Bar Association; (3) the draft prepared by the National Association of Referees in Bankruptcy on the basis of the “Boston draft”; (4) the comprehensive draft of Jacob I. Weinstein of Philadelphia; (5) the carefully constructed revision by Reuben G. Hunt of Los Angeles; (6) the very practical amendments proposed by W. Randolph Montgomery and William B. Layton, members of the National Association of Credit Men and of the Conference, based on their extensive experience; (7) the valuable proposals of Professor James A. McLaughlin of Harvard Law School with particular reference to the subjects of preferences, liens, and the title of the trustee in bankruptcy; and (8) the Hastings-Michener Bill, developed and sponsored in 1932 by the Department of Justice. Many constructive suggestions from bar associations and outstanding attorneys in all parts of the country were also received and considered.

In the concluding paragraph of the preface to the House Judiciary Committee’s Analysis of H. R. 12889 (74th Cong., 2d Sess. (1936)) Mr. Paul H. King, Chairman of the National Bankruptcy Conference, ably expresses the following opinion:

"The Conference, in my opinion, is doing a thorough, painstaking, and workmanlike job. As Chairman, I am fully familiar with the able, unremitting and conscientious work of the conferees, and wish to pay tribute to their devotion. For their services they cannot be compensated in money. Their rewards must lie in the fine friendships resulting from harmonious effort and pleasant contact, and in the thought that they are making a substantial contribution to the solution of vitally important problems in the economic life of our country today."

There is probably little doubt that the members of the Conference would testify to the applicability of the aforementioned thought to Chairman King himself.

Although H. R. 12889 died in committee at the end of the 74th Congress, the process of revision and improvement was continued. The bill was reintroduced as H. R. 6439⁴ by Congressman Chandler on April 15, 1937 with substantial changes and improvements that had been worked out in the meanwhile.

As a result of the far-reaching and extensive publicity and the critical analyses to which this proposed bankruptcy legislation had been subjected, serious opposition arose, and considerable discussion prevailed, throughout the country with respect to the proposed law. At the public hearings held during June 1937⁵ there developed a marked difference of

opinion as to the advisability of many of the proposed changes. The bill, however, was finally reported favorably by the House Committee on the Judiciary and was recommended for passage on July 6, 1937, but was subsequently amended and reintroduced on July 28, 1937 as H. R. 8046. The revised bill was also reported favorably by the House Committee, was passed by the House of Representatives on August 10, 1937, and sent to the Senate.

The Senate Judiciary Subcommittee conducted hearings on the bill during November 1937 and January and February 1938. There also was disclosed a wide difference of opinion existing among the bench and bar of the country concerning the desirability of certain of the reorganization sections, particularly Chapter X, entitled "Corporate Reorganizations". As to the remainder of the bill, most of the proposed changes were agreed upon and the necessary reconciliation of views effected. Although the opposing views regarding the reorganization sections could not be reconciled, those in favor of the new reorganization sections finally prevailed over those that favored amendment and retention of former Section 77B. After full opportunity to be heard had been afforded to all interested, and after much pointed discussion, the Senate Judiciary Committee reported the Chandler Bill with 268 amendments to the bill passed by the House, and in such form it was passed by the Senate on June 10, 1938. The Senate then insisted upon its amendments and asked for a conference with the House. This was not found necessary, however, inasmuch as on June 13, 1938 the House agreed to all Senate amendments. The bill was subsequently approved and signed by President Roosevelt on June 22, 1938.

This legislation climaxed years of arduous effort by the largest group of experts in bankruptcy and related fields ever assembled for the purpose of revising the Bankruptcy Act of 1898 to meet the needs of modern economic life.

SUMMARY OF THE CHANDLER ACT

The Chandler Act may be said to amend the previously existing law by modernizing, supplementing, clarifying, and codifying it on the basis of the experience gained from judicial interpretations of the Act of 1898 during the forty years in which the latter had been in operation up to that time. The Chandler Act is not so extreme a law as some would have liked, and not so conservative as others would have preferred. Instead, it is a composite, representing the consensus of opinion of men thoroughly familiar with the subject, who approached the related prob-

*Hearings before a Subcommittee of the Committee on the Judiciary of the United States Senate on H. R. 8046, 75th Cong., 2d Sess. (1937 and 1938).
lems from the multifold viewpoints of the courts and their administrative officers, the bar, creditors, debtors, economists, public accountants, law school professors, and eminent writers on bankruptcy and allied fields.

The Chandler Act was written with the idea of giving the country a comprehensive bankruptcy statute. It is a conservative step forward toward efficient administration of the estates of honest debtors; for such of these as come under its jurisdiction it affords equitable remedies and relief. It also contains, however, effective sanctions for bringing to justice the small dishonest, unscrupulous, and corrupt element that in the past has been able to escape from punishment and proper accountability through various loopholes and legal technicalities.

The new Act amended Sections 1 to 11, 14, 15, 17 to 29, 31, 32, 34, 35, 37 to 42, 44 to 53, and 55 to 72 of the amended 1898 Act; amends and incorporates as Chapters X to XIV, inclusive, former Sections 12, 13, 73, 74, 77A, and 77B; and repeals former Section 76 and all Acts and provisions inconsistent with the Chandler Act.

The Act is composed of 14 chapters. Chapter I, entitled "Definitions" and coextensive with Section 1, defines terms used in the Act. Chapter II, entitled "Courts of Bankruptcy" and coextensive with Section 2, empowers the federal courts to exercise original jurisdiction in proceedings under the Act to carry out the duties and functions enumerated in 22 subdivisions. Chapter III, entitled "Bankrupts" and consisting of Sections 3 to 17, lists and describes the "acts of bankruptcy", the kinds of persons subject to the Act, and exemptions, discharges, and other matters pertaining to bankrupts. Chapter IV, entitled "Courts and Procedure Therein" and comprising Sections 18 to 32, deals with the courts of bankruptcy and procedure therein. Chapter V, entitled "Officers, Their Duties and Compensation" and including Sections 33 to 54, creates the offices of referee and trustee and refers to the duties and compensation of officers. Chapter VI, entitled "Creditors" and containing Sections 55

\footnote{For an excellent commentary on each section of the Chandler Act cf. Weinstein, The Bankruptcy Law of 1938 (1938), published by National Association of Credit Men, 1 Park Ave., New York, N. Y., 497 pp.}

\footnote{52 Stat. 840-842, 844-849, 11 U. S. C. §§ 1, 11, 21-29 (Supp. 1938).}

\footnote{Id. at 850, 11 U. S. C. at § 32 (Supp. 1938).}

\footnote{Id. at 851, 11 U. S. C. at § 33 (Supp. 1938).}

\footnote{Id. at 851-855, 11 U. S. C. at §§ 35, 41-52 (Supp. 1938).}

\footnote{Id. at 857, 11 U. S. C. at § 54 (Supp. 1938).}

\footnote{Id. at 857, 11 U. S. C. at § 55 (Supp. 1938).}

\footnote{Id. at 857, 11 U. S. C. at § 62 (Supp. 1938).}

\footnote{Id. at 857, 11 U. S. C. at § 63 (Supp. 1938).}

\footnote{Id. at 857-860, 11 U. S. C. at §§ 65-70 (Supp. 1938).}

\footnote{Id. at 860-864, 11 U. S. C. at §§ 72-81 (Supp. 1938).}

\footnote{Id. at 865-869, 872-883, 11 U. S. C. at §§ 91-96, 101-112 (Supp. 1938).}
to 60, outlines the procedures to be followed with respect to creditors' meetings, notices, and related matters. Chapter VII, entitled "Estates" and consisting of Sections 61 to 72, sets forth the manner in which estates are covered in the Act. Sections 75 and 77 of Chapter VIII, entitled "Provisions for Relief of Debtors", and Sections 81 to 84 of Chapter IX, entitled "Readjusting of Debts of Taxing Districts"—all of which deal with farm relief, railroad reorganization, and compositions of insolvent taxing districts—represent portions of the previous law carried over without revision into the Chandler Act.

Chapter X, entitled "Corporate Reorganizations" and coextensive with Sections 101 to 276, is a complete revision of former Section 77B, with substantial improvements. Chapter XI, entitled "Arrangements" and consisting of Sections 301 to 399, includes the substance of former Sections 12 and 74 of the bankruptcy law; other material improvements have also been made. Chapter XII, entitled "Real Property Arrangements by Persons other than Corporations", includes Sections 401 to 526; Chapter XIII, entitled "Wage Earners' Plans", covers Sections 601 to 686; and Chapter XIV, entitled "Maritime Commission Liens", consists of Sections 701 to 703.

As stated in the House\(^{19}\) and Senate\(^{20}\) committee reports, the following general purposes are sought to be accomplished by the Chandler Act:

"1. To clarify certain of the definitions and to add desirable new definitions; to straighten out the statement of the acts of bankruptcy in order to avoid the present overlapping of the third and fourth acts; and to enlarge the fifth act the better to cover and curb equity receiverships.

"2. To increase efficiency in administration.

"3. To make clearer the provisions relative to the jurisdiction of the bankruptcy courts.

"4. To improve the procedural sections of the Act.

"5. To tighten up the provisions for the enforcement of the criminal provisions of the law.

"6. To minimize evasions by bankrupts and to grant certain new privileges in favor of bankrupts.

"7. To make more effective the discharge provisions of the Act.

"8. To perfect the sections relative to preferences, liens and fraudulent conveyances and the title of the trustee.

"9. To provide a more workable partnership section.

"10. To prescribe an improved composition procedure, including certain of the so-called 'relief provisions' of the Act for individual compositions and extensions and a carefully prepared plan for corporate reorganizations, retaining the desirable permanent provisions of the new legislation, and eliminating cumbersome, overlapping, and inconsistent provisions; also providing for wage-earner amortizations and real-property arrangements by unincorporated persons; and

"In general to modernize and bring up to date the bankruptcy law of our country."

To minimize the necessity of renumbering sections every time a new one is inserted, an expansive system of numbering was followed. Thus, the Act proper (Chapters I to IX) was allotted Section numbers 1 to 100; Chapter X, 101 to 300; Chapter XI, 301 to 400; Chapter XII, 401 to 600; Chapter XIII, 601 to 700; and Chapter XIV, 701 to 703. The framers of the Act, realizing that forty years of case law had been accumulated with respect to the original sections of the Bankruptcy Act of 1898, as amended prior to the Chandler Act, and realizing the desirability of making these interpretative decisions readily identifiable with the sections in the Chandler Act, wisely decided to incorporate in the new Act the various old section numbers of the provisions that were carried over from the old law.

Among the improvements of arrangement and phraseology are the re-drafting of Section 48\textsuperscript{21} to allow the orderly assimilation of amendments made at various times since the law was enacted; the elimination of the duplication in former subdivisions (c) and (f) of Section 67, which are now combined in Section 67(a);\textsuperscript{22} the transfer of former Section 47(a) (2) (after clarification of its contemplated purpose with respect to the powers of the trustee) to Section 70(c);\textsuperscript{23} the chronological restatement, in Section 39(a), of the duties of referees;\textsuperscript{24} the rearrangement in procedural sequence of the trustees' duties enumerated in Section 47(a);\textsuperscript{25} and the combining of former subdivision (e) of Section 2 with Section 69(a)\textsuperscript{26} since the former does not deal with acts of bankruptcy but with the taking possession of property.

MITCHELL S. DVORET

\textsuperscript{22}Id. at 875, 11 U. S. C. at § 107 (a) (Supp. 1938).
\textsuperscript{23}Id. at 879, 11 U. S. C. at § 110 (c) (Supp. 1938).
\textsuperscript{24}Id. at 858, 11 U. S. C. at § 67 (a) (Supp. 1938).
\textsuperscript{25}Id. at 860, 11 U. S. C. at § 75 (a) (Supp. 1938).
\textsuperscript{26}Id. at 879, 11 U. S. C. at § 109 (a) (Supp. 1938).
NOTES

A NEW ADMINISTRATIVE LANDMARK

WHEN the first Morgan decision\(^1\) was handed down on May 25, 1936 it caused comparatively little comment in the legal profession. Two years later when the Supreme Court again decided the Morgan case,\(^2\) lawyers, politicians, government officials and business leaders all joined in a great uproar, some in a spirit of commendation, others vociferous in their condemnation of the legal acumen and wisdom of our Supreme Court Justices. Secretary of Agriculture Wallace addressed a curt note\(^3\) to Chief Justice Hughes inferentially attacking the court. Secretary Wallace also addressed a letter to the New York Times,\(^4\) openly and bitterly attacking the decision and accusing the court of switching ground in its later opinion to make political fodder of the Administration's Department of Agriculture. Mr. Frederick Woods, counsel for the stockyards commission merchant, Morgan, replied in a letter which was also published in the New York Times.\(^5\) Mr. E. L. Marshall, former Solicitor of the Department of Agriculture in the Hoover regime, entered the fray with a caustic letter to the New York Times\(^6\) attacking Secretary Wallace.

But more significant to students of administrative law were the principles enunciated in the case. On April 26, 1938, many counsels of the administrative departments of the government were panic-stricken when they read this second Morgan decision. The general counsel of the National Labor Relations Board openly stated that he proposed to take

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\(^{1}\)Morgan v. United States, 298 U. S. 468 (1936).

\(^{2}\)Morgan v. United States, 304 U. S. 1 (1938).

\(^{3}\)N. Y. TIMES, May 3, 1938, § 1, p. 1, col. 6. The Secretary pointed out to the Chief Justice that in the first Morgan decision the Court had said that a tentative report of a trial examiner was not necessary. He also referred to the fact that the procedure held fatally defective by the court was originated by a former administration.

\(^{4}\)N. Y. TIMES, May 8, 1938, § 4, p. 8, col. 5. The Secretary emphasized the fact that the New York Times reporters had assumed that the second Morgan decision was a rebuke to the Administration. This he attributed to "the Court's cloudy phraseology". The Secretary then went on to show that the procedural omission of a tentative report by the trial examiner was the error of the Republican administrations and that he had corrected it. He then accused the Court of shifting ground in the second decision in that the Court had said in the first decision that a tentative report by the trial examiner was unnecessary and now in this decision he says that it is.

It is obvious from this letter to the New York Times that the Secretary interpreted the decision to mean that he who hears must decide. Later decisions of the courts show this interpretation to be erroneous.

\(^{5}\)N. Y. TIMES, May 15, 1938, § 4, p. 8, col. 5.

\(^{6}\)N. Y. TIMES, May 22, 1938, § 1, p. 4, col. 4.
all the cases pending before the circuit courts of appeal and retry them in conformity with the proceedings which he thought the Supreme Court demanded in the Morgan decision just handed down. When all the furor had died down it was apparent that many of the best lawyers in the land had misinterpreted the decision, its effect and possible ramifications. It was only when the Supreme Court, in later cases, cleared away the fog that a definite appreciation of the principles of the case became possible.

The history of the litigation involved in these Morgan decisions is an interesting one. Under the Packers and Stockyards Act, the Secretary of Agriculture is authorized to fix the maximum rates to be charged the farmers by the stockyards. Under the authority of this act, Secretary of Agriculture Hyde on April 7, 1930, issued an order of inquiry and notice of hearing with respect to Kansas City Stockyards rates. Evidence was taken before an examiner. Both government and the stockyards people were represented by counsel. In March, 1931, the Acting Secretary of

The procedure of the National Labor Relations Board at the time of the second Morgan decision did not provide for a tentative report of the trial examiner to be submitted to the other party. Counsel for the Board, apparently interpreting the Morgan decision to mean that a tentative report was necessary to due process sought to take their pending cases before the various circuit courts of appeal and retry them in accordance with what they thought was the procedure required by this last Morgan opinion. Mr. Fahey, General Counsel for the National Labor Relations Board, told the Circuit Court of Appeals for the Third Circuit, in the Republic Steel case: "although the National Labor Relations Board feels its order is valid and enforceable it is seriously considering the reopening of the Republic and several other cases, for the taking of the procedural steps outlined by the Supreme Court and that it would necessitate the withdrawal of these cases from the courts." N. Y. TIMES, May 1, 1938, § 1, p. 1, col. 4.

It is interesting to note that the Republic Steel Corporation applied to the Circuit Court of Appeals for the Third Circuit for an order restraining the Board from withdrawing the case. The National Labor Relations Board then filed a petition with the Supreme Court for writs of prohibition and mandamus directed to the judges of the third circuit to vacate the order they had issued denying the right of the Board to withdraw its case. The Court held in in re Petition of National Labor Relations Board, 58 Sup. Ct. 1001 (1938), that the Labor Board could withdraw a case any time prior to when it had filed with the court a certified copy of the transcript of the record.

42 STAT. 159 (1921), 7 U. S. C. § 181 (1934). The pertinent provisions are:

§ 211. "Whenever after full hearing upon a complaint made as provided in section 210, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; * * * ."
Agriculture heard the oral argument and Morgan, as one of the stockyard commission brokers (along with others), submitted a brief. May 18, 1932, the Secretary made known his findings and prescribed the maximum rates. Then the order was vacated due to economic conditions and a rehearing begun October 6, 1932. The former evidence supplemented by new testimony was submitted. March 24, 1933, Rexford Tugwell heard the oral arguments as Acting Secretary of Agriculture. Appellants submitted a brief on the new evidence introduced at the rehearing as well as their prior brief. The government did not submit a brief nor did it make any contentions outside of what its counsel said at the oral argument. It did not give Morgan a statement of the contentions or issues, or the tentative findings. The stockyard interests also asked that the trial examiner prepare a tentative report to be used as a basis for argument and exception. This request was refused. Secretary of Agriculture Wallace then signed the findings. The counsel for Morgan immediately sought to restrain the enforcement of the Secretary's order in the District Court. Two main contentions were advanced in support of the injunction:

1. The government failed to give the petitioner a proper hearing because:
   (a) No tentative report was issued to the plaintiffs and they did not have the opportunity to argue orally upon the issues presented before the Secretary.
   (b) The Secretary did not personally hear or read the evidence presented at the time he signed the order but obtained his information solely from employees in his department.

The three-judge District Court decided that they had no power to go behind the signed order of the Secretary and decided for the government. The case then came on appeal to the Supreme Court.

Chief Justice Hughes, in delivering the unanimous opinion of the Court, treated the case as one of administrative procedure. He said:

"... we meet at the threshold of the controversy plaintiffs' additional contention that they have not been accorded the hearing which the statute requires." 10

He then narrowed the decision to decide whether or not the Secretary had properly heard and weighed the evidence:

"Second.—The outstanding allegation, which the District Court struck out, is that the Secretary made the rate order without having heard ... the oral arguments or having read or considered the briefs which the plaintiffs submitted." 11

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8 F. Supp. 766 (W. D. Mo. 1934).
9298 U. S. 468, 473 (1936).
10Id. at 478. The court then went on: "The other allegations of the stricken paragraph do not go to the root of the matter. * * * Again, while it would have been good practice to have the examiner prepare a report and submit it to the Secretary and the parties, and to permit exceptions and arguments addressed to the points thus presented—a practice
The Court dismissed the argument that a tentative report by the trial examiner was necessary. Then the principle of the case was laid down precisely:

"It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear."

After the case was remanded to the District Court, interrogatories were sent to the Secretary which he answered. The District Court then held that the hearings before the Secretary of Agriculture were adequate. The plaintiffs again appealed on the ground that they were not given a fair hearing before the Secretary and that his findings were arbitrary. Secretary Wallace candidly answered the interrogatories directed to him as to how he had arrived at his decision:

"He did not hear the oral argument. The bulky record was placed upon his desk and he dipped into it from time to time to get its drift... These, together with the transcript of the oral argument, he took home with him and read. * * * He testified that he considered the evidence before signing the order."

The Court held this to be sufficient saying:

"We agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusion if he gave the hearing required by law."

Then the Court went on:

"But a 'full hearing'—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit to argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the

found to be of great value in proceedings before the Interstate Commerce Commission—we cannot say that that particular type of procedure was essential to the validity of the hearing. The statute does not require it and what the statute does require relates to substance and not form."

This is the statement from which, it was alleged by Secretary Wallace, the Court shifted position in its 1938 decision.

1298 U. S. 468, 481 (1936). [Italics supplied.]
14304 U. S. 1, 17, 18 (1938).
14Id. at 18.
government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final commands.16

The court then points out that the appellant never had such an opportunity in this case. He was never given the opportunity to know the issues although he specifically requested that they be submitted to him.

As soon as this second decision was released to the public a barrage of criticism was directed against the court. It was accused of shifting ground by some while the severer critics openly asserted that the Court had completely reversed itself without ample justification.

The following chart gives some idea as to the process by which Court arrived at its conclusions in this litigation.

**FIXING OF STOCKYARD RATES**

**RATES FIXED BY THE LEGISLATURE**

No hearing is required. Rationale: The legislative process requires that each legislator vote on each statute. Hence the public by reelecting or defeating the individual legislator has a direct check on the action of the legislature. Hence no hearing is necessary.

**RATE MAKING DELEGATED TO THE SECRETARY**

The action is no longer legislative but quasi-judicial. A "full hearing" is required. Rationale: Administrative bodies are subject to the public only indirectly. In addition, the opinion of an administrative body represents the opinion of "a few". Therefore, to safeguard the public a full hearing is necessary.

**FULL HEARING BEFORE ADMINISTRATIVE BODIES**

A. The one who decides must hear. 1st Morgan case. 298 U. S. 468 (1936)

B. A right to know the issues and an opportunity to meet them. 2nd Morgan decision. 304 U. S. 1 (1938)

Thus in the strict logical sense, the Court is correct in its conclusion that it did not shift ground in the second decision. It was still construing the word "hearing". But, after an impartial reading of the two opinions and the rehearing,17 the only fair conclusion is that it vitally broadened the meaning of the term "hearing" in administrative law. The Court had previously suggested in the *dicta* of some of its prior cases18 that the

16*Id.* at 18, 19. [Italics supplied.]
17304 U. S. 23 (1938). The Government, perplexed by the decision, asked for a rehearing on the ground that the Supreme Court had reversed itself. As the chart above shows, the Court did not do this. Rather it broadened the scope of its previous decision.
18Justice Brandeis, in a concurring opinion in the St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73 (1936) said:
parties had a right to know and meet the issues but this is the first case which squarely decided that point.

The decision then in this second decision is a narrow one. It can be epitomized; "reasonable opportunity to know the claims of the opposing party and the right to meet them". It is important to note that does not mean that any defendant in an administrative proceeding is guaranteed any particular type of procedure. The principle is not a mechanical thing. It does not matter how the parties gain a knowledge of the issues; no formal type of notification is necessary. Just as long as they know and just as long as they have an opportunity to meet those issues due process in procedure has been met. That such is the narrow of the decision we know from later cases.\(^3\) As has been said, many lawyers thought otherwise. The reason for the confusion that followed the second Morgan decision is attributable to the involved phraseology of the Court's opinion. Throughout, the second opinion stresses the lack of a "tentative report" of the trial examiner:

"Appellants' request that the examiner prepare a tentative report, to be submitted as a basis for exceptions and argument, was refused."\(^2\)

Later it reiterates:

"No opportunity was afforded to appellants for the examination of the findings

"Like the lower court, I think no reason exists for making special exception of issues of fact bearing upon a constitutional right. The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."

[Italics supplied.]

In Ohio Bell Telephone Co. v. Public Utilities Comm. of Ohio, 301 U. S. 292, 304 (1937) the court held:

"Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives proper deference from courts when it has been reached with due submission to constitutional restraints. . . . Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need when power has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73) of a fair and open hearing be maintained in its integrity. Morgan v. United States, 298 U. S. 468, 480, 481; . . . The right to such a hearing is one of 'the rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement."


\(^{20}\)304 U. S. 1, 16 (1938).
Thus it was possible to draw from this language the conclusion that a tentative report of the trial examiner was necessary to comply with due process. It was again pointed out:

"In absence of any report by the examiner or any finding proposed by the Government, and thus without any concrete statement of the Government's claims, the parties approached the oral argument." 22

It was a reading of these statements that led some to conclude that a tentative report by the trial examiner was necessary to due process in procedure. It is not difficult to understand the position of those who complained that the Court shifted ground in its second decision from the position taken in the former where it said by way of dicta that the examiner's report, while useful, was not essential. 23

The controversy may be summed up by saying that the Supreme Court was correct legally when it based its first opinion on the narrow point of "he who decides must hear." It did not, legally speaking, have to consider the other issues at that time. Furthermore, counsel for Morgan did not argue in the first case that it did not have knowledge of the issues or lack an opportunity to meet them. So, in all justice to the Court, it cannot be said that the argument used as the basis of the second decision was pressed on appeal in the first case. However, it seems fairly obvious that a cursory perusal of the record in the first Morgan litigation would make it apparent to the Court that Morgan did not know the issues. Because of this situation the Court must bear the suspicion that the second Morgan case offered an ideal opportunity to the Court to expand the constitutional safeguards surrounding administrative procedure and that the Court took full advantage of that opportunity.

The question then presents itself—what does the last Morgan decision stand for today in the law of administrative procedure? As in many other instances, 24 the best method is to see how the Court interprets the

21See note 12, supra.
22An outstanding example of this is Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429 (1895); 158 U. S. 601 (1895), where the muddled opinion of the court made hazardous any conclusion as to controlling principles. It was not until Chief Justice White in Brushaber v. Union Pacific Ry., 240 U. S. 1 (1916), held that the case should be interpreted as meaning that an income tax was generically indirect and only for purposes of apportionment was it direct, did we have any clear concept of the principle enunciated by the decision. Likewise, in Eisner v. Macomber, 252 U. S. 189 (1920), the court held in vague terms that a stock dividend was not income because it was not a gain derived from capital or labor or the combination of both. Treasury officials interpreted this to
case itself in later decisions. Twenty-three days after the second Morgan opinion was handed down the Supreme Court had occasion to construe its meaning. In National Labor Relations Board v. Mackay Radio & Telegraph Company the facts were that a general strike of telegraph and wireless operators had been called. As part of that general walkout, the San Francisco office of the Mackay company struck. Eleven strike-breakers were brought in. The national strike failed. The company offered the strikers their jobs again except eleven men who had been prominent in union activities. Six of them eventually returned to work, and then the union filed a petition against the Mackay company with the Labor Board on the ground of discrimination against these five men because of their prominence in helping organize the men and keeping the union alive. A trial examiner held a hearing but before oral argument the case was transferred to Washington. There, oral argument was heard, and the telegraph company filed a brief. Later the Board made its findings of fact and law. In the Circuit Court of Appeals, the Mackay company contended that it had not had a hearing in conformity with due process. It assigned as reasons that it was first summoned to answer a complaint that it discriminated in discharging five men and that later this complaint was withdrawn and a new one substituted which asserted that its offense was a refusal to re-employ. The Supreme Court said:

"Thus the respondent claims that it is found guilty of an unfair labor practice which was not within the issues upon which the case was tried. The position is highly technical. All parties to the proceeding knew from the outset that the thing complained of was discrimination against certain men by reason of their alleged union activities. * * *"

"While the respondent was entitled to know the basis of the complaint against it, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers. . . . "

The respondent also claimed that failure to file a tentative report by the trial examiner was a violation of due process. The Court categorically rejected this contention. Then the court pointed out that in this

mean all stock dividends were not income until they were dumfounded by the decision of Koshland v. Helvering, 298 U. S. 441 (1936), where the court interpreted the Eisner case as applying only to common stock dividends and not to other type dividends.

\[1\] 304 U. S. 333 (1938).

\[2\] Id. at 349, 350.

\[3\] "What we have said sufficiently indicates that the issues and contentions of the parties were clearly defined and as no other detriment or disadvantage is claimed to have ensued from the Board's procedure the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare Morgan v. United States, 298 U. S. 468, 478. The contention that the respondent was denied a full and adequate hearing must be rejected." Id. at 350, 351.
case a full hearing means that if the parties know the issues and have an opportunity to meet them, the requirements of the second Morgan decision are satisfied. The principle enunciated is not one requiring any set mode of procedure. It is not a technical formality in any sense. Actual knowledge is the criterion.

The first case to be decided by the circuit courts of appeal involving the issues set out in the Morgan case is an opinion by Judge Denman in National Labor Relations Board v. Biles Coleman Lumber Company. The Labor Board sought to enforce its order that the company desist from certain unfair labor practices. The company pleaded affirmatively that the Board did not read enough of the testimony to weigh the evidence or form an adequate basis for findings. It also contended that the findings were prepared by subordinates and last, that the findings were not submitted to the respondent in advance of making of the order by the Board. The Circuit Court disposed of the first two contentions quickly by noting that no facts were presented as to how much evidence the Board had read and it cited the first Morgan decision to the effect that "evidence thus taken may be sifted and analyzed by competent subordinates." It also pointed out that by necessity employees of administrative agencies must assist in the preparation of findings.

The court devoted some space to the argument that the petitioner had not been served with the proposed finding before it was made. It pointed out that the respondent knew the issues and had an opportunity to meet them. The conclusion was that proposed findings did not have to be sent to the opposing party. The court pointed out that such a right never existed at common law and it is only by statute or in the discretion of the court that a judge submits proposed findings to the losing party. The court then interpreted the second Morgan decision

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304 U. S. 1 (1938).

In the rehearing of Morgan v. United States, 304 U. S. 23, 26 (1938), the court said:

"The distinction was again brought out in our recent decision in the case of National Labor Relations Board v. Mackay Radio & Telegraph Co., post, p. 333, where the mere absence of an examiner's report was found not to be controlling, as the record showed that in that case the contentions of the parties had been clearly defined and that there had been in the substantial sense a full and adequate hearing."

98 F. (2d) 16 (C. C. A. 9th, 1938).

"We take it that what was said in Morgan v. U. S., 58 S. Ct. 773, 82 L. Ed. —, April 25, 1938, rehearing denied * * *, concerning the failure of the Secretary of Agriculture to submit such proposed findings to the party subject to his order, has to do with no more than their necessity to advise such a party of the specific contention of law and fact relied upon for the Secretary's order, where, as in that case, there was no complaint, brief or argument on behalf of the Secretary which informed the ordered party of the contentions on which the order sought to be made by him was to be based. Here there was no absence of such advice and hence no reason to submit the findings." 98 F. (2d) 16, 18 (C. C. A. 9th, 1938) [Italics are those of the court].
as holding that the opposing party must be given the right to know and meet the issues. Here, again is corroborative evidence of what seems the precise principle of the later Morgan opinion.

The latest case involving the principle of notice of the issues is National Labor Relations Board v. American Potash & Chemical Corp. The Labor Board petitioned the court to have the Potash Corporation desist from certain unfair labor methods. Of importance in connection with this discussion is the claim of the corporation that the substance of notice and hearing had not been accorded it because the Labor Board had been arbitrary in refusing to grant its lawyers reasonable continuances, and because it did not present an oral argument before the Board. The court cited the Morgan case noting that the corporation did have a knowledge of the issues and showing that the company never asked for an oral argument before the Board and that therefore they could not say that they did not have an opportunity to meet the issues.

How can we evaluate this Morgan case in the field of administrative law? The net contribution of the entire Morgan litigation appears limited to: (1) He who decides must decide upon the basis of the evidence presented and read by him; (2) Parties to a quasi-judicial administrative proceeding have a right to know the issues and have a right to an opportunity to meet them. While the actual legal points involved in this lengthy litigation can be narrowed down to precise principles the opinions seem to have greater significance when placed in their proper place in the field of administrative law. Due to the exigencies of modern government, administrative fact finding in most instances is conclusive on the courts and may not be disturbed unless not supported by any substantial evidence. This power, unless properly safeguarded, could lead to much injustice. To insure, therefore, that citizens opposed by the government before administrative bodies, have every protection, the Supreme Court, in these cases, lays down the strict requirement that every essential of a fair trial with the "rudiments of fair play" be followed. Thus the Court has set out another administrative landmark.

FRANK J. DUGAN*

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98 F. (2d) 488 (C. C. A. 9th, 1938).

*Respondent claims that it was denied the substance of notice and hearing as required by the guarantee of due process laid down in the Fifth Amendment U. S. C. A. Const. Amend. 5. Our attention is called to the recent case of Morgan v. United States, 304 U. S. 1, *, *, wherein was reiterated the principle that while mere form is not important, a litigant in any sort of a tribunal or administrative body, must be fairly given an opportunity to present his case,—by reasonable notice of what charges he will have to meet and by opportunity to present both evidence and argument in meeting them." Id. at 491.

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PUBLIC POLICY IN RELATION TO SUICIDE IN LIFE INSURANCE

RECOVERY on a life insurance policy for sane suicide has been the subject of many conflicting judicial opinions. In England, suicide has always been held criminal, Blackstone1 saying, "As the suicide is guilty of a double offense, one spiritual, and the other temporal, . . . the law has, therefore, ranked this amongst the highest crimes". In that country, suicide was looked upon as so heinous that the law imposed a forfeiture on the worldly goods of the suicide until 1870,2 when forfeiture was abolished. In this country, the law has never permitted forfeiture for suicide; it has always been regarded as unlawful and criminal, though generally no longer punishable.3

In the recent case of Beresford v. Royal Insurance Company Ltd.,4 the insured carried a £50,000 policy on his life with the defendant company, payable to his wife. He had paid premiums for nine years at the end of which time he was heavily in debt. Two minutes before the policy would have expired for the non-payment of premiums, he deliberately shot himself before witnesses, intending thereby to pay his debts with his life. The policy contained a clause for forfeiture if the insured "died by his own hand, whether sane or insane, within one year from the commencement of the assurance". After that time the policy was to be indisputable for any cause. The House of Lords, in deciding the case, held the contract of insurance to be valid, but unenforceable on the ground of public policy, the theory being that a person will not be permitted to come to a court of justice and claim a benefit for his criminal act. The court pointed out that under general principles of insurance law the insured cannot by his own deliberate act cause the premature occurrence of the event upon which the payment of the insurance money depends. As the holder of a fire policy cannot recover when he wilfully fires his home; as the holder of a marine policy cannot recover when he wilfully scuttles his ship; so likewise the holder of a life policy should not recover if he deliberately destroys the life upon which payment depends.

In the United States there has been a curious growth in the history of insurance law with respect to payment on life policies. Before the advent of the incontestable clause, after the death of the insured, the insurance company often would contest the policy on some ground of fraud allegedly committed by the insured during his lifetime. Thus, in-

1Blackstone 1
233 & 34 Vict., c. 23 (1870).
stead of the insured leaving security to his beneficiary he left a liability in the form of a law suit. Therefore the incontestable clause was devised to stop that practice on the part of the insurance companies and to encourage the purchase and sale of insurance.\(^6\) By the clause, the insurance company sets for itself a short statute of limitations,\(^6\) after which time it denies itself defenses which it could have made during that period. This clause has been misinterpreted to mean that the insurance company denies itself all defenses even to the extent of fostering criminal acts to hasten the termination of the policy. However, merely because the insurance company contracts to pay in the event of suicide the insured should not be allowed to insist upon payment because of his own criminal act. Some states have added to the confusion by passing statutes which expressly forbid the defense of suicide after the contestable period.\(^7\)

The first definite expression by the Supreme Court of the United States on the question of public policy in relation to recovery on a life insurance policy determined by the suicide of the insured was in the case of *Ritter v. Mutual Life Insurance Company of New York.*\(^8\) In that case recovery was denied on a policy silent as to suicide and contestability. The basis for the decision was two-fold. The first ground of the decision was that the policy was silent as to suicide, which risk was impliedly excepted from the policy; the second and more important ground was that payment under the contract would be against public policy, having a tendency to sanction an act dangerous to the public interest, and subversive of sound morality, because of the temptation to commit suicide and by so doing to provide for dependents or creditors. The sound reasoning of this decision was qualified by the case of *Whitfield v. Aetna Life Insurance Company,*\(^9\) where the court in distinguishing the *Ritter case* held that it was within the province of the state by its legislature to adopt such a public policy as it deemed best. Subsequently the Supreme Court


\(^{169}\) U. S. 139 (1898).

\(^{205}\) U. S. 489 (1907).
expressed what is now the prevailing view in this country in the decision of *Northwest Mutual Life Insurance Company v. Johnson*. In that case the insured took out two policies on his life, one payable to his wife as beneficiary and excepting suicide for two years, the other payable to his administrator and incontestable after one year. The insured killed himself while sane after two years had expired. The court held first, that public policy is a matter for the states to decide, and secondly, that the provision in the first policy is an inverted expression of the general intent of the clause in the second, and that both taken together mean that suicide of the insured, sane or insane, after the specified time shall not be a defense. Mr. Justice Holmes said that the case does not deal with implied exceptions but rather with express undertakings. These two cases did not overrule the question of public policy as settled in the *Ritter case*, but rather delegated the determination of that question to the states. The nearly unanimous majority of state courts have been inclined to follow the *Johnson case*, holding that suicide is not against public policy.

The manner in which the policy is taken out, the person to whom it is payable, and the cause of the insured's death present various legal problems that have resulted in many conflicting decisions. If the insured has the present intent to commit suicide when he takes out the policy, all courts agree that there can be no recovery, the reason being that the contract of insurance is one of good faith and if recovery were permitted it would be a fraud upon the insurance company and the public. The serious conflict appears when the insured while sane takes his own life having in the first instance no intention of committing the criminal act. On the one hand, where the policy is payable to insured's estate recovery is denied by some courts. Two reasons are found in the decisions for the
support of this rule. The first is that there is an implied exception in the contract from the presumed intention of the parties that the insured will not unnaturally terminate the policy.\textsuperscript{14} The second given is that to enforce the contract would be against public policy.\textsuperscript{15} On the other hand, when the beneficiary of the policy is a third party, the weight of authority permits recovery.\textsuperscript{16} The theory of recovery in this instance is that the beneficiary recovers by contract and not by inheritance; the beneficiary not being a wrongdoer should not be made to suffer. When the risk is not expressly excluded by the terms of the policy, the self-destruction of the insured while insane will not defeat recovery, because in that case there is no criminal act upon which to deny recovery.\textsuperscript{17} When the life of the insured is terminated by legal execution and the policy is payable to the insured's estate, recovery is permitted.\textsuperscript{18} But the better view is expressed by the United States Supreme Court in the case of \textit{Northwestern Life Ins. Co. v. McCue},\textsuperscript{19} where recovery was denied on the ground of public policy. The court held in that case that the insurance policy did not cover the crime of the insured, which crime hastened the termination of the policy.

N. W. 381 (1904); Lange v. Royal Highlanders, 75 Neb. 188, 110 N. W. 1110 (1905); Campbell v. Supreme Conclave, 66 N. J. L. 274, 49 Atl. 550 (1901); Mutual Life Ins. Co. v. Lovejoy, 201 Ala. 337, 78 So. 299 (1918); Mareck v. Mutual Reserve Fund Life Ass'n, 62 Minn. 39, 64 N. W. 68 (1895).


A ridiculous example of the extent to which American courts have gone in following state public policy as laid down in the Johnson case is the case of Aetna Life Insurance Company v. DuBarry. In that case the policy contained a disability clause, and an incontestable clause. After the expiration of the contestable period, the insured deliberately shot off his hand with a shot gun. The court held that since the act of mutilation was not a crime and had not been declared by the state to be against public policy, recovery would not be denied. A case which by contrast goes to the other extreme is Metropolitan Life Insurance Company v. Roma. The insured took out a life policy payable to his wife. One clause of the policy provided for double indemnity as the result of accidental death, excepting expressly death as a consequence of an illegal act. The insured who was a gangster by profession had paid premiums for three years. He was assassinated by a rival gangster. The insurance company agreed without contest to pay the face value of the policy but refused to pay double indemnity claiming that the death of insured occurred as the result of an illegal act. The court in denying recovery, upheld the contention of the insurance company on the ground that to allow recovery would encourage the taking out of insurance against an illegal act contrary to public policy.

An outstanding example of an expression by a state court on public policy in the suicide question is found in Security Life Insurance Company v. Dillard. The insured in this case shot himself while sane on the last day of grace given him by the company for the payment of premiums. In deciding that case Mr. Justice Kelly, speaking for the court on the question of the insured providing for his family by his suicide, said,

"We are of opinion that upon the soundest consideration of public policy there ought not to be . . . there cannot be, any recovery. . . . Our decision of this case rests entirely upon the considerations of public policy. . . . These considerations have to do, not with the interests of the parties litigant, but with the public weal, and they overreach, in a case shown by the record to call for their exercise, all mere formal rules of procedure. They can no more be waived, either intentionally or unintentionally, by stipulations or defects in the pleadings than by provisions or omissions in the contract in litigation."

held further that the defence of legal execution was not barred by an incontestable clause because of the implied exception of such risk.


97 Colo. 493, 50 P. (2d) 1142 (1935).

117 Va. 401, 84 S. E. 656 (1915). But see VA. CODE (Michié & Sublett, 1936) § 4228 which provides that suicide or legal execution is no longer a defense under an insurance policy unless expressly excepted in the policy. However, Eagle, Star & British Dominion Ins. Co. v. Heller, 149 Va. 82, 140 S. E. 314 (1927), after citing § 4228, says recovery may still be denied under some circumstances.
"... But the very fact that he probably took this false view of the trustee-ship which he held in his own life, and of his duty to his family, and to the public, illustrates the importance of establishing a known and settled public policy which will discourage this course of conduct on the part of others who might be similarly disposed."23

Another case of opposite strength of expression against recovery in case of suicide decided solely on the principle of public policy was that of Elwood v. New England Life Insurance Company.24 The insured sought to recover under a disability clause of a policy for wounds inflicted upon himself when his attempt at suicide failed. The policy contained a clause excepting suicide, sane or insane, for one year, and also an incontestable clause for one year. The term of contest had expired before the wound was inflicted. The Pennsylvania Supreme Court, in deciding the case, distinguished it from the Johnson case on the ground that here the suicide had not been successful; yet the Pennsylvania Court adopted one phase of the Johnson case which stated that it was a matter for the state to adopt its own public policy. The court in denying recovery cited the previous Pennsylvania case of Hartman v. Keystone Ins. Co.25 as still being the law in Pennsylvania for the proposition that suicide alone, while sane, is sufficient to defeat recovery. However, the main premise for the decision was that even if the policy provided for payment in case of suicide it would be against public policy, as encouraging self-destruction, to provide for dependents.

In England the cases have been uniform in denying recovery when the insured has unnaturally terminated the policy by his illegal act. The first case to establish this doctrine was Amicable Society v. Boland.26 Fauntleroy, a banker, insured his life and paid premiums for nine years. He was indicted and convicted of a felony for which he was executed. The assignee, in suing on the policy, was denied recovery on the ground that since the policy would be void if the insurance were written specifically to protect against death by execution, to allow recovery would be to insert by implication a clause which would, if expressed, render the policy void. In deciding the case the court said:

"Suppose that in the policy itself this risk had been insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition, that in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it

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24 305 Pa. 505, 158 Atl. 257 (1931) (the insured here was deeply in debt and shot himself intending to provide for his family).
26 21 Pa. 466 (1853).
not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating upon the minds of men against the commission of crimes, namely, the interest we have in the welfare and prosperity of our connexions? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim?"27

The English courts have been unflinching in upholding this doctrine; the only modification being to permit recovery by a bona fide third party, but only to the extent of his interest. A condition in the policy in the case of Moore v. Woolsey28 was that the company agreed to pay or not to pay at its option in case of suicide of the insured, but expressly agreed to pay if bona fide third parties acquired an interest in the policy. The court held the policy good, but limited its decision to exclude recovery if the company had expressly agreed to pay in case of suicide. In the case of Dufaur v. Professional Life Assurance Company,29 the English court upheld an assignment of a life policy to the extent of the sum assigned, though suicide was an excepted risk in the policy. The insured died by his own hand while insane. The decision was based on the validity of the assignment, nothing being said about public policy. The temper of the English law is well expressed in the case of Burrows v. Rhodes in these words:

"It has, I think, long been settled law, that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offense, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void.30

From the foregoing it is obvious that the English courts jealously guard the precept of public policy. A criminal cannot profit by his unlawful act;31 a policy which expressly excludes the risk of suicide is upheld without qualification;32 and a contract which provides for payment to the estate of the insured in the event of his suicide will not be enforced.33

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27 Id. at 211, 5 Eng. Rep. at 76.
30 (1899) 1 Q. B. 816, 828.
31 Cleaver v. Mutual Fund Life Ass’n, (1892) 1 Q. B. 147 (C. A.), 8 T. L. R. 139 (1891); In the Estate of Crippen, 27 T. L. R. 258 (1911); Hall v. Knight & Baxter, 30 T. L. R. 1 (1913); In re Sigsworth, (1935) 1 Ch. 89.
In this country if a clause in the insurance policy excepts the insurer’s liability when the insured after a violation of law is executed, the exception in the policy is upheld as prohibiting recovery. But when there is no such clause in the policy of insurance, the courts have held that execution for crime is nevertheless an excepted risk. We have seen that suicide is criminal and against public policy, for the rule has been laid down that in the case of sane suicide, where the policy is made payable to the estate of the insured or his personal representatives, the courts impliedly except that risk and deny recovery. Therefore, is it not reasonable that the courts should deny recovery when sane suicide is by the contract of the parties made an insurable risk?

WILLIAM O. CRAMER
HENRY C. RUBIN

44Breasted v. Farmers’ Loan & Trust Co., 8 N. Y. 299 (1853).
45Northwestern Mutual Life Ins. Co. v. McCue, 223 U. S. 234 (1911); Collins v. Metropolitan Life Ins. Co., 27 Pa. Super. 353 (1905); Burt v. Union Central Life Ins. Co., 187 U. S. 362, 365 (1902), where it is said, “It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would tend to induce crime, and, as it forbids the introduction of such a stipulation, it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for.” Contra: Collins v. Metropolitan Life Ins. Co., 232 Ill. 37, 83 N. E. 542 (1907), where it was held that such a contract was not against the public policy of Illinois. The court saying that payment of an insurance policy was a species of property and based its decision on the Constitution of Illinois of 1870, art. 2 §11 providing that no conviction of a crime shall work a corruption of blood or forfeiture of estate. Accord: American National Ins. Co. v. Coates, 112 Tex. 267, 246 S. W. 356 (1923); Fields v. Metropolitan Life Ins. Co., 147 Tenn. 464, 249 S. W. 798 (1922); Weeks v. New York Life Ins. Co., 128 S. C. 223, 122 S. E. 586 (1924).
36Ritter v. Mutual Life Ins. Co., 169 U. S. 139 (1898); Hopkins v. Northwestern Life Assur. Co., 94 Fed. 729 (C. C. E. D. Pa. 1899); Supreme Lodge v. Kutscher, 72 Ill. App. 462 (1897); Hall v. Mutual Reserve Fund Life Ass’n., 19 Pa. Super. 31 (1902); Security Life Ins. Co. v. Dillard, 117 Va. 401, 84 S. E. 656 (1915); Rudolph v. United States, 36 App. D. C. 379, 389 (1911), where it was said: “There is no difference in the law between a contract of insurance which expressly provides against recovery in case of suicide, and one where such a provision is implied. The prohibition is in the contract in both instances. The one forbids recovery as effectually as the other, and in neither case can the contract be enforced.”
CONSTITUTIONAL LAW—Federal Corporations’ Immunity from Suit for Tort—H. O. L. C.

The present action arose in a Massachusetts State Court. The action was one of tort for personal injuries sustained by the plaintiff, in a fall upon an accumulation of ice and snow on the sidewalk in front of premises upon which defendant corporation had foreclosed a mortgage and was in possession and control of at the time. Defendant moved to dismiss. Held, under the Home Owners’ Loan Act, the Home Owners’ Loan Corporation is not suable in actions of tort. Prato v. Home Owners’ Loan Corporation, 24 F. Supp. 844 (D. Mass. 1938).

The first question to determine is, can the Federal Government create a corporation, proprietary in nature? The Constitution specifies exactly what Congress can do, and this together with the legal interpretations of the Constitution is all the power Congress enjoys. It is true state governments can set up proprietary corporations, but state governments enjoy all the powers not clearly reserved by the various state constitutions. Bearing this distinction in mind it is clear that for a federal corporation, created by Congress, to be constitutional it must be governmental. It was never intended that Congress should pass laws to create a corporation to accomplish objects not entrusted to the government. Osborn v. Bank of United States, 9 Wheat. 738, (U. S. 1824). Thus the status of a federal corporation is that of an instrumentality of the United States, regardless of its purpose.

The United States can not be sued without its consent. Lynch v. United States, 292 U. S. 571 (1934); Wells v. Roper, 246 U. S. 335 (1918). When a state government, however, enters private business it abandons its sovereignty and can then be treated as a private corporation and sued as such. South Carolina v. United States, 199 U. S. 437 (1905). The United States, however, can be sued only by express legislative consent, and the courts can not enlarge upon this consent. Eastern Transportation Co. v. United States, 272 U. S. 675 (1927).

The acquiescence to suit is entirely in the discretion of Congress. During the World War, in corporations set up by the federal government, and more recently in the New Deal agencies, we find many varied types of formations. In each of these Congress has stipulated what immunities it desires the corporations to assume. In some, Congress has agreed to subject the corporation to suit and in others it has not. Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp., 258 U. S. 549 (1922); Langer v. United States, 76 F. (2d) 817 (C.C.A. 8th, 1935).

Therefore, in determining the legal status of federal corporations we must look to the words and intent of Congress in setting up the particular corporation. In this connection, the most important consideration is: will liability to suit in the courts seriously interfere with the performance of a governmental function, that is, the function for which the corporation was created? Federal Land Bank v. Priddy, 295 U. S. 229 (1935).

Certainly in the case of the Home Owners’ Loan Corporation, if it were subjected to the vast number of tort actions which constantly are arising, its staff would be overburdened with litigation and its funds diverted to pay damages. Thus in examining congressional intent as found in the Act, it is indeed inconceivable to hold that Congress consented to subject this instrumentality of the United States to suits which would defeat the very purpose for which the agency was created.

CHESTER HAMMOND.
CONSTITUTIONAL LAW—State Regulation of Theatres

North Dakota passed a law prohibiting the operation of any motion picture theatre which was owned, controlled, operated or managed by a producer or distributor of films. Plaintiff sued to enjoin the Governor and others from enforcing the statute, alleging that the act arbitrarily deprived it of property without due process of law, since it bore no reasonable relation to the prevention of monopoly, or unfair trade practices, and that the act, passed for the sole interest of a class seeking to exclude powerful competition, denied plaintiff equal protection of the law. Held, the policy declared by the act bore a reasonable relation to prevention of monopoly and unfair trade practice, which was a proper public purpose; and that the distinction between exhibitors also interested in producing and distributing films and those who are not, justifies a difference in treatment. Paramount Pictures v. Langer, 23 F. Supp. 890 (S. D. N. D. 1938).

The power of a legislature to deal with practices and situations which may reasonably be considered to be promotive of monopoly and restraint of trade is not subject to question. National Cotton Oil Co. v. Texas, 197 U. S. 115 (1905). In a case closely analogous to the present one, the legislature was upheld in forbidding the ownership of cotton gins by corporations interested in the manufacture of cotton-seed oil, when the facts showed that the practice tended toward giving those corporations a monopoly on ginning. Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129 (1921).

Laws requiring the divorcing of certain classes of business, in the public interest, have been upheld before. See United States v. Delaware & Hudson Co., 213 U. S. 366 (1909) and United States v. Lehigh Valley R. R., 220 U. S. 257 (1911), where defendant railroads were required to divest themselves of ownership of certain coal mines as required by the Hepburn Act, 34 Stat. 584 (1906), 49 U. S. C. § 1 (1934); Hammond Packing Co. v. Arkansas, 212 U. S. 322 (1909), where under an act, Ark. Dig. Stat. (Pope, 1937) § 9414, corporations engaged in a combination or trust outside the state were forbidden to do business within the state.

It is interesting to note that courts have been careful to scrutinize the business sought to be regulated and its relation to the public interest. Tyson & Brother v. Banton, 273 U. S. 418 (1927) held that a theatre ticket brokerage was not so affected with a public interest that the re-sale price of tickets might be regulated by the legislature, even as a means of preventing fraud and collusion between theatre managers and ticket brokers. In Engberg v. Debel, 19 Minn. 394, 260 N. W. 626 (1935), the court held that the refusal to allow a qualified applicant the right to operate an employment agency, on the ground that the field was sufficiently occupied, was a denial of equal protection and due process of law, though in Brazee v. Michigan, 241 U. S. 340 (1916), the Supreme Court held that employment agencies were subject to reasonable regulation and control by license. Lidgett Co. v. Baldridge, 278 U. S. 105 (1928) held that a statute, Pa. Stat. (Supp. 1928) §§ 9377a-1, 9377a-2, forbidding the acquisition by foreign corporations of new drug stores, unless all the stockholders were registered pharmacists, violated due process as having no real substantial relation to the public health.

The power of the legislature to regulate business, when acting upon a proper subject and within its proper sphere, has received the sweeping endorsement of the Supreme Court, which held, in a case involving the fixing of the price of milk, that, "... upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects. ... And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which
Recent Decisions

are not arbitrary or discriminating it does not lie with the courts to determine that the rule is unwise". Nebbia v. New York, 291 U. S. 502, 537 (1934). In a still more recent case upholding the chain store tax, the Supreme Court says, "If, in the interest of the people of the state, the legislature deemed it necessary either to mitigate evils of competition as between single stores and chains . . . or to discourage merchandising within the state by chains grown so large as to become a menace to the general welfare, it was at liberty to regulate the matter directly. . . ." Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412, 426 (1937).

The instant case is being appealed to the Supreme Court, and if the law is sustained, the North Dakota statute may well be a precedent for similar statutes in the several states, Arkansas having one under consideration at the present time and New Mexico has already drastically regulated contracts for and process of distribution of films among exhibitors. N. M. Stat. Ann. (Supp. 1938) §§ 35-2905, 35-2929. At the last session of Congress the Nealy Bill, regulating block booking and blind selling, was passed by the Senate, May 17, 1938, S. 153, 75th Cong., 3rd Sess., though the session ended before the House took any action. The Federal Government filed suit in the Southern District of New York under the Sherman Anti-Trust Law, 26 Stat. 209 (1890), 15 U. S. C. § 1-7 (1934), on July 20, 1938, against all major producers and distributors asking for the disposal of all their theatres and injunctions against all unfair trade practices, which suit if successful, will obviate the necessity for state legislation.

JOHN MICHAEL MCKENNA.

CORPORATIONS—Mergers—Rights of Preferred Stockholders

A corporation attempted to eliminate the arrearages on its $6 cumulative preferred stock by a readjustment of its capital structure pursuant to a plan of merger of the corporation with a wholly owned subsidiary. The plan provided that each share of $6 preferred stock together with its accrued dividends, amounting to $28.50 per share, should become converted into one share of new $3 cumulative preferred stock having a liquidation value of $55 and six shares of class A common stock. After obtaining the necessary two-thirds vote of the stockholders the plan became effective. The complainants had previously protested against the plan, and now seek injunctive relief against the corporation, praying that they be awarded all the unpaid dividends which had accumulated on their old preferred stock before any dividends are paid to the holders of the new $3 preferred stock or of the common stock. Held, injunction granted as prayed against payment of dividends on common stock, but whether an injunction will be entered against payment of dividends on new $3 preferred stock until all arrearages are paid on the old preferred will be determined if the parties care to argue the point. Havender v. Federal United Corporation, 2 A. (2d) 143 (Del. Ch. 1938).

Readjustment of capital structures of corporations under a plan of re-capitalization in order to eliminate dividend arrearages on cumulative preferred stock is by no means novel in corporate finance. See Part VII of S. E. C. Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Section III (1938). In view of the fact that these plans are usually accomplished in compliance with certain legal requirements the attitude of the courts towards them is a matter of great importance to corporate managers, particularly that of the Delaware courts because of the large number of corporations incorporated
under the laws of that state. See 1936 Annual Report of Federal Water Service Corp., S.E.C. File No. 1-1215-2 (withdrew plan because of a decision of Supreme Court of Delaware).

The Delaware Revised Code (1915) § 1940, as amended by Delaware Laws (1917), C.113, § 12 provided, among other things, that less than all the stockholders of a corporation could amend the charter to change the “preferences” of the outstanding stock. In a suit to enjoin an amendment approved by the necessary majority of stockholders, on the ground that the plan deprived the preferred stockholders of their accumulated dividends, the word “preferences” under the statute was held not to include the right to be paid accrued and unpaid dividends, but that such a right was a “vested” one and a “property interest” which could not be destroyed without an impairment of contract. *Morris v. American Public Utilities Co.*, 14 Del. Ch. 136, 122 Atl. 696 (1923). In distinguishing the case from two English cases the court in the *Morris case* said “Our s26 (of the Delaware law) provides only that preferences may be altered or changed. It contains no reference to ‘rights and privileges’. Thus the English cases are distinguishable from the instant one.” *Id.* at 151, 122 Atl. at 703.

The Delaware Corporation Law was amended in 1927 in order to broaden the power of corporations to amend their charters. *Del. Rev. Code* (1935) § 2058. The statute as revised permits a majority of stockholders to adopt an amendment which would change “the number . . . preferences . . . or other special rights of the shares . . . .” However, when a corporation which was incorporated prior to the 1927 amendment to the law wiped out the arrearages on its preferred stock by amending its charter pursuant to a plan of re-capitalization subsequent to the 1927 amended statute, the Delaware Supreme Court held that the right to accrued dividends was a “vested right” which could not constitutionally be destroyed by amendment under a statute enacted subsequent to its incorporation. In the same decision the court stated “The effect of the charter amendment insofar as it concerns the status of the shares . . . . speaking from the time of its accomplishment, is not denied . . . but there is nothing in the language of the section (of the statute), as amended, which compels a retrospective operation.” *Keller v. Wilson & Co.*, 190 Atl. 115, 125 (Del. Sup. Ct. 1936), (1937) 31 I.L. Rev. 661, (1937) 85 U. of Pa. L. Rev. 537; *Notes* (1937) 35 Mich. L. Rev. 620, 46 Yale L. J. 985.

Where the court would come to a similar conclusion with respect to a case involving a corporation organized after the 1927 amendment to the statute was one of the questions raised by the *Keller case*, because one of the grounds of the decision was the unconstitutional deprivation of contractual rights of stockholders by a subsequent act of the legislature. This question was answered a year later when the same court in referring to the *Keller case* held that the statute as amended operates prospectively but not retrospectively, and that one who claims that the state has conferred a power upon corporations to cancel the right to accumulated dividends must “. . . point to statutory language so clear and precise as to permit of no reasonable doubt that a restrospective operation was intended.” *Consolidated Film Industries, Inc. v. Johnson*, 197 Atl. 489, 493 (Del. Sup. Ct. 1937).

These decisions make it clear that corporations cannot deprive dissenting stockholders of accumulated dividends by amending the charter in order to recapitalize. Therefore when the defendant corporation in the instant case was faced with the problem it decided to merge its 100% owned subsidiary into itself in order to eliminate the arrearages on its own preferred stock under *Del. Rev. Code* (1935) § 2091, and thus accomplish by a technical merger what it could not do by a charter amendment.
This the court said it could not do because there was no occasion for a readjustment "... of its own capital structure to the end that the equities of its stockholders might be adjusted to a new asset and liability situation ..." The stockholders of the parent company stood exactly in the same relation thereto before the merger as after the merger. "It was a case of the defendant simply taking over the assets of its own subsidiary and becoming the immediate instead of the derivative owner thereof." The court also pointed out that "If what the defendant did will stand the test of legal legitimacy ... all a corporation needs to do to escape the results of the law as laid down by our Supreme Court, is to create a subsidiary for itself and then proceed to absorb it by merger."

In another part of its opinion the court pointed out that the complainants contend that in no circumstances could the holders of preferred stock of a merging corporation be compelled to choose between being bought out at a "valuation" price, or staying in the corporation subject to the surrender of their claim to accumulated dividends. This the court said, was a broad contention and it did not feel called upon by the facts of the instant case to accept it. The decision thus appears to be a careful extension of the doctrine as laid down in the Keller and Johnson cases.

It is well to note, however, that the court in stating what it understood the proper end of a merger to be, said that when two corporations, each having a distinct body of stockholders, desire to consolidate their assets and liabilities and henceforth be operated as one corporation, a readjustment of capital may follow, but rather as a mere incident to the primary purpose in order to realign the equities of the existing stockholders in proportion to their previous relations to the assets and liabilities of their respective corporations before the merger. By comparing the instant case with this criterion the court found that the primary purpose of the merger accomplished by the defendant was the readjustment of its capital structure, and that the pooling of the assets and liabilities of it and its subsidiary was merely incidental.

With the above standard in mind the question is raised, will the Delaware Courts hold the same way when a subsidiary merges with its parent where the parent owns less than 100% of the subsidiary's stock, if on looking behind the merger they find that the primary purpose is to readjust the parent's capital structure and deprive its preferred stockholders of accumulated dividends? Two examples might be considered: (1) Where the parent company whose preferred stock will be deprived of its arrearages owns 60% of its subsidiary's stock and the remaining 40% is owned by the parent of the parent, and which parent also owns 100% of the original parent's common stock; and (2) Where the parent owns two-thirds of all the subsidiary's stock which percentage would be enough to bind the minority anyway. Another question is, will the courts make a distinction between mergers and consolidations, because there seems to be much less excuse for a readjustment of capital in the former as against the latter.

AUSTIN P. SULLIVAN.

CORPORATIONS—Underwriting Agreement—Legal Impossibility

The North American Company, which owned a majority of the common stock of the North American Light and Power Company, entered into a contract with the latter company. Under the contract the Power Company agreed to make an annual offering to its common stockholders of record of a sufficient number of shares of its common stock to produce $2,000,000 in each of the years 1932 to
1936, inclusive, in order to meet notes maturing in those years. The North American Company agreed to purchase those shares which were not taken up by the shareholders of the Power Company. If it became legally impossible for the Power Company to offer its stock the North American Company agreed to purchase upon maturity at par those notes which had not been retired by the sale of common stock. The contract was performed for the first three years, but in 1935 and 1936 the North American Company notified the Power Company that it did not consider itself bound to take the stock but offered to take promissory notes of the Power Company for $2,000,000 for 1935, and $2,000,000 for 1936. The Power Company accepted without prejudice to its rights under the contract. In 1935 the North American Company refused to vote an increase in the stock of the Power Company. Any such offering would have been illegal without registration under the Securities Act of 1933, 48 STAT. 74, 15 U. S. C. § 77a (1934). As for 1936, the North American Company and the Power Company refused to register under the Public Utility Holding Company Act, 49 STAT. 803, 15 U. S. C. § 79 (Supp. 1935), by which it was made illegal for an unregistered holding company to make a public offering of its stock. This suit was brought by a preferred stockholder on the ground that the transaction caused a preference over the preferred stockholders in favor of the North American Company. Held, (1) a party to a contract must cooperate in its performance and cannot take advantage of an obstacle which it has created. (2) It was not legally impossible to perform under the Securities Act until registration had been attempted and refused by the Commission. (3) It was not legally impossible to perform under the Public Utility Holding Company Act where the parties refused to register and this refusal should not prejudice the rights of the preferred stockholders. *Murphy v. North American Company*, 24 F. Supp. 471 (S. D. N. Y. 1938).

The contract in this case is an underwriting agreement. An underwriting agreement is a contract made before the offer of corporate shares to the public, providing that in the event of the public's not taking all of the shares, the underwriter will take those shares which the public refuses. *International Products v. Vail's Estate*, 97 Vt. 318, 123 Atl. 194 (1924); *In re Licensed Victuallers Mutual Trading Association*, 42 Ch. D. 1 (1889). The construction of underwriting agreements is governed by the rules applicable to contracts generally. 1 *FLETCHER, PRIVATE CORPORATIONS* (1931) § 236. The agreement in the instant case has a novel feature in that it gives an alternative method of compliance if the contract becomes legally impossible of performance. But before the party claiming to be excused can bring himself within the alternative mode, he must show that the condition precedent has happened, *i.e.* the contract has become legally impossible. The party claiming legal impossibility cannot have caused the impossibility relied upon. There is an implied agreement that each party to a contract will not intentionally prevent the other from performing. *Patterson v. Meyerhofer*, 204 N. Y. 96, 97 N. E. 472 (1912).

The defense of a supervening illegality, which can be cured by proper steps taken by the party pleading it, is not a good foundation for a claim of frustration. *Cheatham v. Wheeling and Lake Erie Ry.*, 37 F. (2d) 593 (S. D. N. Y. 1930). In the instant case the party claiming the supervening illegality is not the party who would have to register with the Securities & Exchange Commission, but the negligence of the Power Company should not work a preference for the North American Company as against the preferred stockholders. The fact that the North American Company and the Power Company refused to register under the Public Utility Holding Company Act, on the ground that such registration might prejudice
their rights in contesting the constitutionality of that Act is not a legal impossibility but one caused by the parties. The defense of legal impossibility will not prevail where the thing contemplated can still be done even though circumstances have changed so as to make the doing more difficult. *Columbus Ry. Power & Light Co. v. Columbus*, 249 U. S. 399 (1919).

H. D. KOFFSKY.

COURTS—Application of State Law by a Federal Court—Pleading of Lack of Contributory Negligence in Complaint

In this action brought in a federal court in Illinois, plaintiff omitted allegations of lack of contributory negligence in counts setting out the negligence of the defendant. The court ruled for the defendant on his motion to dismiss. *Held*, that plaintiff’s complaint did not state a cause of action in a federal court since it contained no negation of contributory negligence as required in an Illinois court. *Francis v. Humphrey*, 25 F. Supp. 1 (E. D. Ill. 1938).

Plaintiff contended that Rule 8 (c) of the new Federal Rules of Civil Procedure made contributory negligence an affirmative defense and therefore an element of adjective or procedural law rather than of substantive law. The court interpreted the provision as saying only that unless the several averments listed were set out they would not be available as defenses. Beyond that, in any case where the said rules abridge, enlarge or modify the substantive rights of the parties as established by the law of Illinois, the rule is void. 48 STAT. 1064, 28 U. S. C. § 723b (1934). A federal court under *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938), is bound to apply the substantive law of the state in which it is sitting. *Jones v. New York Casualty Company*, 23 F. Supp. 932 (E.D. Va. 1938).

The failure of the plaintiff in an Illinois court to make proper allegation of lack of contributory negligence is such a vital defect that the cause of action is not even sufficient to stop the running of the statute of limitations. *Urban v. Pere Marquette R. R.*, 266 Ill. App. 152, 164 (1930). From a consideration of this and other Illinois decisions, the court concluded that the negation of contributory negligence was a matter of substantive law in Illinois.

The distinction between substantive and adjective law is incapable of exact definition. *Dexter v. Edmunds*, 89 Fed. 467, 468 (C. C. D. Mass. 1898). While the right to enter a plea is substantial, the time and manner in which it shall be entered are clearly procedural. *State v. McConnell*, 156 Tenn. 523, 3 S. W. (2d) 161 (1928). The instant case goes further, however, and shifts the task of making and supporting the averment from one party to the other. Clearly, the shifting of the burden of proof is no mere matter of procedure. *Central Vermont R. R. v. White*, 238 U.S. 507 (1915).

Since the court was at great pains to prove the Illinois rule actually substantive in nature, the instant case can hardly be considered an authority for the assertion that the declarations of state courts or statutes as to what is and what is not substantial will bind the federal courts to blind obedience. On the other hand, the universal obeisance that all the Federal courts have made to *Erie R. R. v. Tompkins*, *supra*, leads to the same practical result. When the court here declared that the *Erie case* had, legally speaking, “turned the world upside down”, it was but voicing the general opinion. A circuit court has declared that under the *Erie case* it is in exactly the same position as the supreme court of the state. *Wichita Royalty Com-

The borderline between substantive and adjective law has ever been somewhat vague. The doctrine of Erie R. R. v. Tompkins, supra, gains increased momentum each time it is cited. It is doubtful that there is any body of adjective law, however small, (other than court routine) regarding which the federal courts would not be bound by a state ruling declaring the rule or averment a substantial element of a cause of action.

WOODRUFF J. DEEM.

DECLARATORY JUDGMENTS—Right to Trial by Jury under New Federal Rules of Civil Procedure

Plaintiff is the insurer of the automobile of the defendant McDonald who is being sued in an Oregon court by the defendant Brune for injuries received as a result of the former's negligent driving while the latter was a guest in the car. The insurer sues in the federal court for a declaration of non-liability as to the defendants, because of (1) collusion between the litigants in the state courts, (2) false statement as to the cause of accident by McDonald, and (3) failure of insured to cooperate in the defense of the guest's suit. Defendants demanded a jury, but the court refused this request, found against the plaintiff on the first point and dismissed the complaint as to the others. Plaintiff objects to the dismissal and defendants again ask for a jury trial, the new federal rules now having gone into effect. Held, for the plaintiff, as the Rules of Civil Procedure for the District Courts of the United States allow a judgment for declaratory relief although another adequate remedy might be had, but as these claims would be defenses at law as breaches of the conditions of the insurance policy, defendant is entitled to trial by jury. Pacific Indemnity Co. v. McDonald, (D. Ore., Nov. 15, 1938).

The Federal Declaratory Judgment Act, 49 Stat. 1027, 28 U. S. C. § 400 (c) (Supp. 1935) under which the complaint in this case was originally filed expressly reserves to the party the right to trial by jury. It permits the submission of facts triable by a jury to be so submitted by interrogatories when the declaration of right involves the determination of such facts. This statute was held to be remedial and not one enlarging the jurisdiction of the court. Aetna Casualty and Surety Co. v. Quarles, 92 F. (2d) 321 (C. C. A. 4th, 1937).

Rule 57 of the Rules of Civil Procedure for the District Courts of the United States prescribes that the procedure for obtaining a declaratory judgment under the Federal Declaratory Judgment Act shall be in accordance with the new rules and that the existence of another adequate remedy does not bar declaratory relief in a proper case—which was the law before the adoption of the Rules. Equitable Life Ass. Society of U. S. v. Templeton, 19 F. Supp. 485 (D. S. C. 1937). The right to trial by jury in such case is preserved, but only in the manner provided by Rules 38 and 39.
Before examining these provisions, it would be well to inquire into the extent of the Constitutional guaranty of the Seventh Amendment which preserves the right of trial by jury inviolate only as to "suits at common law". The test as to what is a suit at common law is purely historical. James, Trial by Jury and The New Federal Rules of Procedure (1936) 45 Yale L. J. 1022. Such a suit is construed to include all those not under the exclusive or concurrent jurisdiction of equity or admiralty in which legal rights are determined, as well as the traditional proceedings of the common law. Parsons v. Bedford, 3 Pet. 433 (U. S. 1830); Shields v. Thomas, 18 How. 253 (U. S. 1855).

The statute authorizing the formulation of the new rules whereby actions at law and suits in equity are to be united in one form of action, expressly provides that the right of trial by jury shall remain unimpaired. 48 Stat. 1064 (1934), 28 U. S. C. § 723(c) (Supp. 1935). In pursuance of this mandate (see Rule 38a) Rules 38 and 39 provide for trial by jury when demanded in writing by any party after the action has been instituted, and not later than "ten days after the service of the last pleading directed to such issue.” Rule 38(b). But this demand is limited to issues "trialable of right by a jury”—thus maintaining the distinction under the Seventh Amendment between legal matters and those formerly cognizable in equity. If a demand is made for trial by jury of certain specified issues only, the opposite party may ask that all or certain other questions be tried in the same manner. Rule 38 (c). If no demand is served by a party, he is deemed to have waived his constitutional right. Rule 38(d). State courts have held that the right to trial by jury may be reasonably regulated by compelling a litigant to make an affirmative claim to his right and his failure to do so is deemed a waiver. Jenkins v. Skelton, 21 Ariz. 663, 192 Pac. 249 (1920).

After a demand is made, the parties may consent by written stipulations in open court to trial without a jury. The judge is given the power to dispense with the demanded jury if he finds that the issues are not triable by jury as of right. Rule 39(a). The court in its discretion may order a jury trial when there has been no previous demand as to any question, the verdict in such case, being binding only as to legal issues. Rule 39(b). In cases not falling within the protection of the Amendment, the court may, except in specified cases, sit with an advisory jury, or the case may be tried with the consent of the parties by a jury whose verdict will be as binding as in a “suit at common law”.

Rule 48 allows the parties to agree to a jury of less than twelve or that a verdict may be brought in by a stated majority of the jurors.

The Rules then provide for the verdicts which may be returned. The jury may be required to return a special verdict only, i. e. a special written finding upon every issue of fact. If the court omit to present an issue to the jury and counsel fail to object, the right to have it so tried is waived, and the court may make a finding as to such omitted issues. On failure of the court to make a finding when the question is not submitted to the jury, a conclusive presumption arises that the court found in accordance with the judgment on the special verdict. Rule 49(a).

In lieu of a special verdict, the jury may be ordered to return a general verdict with answers to written interrogatories on the various issues. Rule 49(b).

The question now presents itself as to the applicability of the new Rules in the present case which was instituted and in which a memorandum decision was rendered before their effective date, as to further action taken after the rules became the law. Rule 86 wisely provides that these new rules govern "all further proceedings in actions then pending, except as to the extent that in the opinion of the court their
application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies." This statement points out the answer. In the instant case no injustice resulted. The right to a declaratory judgment existed exclusive of the New Rules, under the Federal Declaratory Judgment Act, supra. No new substantive rights are given. The right to trial by jury in a case for declaratory relief, remains inviolate, the only requirement being that the right be affirmatively asserted by the persons entitled. Nothing is taken away; if anything, a new right has been conferred—the right to waive and dispense with a jury trial. This is not the impairment of an old right, but the grant of a new one.

FREDERICK R. TOURKOW.

EQUITY—Attorney's Fees as "Damages" Covered by Injunction Bond—Erie R. R. v. Tompkins Distinguished

A temporary injunction was issued by a federal district court against Skeer and others, doing business as Security Underwriters, Incorporated, in an equity suit brought by the Travelers Mutual Casualty Company. Plaintiffs gave the injunction bond required by the federal courts, which was intended to secure payment to defendants of such damages as they would suffer if the temporary injunction was wrongfully issued. Upon full hearing of the facts the injunction was dissolved and defendants moved to assess damages caused by wrongful issuance of the temporary injunction. Defendants contended that they were entitled to interest on the money which they were not allowed to use during the duration of the temporary injunction, and also claimed as damages the attorney's fees they incurred. Defendants based their claim for attorney's fees on the theory that Tullock v. Mulvane, 184 U.S. 497 (1902), was overruled by Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Defendants' theory was that the bond was a contract and that the common law of the state where a contract is made governs its interpretation, and that the common law, as declared by the Supreme Court of Missouri, is that attorney's fees incurred as the result of the injunction are within the "damages" against which an injunction bond provides indemnity. The Tullock case, supra, held that a bond given in pursuance of a law of the United States is governed as to its construction, not by the local law of a particular state, but by the principles of law as determined by the Supreme Court of the United States, and held that attorney's fees were not "damages" within the purview of the bond. Held, the Erie case did not conflict with the Tullock case and the defendants were entitled to the interest, but not to reimbursement for attorney's fees. Travelers Mutual Casualty Co. of Des Moines v. Skeer, 24 F. Supp. 805 (W.D. Mo. 1938).

The decision in the Erie case concerned the interpretation of Section 34 of the Judiciary Act of 1789, Rev. Stat. § 721 (1878), 28 U.S.C. § 725 (1934). Its opinion stated, "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law." Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). The court there stated it was overruling Swift v. Tyson, 16 Pet. 1 (U.S. 1842), which had held Section 34 meant only statutory law of the states and did not include decisions of state courts on matter
of common law. The principal case is in equity, and the question is whether the *Erie case* goes so far as to hold that Federal Equity is governed by the rules of equity in the various states. The *Erie case* has certainly given rise to many new problems in equity jurisprudence as was stated by a recent writer. Schwelpe, *What Has Happened To Federal Jurisprudence?* (1938) 24 A.B.A.J. 421. The court in the principal case thought that even if the *Erie case* conflicted with the *Tullock case*, it was not up to it to overrule the *Tullock case*, but left that to the Supreme Court when the question should arise before it.

But the court did not think the *Erie case* applied here as contended by the defendants. The court thought the defense erred in assuming the injunctive bond as a contract. This court based its opinion on the *Tullock case* which stated the injunctive bond to be more than a contract, and considered it as a condition imposed by a federal court under the authority of the Constitution and laws of the United States as a prerequisite to the issuance of its injunction. Thus it is a part of the machinery of a federal court as much so as an order or any rule of court. The court considered the defendants' attempt to construe it as a simple contract as an unwarranted doctrine, stating: "Certainly the Federal Court will construe its own orders, its own rules, its own bonds." *Travelers Mutual Casualty Co. v. Skeer, supra*, at 806. As far back as *Bein v. Heath*, 12 How. 168 (U. S. 1851), the Supreme Court considered all the proceedings in a court of equity including the requiring and the conditioning of an injunction bond as being governed by the Constitution and the laws of the United States. The principal case considers this still controlling and indicates that an injunction bond is a part of the procedural machinery of the federal courts and not affected by the holding of the *Erie case*, which was considered as applying to substantive law.

**Leonard A. Goldberg.**

**EQUITY—Injunction against Trade Libel**

This suit was brought in equity for patent infringement. Plaintiff and defendant were competitors in the manufacture and sale of wearing apparel. The plaintiff had given notice to the defendant's customers and the trading public that the defendant was infringing the plaintiff's patent; he further warned them against the unauthorized manufacture and sale of the articles. The plaintiff continued these publications after institution of this suit. Defendant set up a counterclaim, based on unfair competition, seeking an injunction; he alleged these facts and that the plaintiff acted in bad faith, in that he did not believe the defendant was actually guilty of infringement. By way of second counterclaim, the defendant asked the court for a declaration respecting its right to manufacture and sell its products. *Declaratory Judgment Act*, 48 STAT. 955, 28 U. S. C. § 400 (1934). Plaintiff filed a motion to strike the counterclaims. *Held*, motion to strike the first counterclaim denied and the motion to strike the second counterclaim allowed. A court of equity can enjoin a patentee who is without honest belief that the patent is valid and infringed and, for the purpose of impairing the business of his competitor, against spreading throughout the trade that the competitor is infringing his patent. *Stadium Manufacturing Co. v. Plymouth Pajama Corporation*, 24 F. Supp. 779 (D. Mass., 1937).

Less than a century ago the equity courts refused to stretch the strong arm of the law to restrain publications injurious to one's business or profession. The chancellors
closed their eyes to the incidental property right involved and regarded these cases as concerned purely with libel and slander, which are properly within the jurisdiction of common law courts. Seeley v. Fisher, 11 Sim. 581 (Ch. 1841). The English courts were the first to recognize that "to be injured in . . . business is to be injured in . . . property." Dixon v. Holden, L. R. 7 Eq. 488, 492 (1869). With the first obstacle, property right, disposed of, they lost little time in enjoining the publication of circulars charging infringement. Rollins v. Hinks, L.R. 13 Eq. 355 (1872).

The American courts were unwilling to follow these decisions and founded their holdings either upon the theory that the jurisdiction of equity does not extend to cases of libel or slander, or that to enjoin such a publication would be a denial of the right of free speech and press. Boston Diatite Co. v. Florence Manufacturing Co., 114 Mass. 69 (1873); Marx & Haas Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391 (1902). Our courts were not to permit the apparent injustice, that would be suffered by the malicious publications of this nature, to continue forever. Emack v. Kane, 34 Fed. 46 (C.C.N.D. Ill. 1888). In this case the court enjoined the defendant from circulating threats to sue plaintiff's customers for infringement when he did not believe that the infringement could be established. This decision was unwelcome to our courts and for some time it was notorious for its solitude. Parker, C. J., spoke of it as a "decision of a single judge." Martin Fire Arms v. Shields, 171 N. Y. 384, 395, 64 N. E. 163, 166, (1902). But the federal courts found Emack v. Kane, supra, a pillar for justice and two lines of authority came into existence. Gompers v. Buck Stove & Range Co., 221 U. S. 418 (1910); American Mercury Ins. v. Chase, 13 F. (2d) 224 (D. Mass. 1926). Finally, the more reluctant state courts fell in line with the decision they had been criticizing so severely. Fort v. Cooperative Farmers' Exchange, 81 Colo. 431, 256 Pac. 319 (1927); Yood v. Daly, 37 Ohio App. 574, 174 N. E. 779 (1930); WALSH ON EQUITY (1930) § 51.

The decisions in the instant case and Emack v. Kane, supra, are not to be distinguished. Both exemplify the now well established rule that, where publications or threats to publish are made in bad faith and with intent to injure one's business, equity will intervene and grant an injunction. Many of the early decisions are reconcilable with this doctrine. The Massachusetts court in the Boston Diatite case, supra, placed its holding within the rule that where one acts in good faith he cannot be enjoined from making such publications. The principal case is very clear in emphasizing the difference. It is pointed out that "the patentee has a right to notify customers of an alleged infringing manufacturer or dealer", but the court continues, "this right has limitations, and if the patentee over-steps the boundaries to the injury of another, and that injury is likely to continue, equity has intervened . . . ."

It is not to be inferred from these decisions that equity will entertain bills to enjoin out and out libel; since these cases are still regarded as within the exclusive jurisdiction of the common law. But when there is a presence of injury to property right and malice, the chancery courts can ignore libel and base their holdings upon such other torts as coercion, boycott, or extortion. By taking the position that they are restraining these torts rather than libel, the courts feel that they are not abridging the freedom of the press. Gompers v. Buck Stove & Range Co., supra.

In disposing of the demand for a declaratory judgment, the court in the instant case follows a well settled rule that requires no discussion. To grant or refuse such relief "is a judicial discretion and must find its basis in good reason." Aetna Casualty & Security Co. v. Quarles, 92 F. (2d) 321, 324 (C.C.A. 4th, 1937); Note, Federal Declaratory Judgments in Insurance Cases (1938) 26 GEORGETOWN LAW JOURNAL 988. By granting the counterclaim for unlawful competition the court decided that the
defendant had a right to manufacture its products; thus, it would be useless to grant
the second counterclaim.

ARTHUR NADEAU, JR.

EQUITY—Property Right in Broadcast

The Pittsburgh Athletic Club, owner of the professional baseball team known
as the “Pirates”, by contract and for a valuable consideration, gave
the exclusive right of broadcasting play-by-play descriptions, of the games in
which the Pirates should participate, to a certain advertiser, who for a valuable
consideration assigned part interests in its contract to other advertisers and broad-
casters. The athletic club and all of the parties holding an interest under the
contract join in suit to restrain the defendant broadcaster from unauthorized
broadcasts of play-by-play descriptions of the games, obtained from defendant’s
own paid observers, stationed on premises leased by the defendant at vantage points
outside of the enclosed ball park, which is under the ownership, management and
control of plaintiff athletic club. Held, that the athletic club, as owner of the ball
team and park, had a property right in the news value of the games played there by its
team; and that defendant’s unauthorized broadcasts amounted to unfair compe-
tition in interference with plaintiff advertisers’ property in the exclusive rights of
broadcast acquired by contract with the athletic club, and therefore were properly
to be enjoined. Pittsburgh Athletic Club, et al. v. KQV Broadcasting Co., 24 F.

In another case, decided some time previously but just recently reported, where
the owner of the professional ball team and park was the sole party plaintiff in
a suit to enjoin the unauthorized dissemination over telephone wires of play-by-
play descriptions of the games as they were in progress, it was held that in the
absence of some special showing no exclusive property in the news value of the
games could be claimed by one who owned the baseball team and the instrument-
alities by which the games were produced; and that in the absence of such exclusive
property such owner could not enjoin another from play-by-play descriptions, even
(S. D. N. Y. 1936).

Both of these cases cited and discussed the leading case upon the point involved.
There, where both parties were engaged in the business of news gathering and
publication, and where defendant had copied and published the matter appearing
in plaintiff’s early bulletins, and in the early editions of its member publications,
the court held that the plaintiff had, as between the parties, acquired a property
right in the news matter which might be protected by injunction. International

The court in the Teleflash case, seeming to ignore in its opinion the broad holding
of the leading case, seeks to distinguish it, apparently upon the ground that the
news items there involved were produced entirely by the plaintiff’s efforts, whereas
in the facts before it the plaintiff was producing no news items, but only the game
which was the subject matter of the news disseminated by the defendant.

Note should be made that in the Teleflash case, as far as we may judge from the
language of the opinion therein, the bill made but meagre showing of the facts,
and even confessed the plaintiff’s ignorance of the manner whereby defendant secured
the information it used in the dissemination of the descriptions complained of.
It may well be that on this account the bill itself went far to preclude the relief
prayed.
Of these two recent cases *Pittsburgh Athletic Club v. KQV Broadcasting Co.* would seem to be more nearly in harmony with the intent of the opinion in the leading case, for there the application of the leading case was not so narrow. Its opinion was freely quoted and expressly relied upon. "The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right . . . and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired . . ." *International News Service v. Associated Press, supra*, at 236.

In the spirit of this language of the Supreme Court, which is to be found not only in the *Associated Press case* above cited, but also in previous opinions of the same court, *In re Sawyer, 124 U. S. 200, 210 (1888)*, and *Trauz v. Raich, 239 U. S. 33, 37 (1915)*, the District Court in the present case recognized that the news value involved was properly to be protected against unfair competition, since it was a value resultant from plaintiff athletic company’s business in the conduct of the games, and one pecuniary in character, as the advertisers had shown by their willingness to forego a valuable consideration for the privilege of availing themselves of it.

"Regarding the news therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we can hardly fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public." *International News Service v. Associated Press, supra*, at 236.

In the instant case the court held that it was a sufficient commercial use to constitute unfair competition that the defendant used the unauthorized broadcasts to cultivate the goodwill of its listeners, even though no actual profit was realized from payments made to it by a sponsor.

The opinion is to be criticized for the manner in which the judge disposes of certain English cases in point; the court, refusing to consider them, said that the doctrine of unfair competition was unknown to the English Common Law.

JOHN P. CAMPBELL.

REAL PROPERTY—Future Interests—Right of Murderer to Take

The grantee of a fee simple estate, defeasible should the grantor survive the grantee, with a limitation over in that event to the grantor, was killed by the grantor. The circumstances were such as would apparently have constituted murder had the grantor not been criminally irresponsible because of insanity. The plaintiffs below, the deceased’s children, appealed a general finding for the defendants, who held a title derived through the limitation over to the grantor, on the ground that the slaying of their father under the above circumstances prevented the vesting of the fee in the grantor and that therefore the subsequent sale of the land to the defendants by the committee, as the property of the grantor, was void. *Held*, that slaying by an insane person cannot be murder and hence does not contravene the policy of the law established by judicial decision in Missouri against allowing a murderer to benefit by acquiring property from his victim through his felonious act. *Eisenhardt v. Seigel*, 119 S. W. (2d) 810 (Mo., 1938).

The precise question presented by the facts of this case, aside from the matter of insanity, was whether a future, contingent, executory interest held by a slayer subject to vest in him upon the death of the holder of a prior fee could vest if
the killer occasioned the death of the owner of the prior defeasible estate. A search among the authorities has disclosed no direct precedents, either in Missouri or in any other jurisdiction. The case most nearly in point with the situation here involved is In re Estate of Charles Emerson, 191 Iowa 900, 183 N. W. 327 (1921). By his will Emerson had provided that "the rents, issues, and profits" of the property should be equally divided between his wife and son so long as his wife lived. If the wife predeceased the son, all the property should go to the son; if the son predeceased the wife "without leaving living issue", the property should go to the wife. The son was convicted of murdering his mother, and committed suicide pending an appeal, leaving no children. In decreeing that the whole of the property should go to the son's estate, the court seems to have reasoned that because the public policy of the state of Iowa had been embodied in a statute setting out with some particularity the types of cases in which a murderer should not be allowed to benefit by acquiring property from his victim as the result of his wrongful act, it must construe the statute strictly. The language of the court infers that if there had been no statute in Iowa, the decision might have been that public policy would have compelled the judiciary to prohibit felonious killers from acquiring property in any case from the deceased.

In the absence of a statute preventing the felonious slayer of another from taking the latter's property by will or intestacy, if he is otherwise entitled thereto, the weight of authority supports the view that the wrongful killer may take. Hagan v. Cone, 21 Ga. App. 416, 94 S. E. 602 (1917); McAllister v. Fair, 72 Kan. 533, 84 Pac. 112 (1906); Carpenter's Estate, 170 Pa. 203, 32 Atl. 637 (1895); Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785 (1914); Eversole v. Eversole, 169 Ky. 793, 185 S. W. 487 (1916); Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935 (1894). However, there is a strong minority view denying the right to take to one who has killed his ancestor or testator, largely upon the ground that one should not be permitted to take advantage of his own wrong. Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641 (1908); In re Tyler's Estate, 140 Wash. 679, 250 Pac. 456 (1926); Box v. Lanier, 112 Tenn. 393, 79 S. W. 1042 (1903); Price v. Hitafler, 164 Md. 505, 165 Atl. 470 (1933); Slocum v. Metropolitan Life Ins. Co., 245 Mass. 565, 139 N. E. 816 (1923); DeZotell v. Mutual Life Ins. Co., 60 S. D. 532, 245 N. W. 58 (1932). In jurisdictions having statutes on the subject a strict construction is generally adhered to and unless the particular kind of interest involved comes clearly within the terms of the legislation the murderer is entitled thereto. In re estate of Kirby, 162 Cal. 91, 121 Pac. 370 (1912); cf. Hamblin v. Marchant, 103 Kan. 508, 175 Pac. 678 (1918); Bruns v. Cope, 182 Ind. 289, 105 N. E. 471 (1914); Hogg v. Whitham, 120 Kan. 341, 242 Pac. 1021 (1926); Harrison v. Moncravie, 264 Fed. 776 (C. C. A. 8th, 1920), appeal dismissed, 255 U. S. 562 (1921).

Missouri is one of the states adhering to the minority view. Its leading case on the subject, Perry v. Strawbridge, supra, was a case holding that a husband could not inherit his wife's real estate because he had murdered her. It should be noted that in the present case the property interest which the slayer acquired did not accrue to him by inheritance, nor was it the same estate held by the deceased prior to his death. The court made no effort to determine the exact nature of the estate that the grantor took upon the death of the grantee, but even if it had realized that it was dealing with an executory interest rather than some form of reversion or reverter, that fact would probably have had no effect upon its decision. In the Emerson case, supra, the court was aware that it was dealing with a contingent remainder that had vested as the result of a murder. Yet it does not appear in either case that the court thought there was any merit in making a legal distinction,
not based on a specific exemption from a statute, between those who take estates directly from and in succession to their victims, and those who take new and different estates emanating from third persons and merely vesting as the result of the death of others whose estates might otherwise have continued and prevented the murderers' estates from ever vesting.

The decision in the instant case was undoubtedly right in substance. The form it took was logical in view of the fact that there was no statute in Missouri and that, therefore, the reason behind the public policy, as stated in the Strawbridge case, which precluded a murderer from profiting by his act, could rationally be applied to all analogous cases.

HARRY PLATNIK.

UNFAIR COMPETITION—Robinson-Patman Act

The Federal Trade Commission issued a complaint against the Biddle Company and others for alleged violation of the Clayton Act, as amended by § 2 (c) of the Robinson-Patman Price Discrimination Act, 49 Stat. 1526, 15 U. S. C. § 13 c (Supp. 1936), which makes it unlawful for a vendor to grant a brokerage except for services actually rendered in connection with the sale. The Biddle Company's business method consisted in securing subscribers to their marketing service, charging a fee therefor. This service was composed of a trade information and a purchasing service for jobbers and wholesalers. It was also engaged in selling the products of numerous manufacturers to its marketing service subscribers. The Biddle Company received a brokerage fee for its selling activities, which brokerage it credited to the accounts of its subscribers. In 14 percent of the cases, the buyers received a cash rebate in addition to payment in full of its subscription fee as a result of these brokerages passed on to them by the Biddle Company. In 86 percent of the cases, the brokerages credited did not aggregate the amount of the subscription fee. With these facts the Federal Trade Commission found the Biddle Company guilty of violating the provisions of § 2 (c) of the Robinson-Patman Act, and issued an order to cease and desist. Held, that these facts constituted a violation of the statute, and that the statute was not unconstitutional as a violation of the due process clause of the Fifth Amendment. Biddle Purchasing Co. v. Federal Trade Commission, 96 F. (2d) 687 (C. C. A. 2d, 1938), cert. denied, 59 Sup. Ct. 101 (1938).

By § 2 of the Clayton Act, 38 Stat. 730 (1914), 15 U. S. C. § 13 (1934), price discriminations, the effects of which were to substantially lessens competition or create a monopoly, were declared unlawful. This section of the Clayton Act was substantially taken over in § 2 (a) of the Robinson-Patman Act, supra. Section 2 (c) of the new act differs considerably from § 2 (a) in that it is an absolute prohibition on brokerage rebates, regardless of whether or not such practice substantially lessens competition or tends to create a monopoly.

The Biddle Company contended that § 2 (c) should be considered with § 2 (a) and that only such brokerage rebates as substantially lessens competition or tend to create a monopoly were intended to be prohibited by the act. The court, however, took a different view and decided that § 2 (c) stood alone and did not depend or relate to § 2 (a), and that any rebate of brokerage was unlawful.

A further contention was that if § 2 (c) is construed without relation to § 2 (a), it is unconstitutional and deprives the petitioners of the freedom to contract and dispose of property, without due process of law. In this regard the court said
that under the Fifth Amendment there is no absolute freedom to contract, and that Congress is not prohibited from exercising its power to regulate commerce even though it be in derogation of rights under that Amendment, citing Tagg Bros. & Moorhead v. United States, 280 U. S. 420 (1930). The guaranty of due process merely demands that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the objects sought to be obtained. The power of Congress to regulate interstate commerce is plenary. It may be exercised to protect commerce from dangers of any source. It is for Congress to determine what evils exist and what evils are to be eliminated. Having determined that the evils exist, its power to legislate concerning them is plenary and the constitutionality of the acts cannot be questioned as long as they are not unreasonable, arbitrary, or capricious, and bear some reasonable relation to the ends sought to be accomplished. Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467 (1911); N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1936).

The instant case is the first case, arising under § 2 (c) of the Robinson-Patman Act, supra, to reach the courts. A similar case in which the Commission issued a cease and desist order is In re The Great Atlantic and Pacific Co., F. T. C. docket 3031, decided January 25, 1938, wherein the Commission found that the alleged broker was employed on a salary basis, his office expenses being paid by the purchaser, and that the alleged broker bought goods only for the respondent purchaser. On these facts the Commission concluded that the alleged broker was only an agent of the purchaser and issued a cease and desist order. The purchaser has taken an appeal which is now pending in the Circuit Court of Appeals of the Third Circuit.

In a case decided in the same circuit as the instant case an order of the Secretary of Agriculture to cease and desist from paying brokerage fees to an agent of the purchaser, was affirmed. Truns Pork Stores v. Wallace, 70 F. (2d) 688 (C. C. A. 2d, 1934). This case was decided before the passage of the Robinson-Patman Act and was based on the Packers and Stockyards Act, 42 Stat. 159 (1921), 7 U. S. C. § 181 (1934), which prohibited price discriminations in the sale of meats.

These cases are somewhat analogous to those arising under the Interstate Commerce Act, 24 Stat. 379 (1887), 49 U. S. C. § 1 (1934), which forbids common carriers from making rate discriminations between shippers, but permits an allowance to the shipper who renders any service which is a part of such transportation. Under the Act shippers have been held entitled to an allowance from the carrier only for furnishing a part of the transportation which it was the duty of the carrier to furnish. Interstate Commerce Commission v. F. H. Peavey & Co., 222 U. S. 42 (1911); Union Pacific R. R. v. Upsäke Grain, 222 U. S. 215 (1911); United States v. Baltimore & Ohio R. R., 231 U. S. 274 (1913).

ANTHONY A. JUETTNER.
BOOK REVIEWS


The stated object of the authors is to trace the history of labor organization in this country, "to show how the growth of workers' organizations has accompanied the developments in industry and commerce, and how these organizations have both influenced and have been influenced by political trends". This book is not designed to be a technical treatise either from the sociological, economic, or legal standpoint. It seems to be a descriptive account of the accomplishments and vicissitudes of the labor movement as a phase of our social history for the enlightenment of that large group of Americans who today are keenly aware that they are a part of that movement. Admittedly, that objective does not call for a fundamental analysis of economic factors, nor any accurate appraisal of the legal principles with which employer and employee protagonists have armed themselves in their contests before the courts. The straightforward narrative form, suggestive of the high school text, is probably well adapted to the needs of the public to whom this book is addressed, and the authors are to be congratulated on the plan and style of presentation that they adopted. Any critical evaluation of a book of this sort, written for the enlightenment of the ordinary reader, must be founded on the truth and consequent usefulness of the impressions conveyed by the authors.

The first chapters cover the history of the early mass movements, such as the Knights of Labor, Socialists, and I. W. W., with the contemporary evolution of the unitary craft unions grouped within the American Federation of Labor. This is a clear, though distinctly dispassionate, account of the conflicts between rival movements, and the final predominance in the skilled crafts of the settled policies of loyalty to an economy based on private profit, and of adherence to non-partisan, political activity. The authors point out that at the close of the World War and during the "Coolidge era", the most significant and too little appreciated social fact in this country was that the mass labor groups were substantially unorganized, while the trade unions spoke only in the interest of their membership of skilled workers. Although this is made clear, the further point is not emphasized that, in effect, if not in intention, the American Federation of Labor's policies, of loyalty to the profit system and adherence to the craft principle of bargaining organization, have inevitably been antagonistic to the efforts of the

†Author of Organized Labor in Mexico (1934).
rank and file of the workers to improve their earnings at the expense of industrial "peace" and profits for the time being. It seems clear to me that the particularism, inseparable from the limited aims of craft organization, has not only left the larger numbers of the unspecialized industrial workers without leadership, but has also made craft unionism the natural sharer of the employers' philosophy, the lowest possible wage costs in the interest of enhanced profit. In dealing with this phase of the subject, the authors may well have sought to avoid controversy, in the interest of carrying their factual narrative to the largest possible range of readers; certainly, it is more than arguable that today there is a greater need for the dissemination of factual information than of opinion, to say nothing of prejudice and partisan spirit. This ought to be of service to all persons interested in the labor movement regardless of faction.

Where the authors have freely stated judgment and opinion as conclusion of fact, it is to be noted that the implicit criticism impinges on political parties or movements, or employer, or capitalist groups. Without examining the validity of the premises, or justice of the conclusions underlying such statements, I am impelled to remark upon the inclusion of our working judicial system, under the easy generalization of "the Courts" in this type of critical assumption. In retrospect, and often at the time judgments were rendered, the line of reasoning relied upon, and the resulting decisions, were not legally necessary, nor wisely chosen; but that is a very different thing from the broad statements that "the Courts" are engaged in a fight against labor. It is of the greatest concern in these uncertain times to do nothing to shake the principles of liberty under the law, nor to diminish the independence and prestige of the judiciary. No greater disservice could be rendered the workers in this country than to weaken our judicial system. Southerners, at least, have not forgotten the crucial service of the civil rights decisions in ending the oppression of Reconstruction in the South. It is not necessary to "write down", to over-simplify the explanation of the judiciary's place in the development of our labor law. Any wage earner who reads this book has enough intelligence to understand the legal process involved.

I quite agree with the authors that the forces which determined the growth of the common law in the 19th century greatly reinforced private property rights and sought to assure full liberty of action in their use and enjoyment. But as early as the 1840's in England, and subsequently in this country, the social reaction to the shocking conditions, resulting from the rapid progress of industrialization, started another line of development. This was the demand for new law to establish social
justice, to reverse the ruin threatened under the guise of economic individualism. The reform movement commenced almost in our own time, and is still in progress today. The early factory, sanitation, and safety appliance acts, employers' liability and industrial accident laws, are only the earlier incidents in a single great tidal sweep in which subsequent employment, health, and recent wages and hours measures, mark further stages of progress towards some final goal of a stabilized era of social justice under the law. Fundamentally, the pronounced inclination of most writers on the labor reform movement to portray "the Courts" on the opposition side of the picture, is attributable to over simplification, or else a misunderstanding of the daily practical task of our Anglo-American judicial system, and its place and function in our social life.

Courts came into being and exist to provide a means for the orderly determination of conflicts of interest. Whenever individuals or groups clash—have a conflict of what they conceive to be their interests—they formulate it as a "case" and present it to a court. If the judge finds that he has jurisdiction and that the law recognizes the claim of right or interest involved, then it becomes his duty to proceed with that case to a final determination according to the accepted processes and the principles of law as they then exist. It is at this point, of course, that the court has to weigh the two legal formulations into which lawyers have transposed the two sides of the dispute. More frequently than not, the opposing counsel have presented respectable and bona fide arguments, and the adoption of either usually would have legal justification for a decision. Frequently, and most always in cases involving principles of law, the social premises of which are in process of change, the final appeal results in a judgment by a divided court. The law is a very complex and heterogeneous collection of principles. No one has ever contended that it is, or should be, or by any possibility could be made to be, consistent in all its parts. Consequently, two sides of the same case often are supported by legal principles which are intrinsically good law. In the famous Yellow Dog Contract case, the dispute was finally decided in the Supreme Court with a cogent dissent. Two groups of judges, constituting one of the greatest courts in the world, voted for opposite results. Why? It is not because they do not understand and respect each other's position, nor because they do not agree on the facts. Ultimately each judge on the Court has to choose; his choice lies between the alternative results, or it lies between the choice of applicable legal principles. Either choice is equally valid, if the two

1Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229 (1917).
sets of legal principles are equally available, authoritative and well established. But to the extent that this balanced equality does not exist, there is a corresponding probability, independent of the inclination to favor one result rather than the other, that a judicial mind will incline towards the deeply rooted and integrated, rather than the pioneer formula.

Those of us interested in the orderly development of principles of law which are conducive to a liberal extension of the program of social justice on all fronts, should be the first to admit that this movement is essentially a progressive one. Human rights must be reformulated to meet and correct the pressure of economic developments. From the legal viewpoint the whole labor movement of the last eighty years, here and in England, has been a progressive demand for new legal formulations in the field of substantive law, and to some extent, the limitation of procedural devices invoked to protect economic individualism and private property. The labor movement is, above all things, a demand for new law made articulate by social action bearing on public opinion and responsive legislation, and only to a small degree by judicial interpretation and decision. The process is one of education and innovation. Common law courts are not innovators. I doubt whether any thoughtful person, however impatient he may be to social maladjustments, would like to see our judges assume a primarily legislative function. On the contrary, when it is not our pet enthusiasm that is involved, we want a judge to resolve conflicts of interest by seeking the certain rule. Let us fight for a better, juster world in the forum of public opinion and in politics, recognizing that it is a fight for a new and better law, and that we cannot expect the courts to promote, but only to recognize accomplishments when they have been won and consolidated. Much progress may be achieved by judicial decision, which has not infrequently happened, and may happen many more times because of cogent argument, ably and insistently presented by counsel. To seek to make the courts a primary channel of legal reform by wholesale disparagement of the judiciary, is to adopt a method which can be made productive only at a great sacrifice, the loss of the prestige and traditional respect for the courts as the custodians of the guaranteed liberties of the individual. The performance of that role may some day be of more vital importance to the wage earner than to any other section of our people.

Leslie H. Buckler*

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TWENTY YEARS OF GOVERNMENT IN ESSEX COUNTY, NEW JERSEY—
$2.00.

The successful working out of the political problems of a great
urban area, with an organization practically unchanged for the past
twenty years, is a phenomenon well worthy of study. To the history of
this achievement, Dr. Reed has devoted this little book. It is an institu-
tional study written primarily for the man of the street by one unusually
skilled on the technical side of local government. The result is a fas-
cinating description of municipal administration in action that holds
the attention of the reader, expert or layman, who undertakes to follow
its pages.

Essex County is almost exclusively urban in character with a popu-
lation of upwards of a million people, of whom approximately one-half
are inhabitants of the city of Newark. It is an agency for the execution
of important state functions, such as taxation, elections, charities, san-
titation, education, parks and highways and the administration of justice.
Certain of these functions are in charge of officers or boards appointed
by the central government acting under control of state authorities while
others are in charge of locally elected officials, but the entire expense of
administration falls upon the county. The local governing body con-
sists of a Board of Chosen Freeholders of nine members, elected at large
with overlapping tenures, one third being chosen yearly, which func-
tions largely through some twelve standing committees of its mem-
bership. Side by side with this powerful body stands the Supervisor,
elected at large every three years, who is denominated the county execu-
tive, but without any power of appointment or control over other sub-
ordinate officials except indirectly through a limited power of removal.
He is given a power of veto over the acts of the Board, subject to re-
enactment by a two-thirds vote, but this veto power is seldom exercised.
His main function therefore is to advise the Board and its standing
committees.

This unique set-up leaves the Board of Chosen Freeholders in a
dominant position of control of the legislation and administration of
the county government and leads naturally if not logically to the build-
ing up of a political machine. With an annual operating budget of six
to eight million dollars, only about one-fifth of which is under direct
state supervision, the temptation to subordinate efficiency of adminis-
tration to political exigencies even besets any partisan Board. Such
appears to have been the situation in 1917. At that time the county

†Professor of Political Science in the University of Michigan.
administration had become so profligate that upon petition of resident taxpayers a commission of investigation was appointed by the Supreme Court of the State, which reported gross inefficiency, if not corruption, in the county administration. This report gave occasion for the organization of an independent reform group, headed by Mr. Arthur T. Vanderbilt of Newark, N. J., under the name of the Essex County Republican League, which in the election of 1919 was able to elect two of its candidates as freeholders and from that day to the present has exerted a powerful influence, whether in full control or not, toward approximating an efficient administration by the officers of the county.

This struggle through the years is the story unfolded by Dr. Reed's tale, the interest of which is not lessened by his attitude that the reformers' conclusions were always right and that the opposition consistently represented the forces of darkness. The lesson we may draw is the possibility of making any system of local government workable where the voters have the problem defined for them by an independent leader of the ability of Mr. Vanderbilt. One may regret that the author nowhere presents the other side of the picture nor sets forth the arguments presented from time to time by the opponents of the present organization, which oftentimes comes dangerously close to convincing the majority of the Essex electors to support their views at the polls. It is notable that while the dominant organization has been in power, no criminal charges have ever been pressed home against the perpetrators of the iniquitous acts so luridly set forth. A presentation of the other side might well detract from the author's thesis, which seems to be the beatification of reform movements as a constructive force in American local government. Upon the whole, as a study of an important era in local government in the United States, this work commands the attention of all scholars in this field. So far as it goes it reveals a well wrought picture of local politics drawn by a master of his craft, who with characteristic self-restraint leaves to the individual reader the lessons to be drawn from his narrative.

C. W. TOOKE*


When the archaeologists reveal the historic glories of a past civiliza-

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†Late Regent, and Lecturer in Jurisprudence, Fordham University School of Law.
‡Member of the Bar of New York, Sometime Assistant United States Attorney.
tion lost for awhile beneath the debris of "modern progress", scholars and discerning students acclaim their achievement. Father Le Buffe's nobler, deeper work in the Philosophy of Law shows the untiring spirit of the archaeologist; he has had to blaze anew an old trail obscured by false theories of law. It deserves more than faint praise and superficial criticism as will be found in any short review such as this. About the most that can be done in a brief survey of this book is to admit that the evidence of scholarship contained therein is unmistakeable, and to point out what to this reviewer appear to be minor flaws in the workmanship; technical errors in terminology which do not invalidate the really great worth of the book.

That this third edition, augmented by cases to illustrate principles, is an improvement of the previous editions, is hardly open to doubt. It should do for the young lawyer in college what his other books do not attempt to do; it offers him guidance in the devious and treacherous task of applying sound philosophical principles to the ever changing rules and enactments which emanate from our American courts, legislatures, and administrative bodies. It is "fashioned for classroom use", and its often sketchy paragraphs present the professor of the philosophy of law with opportunities for selective elaboration from his own store of legal and philosophical knowledge. The wide use which this timely volume should have, and the welcome which it most likely will receive, may eventually encourage the authors to enlarge it into a fourth edition in which certain gaps in the treatment of principles can be filled.

Anyone who studies this book carefully will find himself inspired to pursue his research into the wealth of reference material already suggested by the excerpts and annotations. Hence, one may safely predict that Father Le Buffe's pioneering will be followed by a solid literature concerned with special problems in American Jurisprudence. Perhaps some new Oberings or Brownsons will owe their stimulation to the awakening which awaits them in their intimate acquaintance with this exploratory survey of Jurisprudence.

Several examples of the gaps in the sequence of presentation are called for in justification of the constructive criticism. The first comment is elicited by the lack of clarification in the choice of method for the study. In the first chapter, entitled Definition of Jurisprudence, we are confronted with a confusion between analytic and synthetic (or deductive) methodology. To quote from page 5:

"(6) Analytical Jurisprudence

"Analytical (Pure) Jurisprudence is the science which investigates the ultimate principles of law."

"As to Analytical (Pure) Jurisprudence, the question is raised at once: 'Can
any such set of fundamental, universally valid principles be found and formulated?"

"Lightwood says that only two attempts have been made:

a. The Roman Jurists found the Law of Nature;
b. Bentham's principle of Utility.

He thereby shows himself unconscious of the field of Analytical (Pure) Jurisprudence as treated by the great scholastic philosophers and legists of the Middle Ages and centuries subsequent thereto. This school formulated the one sound guiding principle of law; viz., man in his essential relations, i.e., man as he is, constituted in a triple indestructible relationship to his Maker, to himself and to other men."

"The present work is precisely committed to the development of this Scholastic Jurisprudence, much of which lies at the very heart of our American Jurisprudence."

At the outset, Father Le Buffe asks a question which is distinctly ethical, and after raising the question, turns to criticize Salmond in his Jurisprudence, for distinguishing Historical, Analytical and Ethical Jurisprudence. The latter, Ethical Jurisprudence, according to Father Le Buffe, it seems, is not distinct from Analytical Jurisprudence. In so identifying the term analytical with ethical, he is flying in the face of logical usage. If there is good reason for revolutionizing the language of Logic, that reason ought to be given along with explicit declaration initiating the reform. That there is, indeed, just complaint against the needless complications in the terminology of methodological science, others would be found to agree; but even the most appropriate remonstrances are misconstrued when they are not properly labeled, as intended departures from ordinary scientific terminology.

Modern Logic recognizes, as a strictly analytical method, only that in which the sequence of thought passes from the more complex conception to the simpler, or from effect to cause. Logic still identifies, it is true, the a priori, necessary judgment as an analytical act of mind. When, however, the search for truth involves reasoning, and not merely a judgment considered out of relation with other judgments, the term analytical is applied to quite a different mental process. In reasoning processes, when we begin by investigating concrete data (complex from the conceptual point of view) and reason regressively until we have arrived at more remote and simpler constituent concepts or "causes", the method so described is analytical.

It has been well said that our great scholastic philosophers, following Aristotle's manner used a combined "analytico-synthetic" method in arriving at an understanding of the essential nature of law as an ordinance of reason, mandatory in form, etc. Yet Father Le Buffe omits mention, in the first chapter, where one might well expect it, some indication of the genesis of law and leaves to a later chapter the dis-
cussion of the ethical basis of law. He gets to his interpretation of the essential nature of all law with such rapidity that non-scholastics could readily suspect that he has assimilated the Thomistic concept of law uncritically and on faith; which is not true as later chapters tardily manifest.

A strictly analytical method is better exemplified by John Austin, whom Father Le Buffe scores directly for inaugurating his treatment of Jurisprudence with a comprehensive view of every type of legal rule, law in its collective sense as "the aggregate of rules set by men politically superior or sovereign to men as politically subject". The reviewer here agrees with Father Le Buffe that Austin's peculiar adaptation of the analytical method fails to carry through to an adequate concept of the nature of law in its essential content of meaning; but his method is on the whole what Logicians call analytical.

What Father Le Buffe wishes to call Analytical Jurisprudence is indeed the traditional Theo-philosophical approach to the study of law. Since a philosophical science is principally deductive as contrasted with the Natural Sciences which are primarily inductive, it is not at all helpful to the student of law to find in a text-book which so admirably demonstrates the value of a thorough acquaintance with sound metaphysics, so confusing a label for one's method as that which occurs on pages 5 and 6; for the deductive method is synthetic, not analytical.

A second comment may be made regarding another confusion of terms. In Chapter IV, Positive Law, we find after a division of Positive Laws:

(9) International Law

"International Law is not law in the strict sense, since there is no authority superior to the States bound by such law and imposing it upon them. It is rather a sum of duties and agreements entered upon by the contracting States. It may be defined (Brosnahan, Digests, Ch. XXX, p. 135) as 'a body of duties and rights by which nations are mutually and morally bound'. International Law is, of course, law strictly so called, insofar as it as a restatement and reaffirmation of Natural Law."

In the above brief paragraph we are told that "International Law is, of course, law strictly so called". We find ourselves unable to untie this Gordian knot of paradox since we are allowed no escape by implied distinctions, by interpreting the law differently in two judgments. Just what does the author mean by "law strictly so called"? Reverting to the opening paragraphs of this Chapter IV, we find that "law in the strict sense" is held not to mean natural law but positive law, and that "it has been customary to narrow positive law to civil positive law". How can the author list International Law as a type of Positive Law if it lacks the elements of positive law? The contradictory phrase-
ology is familiar to lawyers but we do not expect to find a philosopher of law adopting literally and without argument the obscure language of those who allow the muddled conditions of world politics to darken their understanding, to the extent of denying that nations and states can establish positive rules of international conduct because they have not as yet any super-state possessed of physical power sufficient to constrain all people to obey. Unwilling to be construed as having justified international anarchy, Father Le Buffe turns the paragraph to a weak conclusion by his contradiction: "International Law is, of course, law strictly so called, insofar as it is a restatement and reaffirmation of Natural Law." According to this reasoning, the world must not hope to see responsible statesmen respect any treaties that embody concrete arrangements in the matter of trade, etc., because treaties are meaningless scraps of paper and concordats are made to be broken; we are not told just where and by whom the restatements and reaffirmations of Natural Law which alone are to guide sovereign states are to be made legitimately and authoritatively. It is not altogether correct to cite Suarez in support of a doctrine so imperfectly expounded, by adding: "The first to define international law in this sense was the Jesuit Suarez, who resorted to Isidore of Seville". Suarez would rather have agreed with Brosnahan, whose statement on page 69, fortunately tends to retrieve something of the value which the confused terminology above would seem, on its face, to have thrown overboard. It is only fair to the author to add here that he does explain satisfactorily in a later chapter, XIV, the relation of authority to sanctions. While the author has missed a splendid opportunity to emphasize the current need for clear thinking in terms of international law, it is to be remembered that this text is intended primarily for students who are studying the common law, national law, and state law.

In general, one who reads the latest edition of Jurisprudence by Father Le Buffe and James Hayes critically will find so little to complain about in the excellent material which is presented concisely and cogently, that he only wishes the volume could be even more explicit than it is; that there would be rather more of philosophical explication, than less of it. Indeed, our fault finding is limited to such terminological inadequacies as are exemplified above, and to omissions of detailed reference to some rival schools of Jurisprudence, such as that of Savigny (Historical Jurisprudence) whose influence upon students of law is not negligible. However, we must remember that this book is designed not as an encyclopedia but as a "textbook fashioned for classroom use".

WILLIAM F. ROEMER*

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Persons who quarrel with the "Zing!", "Bang", "Zowie!" adjectives of radio commentators argue that there's no need for these verbal pyrotechnics. Facts that are sufficiently important are engrossing in themselves, and the embellishment only tends to distract a listener, they contend.

Well, here's an excellent witness for their cause. This work is a simple presentation of facts. There is no attempt at literary embroidery. And yet, it will make one think; it will shake a reader out of his complacency. It is more than just another book for another reason. It is the report of a serious study made at the instance of an important organization.

The authors—one a criminologist and the other a sociologist (now deceased), each well thought of in his field—have collaborated well. Theirs is a vivid picture of New York City's delinquency problem. They hold up, on the one hand, the weaknesses of the present system of criminal justice as it relates to juvenile offenders, and, on the other, a methodology which they felt would be concrete and constructive in seeking a cure.

It is maintained by the authors that "crime deterrence is more dependent upon initial events related to the commission of an offense than upon the remote effects of harsh punishment". "If this is so", they contend, "the value of punishment, either for punishments' sake or as a deterrent, loses the force of unquestioned utility. Once this is admitted the way is cleared for acknowledging that reformation of offenders should be the first objective of a system of criminal justice and that imprisonment should always be a secondary resort following upon failure of attempts at reform."

And in this connection, the work brings out a point upon which laymen think too little. A very large percentage of young people become enmeshed in the outer reaches of the machinery that is the law in operation, but are not convicted, and may not even be brought to trial. In at least a good percentage of these cases it may be assumed that there was never a question of substantial guilt. And yet, these youths—victims, say, of circumstances—have been subjected to much of the noxious routine associated with hardened criminals. They are, first of all, arrested. They may be put publicly into a patrol wagon. They are finger-printed and photographed. They are lodged in a cell. They

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‡Founder of The Boys Bureau.
may be arraigned. If there is a trial with subsequent acquittal, incarceration for a protracted period is the only degrading element that is lacking. They are innocent, to be sure. They’ve been released, oh yes. But how can they keep from looking upon themselves as being perhaps a little bit criminal?

The authors have not treated crime prevention. Really, it doesn’t come within the scope of their study, “except as the cure of an offender prevents continuation of offenses on his part and eliminates the dangers of his infecting others with ideas of delinquency”.

“Although we fully acknowledge the wisdom of the old adage about an ounce of prevention”, say the authors, “we must face the ugly fact that all too frequently the ounce is lacking, and the pound of cure becomes necessary. Our position is that a pound of cure is worth more than a hundredweight of retributive punishment.”

There is in this book a reminder that the “science of law is not adequately performing its functions in judicial processes”.

It is pointed out that the penal law which attempts to apportion the penalty to fit the crime is constantly being modified by the exercise of discretion on the part of district attorneys, judges, and juries.

The authors advise that “the State is now paying heavily for every boy whom it adjudges, by a more or less flexible criminal arrangement of law, to be delinquent and to require incarceration in a penal institution”. They show, moreover, that only too often incarceration is nothing more than a period for incubation of more serious offenses and extended careers.

The authors propose:

1. That a special delinquency code for minors between 16 and 21 years of age be enacted;
2. That a new court, known as the Delinquent Minor Court be created;
3. That the court be so organized as to provide for the exercise of two separate functions, (a) a judicial function of determining guilt or innocence of offenses charged and, (b) a dispositional function of determining the form of treatment to be imposed upon those found guilty; and
4. That disposition of offenders be based on a diagnostic examination by experts comprising a Disposition Board, and that delinquent minors be under the control of this board until formally discharged from its supervision, or until an order for indefinite

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1See Arnold, The Role of Substantive Law and Procedure in the Legal Process (1932) 45 Harv. L. Rev. 617.
segregation is made by it following a decision that rehabilitation is unattainable."

It is not the claim of the authors that their plan is a cure all, and they recognize "the fact that a new code will not in itself effect a solution". They state, too, that they "realize fully that it will be no better than the persons who administer it, and routines and insensitive attitudes can defeat its purpose".

However, when the inadequacies of the present system are so plainly evidenced by the cases cited, it cannot be gainsaid that something must be done to improve conditions.

Then why not have such a "disposition board"—a "clearing house" for a thorough study of the juvenile offenders which would introduce the facilities of psycho-therapy, education, guidance and job placement at the outset, rather than after release?

The parole officer is seldom a magician, and society is unwilling to accept the individual once he is marked as a criminal.

Such acts as the "Baumes Law" are hardly deterrence factors. If the decidivist is to be obliterated, it will only be by control and reformation of the youthful offender.

There are those who will demur, but the law (not laws) is sufficiently elastic and flexible to admit of this separation of functions and shift of emphasis. Perhaps that is why law is today the most fascinating of the Social Sciences.²

Society cannot but gain if we concentrate our efforts on turning minors back from the threshold of prison.

THOMAS GILLESPIE WALSH*


This little book is printed in 12 point type, heavily leaded. The printed portion of any of its pages (3½" x 5¼") can be exactly covered by an ordinary, one-cent postal card. Interspersed through its text are some forty pictures which use up about fifteen of its pages. A fairly close estimate will fix the number of words in its text at about 32,000. The whole exposition, with pictures included, could be printed in ap-

²See note 1, supra.

*Lawyer-member and Chairman, Commission on Mental Health; formerly Assistant Corporation Counsel at the Juvenile Court of District of Columbia.

†Former lecturer on Commercial Education in Columbia University.
proximately 71 pages of the journal in which this review appears. With such a limited content, it is obvious that the book can do no more than present the barest outlines of the technique of the examination of questioned documents. It would be impossible to present fully any one of three important topics, of which, *inter alia*, the book treats—Handwriting, Inks, Paper—within the scope of so small a volume. (Mr. Osborn’s book, *Questioned Documents*, contains over 1000 pages, many of them printed in fine type.)

With these matters in mind, one may truly question whether the value of the book has not been overstated in the claims printed on its jacket. It is open to doubt whether the author here "reveals the secrets of his craft", or that it can offer much practical protection to "bankers, cashiers, credit men, insurance officials, and every one else who has to guard against forgeries"; and there is even greater reason to doubt that the scanty material, printed on pages 124 to 134, inclusive, offers anything which will teach an expert witness how to testify with complete equanimity "even under a grilling cross-examination." While this overstatement becomes much less marked when compared with the presentation of certain other books which have appeared in recent years, it is sufficient to cause the present writer to question whether publishers do not perform a positive disservice to any volume so "touted", and whether they do not to some degree hazard their reputations as publishers in so doing.

The book presents the outlines of a fascinating science—but only the outlines. Its contents may inspire a reader to enter upon that broader study, through which alone he can become an expert in this field, but, of itself, this book will never make him one. Certainly it would not be safe to charge another person with forgery with no other information than contained in this work. It is a book for the beginner and for the reader who may be interested in knowing generally about the methods used by the examiner of questionable documents. Pleasantly and understandably written, it makes the presentation that one would expect to find in one of the better magazines devoted to "popular" science. It is not a handbook for the technical expert.

Two specific shortcomings should be noted. In the table of cases, offered for collateral reading, this reviewer finds no case decided since 1925. And in Chapter IV—What Paper and Ink May Reveal—a most important warning has been omitted, namely, the admonition that the examiner must be extremely careful to do nothing to the document he is examining which will render that document inadmissible in evidence. Such a warning, for example, seems especially important in connection with the suggestion that added rosin sizing can be removed
by brushing the surface of the paper with alcohol; this method should be used with caution. The entire document may be washed with cold water; and that inks may be tested with acids and other chemicals. The admonition to use minute quantities of such reagents seems inadequate. There is grave risk, indeed, that the tyro who tries such tests may ruin the documents for use as evidence.

The book will fascinate the scientifically-inclined layman, but it is to be hoped that no layman will in any vital matter rely upon it as “A Quick Aid to Decision on Questioned Writing.” We may trust the seasoned expert to take care of himself.

LYMAN P. WILSON*

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1P. 97.
2P. 108.
3P. 106 et seq.
4P. 109.
*Professor of Law in the Cornell Law School.
BOOKS RECEIVED

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


Dennison, H. S. and Galbraith, J. K.—Modern Competition and Business Policy. Oxford University Press, New York, 1938. Pp. 120. $0.75.


