PUBLIC POLICY CONCEPT OF VALUATION FOR PURPOSES OF PUBLIC UTILITY RATE CONTROL

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"VALUE is a word of many meanings", remarked Justice Brandeis in struggling over the application to a particular case. Nevertheless, the courts have mostly spoken as if there were but a single value concept, and that in any given legal proceeding the problem is merely to find the proper amount of the general substance.

Dr. James C. Bonbright, in his notable work on The Valuation of Property has subjected the court discussions to extensive analysis. He shows that while mostly they convey the assumption that there is only one kind of value, in dealing with different types of conditions, the courts have actually applied different concepts according to special circumstances or purposes.

The purpose for which the valuation concept has been most troublesome is public utility rate control. This in itself is, of course, a legislative function applicable to properties affected with special public interest. Yet rates fixed by legislative action, either directly by the legislature of a state or by a special commission, have been subjected to court review, and must thus pass the muster of judicial reasonableness. According to the standard fixed by the Supreme Court of the United States, they must

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1Southwestern Bell Tel. Co. v. Public Service Commission, 262 U. S. 276, 310 (1923).

bring a fair return on the "fair value" of the properties devoted to public service. 

No definite modification of the fair value rule has ever been made. However, prior to the world war, the statement involved no particular conflict between the two major bases of approach,—actual cost and reproduction cost. The latter might reasonably have been construed as applicable under circumstances when the original cost could not be ascertained or was grossly excessive. During and after the world war, prices increased greatly, and then reproduction cost exceeded correspondingly the actual cost incurred under pre-war conditions. This shift in relative factual position was followed by emphasis on reproduction cost. This appeared first in Southwestern Bell Telephone Company v. Public Service Commission, and was later accentuated by Bluefield Water Works & Improvement Company v. Commission of West Virginia, by McCadle v. Indianapolis Water Company, and by St. Louis & O'Fallon Railway Company v. United States. Following the sharp decline in prices after 1929, there has been no formal departure from the fair value rule, but there has been leaning back toward actual cost. This is indicated in Los Angeles Gas & Electric Company v. Commission, and later in Railroad Commission of California v. Pacific Gas & Electric Company.

COMMERCIAL VALUE INAPPLICABLE

In discussing fair value, the Supreme Court has proceeded almost throughout as if it were dealing with a clear general concept, without special connotation for rate making purposes. It has appeared to consider the problem in each instance merely as one of specific factual determination. It has particularly conveyed the idea that the "fair value" to be found is in character the same as commercial value.

*The so-called "fair value" rule was first enunciated in Smyth v. Ames, 169 U. S. 466, 546-47 (1898). To ascertain the fair value in any instance, "... the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

*262 U. S. 276 (1923).
*272 U. S. 400 (1926).
*289 U. S. 287 (1933).

*262 U. S. 679 (1923).
*279 U. S. 461 (1929).
*58 Sup. Ct. 334 (1938).
Actually, however, by saying or implying one concept but tacitly applying a very different one, it has avoided the logical impasse to which commercial value would lead in its application to rate making.

The commercial value of an industrial property depends upon its expected net earning power. This in turn, among other factors, depends upon the prices or rates to be realized from the products or services to be sold. Thus the commercial value of a public utility property would depend upon the rates charged for service, and therefore could not be logically used as a measure for the determination of reasonable rates. As a matter of principle, it would obviously preclude either the lowering or increasing of rates. High rates would be reflected in expected earnings, and therefore in the value of the properties; hence they could not be reduced. Likewise low rates would be reflected in the consequent value, and so could not be increased.

Commercial value as such clearly is not a concept that can be applied to monopolized industries for the purpose of protecting consumers against exorbitant charges or safeguarding investors from confiscatory rate restrictions. Notwithstanding its obvious inapplicability, the Court has appeared to fix ordinary commercial value as the constitutional basis of rate control. Yet it has recognized that rates are properly reduced if they are excessive, and increased if they are inadequate to bring a fair return on the fair value of the properties. In reality, it has tacitly applied intrinsically a different concept which does not involve earning power and can be objectively established as a measure of allowable earnings.

Actually the Court has predicated valuation primarily upon physical appraisal, in which consideration is to be given to all relevant factors, including actual and reproduction cost. In its various discussions it has always presented objective or exterior factors which are not dependent upon earning power. During the post-war and pre-depression period it seemed to give primary consideration to reproduction cost, less depreciation. This would reflect at any given time the changes in price level or the shifts in the specific costs applicable to any particular property since the date of construction; it is not dependent upon future earning power, and so can be logically used as a measure of allowable earnings. As a concept it is entirely different from commercial value, although its distinction has not been overtly recognized by the Court. Valid criticism is not its theoretical and logical inapplicability, but rather its practical unsuitability for the purposes of governmental rate control.
PUBLIC POLICY CONCEPT

Apart from other classifications that might be made, a fundamental difference appears between commercial value and what may be termed a public policy concept of valuation. The one depends upon earning power and so is not applicable to rate control. The other is specifically formulated to suit the particular purposes of legally declared public policy and to facilitate the attainment of the stated objectives. There are available various public policy concepts, and the desirable selection for public utility rate control depends upon the specific regulatory statute and upon the practical requirements to attain the particular purpose.

The actual fair value concept as developed by the Supreme Court, apart from overt recognition, has been one of public policy rather than commercial value. In emphasizing reproduction cost after the war, the Court apparently had in mind particularly fair dealing with investors. If these had been limited to normal returns based upon actual dollar investments made before the war, they would have been subjected to relative losses. The consideration of fair dealing presumably led the Court to emphasize reproduction cost for the tacit purpose of compensating investors for the rise in prices, with the appearance of holding to the fundamental principle of real value.

The Supreme Court itself thus formulated and applied a special policy concept, which it deemed reasonable for rate making purposes under post war conditions. While this action was understandable, it was basically a departure from what it was presented to be as a category of value. Within analytical disguise it effected actually establishment of policy which properly belongs to legislation and not to judicial decision. Suitable policy should take into account not only fair dealing with investors, but also other basic considerations of rate control. Reproduction cost less depreciation might be defended merely from the one standpoint, but it is utterly unsuited to the primary purposes and needs of rate control.

POLICY FAULTS OF REPRODUCTION COST

The principal policy fault of reproduction cost less depreciation is its indeterminateness and, hence, its lack of administrability. At any given time, the amount can be determined only by re-appraisal of the properties. This is predicated principally upon expert testimony, rather than definite facts. It involves, therefore, gross conflicts between private and public interests, and leads to extensive controversy, protracted proceedings, great expense, and inconclusive results. The procedure itself precludes reasonably prompt, definite and effective rate administration. Neither reductions nor increases can be obtained as warranted by chang-
ing conditions. The valuation method practically estops the governmental function of rate regulation.

Apart from its lack of administrability, the reproduction cost concept involves also other objections from the standpoint of reasonable policy. First, it leads essentially to transformation of the state commissions from administrative agencies to quasi-judicial bodies, which hold hearings and issue orders on the basis of formal records according to the standards of law suits. Second, in the quasi-judicial inquiries the private company side is always fully prepared and presented, while that of the public goes largely by default, so that the ultimate determination in a case is based primarily upon a one-sided record. Third, consistent application creates serious financial distortions with changing prices, since a large proportion of the actual investments is normally made through fixed return securities, bonds and preferred stock, and only a small proportion, about 25%, by common stock.

Notwithstanding the full adjustment of reproduction cost with changing prices, it is not applicable to bonds and preferred stock, and so affects the returns of common stockholders with great cumulative force. It produces grossly undue returns to common stock when prices have risen, and so stimulates speculation and extravagance, as witnessed during the period after the war and before the financial collapse in 1929. When prices have fallen, it affects first the common stock and rapidly destroys their returns; if the decline is sufficient, a company would be unable to pay interest on bonds and so would face insolvency. The falling prices after the 1929 financial collapse were probably the reason for reduced emphasis by the Supreme Court on reproduction cost and for more favorable consideration of actual investment as the rate base.¹⁰

**CRITERIA OF PROPER POLICY CONCEPT**

Since rate regulation requires a special policy concept as distinguished from commercial value, the particular selection should be based upon

¹⁰If it could be systematically applied, reproduction cost less depreciation would furnish no compensatory relief to about three-fourths of the total actual investment, and would provide threefold increases to the one-fourth, during periods of rising prices. But, during falling prices the concept cannot be rigorously applied without financial disruption beyond a 33-1/3% decline in prices below the level of actual cost. Reproduction cost less depreciation thus does not serve even as a reasonable basis of fair dealing with the investors, if systematic application were possible. Since, however, there is long lag of quasi-judicial application after shifts in prices have taken place, a company may suffer irreparable loss during rising prices before proper rate adjustments are made, as happened extensively during the war. And during falling prices, consumers are subjected to long overdue reductions, as happened throughout the country after the 1929 financial collapse. The concept has really no functional justification for any phase of reasonable rate policy.
The responsibility, they should be adopted through legislation, and not through judicial action. It should embody, I believe, the following principal criteria:

1. Valuation for rate making should be subject to systematic administration. The amount in any instance should be a definite one, established as a matter of regular record, and capable of prompt ascertainment at any time. It should depend not upon expert opinion and evidence, but exclusively upon facts ascertained through continuous administration.

2. It should represent exactly the reciprocal rights and obligations. It should involve no conflict of interest between the two parties, and should provide for prompt increases in rates as well as reductions,—to assure the returns to which investors are entitled, but also to preclude the payment of excessive returns by consumers.

3. It should make available new capital as needed for extensions, additions and improvements at lowest attainable terms, by safeguarding the returns that investors agree to accept through appropriate administrative provisions.

4. It should form a part of a comprehensive plan of regulation, including not only continuous administrative provisions for rate base determination, but also for rate of return and for systematic showing of operating revenues, operating expenses and other elements that enter factually into the fixing of rates. The entire rate making system should be integrated so as to provide for continuous factual showing as to the reasonableness of the rates.

5. It should be formulated especially in the light of the functions of the administrative authority. During the past, public utility commissions have been engaged principally in rate litigation or in avoiding their duties to make proper rate adjustments. Under a comprehensive program, they should be freed from the egregious waste of time, energy and expense involved under the present fair value procedure, and from the consequent quasi-judicial strangulation of positive rate control. They should be concerned only with administration in carrying out the objectives of governmental regulation.

The commissions should become primarily planning agencies in furnishing public utility services for the various economic and social developments. As to valuation, they should be concerned not only with the establishment and maintenance of definite sums on a factual basis, but they should bring about needed property expansion and prevent unnecessary capital expenditures. With such planning and administrative responsibility, they could then systematically safeguard the recognized
fair value, protect the public against unreasonable charges, and assure
the progressive development of the properties and service according to
public needs and advantages.

PRUDENT INVESTMENT AS POLICY RATE BASE

The criteria of a desirable public policy rate base as thus briefly
outlined are, I believe, best embodied in the concept of *prudent invest-
ment*, if this is properly defined and applied. It represents the *actual
cost reasonably expended and maintained* in the properties devoted to
public service.

In the application of prudent investment, proper consideration must
be given to the differences in conditions between existing properties and
future expansion. This particular policy rate base can be readily adopted
and applied to all future property additions, extensions and improve-
ments, but it requires not only legal but factual adjustments with respect
to existing properties.

For all future property enlargements, the rate base could be main-
tained systematically on the basis of prudent investment. The factor of
prudence itself, however, should be subject to continuous administrative
determination. Only such actual costs of property expansion as are
justified for public service should be authorized by the public utility
commission. When once incurred and approved, they should be charged
as determined facts to the property accounts, and thus enter definitely
into the rate base. Likewise, when property units are retired from service,
their original costs should be deducted from the property account. Thus
the actual original cost of the properties existing at any time would be
shown by the accounts. These are all matters capable of exact and
continuous accounting administration.

Besides the exact record of property additions and retirements, pro-
visions should be made for *depreciation* of durable property units which
are subject to physical deterioration and functional decline. Annual
charges should be made to operating expenses to cover all depreciation
due to physical and functional factors. The amounts should be accumu-
lated in a depreciation *reserve*, which would be increased by the annual
charges to operating expenses and diminished by the cost of the property
units retired. The balance of the reserve at any time would show the
amount of existing property costs that have been charged to past oper-
ating expenses because of depreciation.

With such definite administrative provisions, the rate base would be
shown definitely at any point of time as a matter of simple accounting
analysis. It would consist of the original cost of the properties as shown
by the property accounts, less the depreciation as shown by the reserve. All the factors would appear as exact quantities of record. There would be no conflict of interest, and no dispute over any factual determination.

The situation, however, would be very different with respect to existing properties, provided under the present fair value rule. To bring them within the regulatory program would require an initial valuation, which might best be based upon reproduction cost less depreciation, if properly determined from the public as well as the private standpoint. The results should then be taken into the property accounts, and would not be subject again to re-appraisal. They would be recorded in lieu of actual costs and would be treated subsequently as prudent investment. The entire rate base would thus be subject continuously to definite accounting administration.

MEETS CRITERIA OF PROPER POLICY

Prudent investment as thus briefly outlined would furnish, I believe, the best public policy concept of value for rate making purposes. It would meet the fundamental requirements of systematic administration. It would be continuously adjusted with property additions, retirements and depreciation, would permit prompt raising and lowering of rates according to changing conditions as factually established, and would avoid the basic difficulties which have prevented effective regulation under the fair value rule.

Apart from exact administrative provisions, prudent investment would conform also to the other criteria of a desirable public policy concept of value. It would deal fairly with investors, representing definitely their rights together with the responsibility of the consumers, and protecting systematically the actual investments made for public service. It would attract new capital required for property expansion at most favorable terms, by furnishing maximum assurance that the returns accepted as satisfactory to investors are actually carried out. It would be integrated

11The alternative might be actual cost of existing properties, less depreciation. In either case, however, proper factual determination would be necessary, and this would probably be more readily ascertained through appraisal at reproduction cost less depreciation. This, moreover, would conform to present legal standards of appraisal, and would thus involve only the constitutional question whether subsequent re-appraisal can be avoided without regard to shifts in prices. If, however, the prudent investment were to be applied retroactively to existing properties, factual determination would be necessary (a) as to reasonable actual cost, and (b) as to depreciation deductible for expired usefulness of the properties. The concept involves full maintenance of investment and so requires deduction of depreciation from the reasonable original cost. For old properties, it represents the net amount, not the gross actual cost without regard to depreciation.
with a comprehensive plan of regulation, and particularly would fit the positive objectives in obtaining proper utility expansion at minimum cost to the public, but with maximum protection of recognized private interests.

Such a comprehensive regulatory program would have to be established by legislation. This should present the conditions, needs and objectives, and should provide for definite standards and machinery of administration. As to rate base, it should present a clear concept, defining precisely the relative private and public rights, and prescribing specifically how they shall be embodied in continuous and exact administration. This should be an integral part of the entire program of regulation to keep private organization systematically directed to public objectives.

COMPREHENSIVE LEGISLATIVE PROGRAM

The impasse of regulation has been charged by most economic and legal analysts to the courts, particularly to their dealing with valuation. While, of course, judicial action has produced a non-workable policy concept under the guise of protecting absolute property values, constructive criticism should be concerned primarily with legislation. The judicial misdirection is probably due basically to the indefiniteness and inadequacy of the regulatory statutes. For the future, correction depends less directly upon judicial modification than upon positive legislation to establish clearly the objectives of regulation and to provide appropriate administration for their attainment.

Public utility legislation in the past has been extremely general and vague in declaration of objectives, and non-definitive as to relative private and public rights. Mostly it has provided only that the state public utility commission shall fix reasonable rates, sometimes stating that the rates shall be adequate to bring a fair return on the properties used in public service. But what is reasonable or fair has been left undefined. No standards and machinery for exact measurements were created. Clear objectives were not established, and appropriate means of administration were not provided.

Under such circumstances, questions of private rights inevitably arose for judicial determination. Since rate making in principle has been a legislative process, complaints arose under the constitutional provisions of due process and due compensation for the taking of private property for public uses. While the courts perhaps made the initial error in assuming constitutional jurisdiction over rates fixed through legislation, in attempting to protect private property rights against confiscatory
rates they were practically compelled to set up some standard of valuation as yardstick of due process and compensation. Unfortunately, however, they have imposed a standard which has rendered regulation ineffective as an instrument of public policy. For the future, there is needed, first, clear realization of conditions and, second, positive legislation for establishment of clear objectives and suitable administration.

Unless there is such comprehensive legislation, discussion of judicial action appears rather futile. Even if the Supreme Court should modify its general declarations and were to accept the constitutional validity of prudent investment as rate base, this would merely be an abandonment of past judicial restrictions, but would not establish positive policy. It would merely free the legislators to formulate policy, and would then permit the commissions to act as administrative agencies to carry out the objectives within the legal standards created by legislation. While such judicial shift might stimulate desirable legislation, it is more likely to be brought about through appropriate statutory action. Discussion, therefore, should center particularly upon the kind of positive action needed for establishment and attainment of desirable public objectives, including systematic protection of private interests.

QUESTION OF CONSTITUTIONALITY

In the establishment of such positive policy, there is doubtless a constitutional question whether a basic shift in valuation concept and procedure can be attained through legislation. Ultimate decision would, of course, depend upon the Supreme Court, which would consider the basic reasonableness of the legislation, together with the effect upon private property rights as presented in the specific cases under review.

With respect to future property expansions, there should certainly be no constitutional obstacle to legislative establishment of prudent investment as rate base. In dealing with existing properties, however, careful consideration would have to be given to actually fair standards. For this purpose, initial valuation of existing properties under the present fair value rule would probably be most satisfactory, both from the legal and administrative standpoints. But when such valuation has once

12From the legal standpoint, there could be no constitutional objection to the initial valuation within the present fair value rule, based primarily upon reproduction cost less depreciation. Subsequently as to general policy, the sole constitutional question would be whether the indefinite and variable "fair value" right which cannot be systematically protected, can be converted to a precise and fixed right which is subject to exact administrative protection. The answer to this question should certainly be affirmative, provided that the comprehensive regulatory program really involves public objectives and does not embody a confiscatory purpose. In addition, however, the application of the new policy concept would have to be intrinsically fair in the factual determination of each individual property.
been made, it would subsequently be freed from further re-appraisals, and would be embodied as an integral part of the prudent investment procedure as provided for explicitly by legislation.

With such positive legislation, the Supreme Court as now constituted would hardly declare the valuation provisions unconstitutional. It would certainly consider most carefully the fundamental justification of the objectives and the administrative standards and means, before declaring the legislative action unconstitutional. Furthermore, it would meet any question of validity only in individual instances of alleged denial of due process. Even if it should find in any such case that the rates as fixed are confiscatory, it would doubtless limit the incidence of its decision and would not invalidate the entire program of regulation as established by legislative action.

For the needed transformation of regulation there should be, first, due regard within the statutes to fair treatment of investors. Second, there should be particularly regard by the administrative agencies for reasonable private rights, especially in fixing the initial valuation of existing properties for embodiment in the prudent investment rate base. This would involve unavoidable conflicts of interest and probably considerable litigation. This clearing up process would necessarily entail considerable effort and expense. Subsequently, however, there would be little occasion for conflicts of interest. The commissions would then become primarily administrative agencies to carry out the public objectives as established through legislation.

If private ownership is to be continued as the principal type of public utility organization, constructive consideration must be given to the requirements of effective regulation for attainment of public objectives. The present un-precise legal rights and unworkable administrative procedure furnish a powerful force against private ownership. For the future, therefore, particular emphasis is needed upon proper legislation and not merely upon judicial short-comings. The faults of legislation have preceded those of the courts. Proper legislation is likely to be followed by sensible judicial action.
RATIONALE OF BARGAIN CONSIDERATION

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IN ANGLO-AMERICAN law there have been and still are three kinds of consideration: (1) moral consideration,¹ (2) injurious reliance or promissory estoppel,² and (3) bargain consideration.³ It is submitted that a recognition of this truth is essential to any intelligent rationalization of the Anglo-American law of consideration. It is impossible to explain it according to any one theory. All attempts to do so can lead only to confusion. Two types of consideration involve detriment to the promisee. One type involves benefit to the promisor. One type involves antecedent facts, a second, contemporaneous facts; and a third, subsequent facts. Types of consideration with such dissimilarities cannot be defined as one kind of consideration, but each kind of consideration must be defined and considered separately.⁴*


¹Willis, Rationale of Past Consideration and Moral Consideration (1934) 19 IOWA L. REV. 395.

²Restatement, Contracts (1932) § 90; Willis, Rationale of the Law of Contracts (1936) 11 IND. L. J. 227, 234.

³Willis, Consideration in the Anglo-American Law of Contracts (1932) 8 IND. L. J. 93, 110, 153, 171.

⁴Because this has not been done there are insolvable problems of consideration in both the Uniform Negotiable Instruments Act and the Uniform Sales Act.

The Negotiable Instruments Act apparently makes value, or consideration, a requisite for a negotiable instrument, though it does not name it in the list of requisites; and an "antecedent debt" and "any consideration sufficient to support a simple contract" will constitute value. But will injurious reliance, or prior pecuniary benefits constitute value?

The Sales Act requires "a consideration called the price" for a contract to sell (or a sale) and this without doubt includes a promise for a promise, but does it include an act for a promise, or injurious reliance on a promise, or a prior legal obligation, or prior pecuniary benefits?
Moral consideration owes its origin for the most part to Lord Mansfield. It had a great vogue for a time, but was almost abolished in the period of maturity, and now survives only where there are the facts antecedent to a promise of prior debts, or the receipt of prior pecuniary benefits without any antecedent legal obligation. Injurious reliance or promissory estoppel as consideration involves the facts subsequent to a promise of reasonable and justifiable reliance on the promise to one's pecuniary injury. This basis for contract law was at first rather extensive. But it was adequate only for promises followed by acts and not for bilateral agreements (involving contemporaneous facts), and it was nearly supplanted by bargain consideration invented to meet the need for a contract law of this kind but which could also take care of most cases of injurious reliance. Today only a few promises of this sort still survive although the American Law Institute restates the law in a way to make it capable of further development along this line.4

The Restatement of the Law of Contracts undertakes to simplify the law of consideration by abolishing moral consideration and injurious reliance as consideration and providing that promises based on such consideration are enforceable "as contracts without assent or consideration."5 The Restatement's position with respect to these matters simplifies the law of consideration, but it is doubtful if it is either any improvement or if it will definitely influence the course of judicial decisions.

Bargain consideration was invented for the sake of bilateral agreements and then was extended to unilateral agreements. Both bargain consideration and injurious reliance go back to special assumpsit. Bargain consideration was coined out of various materials. The injurious reliance, heretofore discussed, was given a twist so that the act was required to be given in exchange for a promise instead of to follow the promise, and it was made to include a promise as well as other acts. The other materials for the doctrine were found in the law of consideration developed by the equity courts and in the requirement of a quid pro quo for the action of debt.6 Bargain consideration is a modification of the law of objective agreement. It delimits this law so that not all objective agreements are contracts but only those which also have bargain consideration. This article will be concerned with bargain consideration only, and only from the standpoint of the formal, not the empirical science of the law.

1Restatement, Contracts (1932) § 90.
2Id. at §§ 85-93.
Bargain consideration may be defined as the act of giving, or the promise to give, in exchange for a promise, of any legal right, privilege, immunity, or power other than the power to do an illegal act;2 except that in the transfer of money, or fungible goods, the consideration given or promised by one person must be equivalent to that promised by another;3 and consideration under the bargain theory may (a) "be given to the promisor or to some other person," and (b) "be given by the promisee or by some other person."4

This definition makes the bargain theory of consideration one theory rather than two theories. It does not adopt one theory for unilateral contracts and another theory for bilateral contracts, or one theory for valid contracts and another theory for voidable contracts, or one theory for pre-existing legal duty and forbearance to sue cases and another theory for all other cases. But whatever is sufficient consideration under the bargain theory for one type of case is made sufficient under the bargain theory for all other types of cases. It is true that this statement is modified by a doctrine of mutuality of consideration hereafter to be discussed and by the equivalent theory (an exalted form of the bargain theory) excepted in the definition, but these exceptions do not introduce any new theory.

This definition of bargain consideration differs from that of the Restatement of the American Law Institute. Section 75 (1) provides that "Consideration for a promise is (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise." Section 75 (2) has a statement as to who may give consideration and to whom it may be given, but this Section is not involved in this discussion. Section 75 (1) therefore without question defines consideration in the terms of an act or a promise. Section 76 provides that "Any consideration that is not a promise is sufficient . . . except the following: (a) An act or forbearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed either to the promisor or to the public, or, if imposed by the law of torts or crimes, is owed to any person; (b) The surrender of, or forbearance to assert an invalid claim or defense by one who has not an honest and reasonable belief in its possible validity." Section 76 (c) has a provision with reference to the transfer of money or fungible goods which involves the equivalent

1Willis, Comments: Restatement of the Law of Contracts of the American Law Institute (1932) 7 Ind. L. J. 429, 434.
2Restatement, Contracts (1932) § 76 (c).
3Id. at § 75 (2).
theory and is also outside this discussion. Section 76 (a) (b) therefore states that any act in a unilateral contract is not sufficient consideration in forbearance to sue and pre-existing legal duty cases involving no third person. Section 78 and the comment thereon provides the same rule for a promise in a bilateral contract that is announced by Section 76 for an act in a unilateral contract. It states "A promise is insufficient consideration if the promisor knows or has reason to know at the time of making the promise that it can be performed by some act or forbearance which would be insufficient consideration for a unilateral contract," but that "wherever actual performance is sufficient consideration for a unilateral contract, a promise of that performance is sufficient consideration for a bilateral contract." Sections 76 and 78 do not state what will be sufficient consideration in the case of pre-existing legal duty cases and forbearance to sue on invalid claim cases, but the law is that in such cases the bargain theory requires a legal right, power, privilege, or immunity given or promised. Hence, it must be assumed that this is the consideration meant by Sections 76 and 78. That means, consequently, that in these two exceptional cases the Restatement makes the bargain consideration require a right, power, privilege, or immunity to be given or promised; but that in all other cases it makes the bargain theory of consideration require only an act or a promise. For this reason the Restatement adopts two different theories of bargain consideration, one for pre-existing legal duties and the surrender or forbearance to assert invalid claims (evidently a legal right, power, privilege, or immunity)10 and another for all other types of cases (any act or promise).11 This distinction of the Restatement follows an analysis of consideration made by James Barr Ames.12

This article is written to rationalize the Anglo-American law of bargain consideration and the author will pursue this policy though it puts him in the position of attempting to prove that the Restatement’s definition is wrong, and that the definition of bargain consideration set forth herein is right; in other words, that Section 75 (1) of the Restatement is incorrect and should be dropped and that Section 76 (a), (b) and Section 78 are correct with the theory of consideration implicit in them, and that these Sections should be expanded to cover the entire subject of bargain consideration. There are three lines of proof available for the accuracy of the definition of consideration championed by this article.

In the first place, there are the cases which hold that any right, power, privilege (or immunity), given or promised is sufficient consideration

10Id. at § 76 (a) (b).
11Id. at §§ 75, 76, and 77.
12Ames, Two Theories of Consideration (1899) 12 Harv. L. Rev. 515; (1899) 13 id. 29.
under the bargain theory. In the case of contemporaneous facts where
the bargain theory of consideration, if any, is required, the consideration
almost always consists either of some legal right bargained for and
given in exchange for a promise in the case of unilateral agreements,
or of the promise of some legal right bargained for and given in exchange
for a promise in the case of bilateral agreements. The safest way to
make a written contract legal is to draw it with this kind of consideration.
Legal rights are so numerous it would be both impossible and unneces-
sary to undertake to enumerate all of them; however, a few typical
rights which have been held to be sufficient consideration will be named.
Thus, the following legal rights have been held sufficient consideration:
the surrender of the right of possession, a promise to pay money to
which a person has a right on ground rent to a third person, a promise
to transfer one's right to chattels, a promise to transfer to another
bills receivable to which a person has a right. Many other illustra-
tions of consideration of this sort could be given, like the giving up of,
the promise to give up, the legal right to particular tracts of land,
the legal right to a contract, the legal right to other incorporeal things,
the legal right to corporeal chattels, the legal right to safety, the legal
right to reputation, the legal right to liberty, so long as it is not against
public policy for one to give them up or promise to give them up.
Yet what is true of legal rights is also true of legal privileges, legal
powers, and legal immunities although they are not so frequently used
for bargain consideration as are legal rights. Among legal privileges
which have been held to be sufficient bargain consideration are the
following: the privilege of not buying coal from a particular person,
the privilege to drink intoxicating liquor, the privilege of trying to
get a husband to change the beneficiary in an insurance policy, and
the privilege of going through bankruptcy. In the same way the
surrender of, or the promise to surrender, a power, like the power of
acceptance of an offer, will amount to sufficient bargain consideration.
While there is no direct holding that the surrender, or the promise to

\(^{13}\)Bainbridge v. Firmstone, 8 A. & E. 743 (K. B. 1838).
\(^{14}\)Thomas v. Thomas, 2 Q. B. 851 (1842).
\(^{15}\)Lima Locomotive & Machine Co. v. National Steel Castings Co., 155 Fed. 77 (C. C. A.
6th, 1907).
\(^{16}\)Murphy v. Hanna, 37 N. D. 156, 164 N. W. 32 (1917).
\(^{17}\)(1917) 13 C. J. 308-320.
\(^{18}\)Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142 (1891).
\(^{22}\)White v. McMath & Johnston, 127 Tenn, 713, 156 S. W. 470 (1913).
surrender, an immunity would be sufficient, there is no doubt that the courts would so hold. Thus, if a corporation were given an immunity against some form of taxation in its charter it could by giving this up, or promising to give it up, furnish consideration for another promise.

In the second place, there are the cases which hold that there is no consideration under the bargain theory unless a right, power, privilege (or immunity), has been surrendered. In the case of forbearance to sue on, or to assert, an invalid claim there is no consideration unless a person gives up or promises to give up a privilege or a right. If a person forbears to sue upon a doubtful claim, which is reasonably and honestly asserted, there is sufficient consideration because under such circumstances he has the privilege to sue. But if the circumstances are otherwise, the other party would have the right to have him refrain from suing, and he would be guilty of malicious prosecution if he did sue, and there would be no consideration. Apparently Dean Ames did not see that this is the explanation for Callisher v. Bischofsheim. In the case of pre-existing legal duty also there is no consideration under the bargain theory unless a person gives up a legal right, power, privilege or immunity. Where there is a doing or the promise to do what one person is already under legal obligation to do for another in consideration for a new promise by the other there is, therefore, no consideration because the promisee neither gives up nor promises to give up any right or privilege. A few courts have tried to find consideration under such circumstances by inferring a discharge of the old contract and the making of a new contract thereafter, but the reason for the courts doing this was in order to find consideration of the type we are now discussing. Where there is the doing of, or promise to do, what one is already under legal obligation to do for another, in consideration for a promise of a third person, the situation is different. In such case there is sufficient consideration under the bargain theory, because of the privilege of the person under legal obligation to offer a rescission to the other party to the contract, and the performance or the promise to perform his contract amounts to a giving up of, or a promise to give up, this privilege. This should have been the ration-

**Footnotes:**

24Cook v. Wright, 1 B. & S. 559 (Q. B. 1861).
26L. R. 5 Q. B. 449 (1870).
29De Cicco v. Schweitzer, 221 N. Y. 431, 117 N. E. 807 (1917).
alization of the case of Shadwell v. Shadwell, but the court did not think of this explanation and Mr. Ames therefore thought it was authority for a second theory of bargain consideration.  

In the case of an illusory promise there is no contract because there is neither bargain consideration nor even a promise. A promise to give up a right or a promise to do something which a person has a privilege not to do, if he chooses to give or do so, is not a promise to give up a legal right or privilege. Such a pretended promise does not even amount to a legal promise, as promise should be defined. Except for this fact illusory promise cases also are authority for the proposition that bargain consideration requires the giving up or the promise to give up of a right, power, privilege or immunity; and they are certainly authority for the proposition that illusory promises will not amount to sufficient consideration under the bargain theory.

In the third place, there are no cases holding that anything else than a right, power, privilege, or immunity, or the promise thereof, will amount to sufficient consideration under the bargain theory. Cases which are sometimes thought of as cases which hold that any act or promise will be sufficient consideration are the forbearance to sue and the pre-existing legal duty cases, heretofore considered, infants' and other voidable contract cases, conditional promise cases, compromise cases, and power to cancel cases. It has already been sufficiently shown that the forbearance to sue and pre-existing legal duty cases instead

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9 C. B. N. S. 159 (1860).

The Restatement, without giving the reason, recognizes that there is consideration in the case of a promise to a third person, but it must be assumed that it regards the case as an illustration of "any act or promise." See also Ames, Lectures on Legal History (1913) 327, 340.

Mr. Morgan has rationalized (Benefit to the Promisor as Consideration for a Second Promise for the Same Act (1917) 1 Minn. L. Rev. 383), and Mr. Williston now rationalizes this type of case [1 Williston, Contracts (Rev. ed. 1936) § 131A.], as a case of bargain consideration created by benefits to the promisor. If the parties had not in such case dealt in terms of bargain the case could be rationalized on the basis of moral consideration created by a promise for pecuniary benefits received; but since they have dealt in terms of bargain, it is submitted Mr. Morgan and Mr. Williston are wrong. In such case, detriment to the promisee can be found; and there is no reason for trying to explain the cases on any benefit theory. Willis, Consideration in the Anglo-American Law of Contracts (1932) 8 Ind. L. J. 93, 104. Judge Cardozo has seen this, DeCicco v. Schweitzer, 221 N. Y. 431, 117 N. E. 807 (1917). Cf. also Orr v. Orr, 181 Ill. App. 148 (3d Dist. 1913). For this reason the explanation of benefit to the promisor should be confined to moral consideration cases and not introduced into any bargain consideration cases.

Restatement, Contracts (1932) §§ 2 (b) and 79.

Great Northern Ry. v. Witham, L. R. 9 C. P. 16 (1873); Strong v. Sheffield, 144 N. Y. 392, 39 N. E. 330 (1895).
of being authority for any act or promise theory are authority for the legal right, power, privilege, and immunity theory so that nothing further need be said about these cases. In the case of an infant's promise it is said that he always promises to give or do something only if he chooses to do so.\textsuperscript{33} If this were in truth the nature of the infant's promise, his promise would be illusory and the infant's attempted contract would be no contract at all; whereas his contract is really a voidable contract. It is true that an infant has the power to avoid his voidable contract; but this power has nothing whatever to do with consideration for the adult's promise. Consideration is not the legal obligation resulting from objective agreement and bargain consideration. Legal obligation is only the effect of objective agreement and consideration. Bargain consideration is what is given as the price for a promise. There is nothing illusory about the infant's promise. The power of avoidance is no part of his promise but an independent power given him by the law for other social reasons. If an adult made the same promise, which is called illusory, when an infant makes it, nobody would think of calling it an illusory promise. Nor should it be called an illusory promise when an infant makes it. Thus, an infant, like an adult, has the privilege of single blessedness. If he promises to give this up in consideration for the promise of an adult to marry him, he has promised to give up a privilege and immunity just as much as the adult has promised to give up a privilege and immunity.\textsuperscript{34} The consideration, therefore, which the infant promises to give in his voidable contracts, is not any act or promise but a legal right, power, privilege, or immunity. What is true of infants' promises is true with reference to all voidable promises. The persons upon whom fraud, duress, and undue influence have been practiced have the power to avoid their contracts, given to them independently by the law for other social reasons. If they make any contracts at all they have to promise to give up some legal right, power, privilege, or immunity. They must not promise to give up a right, power privilege, or immunity if they choose to do so, or if they do not choose to avoid their contract.\textsuperscript{35}

In the case of conditional promises also, the fact of condition does not make the promise illusory. The condition relates not to the consideration but to performance.\textsuperscript{36} So far as bargain consideration is concerned, in such cases the parties must either give up, or promise to give up, a legal right, power, privilege, or immunity to each other.

\begin{itemize}
\item \textsuperscript{33}Williston, Contracts (Rev. ed. 1936) § 105.
\item \textsuperscript{34}Holt v. Ward Clarencieux, 2 Strange 937 (K. B. 1732).
\item \textsuperscript{35}Restatement, Contracts (1932) § 84 (e).
\item \textsuperscript{36}Coleman v. Eyre, 45 N. Y. 38 (1871).
\end{itemize}
If they do not there is no sufficient consideration whether or not their promises are conditional; if they do, there is sufficient consideration even though their promises are conditional. Compromise cases must be rationalized in much the same way. In such cases, if there is sufficient bargain consideration a person must give up, or promise to give up, a part of his right, or at least the privilege of suing to learn whether or not he has such right.\(^37\) Conclusive precedent for the rationale herein is found in a case where a plaintiff agreed to buy five special cases of plate glass in consideration for the promise of the defendant to sell them at one dollar per square foot, provided the plaintiff might cancel his order before shipment (power of avoidance), and the court held that there was sufficient consideration and the promise was not illusory because the plaintiff's privilege and power were not unconditional.\(^38\)

It has been suggested that consideration under the bargain theory may be either legal detriment to the promisee, as heretofore discussed, or legal benefit to the promisor.\(^39\) Benefit to the promisor is required for moral consideration, but historically it has not been sufficient for bargain consideration. Usually benefit to the promisor accompanies detriment to the promisee, but this is accidental. What is required by bargain consideration is detriment to the promisee because he must pay something to the promisor as a price for his promise. There are many cases where detriment to the promisee alone, without benefit to the promisor, has been held to be sufficient consideration, and many cases where benefit to the promisor without detriment to the promisee has been held not sufficient consideration.\(^40\) This eliminates benefit to the promisor as a part of the bargain consideration.

In the case of bilateral contracts, there is one further word which should be said to make a full statement of bargain consideration, and that is that, in such contracts, mutuality of consideration is required because the parties deal on the mutual assumption that unless both parties furnish sufficient consideration, neither party shall be bound on his promise.\(^41\) It should be noted that this is a doctrine of mutuality of consideration and not a doctrine of mutuality of obligation. Mr. Oliphant is right in his contention that there is no requirement of

\(^{37}\)Cook v. Songat, 1 Leo. 103 (K. B. 1588); Seward & Scales v. Mitchell, 1 Cold. 87 (Tenn. 1860).
\(^{38}\)Gurfein v. Werbelovsky, 97 Conn. 703, 118 Atl. 32 (1922).
\(^{39}\)Morgan, Benefit to the Promisor as Consideration for a Second Promise for the Same Act (1917) 1 Minn. L. Rev. 383.
\(^{40}\)McDevitt v. Stokes, 174 Ky. 515, 192 S. W. 681 (1917); Willis, Consideration in the Anglo-American Law of Contracts (1932) 8 Ind. L. J. 93, 108.
\(^{41}\)Restatement, Contracts (1932) § 80; 1 Williston, Contracts (Rev. ed. 1936) §§ 103, 106, 139, 140.
mutuality of obligation in bilateral contracts. But the doctrine of mutuality of consideration does not change the essential nature of what is required under the bargain theory.

The three lines of proof which we have pursued have, we think, abundantly proven that, in Anglo-American law, consideration under the bargain theory must always consist of a legal right, power, privilege, or immunity given or promised. This means that the bargain theory of consideration is one theory, as the writer has been contending, and not two theories, as the Restatement of the American Law Institute contends. In this matter, the Restatement is not undertaking to simplify or reform the law; it simply has made a mistake as to the law. The statement of the law which the writer has given makes the law simpler than the statement which is found in the Restatement. Very fortunately, also, it is a restatement of the law. The Restatement over-simplifies the law in defining all consideration in the terms of bargain theory, but it does not simplify the law enough in defining bargain consideration in the terms of two theories.

While the writer contends that for the sake of accuracy the bargain theory of consideration must be stated as it has in this article, he does not in this article champion the requirement of bargain consideration. It may well be that the requirement of bargain consideration has become a mere form and technicality; that the empirical differs from the formal science of the law of bargain consideration; and that at least a part of it should be dispensed with. If the American Law Institute had, by way of reform, proposed the abolition, not only of all forms of consideration, but also of the requirement of the seal and agreement for all promises in writing signed and delivered, the writer would heartily have approved of its proposal. This would have confined bargain consideration to oral agreements. But to do what the American Law Institute has done, to wit: require two different bargain theories of consideration for oral and written agreements, is neither reformation nor restatement and the writer cannot approve of the American Law Institute's position.

Perhaps it will make little difference in judicial decisions whether the law is stated one way or the other, but it will make a great deal of difference in the rationale of the decisions, and, if the writer is correct, it would seem that the language of the Restatement should be amended or reformed.

IMPLEMENTATION OF STATUTES
GREGORY HANKIN*

A T THE last annual meeting of the American Bar Association, the Special Committee on Administrative Law submitted a report in which it strongly disapproved of certain administrative practices (real or imaginary), recommended policies to govern the attitude of the legal profession toward administrative law, and proposed a bill to provide for the more expeditious settlement of disputes with the United States. The report of the Committee, including the recommended policies, was approved by the House of Delegates. The Committee’s proposed bill, however, was not approved, but was recommitted to the Committee.¹

This proposed bill may be divided into two parts, each dealing with a subject which could easily have been made the basis of a separate enactment. (1) The implementation of statutes through the issuance of rules, regulations and declarations of policy, which are made subject to review by the United States Court of Appeals for the District of Columbia; and (2) intradepartmental boards, their procedure, and judicial review of their orders and decisions. It is the purpose of this article to treat of the first part of the bill in the light of the policies recommended by the Committee and adopted by the Association.²

NECESSITY FOR IMPLEMENTATION OF STATUTES

There can be no doubt about the necessity for and the desirability of administrative rules and regulations implementing complex legislation. In dealing with social problems, it is not possible for Congress to legislate in utmost detail. It must resort to the method of laying down general rules with standards to be applied by those charged with the duty of administering and applying the law. How general the rules must be, depends on the subject matter of the legislation.³

Even where legislation in detail is possible, it is not always desirable.

¹A.B., The College of the City of New York (1916), M.A., Harvard University (1917), LL.B., The George Washington University (1924), LL.M., Id. (1925). Member of the Bar of the District of Columbia and of the Bar of Maryland; sometime Bromfield Memorial Fellow in Ethics and Jurisprudence at Harvard; Director of Legal Research Service 1927-1938; Editor and Publisher of United States Supreme Court Service 1928-1937; author of books on the work of the Supreme Court and of numerous articles in legal and other publications.
²After this paper went to press, a revision of the bill appeared in (February, 1939) 25 A. B. A. J. 116. The bill, as revised, was approved by the House of Delegates, and has been introduced in the Senate as S. 915. This revision cures some of the defects in the bill proposed by the Special Committee on Administrative Law at the Cleveland meeting of the Association.
³Panama Refining Co. v. Ryan, 293 U. S. 388, 421 (1935).
Experience with legislative rate fixing has demonstrated that it is by far the better policy to prescribe a legislative standard for a "reasonable rate", leaving its applications to an administrative agency. Legislative enactments are too rigid. Flexibility is necessary to take account of the variations in facts to which the law is applied. If that flexibility is not supplied by an administrative agency, specializing in the particular field of regulation, it must be supplied by the courts in order to avoid hardship and at times to save the validity of the enactment. Judicial applications of legislative standards in broad fields of regulation are bound to result in inefficient administration, even if only because a court must regard the legislation from the standpoint of the particular case or controversy. Except in rare instances of broad vision, a court's ruling may be said to be a generalization upon a single example; whereas in administrative procedure, the facts pertaining to the whole field of regulation are applied to the particular case. The judicial machinery is not equipped with the means for the thorough study of the facts concerning each field of regulation.

The broader and more complicated the field of regulation, the broader are the legislative standards apt to be; the broader the legislative standards, the less definite must the statute be. Yet each person is presumed to know the law, not only as it appears on the statute books, but also with its necessary or reasonable implications; not only as it has been applied by the courts, but also as it probably will be applied in the future. The rule that ignorance of the law is no excuse is reasonable enough when all the laws, in full detail, are contained in the Twelve Tables. But when the same rule is applied to laws which are susceptible of various reasonable implications, each hidden in the crevices of the administrator's mind, then indeed the rule may work a hardship. If men learned in the law may reasonably differ on the meaning and effect of a legislative standard, then the presumption of knowledge on the part of a layman is most unreasonable indeed.

The rules and regulations which constitute the reasonable implications of the statutes have the force and effect of law, and should therefore be made as available as the statutes themselves. Furthermore, since the

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6Ex Parte Reed, 100 U. S. 13, 22 (1879); Caha v. United States, 152 U. S. 211, 221 (1894); Boske v. Comingore, 177 U. S. 459, 467-468 (1900); Haas v. Henkel, 216 U. S. 462, 480 (1910); United States v. Foster, 233 U. S. 515, 527 (1914).
rules and regulations have the force and effect of law only in so far as
they are made pursuant to or in conformity with and not inconsistent
with the law, all persons affected should have reasonable means of
knowing whether they are or are not bound by those rules and regu-
lations. This certainty in the requirements of the law can be accom-
plished to a very great extent by the issuance of sub-legislative rules
and regulations.

How definite and detailed those sub-legislative rules should be, is a
matter which cannot be determined by rule of thumb. It is evident
that if they become too definite and too detailed, they freeze the statute
and thereby destroy the flexibility necessary for the administration of
complex legislation. The principles of certainty and flexibility must be
balanced in the rule-making process. Whether it is better to err on the
side of certainty or on the side of flexibility may be difficult to deter-
mine. But, as already stated, there can be no dispute concerning the
desirability of rules and regulations implementing the statutes. Con-
gress recognized this need as long ago as 1789, when it authorized
each department head to prescribe regulations, not inconsistent with
law, for the government of his department, the conduct of his officers
and clerks, the distribution and performance of its business and the
custody, use and preservation of the records, papers and property apper-
taining thereto. Later, in the statutes creating various independent
offices, bureaus or agencies, Congress authorized them to make rules
and regulations necessary to carry the provisions into effect.

In the long history of the departments and independent agencies,
however, there has been a tendency to limit the rule-making power to
matters of procedure. Some of the departments and bureaus have also

6 Campbell v. United States, 107 U. S. 407, 410 (1882); United States v. Eaton, 144 U. S.
677, 688 (1892); United States v. George, 228 U. S. 14, 21 (1913).
8 There is no uniformity in the rule-making provisions. In some statutes, blanket authority
is given to make rules and regulations to carry out the provisions of the act. See e.g., Na-
In other statutes, the agency is given authority to make "such rules and regulations as may
be necessary to carry out the provisions"; e.g., Securities and Exchange Act, 48 Stat. 85
or "reasonable rules and regulations", Bituminous Coal Conservation Act of 1937, 50 Stat.
72, 73, 15 U. S. C. § 829 a (Supp. 1937). Some statutes designate the general subject for
rule making, for example, the rule making power of the I. C. C. as to car service, 41 Stat.
499 (1922), 49 U. S. C. §§ 1, 5 (1934). Some agencies which are parts of departments may
make rules only with the approval of the head of the department; e.g., the Commissioner
of Internal Revenue may make such rules and regulations with the approval of the Secretary
of the Treasury. But the Bituminous Coal Commission does not need the approval of the
Secretary of the Interior.
resorted to implementing their statutes by substantive rules. Other departments and agencies have avoided the promulgation of substantive rules, lest it constitute an usurpation of the legislative function.\(^\text{10}\) The object of the Bar Association’s proposed bill is to lend legislative authority for the promulgation of all rules, regulations and declarations of policy which go to make statutes more definite and certain. The object is a very laudable one, and has our hearty support.

While we applaud the effort, however, we must also turn down the measure, if upon examination it appears that the proposed bill is not suitable to effectuate the desired result. The provisions of the bill must be examined in the light of the policies recommended by the Special Committee. Therefore, we shall examine those policies first.

**THE PROPOSED POLICIES**

Of the seven policies adopted by the Association for the guidance of the legal profession in their attitude toward administrative law, only the first is directly applicable to the part of the bill dealing with implementation of statutes. It provides:

> “As to the rule making procedure, administrative agencies should be free to develop each its own on the basis of experience except that publicity and authoritative promulgation should be required so as to make administrative rules as accessible as are rules of court. It should be considered also whether substantive rules should not merely be promulgated but brought affirmatively to the attention of the legislative body. As to this latter point it will not do to say that the line cannot be drawn between procedural and substantive rules. This extreme of skepticism (not infrequently urged today) comes from those who believe law an illusion and would have an administrative absolutism.”

As it stands, the entire policy is really embodied in the first sentence. The words “rule making procedure”, however, are ambiguous. Do they really mean the procedure for rule making, whether the rules are of a procedural or substantive character; or do they mean the making of rules of procedure? If they mean the former, *i.e.* the procedure for the rule making process, then there seems to be no connection with the remaining part of the policy. What is said of the substantive rules seems to be in contradistinction to the subject matter covered by the first sentence. Furthermore, if the first sentence is not intended to cover the making of rules of procedure, why raise the question concerning the line of distinction between procedural and substantive rules?

The words “rule making procedure” must therefore have been intended to mean the “making of rules of procedure”. But then a further question arises as to the meaning of the word “free”. Does it mean that no

\(^{10}\)Schechter Corp. v. United States, 295 U. S. 495, 537 (1935).
rules of procedure should be prescribed for the administrative agencies by the legislature or by a court specialized in reviewing the orders of administrative agencies, like the United States Court of Appeals for Administration sought to be created by the Logan Bill.\footnote{11}

There are good reasons for the argument that each administrative tribunal, like each judicial tribunal, should be free to develop its own rules of procedure and not be hampered in its work by rules imposed upon it from above. A distinction, however, must be made between general procedural rules, which may be prescribed without hampering the work of the administrative body, and the more specific rules, which should be left to the judgment of each administrative agency. The desirability for freedom of administrative action should be balanced against the necessity for some measure of uniformity and for safeguarding the rights to a fair hearing. Our courts have developed their own procedural rules, but have often been aided by legislative enactments. Common law procedure has in many states been supplanted to one extent or another by "codes of civil procedure", or "codes of criminal procedure", or "code pleading". These legislative enactments, however, have left a sphere of self-regulation in the courts. More recently, Congress enacted a law delegating to the Supreme Court the task of prescribing rules of civil procedure for the district courts, just as in the past the Supreme Court has been authorized to prescribe Equity Rules, Admiralty Rules, General Orders in Bankruptcy and Criminal Appeal Rules. Even with these rules, the various courts find it necessary to prescribe their own rules for matters of a less general nature.

While the policy of leaving administrative agencies free to develop their own rules of procedure is a sound one, it seems to me it should not be stated in such absolute terms; but provision should be made for such rules of procedure, which, though imposed upon administrative agencies, may, nevertheless, be productive of greater benefits.

The policy, as stated, would leave the administrative procedural rules free from judicial review, and would render impossible such decisions as Morgan v. United States,\footnote{12} where the Court held that the Secretary of Agriculture did not afford a "full hearing"; and, therefore, set aside his order under the Packers and Stockyards Act; or such decisions as Atchison, Topeka & Santa Fe Railway v. United States,\footnote{13} where the Court set aside a rate order of the Interstate Commerce Commission because the denial of a second petition for rehearing in that case

\footnotesize{\textsuperscript{11}S. 3676, 75th Cong., 3rd Sess. (1938).}
\footnotesize{\textsuperscript{12}304 U. S. 1 (1938).}
\footnotesize{\textsuperscript{13}284 U. S. 248 (1932).}
amounted to a denial of a hearing on the facts existing as of the time when the order was to take effect.

Although I personally favor judicial review of administrative procedure within proper limits, yet I recognize that the arguments for excluding judicial reviews of such questions are not without reason or authority. Our courts do not sit as courts of revision over administrative agencies; their function is not to supervise the agencies, but to protect substantive rights. If a person is aggrieved by an order of an administrative agency and appeals to the courts, their function is to determine whether or not his substantive rights have been invaded. If there was no invasion of such rights, there is no cause for complaint; if his substantive rights were invaded by administrative action, the order should be set aside on that ground, and the procedure followed, therefore, makes little or no difference.

In this view, it may with reason be argued, with reference to Morgan v. United States, that the Supreme Court unnecessarily went out of its way to criticize the procedure adopted by the Secretary of Agriculture, without passing on the validity of the rates prescribed. If the rates were confiscatory, then the order should have been set aside on that ground; if they were not, the appellant should have been subjected to the regulation prescribed. Irregularity of administrative procedure may be cause for a more careful judicial inquiry into the question as to whether or not the findings are supported by substantial evidence, but should not constitute cause for setting aside an otherwise valid rate order.

Likewise it may be argued that in Atchison, Topeka and Santa Fe Railway v. United States, the denial of a second petition for rehearing was entirely within the discretion of the Interstate Commerce Commission, and that the Court should have determined the validity of the rates prescribed, upon the record made. Here, again, the district court might, if the record made before the Commission had been brought before it, have taken evidence to determine whether the change in economic conditions had rendered the findings of the I. C. C. unsupported by evidence. However, since the railroads did not choose to file the record of evidence with the court, the findings had to be taken as supported by substantial evidence, and the only questions before the


\[16\] Atchison, T. & S. F. Ry. v. United States 51 F (2d) 510, 515 (N. D. Ill. 1931).

\[17\] Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282, 286 (1934) and cases cited therein.
district court and the Supreme Court were whether the findings supported the order, and whether the order was supported by statute. It may even be asserted by way of speculation (but not without cause) that the order of the I. C. C. was set aside on a procedural ground merely as an excuse, that the real reason lay in the fact that the court did not like the Hoch-Smith Resolution under which the rates were said to have been promulgated. If that was so, judicial review of administrative procedure may be said to be a misuse of the proper judicial function.

And so, although I personally do favor some measure of review over matters of procedure, I should not regard the policy adopted by the Association as being in any manner unreasonable. Nor would there be any element of surprise in the proposition, that administrative bodies should be free to adopt their own rules of procedure, had it not been for the report of the Special Committee and the provisions of their proposed bill. The report of the Committee on Administrative Law bristles with criticism of administrative action, and Policy No. 3 assumes judicial review of administrative procedure. Furthermore, as will appear later, the proposed bill contemplates that both procedural and substantive rules shall be subject to judicial review. In conclusion, therefore, it must be observed that, if the Bar Association contemplates judicial review of administrative procedure, the first sentence of the policy is not aptly worded. If it does not contemplate such judicial review, then the first sentence of Policy No. 1 is inconsistent with Policy No. 3 and with the proposed bill, which, it is to be assumed, is designed to be responsive to the Association's policies.

The policy with reference to the "rule making procedure" also carries an implication that the administrative rules are not made as accessible as are the rules of court. In my own experience, I have encountered no difficulty in obtaining rules issued by the various administrative agencies. At times, of course, the rules issued by administrative bodies are not as definite and clear as they should be, but that is a difficulty which may be encountered with rules of courts. Knowledge and experience with procedure, in practice, greatly helps one in understanding the procedure as set forth in the rules. For example, Rule 38 of the Supreme Court Rules might require a volume of explanations as to

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39 In United States v. Northern Pacific Ry., 288 U. S. 490, 492 (1933), Mr. Justice Roberts, delivering the opinion of the Court, distinguished the case at bar from Atchison, T. & S. F. Ry. v. United States on the ground that in the Santa Fe case, the rate had been prescribed pursuant to the Hoch-Smith Resolution.

20 Judicial review should be jealously preserved to the extent of assuring due process of law by requiring a hearing of both sides, allowing each side to present its case fully and to
when the Court will, and when it will not, grant a writ of *certiorari*. Only recently has the Supreme Court transmitted to the Attorney General the Rules of Civil Procedure in the district courts, and, before the effective date of those rules, several sets of two or three volumes had already appeared interpreting these rules. If by the implication that administrative rules are not as accessible as the rules of court, the Association means that they are not as clear as the rules of court, or do not sufficiently reflect the procedure in the administrative agencies, it is difficult to see the basis of comparison on which this implication rests.

The second part of the policy deals with substantive rules. There is no direct commitment on this question by the Association. The policy merely recommends consideration of the question whether the substantive rules should not be affirmatively brought to the attention of the legislative body. It would indeed be most desirable that administrative agencies issuing sub-legislative rules submit those rules to the legislature, which should supervise the application of the legislative policies. On the one hand, such procedure would tend to insure that the laws passed by the Legislature will be properly administered by its agencies. On the other hand, either active ratification of, 21 or acquiescence in, the sub-legislative rules will avoid the ever troublesome question of the separation, or delegation, of powers. The legislative check on substantive administrative rules would also furnish an authoritative technique for "administrative lawmaking", and would obviate the objections raised by the Special Committee in reference thereto.

The proposed bill, however, strays from this consideration. The bill might have provided for submission of substantive rules to Congress, so that they would be referred to the appropriate committee, with directions to report back to Congress. The various committees would then examine those rules and ascertain to what extent they conform with, or

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meet fully everything to be used against it in arriving at a determination, precluding inspections with one party present and not the other, and interviews with representatives of one side in the absence of or without notice to the other." *Advance Program, 61st Annual Meeting, American Bar Association* (1938) 164.

21 The Act of June 19, 1934, 48 STAT. 1064, 28 U. S. C. § 723 b and c (1934), giving the Supreme Court power to prescribe rules of civil procedure in the district courts, contains a provision for ratification by acquiescence with reference to rules uniting actions at law and in equity. Another example of ratification by acquiescence is contained in the act of June 30, 1932, 47 STAT. 414 (1932), 5 U. S. C. § 130 (1934) authorizing the President to reorganize the executive departments and agencies of the government. An example of ratification after the sub-legislative rule has taken effect may be found in the Emergency Banking Act of 1933, 48 STAT. 1 (1933), 12 U. S. C. § 95 b (1934), confirming orders of the President and of the Secretary of the Treasury rendered since March 4, 1933. See also Gold Clause Cases, 294 U. S. 240, 295 (1935).
are in derogation of, the policies, standards and rules prescribed by the statutes. Such a provision would have been responsive to the Association's policy. Instead, the proposed bill subjects all substantive rules to judicial review, if, indeed, it can be called a judicial review. As I shall try to show in reviewing the rules of administrative agencies, as proposed in Section 2 of the bill, the United States Court of Appeals for the District of Columbia will not act in a "judicial capacity".

The last two sentences of the policy are in the nature of a defense, and of a recommendation as to how the legal profession should regard those who are not in agreement with this policy. Much as I favor the policy, even in its imperfect form, I cannot share the view that there is a clear line of demarcation between procedural and substantive rules, or that those who are skeptical that a clear line of demarcation exists are to be denounced as believing that "law is an illusion and would have an administrative absolutism."

The line of demarcation between procedural and substantive rules is indeed indistinct. One need only examine the cases which arise under the contract clause of the Constitution and try to draw a line between those retroactive laws which merely change the procedure and those which affect substantive contractual rights. Even the Minnesota Moratorium Law, upheld in Home Building & Loan Association v. Blaisdell, presented a serious question whether the law could not be upheld as one merely changing the procedure governing the redemption of the property upon foreclosure.

The Committee, itself, found difficulty with the "tendency of administrative bodies to go beyond rules of procedure and formulation of details of application of standards"; and said: "More than one court which has had to review administrative action has called attention to rules purporting to be rules of procedure which in effect were and were evidently intended to be rules defining or abrogating individual legal rights." Without specific references, it is difficult for the reader to

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25Chief Justice Hughes said in the Minnesota Moratorium Case, 290 U. S. 398, 447 (1934): "Although the courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction. If it be determined, as it must, that the contract clause is not an absolute and utterly unqualified restriction of the State's protective power, this legislation is clearly so reasonable as to be within the legislative competency."

26Advance Program, 61st Annual Meeting American Bar Association (1938) 163.
know how extensive is the practice of making such rules, whether the fault is really with the administrative agency, or the reviewing court, or the commentator on the review, or the commentator on the commentator.

Be that as it may, there is no doubt that confusion between procedural and substantive rules does exist. At times, we may assume some Desperate Desmond type of administrator will maliciously issue substantive rules under the guise of procedural rules. At other times, there may be a genuine difference of opinion as to whether a rule is substantive or merely procedural. And again, a perfectly good, innocuous, inoffensive procedural rule may, under certain circumstances, so operate as to affect substantially the rights of individuals.

The policy recommended does not contemplate a clear line of demarcation between substantive and procedural rules. All that the policy recommends is that the administrative agencies be left free to formulate their own rules of procedure, but that substantive rules formulated by them should be affirmatively brought to the attention of the legislative body. So far as compliance with this policy is concerned, all controversies as to distinction between the two types of rules can be avoided by bringing to the attention of the legislative body all rules which come within the doubtful class. In fact no harm will result if all the rules are affirmatively brought to the attention of the legislative body.

PROVISIONS OF THE BILL

We shall now turn to the proposed bill. Section 1 provides that

Section 1. "Implementing Rules and Regulations.—Within one year from the effective date of this Act, and with the approval of the President, the head of every department, independent establishment, board, commission, authority, Government-owned corporations, or other agency (all hereinafter in this Act referred to as "agency"), shall, for the purpose of filling in the details of the statute, after publication of notice to and hearing of interested parties, issue and may from time to time amend rules, regulations and declarations of policy (hereinafter called rules) to implement every statute, commencing with the United States Code, and all statutes thereafter or hereafter enacted affecting the rights of persons or property required to be administered or enforced by such agency. All such rules and amendments thereof shall be published in the Federal Register within ten days (Sundays and holidays excluded) of the date of their approval by the President, and shall not be effective until publication, except in public emergency, stated in the rule. No person shall be penalized for any act done or omitted in good faith in conformity with a rule, even though the rule has been rescinded or judicially annulled, unless the Act was done or omitted to be done, more than thirty days (Sundays and holidays excluded) after the publication in the Federal Register of the rescission or judicial determination of invalidity of such rule. No rule shall be held invalid except for violation of the Constitution of the United States or conflict with a statute thereof or because in excess of the authority conferred by the statute or statutes pursuant to which it is issued." Advance Program, 61st Annual Meeting, American Bar Association (1938) 165-166.
the implementing rules and regulations shall be issued within one year, with the approval of the President, upon notice and hearing to all interested parties, and that all persons acting in good faith in conformity with a rule shall be given a period of immunity for thirty days after the rule has been repealed or held invalid. Section 226 provides that the rules shall be subject to review by the United States Court of Appeals for the District of Columbia.

1. Notice and Hearing to Interested Parties

The Committee's report recognizes that a large rule-making power must be committed to administrative agencies. It states, however, that "where this power is in effect legislative, there should be so far as possible the same hearing of those interested or to be affected... as are a matter of course in the case of ordinary legislative lawmaking." Ordinarily, when a bill is introduced in Congress, it is referred to a committee, which exercises its own judgment as to whether it will or will not hold hearings. If hearings are to be held, the matter is merely referred to a subcommittee. No particular form of notice is required. Those interested in a particular bill make inquiries of the chairman of the subcommittee, and others learn of the hearings through the press. The hearings may take the form of a round table discussion, or of a presentation of evidence or of arguments on questions of law. In general, the purpose of a legislative hearing is to effect an interchange of ideas, to sound out the amount of popular support, to get expressions of opinion as to the desirability of legislation, and, at times, to test the draftsmanship of the legislation. In rare instances, where the validity of the legislation depends upon the legislative findings of fact,27 the testimony adduced before the committee is important for the determination of whether the facts support the findings. But facts supporting the findings may also be derived without hearings, for example, from government documents, scientific treatises, etc.

If that is what is meant by the scope of "hearing" provided for in Section 1 of the proposed bill, there has been a complete failure to express such intent. When a statute provides for the issuance of rules "after publication of notice to and hearing of interested parties" it means to provide for reasonable notice28 and a reasonable opportunity to be

26See note 38, infra.
27See for example, Chicago Board of Trade v. Olsen, 262 U. S. 1 (1922).
28Glidden v. Harrington, 189 U. S. 255, 258 (1903): "It can only be said that such notices shall be given as are suitable in a given case, and it is only where the proceedings are arbitrary, oppressive or unjust that they are declared to be not due process of law." King v. Portland City, 184 U. S. 61, 69 (1902): "The manner of notice and the specific period of
Under a provision of this character, a substantive right is given to all interested parties to be heard on the validity or propriety of the rules and regulations issued by any department or agency of the government. Upon failure to give reasonable notice and hearing, it would follow that a person affected by a rule is not bound by it.

While Congress may provide that notice need not be in the form of personal service, but may be by publication, the publication must be such as to give reasonable notice, either by publication in the local newspapers, or by posting notices in the post offices or other federal buildings, or by sufficient number of notices in the Federal Register. No particular rule can be prescribed. Suffice it to say, however, that one or two or three notices in the Federal Register, having a circulation of about seven thousand, that hearings will be held on implementation of a given law, would not constitute reasonable notice. Assuming that reasonable notice is given to the effect that a hearing will be held in some hidden nook in one of the great government buildings in Washington, on the implementation of such law as the Revenue Acts, contained in the United States Code, as amended by recent legislation, that would not constitute a reasonable opportunity to be heard.

Nor would it be sound policy to give the least reasonable notice or the least reasonable opportunity to be heard. In view of the expansive scope of these rules and regulations, reasonable opportunity to be heard would imply holding hearings on detailed provisions in numerous parts of the United States, so that all interested parties would have a reasonable opportunity to protect their rights.

This leads to the question who are the “interested parties”. In the enactment of legislation “interested” persons are those who exhibit an interest, in the sense of curiosity, in the proposed legislation. But that is not the meaning of “interested parties” within the meaning of the bill under consideration. Here “interested parties” are those whose rights will be affected by the rules and regulations. Off hand, one is tempted to say that all persons in the United States, and many outside the

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29 See also Toombs v. Citizens Bank of Waynesboro, 281 U. S. 643, 646-647 (1930); "Notice, and reasonable notice, meant, and were intended to mean, one and the same thing, else the admission was without meaning." Larrabee v. Inhabitants of Searsport, 42 Me. 202, 203 (1856). Under Mo. R. S. (1919) § 2361; "notice, in contemplation of law, means reasonable notice, one which will fairly and fully enable the party cited to know the specific acts he is charged with and be thereby enabled to prepare his defense." Sands v. Richardson, 252 S. W. 990, 994 (Mo. 1923).

United States, are interested parties. As an example of the latter class of persons, one may cite the rules and regulations under the provisions of the internal revenue laws relating to incomes of persons residing abroad, or the allowances of foreign taxes as credits against taxes imposed by the internal revenue laws. The rules and regulations under the immigration laws may constitute another example. But perhaps the statement that all persons in the United States are interested parties as to all rules and regulations is a gross exaggeration. It is necessary to look to the specific provisions of the numerous statutes and from the standpoint of some 125 governmental agencies, in order to guage the number of interested parties who may be involved.

By way of illustration, we may limit ourselves to the Treasury Department, and to some specific types of regulations which that department promulgates. For the promulgation of regulations under such a comparatively insignificant provision as the capital stock tax, it may be necessary to give notice and an opportunity to be heard to all corporations in the United States. It may fairly be assumed that officers, directors, and stockholders of corporations are not parties entitled to notice and hearing. In formulating rules, regulations, and declarations of policy on such special taxes as are imposed on the manufacture and sale of automobiles, automobile parts and accessories, games, oleomargarine, etc., it may fairly be assumed that persons engaged in such businesses would be entitled to notice and hearing, but that the purchasers of such products would not be. These regulations have a comparatively limited application. If, however, we consider the income tax laws, then, it is not sufficient to say that the regulations pertaining to the surtax affect only those who actually pay the surtax, for one never can tell who will become subject to this provision in the income tax laws in the following year. The same may be said about the other provisions of the income tax laws. Several volumes of regulations are issued by the Treasury Department every year. Some of these volumes contain thousands of regulations. With reference to each of these, it would then be important to determine who are the interested parties entitled to notice and hearing.

Similarly it may be said that railroads, truck carriers and shippers are the interested parties in the promulgation of rules, regulations and policies by the Interstate Commerce Commission. Electric power companies, natural gas companies, states and municipalities are interested parties in the promulgation of rules and regulations by the Federal Power Commission. Public utilities, dealers in securities and corporations issuing those securities may exhaust the class of persons interested in the rules and regulations of the Securities and Exchange Commission. In some departments or agencies it is not possible to draw a line of demarca-
tion between those who are and those who are not interested parties. For example, the Federal Trade Commission is charged with the task of prohibiting unfair methods of competition in interstate or foreign commerce. It follows, therefore, that although all persons engaged in such commerce should be given an opportunity to be heard on the rules, regulations and policies pertaining to the administration of the Federal Trade Commission Act, the purchasing public is also entitled to notice and hearing since it is the chief beneficiary of the Act.

The number of interested parties may in practice be materially diminished, when we consider that numerous persons are organized into groups, and representatives may appear in behalf of the group, rather than in behalf of an individual. In some statutes, like the National Conservation Act, there is provision for group representation. For example, the consumers are represented by the Consumers Counsel, while the producers are represented by the District Boards. These may be termed "representations in a loose manner". In the application of other statutes, there is voluntary group representation. For example, should the Railroad Mediation Board undertake to formulate rules, regulations and policies, the railroads would undoubtedly be represented by counsel for the American Association of Railroads and for the Short Line Railroads and perhaps also by counsel for a number of individual railroads, while railroad labor would be represented by the standard railroad brotherhoods or their counsel. In the rule making process of the Federal Trade Commission, representation may be limited to some 1000 or more trade associations.

But not in all instances is group representation possible or sufficient. Under the provision in question, each side affected by a rule, regulation or policy is entitled to be heard and "to present its case fully and to meet fully everything to be used against it". The determination of the administrative agency, promulgating a rule, must be based upon "full consideration of evidence not on general ideas of expediency or of getting things done." In these circumstances, it is not safe to proceed on the assumption that group representation would suffice to bind each and every person affected by the rule, regulation, or policy.

If, despite this provision, the departments and independent agencies should proceed on the assumption that they are required to do no more

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<sup>30</sup>See note 20, *supra*.

<sup>31</sup>Policy No. 4. "Judicial review should be preserved to the extent of assuring action upon evidence rather than a preformed conception of the facts, and requiring determinations to proceed on the basis of full consideration of evidence and not on general ideas of expediency or getting things done." *Advance Program, 61st Meeting, American Bar Association* (1938) 164.
than publish a notice and conduct the hearings in such manner that only few persons would appear, then the object of the provision may be defeated. The operation and effect of the provision would then be a mere interchange of ideas between the administrators and the persons appearing at those hearings. This interchange of ideas can be and is accomplished by less expensive means than a requirement of notice and hearing which, in the last analysis, does not have any binding effect upon the parties interested in the rules, regulations, or policies.

If the hearings are conducted in such manner that only few persons are represented, the rule-making process may result in benefit to the few persons who can afford the luxury of constant appearance before the government agencies, to the consequent disadvantage of those not able to be present. For example, if in promulgating rules and regulations implementing the anti-trust laws, only financially powerful corporations should appear and present their facts before the Federal Trade Commission, the Department of Justice or other agencies charged with the administration of those acts, and the government agencies should be required to make their rules and regulations only upon the evidence submitted before them, the application of the anti-trust acts would fall short of their paramount purpose, which is to diminish the oppression of small enterprises or the public at large. If only financially strong interests should appear and bring forth the facts relating to the application of the surtax, the adoption of regulations based upon those facts may result in lesser taxation to those interests, but with a consequent diminution in the treasury, thus restricting the use of public funds for the general welfare.

Before we leave the subject of notice and hearing to interested parties, it is apt to point out that this requirement in respect to the legislative process is an anomaly. As has been shown, such requirement, to be effective, must also mean that if any person is not given notice and an opportunity to be heard, he is not bound by the rule. Assuming, however, that the requirement has been fully complied with, the question still arises as to the binding effect of the rules and regulations on persons who come into being or become interested parties after the rule, regulation, or policy has been promulgated. If the regulations under the capital stock tax are binding on all corporations by virtue of the notice and hearing given to them, why should it be binding on corporations which come into being afterwards? Or, why should the regulations under the surtax provisions be binding on one who becomes an "interested party" after the rules take effect? It may be said that corporations are created with knowledge of and subject to the existing rules and regulations. The same reasoning, however, would hardly apply in answer to a natural person born after the promulgation of the rule. While the equal protec-
tion clause of the Constitution is not a limitation on the Federal Government, sound legislative policy, however, would require that all persons within the same class be treated alike. This requirement can be met by affording to such person a right to file an application for exemption from any rule or regulation promulgated under Section 1 of the proposed bill. But then the question presents itself, whether the same result may not be accomplished, less expensively and more efficiently, if rules are promulgated without the requirement of notice and hearing, but an opportunity is given to any interested party to apply for an exemption from such rules.

2. Scope of Implementing Rules.

The above questions of notice and hearing to interested parties and the feasibility of such procedure must be considered together with the scope of the implementing rules. Are notice and hearing required for the promulgation only of those rules which are in the nature of a judicial decree (for example, a rule fixing reasonableness of rates, or of such legislative rules, the validity of which depends upon findings of fact, which must be supported by substantial evidence), or of all rules, regulations and declarations of policy? Are the requirements of notice and hearing intended to apply only to substantive rules or also to procedural rules?

The language of Section 1 is sufficient to cover all rules, regulations and declarations of policy, whether of a substantive or procedural character. That is why we pointed out the apparent inconsistency between the Association’s policy and the proposed bill. In addition, the special committee, in its 1937 report on substantially the same bill, expressly stated that one of the purposes of this section was “to require the issuance of rules and regulations defining both the adjective and substantive details of federal statutes.” In other words, when a statute provides that an administrative agency shall have power to adopt its own rules of procedure, Section 1 immediately adds the requirement that rules of procedure shall be adopted upon notice and hearing given to all interested parties. If the agency proposes a rule that an answer to a complaint must be filed within twenty days, the door is opened to numerous suggestions ranging from, let us say, five to sixty days. Each “interested party” may introduce evidence to show that the number of days suggested by him is the proper period, but that a lesser or greater number is undesirable. The same may be said about every rule of procedure, and every form adopted by any one of the numerous agencies of the Govern-

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ment. The form of a registration statement required to be filed under the Securities and Exchange Act; the form of a public utility report in connection with the issuance of securities, or in connection with the contracting of a loan required under the Federal Power Act; the numerous forms adopted by the Commissioner of Internal Revenue for filing tax returns, for the purchase and sale of narcotics, for the purchase and sale of firearms; all these, after all, may be regarded as rules of procedure. Their adoption would have to be preceded by notice and opportunity to be heard to all interested parties. We shall not press our point ad absurdum by stating that under this provision each department or agency would be required to set forth in detail all rules of evidence.

The issuance of procedural rules upon notice and hearing, fantastic as that may be, is perhaps a comparatively simple task, as compared with the issuance of the substantive rules to fill in the details of the statutes. These may be divided into two groups: rules which may be drawn from prior experience, and those which would anticipate any questions arising in the future. The Federal Trade Commission may issue rules and regulations which would define "unfair methods of competition in commerce". It may issue rules, condemning a number of practices such as misrepresentation, false advertising, espionage, commercial bribery, colliding with a competitor's truck to prevent delivery of goods on time, etc. These practices, which are obviously unfair methods of competition, would nevertheless have to be preceded by notice and opportunity to be heard. But the practices and methods of competition, which may be said to be unfair, have not yet been exhausted. With the promulgation of each rule, defining unfair competition, other practices may arise. In some instances, a shade of difference in the meaning of a word may absolve a person from compliance with the rule. The departments and administrative agencies must then draw heavily upon their imaginations, in order to formulate rules which would cover every conceivable practice in the light of numerous combinations of facts. The past experience of the Treasury Department, for example, would not be sufficient to make the internal revenue laws effective. Some 2000 Articles constituting the regulations of the income tax laws would not be sufficient. In promulgating regulations, the Department would constantly have to keep one step ahead of books issued on "tax avoidance", in order to prevent raids upon the public treasury.

Finally, we come to a class of rules which cannot be expressed, except in the light of the facts of each particular case. For example, we have a general rule that the Federal Communications Commission may issue licenses for broadcasting stations upon a finding that the public interest, convenience and necessity will be served by such license. The Com-
munications Commission may adopt some regulations which would narrow the scope of the operation of this provision. For example, it may provide that the licensees must show financial ability to operate. But can the Communications Commission define in specific rules what would constitute "public interest, convenience and necessity", so that any person complying with the provisions of these rules could know in advance whether he is entitled to a license? Or, suppose we take a provision like the one involved in the Federal Power Act, prohibiting mergers of electric power companies without the approval of the Federal Power Commission to be granted only if the merger is "consistent with the public interest". The Commission may issue a rule to the effect that "consistency with the public interest" would mean that an affirmative benefit must result from such change of corporate structures or transfer of property, or, it may issue a rule that a merger resulting in an increased rate base for consumers would not be consistent with the public interest. But can it define for all future purposes all the variations of facts which may enter into consideration of "consistency with the public interest". With reference to these types of orders, Section 1 of the proposed bill would impose an impossible task upon the departments and administrative agencies.

There are some instances in which it is advisable to make an investigation of facts before issuing a rule or regulation. At times, that investigation must take the form of a hearing, if the facts are not as easily obtainable otherwise. In these instances, however, a hearing would serve the convenience of the rule making agency, rather than act as a basis for the validity or propriety of the rule. They cannot be taken as a criterion for the desirability of the legislation proposed by the Committee.

3. Time for Issuance of Rules.

The above problems suggest the further questions: when are the rules to be issued, and what are the consequences if they are not issued?

Section 1 provides that the rules, regulations, and declarations of policy shall be issued "within one year after the effective date of this Act, and with the approval of the President". But the issuance of rules within one year must be an impossible task, especially since the President's approval is required first for initiating the rule-making process and then for the rules themselves. Let us visualize a task of such great magnitude and contemplate the Governmental machinery which must be set into motion upon the enactment of a bill of this character.

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The head of every department, independent establishment, board, commission, authority, Government-owned corporation or other agency would be obliged to decide whether it would be possible or desirable to undertake this task of issuing rules, regulations and declarations of policy, so that he may weigh the propriety of asking the President's approval. It must be assumed that this determination would take some time. Some department heads may decide to urge the President to approve projects for implementing the statutes. On the other hand, others may find that with the available personnel and appropriation, the task would be impossible of accomplishment within one year, and may urge the President to withhold his approval. All this would take at least a year before the rule-making process could be started. We must, therefore, conclude that the words "within one year from the effective date of this act", refer not to the issuance of the rule, but to the commencement of the rule-making process.

This conclusion is strengthened when we consider that the words "with the approval of the President", in connection with the issuance of the rules, are not to be confused with the "approval by the President" to make the rules effective. For after the President has approved the rule-making process for each governmental agency, he must then approve the rule itself or amendments thereto. The President must then publish the rule in the Federal Register within ten days after the approval, and only then the rule becomes effective. A number of questions may arise in connection with this provision. What becomes of the rules which are now in existence, or which are promulgated without the approval of the President? Or, if the President approves the promulgation of the rule and the rule itself, what is its status, if it is published more than ten days after that approval?

The provision requiring the President's approval for each rule, regulation and declaration of policy, promulgated under Section 1, raises a serious question of administration. Is the approval by the President to be merely perfunctory, or must he approve the rule upon full consideration of the record made? If it is the former, then the provision can serve only one purpose, and that is, to vest the general responsibility for the rules and regulations in the President. That general responsibility, however, already exists under the provision in the Constitution making him the Chief Executive of the Nation. If it is the latter, then it must be remembered that the President, though undoubtedly a person of great capacity, is nevertheless human, with limited capacity. The task of approving thousands of regulations would be impossible of performance, even if the President had no other work to do.

Of course, it is not intended that the President should give full con-
sideration to the record pertaining to each rule, regulation, policy or amendments thereto. It is assumed that he would subdelegate the task to numerous other persons, with the result that the same conditions would obtain as under the National Industrial Recovery Act. There, subdelegations of authority were expressly permitted by statute, and the whole-sale subdelegations without sufficient supervision were excusable because of the existing emergency. Thorough consideration of the rules and regulations, which constituted the provisions of the Codes of Fair Competition, had to give way to "expediency and getting things done". Here, there would be no such excuse.

If the President, in approving rules and regulations, is to act through others, why is not the present machinery sufficient? It is true, there is a general aversion to an individual reviewing his own acts. But practical considerations would preclude this situation. While Section 1 provides that the head of every department or agency shall issue rules and regulations implementing the statutes it cannot be assumed that the bill calls for a personal service to be performed by the department head. That would indeed be absurd. The rules would have to be evolved through numerous subordinates, whose work would be reviewed by a hierarchy of employees and officers, and lastly by the head of the department. If that is so, why cannot the department heads be the President's representatives for the purpose of approving the rules and regulations? And then the final approval by the President is merely perfunctory. If, however, it is intended that after the rules leave the Department there should be further review by some other agencies of the President, additional delay must inevitably follow.

4. Immunity from Law.

The rules, regulations and declarations of policy promulgated under Section 1 of the proposed bill become effective and remain so until they are rescinded or "judicially annulled". However, there is a period of immunity from penalties, which is granted to persons who comply with the provisions of any rule or regulation, for thirty days after publication of the rescission or judicial annulment of such rule. The provision is intended to embody, with reference to all rules, an immunity like that contained in Section 209 of the Securities and Exchange Act of 1934, 48 which authorizes the Securities and Exchange Commission to make, amend or rescind rules and regulations necessary to carry out the provisions of the Act and provides that "no provision of this Act imposing any liability shall apply to any act done or omitted in good faith in conformity with

any rule or regulation of the commission, notwithstanding that such rule
or regulation may, after such act or omission, be amended or rescinded
or be determined by judicial or other authority to be invalid for any
reason.” The operation and effect of this provision is to require com-
pliance with the provision of the Securities & Exchange Act, as inter-
preted and applied by the Securities & Exchange Commission, and the
liabilities imposed by the act do not extend to those violations which are
made in conformity with the rules and regulations issued by the Com-
mission.

Perhaps it was the intent of the draftsmen of Section 1 of the proposed
bill to include the same type of limitation, as is contained in the Securi-
ties & Exchange Act. We are not convinced that the policies which
prompted that enactment apply equally to all statutes. If we were to
adopt the same mistrust of administrative agencies as is contained in
the approach of the Committee and evidenced in their report, then, as a
matter of policy, we should consider it dangerous to make a wholesale
provision for the suspension of liabilities incurred pursuant to invalid
rules promulgated by these agencies.

Furthermore, if the intent was to go no further than the above men-
tioned section of the Securities & Exchange Act, this provision in Sec-
tion 1 of the proposed bill is most inaptly worded. As drafted, the in-
munity here extends not only to the liabilities imposed by particular
statutory provision implemented but by any law; not only for acts and
omissions during the operation of the rule, but for thirty days after pub-
lication of rescission or annulment of the rule. Thus, an invalid rule of
the Securities & Exchange Commission may grant immunity from the
operation of the internal revenue laws; an invalid rule of the National
Labor Relations Board may grant immunity from laws punishing tres-
pass or destruction of property. There is no limit to the many types of
invalid rules which may be promulgated and consequently no limit to the
immunities attaching to acts committed or omitted in conformity with
such rules. No doubt, the intent was, as the Committee states, “to en-
able the person affected to secure notice and readjust his business or
professional practices accordingly.” 87 But the provision itself opens the
door wide to fraud and criminality. We approach with horror the ques-
tion of unconstitutional delegation of legislative authority. But inherent
in this provision is a delegation “running riot”, for it means that by the
rule-making power, especially when unlawfully exercised, any executive
or administrative agency can suspend the operation of any law imposing

87 (1937) 62 A. B. A. Rep. 814

Section 2 of the bill provides for a review of the rules by the United States Court of Appeals for the District of Columbia. The Section is called "judicial review of rules". The draftsmen, however, were in grave doubt whether the review provided was judicial in character.

Originally, the draftsmen conferred jurisdiction to review these rules on the Court of Claims, because as a legislative court its jurisdiction need not be limited to cases or controversies within the meaning of Article III of the Constitution. Apparently, the intention was to have these proceedings for review take the form of suits under the Federal Declaratory Judgment Act. Upon further consideration, however, the Committee thought that judicial review over these rules should be vested in a Constitutional court, because such a tribunal may exercise its judicial power under the Declaratory Judgment Act. The Committee definitely did not intend to provide for proceedings calling for advisory opinions, which could not be rendered by a Constitutional court. They finally decided that the proceedings to test the validity of the rules would not be proceedings for advisory opinions. To play safe, however, they vested jurisdiction in the United States Court of Appeals for the District of Columbia, which acts both as a Constitutional and as a legislative court, so that if the limits of judicial power are overstepped and an advisory opinion is rendered, there will be no Constitutional objection. The judicial function in the proposed review, however, is obviously exaggerated, and the legislative or administrative function greatly minimized.

First. It must be remembered that the word "rules", as used in the

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Section 2. "Judicial Review of Rules.—In addition to the jurisdiction heretofore conferred upon the United States Court of Appeals for the District of Columbia, such court shall have exclusive jurisdiction, upon petition filed in accordance with the rules of the said court, to hear and determine whether any rule issued in accordance with Section 1 of this act is in accordance with the Constitution of the United States and the statute under which it is issued. Upon the filing of any petition alleging the invalidity of a rule, the said United States Court of Appeals may refer such petition and any reply thereto, whether by answer, demurrer, or otherwise, to an employee of said court for the taking of such evidence as shall be material and relevant thereto. The said United States Court of Appeals shall have no power except to approve or annul the rule, and if annulled, the said rule thereafter shall not have any force or effect except as to the period of immunity as provided in Section 1 hereof. Nothing contained in this section shall prevent the determination of the legality of any rule which may be involved in any suit in any court of the United States as now or hereafter authorized by law." Advance Program, 61st Annual Meeting, American Bar Association (1938) 166.


For a distinction between Declaratory Judgments and Advisory Opinions, see Borchard, Declaratory Judgments (1934) 52.
proposed bill, includes rules, regulations and declarations of policy. Policies are at times laid down in the statutes; at times, they are within the judgment of the executive. If the policy pursued by the executive is not in accord with that of the legislature, the remedy lies in an appeal to the legislature. If the policy of the legislature is not in accord with what the people want, their remedy is at the polls, and not in the courts of law. The Supreme Court has often reiterated the proposition that it is not concerned with the policy of legislation, but only with the question of constitutional power to carry the policy into effect. An adoption of a policy may occasion the enactment of rules and regulations which will affect the rights of private persons, and the validity of those rules and regulations may be drawn into question, when so applied, or about to be applied, as to affect private rights. But even if these rules and regulations are held invalid, the declaration of policy is beyond the reach of the judicial power.

Second. Aside from the above, Section 2 does not provide for judicial review of rules. We must not be misled into thinking that because this authority is exercised by an agency called a court, the function is therefore judicial. The bill provides that the Court of Appeals shall have no power, except to approve or annul the rule. In other words, although the aggrieved party may seek a declaratory judgment as to his rights, the court may not exercise its judicial power to determine those rights, but may exercise only a legislative function of vetoing or approving a rule. This may be in accord with the popular conception of the nature of judicial veto over legislation, but it is very far removed from the legal limits of judicial power. The annulment of legislative or executive action by the courts is only incidental to the determination of the rights of the parties. The power cannot extend beyond the limits of the court's jurisdiction in the particular case or controversy before it. Whatever weight is given to the effectiveness of the court's pronouncement concerning the validity of governmental action beyond the particular case before it, rests entirely with the deference which the other branches of the government entertain toward the judiciary. It is inherent in the judicial power to determine the rights of the parties before the court. Here, 


however, upon the filing of the petition, and perhaps upon evidence introduced concerning the manner in which a rule or regulation may affect the petitioner’s rights, the court has no power, except to pass a judgment on the validity of the rule itself.

Third. In the last analysis Section 2 provides only for advisory opinions, and not for declaratory or other judicial relief. In filing the petition for review of a rule promulgated by the head of a department or agency, the petitioner in effect submits that he wishes to be advised concerning the validity of the rule. If the court upholds this contention then, according to Section 2, the rule has no force and effect, except to give immunity from violation of law for a period of 30 days, as provided in Section 1. If, however, the rule is upheld, the petitioner may still consider himself not bound by the rule, but may question its legality “in any suit, in any court of the United States, as now or hereafter authorized by law.”

Since the United States Court of Appeals for the District of Columbia will act in an administrative, not in a judicial capacity, a grave question of constitutionality arises whether rules, especially policies, approved by the President, may by statute, be subjected to such review. The Constitution vests in the President, as Chief Executive, the power and duty to see that the laws are faithfully executed. To this end he is vested with great discretionary and policy making (political) powers. In the exercise of those powers, he is beyond the reach of any other branch of the Government, including the judiciary, let alone a mere agency, exercising an administrative function.

The section raises a number of less extensive questions, which probably could have been avoided by more careful draftsmanship.

First. Section 1 provides for notice and hearing, which, of course, implies the taking of evidence and the promulgation of rules upon full consideration of that evidence. There is no provision as to what use shall be made of the record in the rule-making procedure, when a petition for review is filed under Section 1. On the contrary, the latter section provides that upon the filing of a petition to review a rule and a reply thereto, the court may refer the matter to an employee of the court for

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44Kendall v. United States, 12 Peters 524, 611 (U. S. 1838).

45See note 31, supra. If a statute contemplates a hearing, where evidence is introduced, an agency making a rule without full consideration of the evidence is not complying with the statute. Even where the statute does not contemplate that a determination be arrived at upon a hearing or investigation, but an investigation is made or hearing held, it is only fair that the determination be made upon full consideration of the evidence adduced, and where the subject comes properly within the scope of judicial review, all the evidence upon which the determination was made, whether in support of or contrary to the determination, should be made available to the reviewing court.
the taking of evidence. Apparently the proceeding contemplated is in the nature of a trial *de novo* on the facts and the law relating to the rule.

**Second.** Section 2 does not provide for the employment of special master of commissioners, nor is there any provision for any additional judges to cope with this work. Is it contemplated that all this work can be handled by the court as at present constituted? As Chief Justice White often said: "to state the question is to answer it."

**Third.** It is provided that the jurisdiction of the United States Court of Appeals for the District of Columbia to determine the validity of the rules shall be exclusive. Yet, the same section does not prevent, but expressly makes provision for, the determination of the legality of the rule in any suit in any court of the United States.

**Fourth.** Section 1 provides that no rule shall be held invalid except (a) for violation of the Constitution or (b) for being in conflict with any statute of the United States or (c) for being in excess of the authority conferred by the statute or statutes pursuant to which it is issued. Section 2, however, confers jurisdiction on the United States Court of Appeals for the District of Columbia to determine only whether or not any rule comes in conflict with the first two prohibitions.

**Fifth.** The jurisdiction of the Court of Appeals is limited to the determination of the validity of any rule issued pursuant to Section 1, but makes no provision as to rules which are issued otherwise than in accordance with Section 1 or contrary to it. It would almost appear that whenever the court finds that the rule in question does not comply with the requirements of Section 1, it must divest itself of jurisdiction, instead of declaring it invalid.

**Sixth.** This leads to the question, already raised, of what becomes of the existing rules? Do they come to an end within one year after the effective date of this act, or only when a new rule is promulgated in accordance with Section 1? Is it left to the discretion of the administrative agency to continue the existing rule in effect? What happens when a rule under Section 1 is invalidated? Is the old rule revived, or is there no rule at all? All these, and many other questions are left to speculation.

**Conclusion**

It can hardly be said that the proposed bill is responsive to the policy adopted by the American Bar Association, or that it presents a feasible method of implementing the statutes of the United States. Under Sections 1 and 2 any person dissatisfied with a rule has a number of chances to question its validity. After the delay incident to obtaining the approval of the President to initiate the rule making orgy, after notice, hearing, and probably endless arguments and memoranda, further ap-
proval by the President and publication, any person may question the validity of the rule in the United States Court of Appeals for the District of Columbia. If he does not succeed there, he may further question its validity in any suit in any court of the United States. Upon analysis of these sections, I cannot agree with the assertion of the Special Committee, that Section 2 of the bill "will give a much needed, expeditious, and inexpensive method of determining the validity of regulations. . . ." On the contrary, such method as applied to all rules and regulations is not needed; it would occasion unprecedented delay and would be very expensive.

As a Works Progress Administration project for the benefit of the legal profession, Sections 1 and 2 can hardly be excelled. It would not only absorb all unemployed lawyers or persons who ever studied law, but would actually cause a shortage of available personnel. The great advantage of this project, as compared with other Works Progress Administration projects, is that it is bound to be a permanent one. As rules and regulations are enacted, new problems will arise, new statutes will be passed, and new rules will have to be issued. All this may be to the good, but the taxpayer should also be considered.


ON JANUARY 4, 1938, the President nominated Mr. Felix Frankfurter to be Associate Justice of the Supreme Court of the United States to occupy the chair left vacant by the death of the late Justice Cardozo. That nomination was shortly confirmed by the Senate, and for the first time during the current term, a full Court was constituted on January 30, 1938, when the new justice took his seat. The nomination and confirmation of Mr. Justice Frankfurter came as no surprise to a legal profession already familiar with his work as Assistant United States Attorney in New York, Byrne Professor of Administrative Law at the Law School of Harvard University and advisor and government official during several administrations. Long recognized as an authority on the jurisdiction and procedure of the Supreme Court, he will be no stranger to the judicial duties he is about to assume.

NATIONAL LABOR RELATIONS BOARD—PROCEDURE—REMAND OF ORDER

The Supreme Court, on January 3, 1939, added another to the sequence of opinions defining procedure in the administration of the National Labor Relations Act, when it decided the case of Ford Motor Co. v. National Labor Relations Board. The principal issue was whether a circuit court of appeals was empowered to remand a case, on motion of the respondent Board after that agency had filed a petition for enforcement accompanied by a transcript of the record, without deciding the merits or ruling on issues raised by the petitioner. It was held that such action was properly taken by the court below in the circumstances presented. It was pointed out that the Board was not entitled to have a case remanded as a matter of right, but only in the exercise of a sound judicial discretion, governed by the facts in each particular instance. In this respect, the decision is to be distinguished from In the Matter of National Labor Relations Board where it was held that the Board was entitled, as a matter of right, to withdraw its order for good cause and fail to certify a transcript of the record following petition by an employer for review. Attention was called to the fact that in the case at bar the remand was for the purpose “of setting aside its (the Board’s) findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case.” Since the court could have ordered the Board to take such action, it was

*Written Feb. 1, 1939.
*59 Sup. Ct. 301 (Jan. 3, 1939).
*304 U. S. 486 (1938).
proper to permit the administrative agency to withdraw its petition voluntarily in order to remedy whatever defects in procedure or substance might be deemed to exist. The Court found that the application for remand was not based "on frivolous grounds or for any purpose that might be considered dilatory or vexatious." Emphasis was placed upon the circumstance that the case remained within the control of the circuit court of appeals and that upon final submission for enforcement all rights of petitioner would be amply protected, since all questions concerning the entire treatment of the case, and all questions of law, would be subject to attack and review. It was further held that where a petition for enforcement had been filed by the Board, it was superfluous for the employer to file a petition for review. "The breadth of the jurisdiction conferred upon the court to set aside or modify in whole or in part the Board's order, or to permit new evidence to be taken, necessarily implies that the party proceeded against is entitled to raise all pertinent questions and to obtain any affirmative relief that is appropriate." The opinion was unanimous, although Mr. Justice Roberts did not take part in the hearing, consideration or decision of the case.

CONSTITUTIONAL LAW—TWENTY-FIRST AMENDMENT—STATE CONTROL OF IMPORTATION OF LIQUOR

In Indianapolis Brewing Co. v. Liquor Control Commission, the Court held that a Michigan statute prohibiting the sale in that state of beer manufactured in any other state which by its laws discriminates against Michigan beer was constitutional by virtue of the Twenty-first Amendment to the Constitution; and in Joseph S. Finch & Co. v. McKittrick the Court upheld a substantially similar statute of Missouri. In view of the previous opinions of the Court interpreting the Amendment, the decisions in these cases were not unexpected. In State Board of Equalization v. Young's Market Co., the first case in which the Court had occasion to consider the powers granted to the states by this Amendment, a statute of California imposing a fee for the privilege of importing beer was upheld as constitutional. The Court said that "the words used [in

\[Vol. 27\]

*This would seem to answer the question raised by the controlling opinion in Consolidated Edison Company of New York v. National Labor Relations Board, 59 Sup. Ct. 206 (Dec. 5, 1938) concerning adequacy of the review afforded under the Act. For a discussion of this point, see Sup. Ct. (1938) 27 Georgetown Law Journal 329.


*Section 2 of the Amendment provides: "The transportation or importation into any State - - for delivery or use therein, of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."


499 U. S. 59 (1936).
the Amendment] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes," and that to construe the terms of the Amendment as being limited by the commerce clause would involve "not a construction of the Amendment, but a rewriting of it." In Mahoney v. Joseph Trinner Corp., a Minnesota statute prohibiting the importation of certain brands of intoxicating liquors unless such brands are registered in the United States Patent Office, although clearly discriminating in favor of liquor processed in the state as against liquor processed elsewhere, was upheld on the ground that discrimination against imported liquor is permissible even though it is not an incident of reasonable regulation of the liquor traffic. In answer to the objection that the statute was prohibited by the equal protection clause, the Court, quoting State Board of Equalization v. Young's Market Co. said that "a classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

On that basis of these four cases, it is apparent that the authority of the state under the Twenty-first Amendment to restrict in any manner it chooses or to prohibit entirely the importation of liquors is not in any respect affected by the commerce clause, the equal protection clause or the due process clause of the Constitution and that, in imposing such restrictions and prohibitions, the state is not required to base them on the ground that they are necessary as a protection of public health, safety or morals. In these cases the Court has refused to consider the historical background of the Twenty-first Amendment, from which it might appear that it was the intention of the framers of the Amendment merely to give "dry" states control over liquor traffic in the exercise of their ordinary police powers, rather than to give the states plenary control over such traffic without regard to the power of Congress to regulate interstate commerce, or the limitations generally imposed in the exercise of the police power by the equal protection and due process clauses of the Constitution. However, the wording of the Amendment certainly justifies, and probably requires, an interpretation that the Amendment confers an absolute power not restricted by any other provisions of the Constitution.

INTERSTATE COMMERCE COMMISSION—DETERMINATION OF JURISDICTIONAL FACT

In Shields v. Utah Idaho Cent. R.R., it was held that the finding by the Interstate Commerce Commission, after an adequate hearing pur-
suant to the Railway Labor Act,\textsuperscript{12} that the respondent railway was not an interurban electric railway, was supported by the evidence and, therefore, binding upon the courts and the question may not be tried de novo. While Congress did not define "interurban electric railway" in the Act, the term was held to have sufficiently distinguishable characteristics which had been previously susceptible of judicial and administrative interpretation,\textsuperscript{18} and the delegation by Congress of the power to determine the applicability of the term to electric railways was valid and could be made conclusive upon the courts.

The instant case is to be distinguished from \textit{United States v. Idaho}\textsuperscript{14} and \textit{United States v. Chicago N. S. & M. R. R.}\textsuperscript{15} In the latter case the Court permitted the lower court to try the question de novo after the Interstate Commerce Commission had found that the respondent railway was not an interurban electric railway within the meaning of the Transportation Act of 1920,\textsuperscript{16} and in the \textit{Idaho case} the determination of the question whether a particular track was a "spur track" under the Act\textsuperscript{17} was held to be a "mixed question of fact and law left by Congress to the decisions of a court," and the Interstate Commerce Commission's determination could not be considered as conclusive. In these cases the Commission had not been given specific authority to make the determinations in question, and the ultimate decision, therefore, must be made by the courts. In the \textit{Shields case}, however, authority to determine the status of the railway was specifically granted to the Interstate Commerce Commission. While the determination was, under the Railway Labor Act, a jurisdictional fact in respect to the National Mediation Board, the exemption from that Act of interurban electric railways did not have to be made by Congress, and when made, it could be put on the basis that the determination by the Interstate Commerce Commission of the jurisdictional fact, after a proper hearing, shall be conclusive. In this respect, it differs from a determination of a jurisdictional fact which involves as well the constitutional limits of Congressional authority.\textsuperscript{18}

\textbf{TENNESSEE VALLEY AUTHORITY—DETERMINATION OF CONSTITUTIONALITY}

For the second time in as many attempts, parties seeking determina-
tion of the validity of the Tennessee Valley Authority Act\textsuperscript{19} in its entirety, failed of their purpose\textsuperscript{20} when the Supreme Court upheld dismissal of the bill in \textit{The Tennessee Electric Power Co. v. Tennessee Valley Authority}\textsuperscript{21} on the ground that petitioners had no standing in a federal court to challenge the constitutionality of the statute.

The first point touched upon by the Court was that no contract right was violated by the entrance of defendant into competition with petitioners, since none of the latter held an exclusive franchise. While the power companies were attacking, in fact, competition by the TVA, they had no right to be free of competition. It was pointed out that the appellants might not challenge an act under which an official threatens an action which will invade a right, and thus harm them, unless the right so invaded is a legal one.

The Court dismissed the contention of the power companies that if a commodity used by a competitor were not lawfully obtained the latter might be liable in damages or enjoined, citing \textit{Alabama Power Co. v. Ickes}\textsuperscript{22} and \textit{Duke Power Co. v. Greenwood County}\textsuperscript{23}.

Claims of the appellants to protection against authorization by the states of TVA operations were dismissed. The ground for this action was that it was a matter of policy, to be determined by the legislature of each state, whether competition between utilities was desirable. Such a policy was subject to alteration at will and no vested rights were created in the maintenance of any given condition.

It was also held that the appellants could not contest the action of the TVA in entering into competition with privately owned power companies

\textsuperscript{20}In Ashwander \textit{v. Tennessee Valley Authority}, 297 U. S. 288 (1936), the decision was limited to the power of Congress to control a navigable stream and to provide for national defense by constructing the Wilson Dam. The Court held that Congress, in this instance, acted within the scope of its authority. As a consequence, it was held that electric power generated at the dam was property constitutionally acquired by the United States and might be disposed of as Congress deemed fit. Decision on the question concerning the validity of the Act was expressly reserved.
\textsuperscript{21}59 Sup. Ct. 366 (Jan. 30, 1939). The majority opinion was written by Mr. Justice Roberts, the Chief Justice and Associate Justices Black, Brandeis and Stone concurring. Mr. Justice Reed took no part in the consideration or decision of the case.
\textsuperscript{22}302 U. S. 464 (1938). The Court, in that case, answered this argument by declaring that though there might be injury inflicted upon the petitioner it was not such damage for which there existed a legal remedy. As in the principal case, the Court held that petitioner had no exclusive franchise; was to be subjected to lawful competition of municipalities, even if the loans and grants were unauthorized; was not being injured by coercion, conspiracy, fraud, or malice on the part of the respondent, and was not unlawfully being subjected to the control of the Federal Government. The Court, therefore, found that the petitioner had no standing to challenge the actions of the respondent.
\textsuperscript{23}302 U. S. 485 (1938).
on the ground that it constituted violation of the Ninth and Tenth Amendments. While it was true that such competition was indirect regulation of power rates, it was equally true that competition from another privately owned corporation would have the same effect. As was previously mentioned, the appellants were not protected against competition.

The Court further declared that the findings of the court below indicated that the companies did not have standing in court because of coercion, duress, fraud or misrepresentation on the part of TVA in obtaining contracts, by reason of actions with malicious or malevolent intent, or through conspiracies between respondent and municipalities or consumers.

The Court summarized its position by declaring that "In no aspect of the case have the appellants standing to maintain the suit and the bill was properly dismissed."

Mr. Justice Butler, dissenting, was of the opinion that the issue was whether the Act was consonant with the Fifth, Ninth, and Tenth Amendments when construed so as to authorize the actions taken by TVA. In his view, the declaration in the statute of a purpose to control commerce on a navigable stream, was a pretext, except as it referred to construction of the Wilson Dam. He declared that the clear intent of Congress was to regulate utilities by the creation and sale of power, as evidenced by the fact that the area now consumes only 56 percent of the amount of power ultimately to be produced. The dissenting Justice found that the respondent was guilty of misrepresentation in asserting that the "yardstick" (i.e. the wholesale rate set by TVA) constitutes a fair measure of a reasonable rate. He asserted that, in fact, the "yardstick" was unreasonable and confiscatory because of exclusion of the major portion of the investment made and of necessary operating expenses. The retail rates were found to exclude the cost of rendering the service given. He also saw evidence of coercion exercised against the power companies in order to force them to sell to the TVA at confiscatory prices on threats that the Public Works Administration would otherwise make loans and grants to municipalities.

In conclusion, Mr. Justice Butler declared: "They [appellants] allege facts that unmistakably show that each has a valuable right as a public utility, non-exclusive though it is, to serve in territory covered by the franchise, and that, inevitably the value of its business and property will suffer irreparable loss by defendant's program and acts complained of.

"If, because of conflict with the Constitution, the Act does not author-

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24Mr. Justice McReynolds concurred in this dissent.
ize the enterprise formulated and being extended by defendants, then their conduct is unlawful and inflicts upon complainants direct and special injury of great consequence. Therefore, they are entitled to have this court decide upon the constitutional questions they have brought here."

In view of this decision, it is difficult to see how the question of the constitutionality of the TVA can be brought before the Supreme Court. The conditions given as a bar to action, if met, would not necessarily constitute valid grounds for raising the issue. If a power company held an exclusive franchise which was being infringed, the case would turn upon the breach. Should there be fraud, coercion, or the like, in some action of the TVA directed against a power company, the problem of power to act at all would be collateral to the suit in tort. One other instance in which it might be necessary to determine the issue would arise should a state attempt to levy a tax upon the income of an employee of the TVA. The only circumstance under which the issue might be directly determined would seem to be where the petitioner was a state.

CONSTITUTIONAL LAW—VALIDITY OF FEDERAL TOBACCO INSPECTION ACT

In *Currin v. Wallace*26 the Court upheld the constitutionality of the Tobacco Inspection Act of 193527 which provides that no tobacco may be sold at a market designated by the Secretary of Agriculture (pursuant to the terms of the Act) until such tobacco has been inspected and certified by an authorized representative of the Secretary as conforming to the official standards established by the Secretary.

The Act was assailed on several grounds by certain warehousemen and auctioneers. Their first contention was that the offering of tobacco for sale at auction is not a transaction in interstate commerce and hence is not subject to regulation by Congress. The Court however held that the facts showed that the majority of the sales consummated are sales in interstate commerce, the principal purchasers being engaged in the export trade or in the manufacture of tobacco products in other states. The mere fact that some bids are rejected and the sales not consummated does not remove the auction from its immediate relation to the sales that are consummated, and the auction must be considered a part of the transaction of the sale. Furthermore the power of Congress to regulate interstate commerce is not affected by the fact that some of the sales are entirely intrastate in nature. On this point the Court held that the rule of *The Minnesota Rate Cases*28 and *Houston, E. & W. Ry. v. United

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28230 U. S. 353 (1913).
States, that where interstate and intrastate activities are co-mingled, full power to regulate such activities rests in Congress, is applicable in the present instance. Having power to regulate these sales of tobacco, Congress, in order to protect sellers or purchasers, or both, could prescribe the conditions under which such sales should be made, and this authority cannot be denied merely because the regulations are in the nature of police regulations.

The plaintiff's claim that the Act was discriminatory because all of the markets in the state or locality were not made subject to the regulations was dismissed on the ground that the commerce power is complete in itself and Congress may exercise its discretion in its use. The Constitution does not impose any requirement of uniformity upon the exercise of the commerce power by Congress and although the exercise of that power is subject to the Fifth Amendment, "that Amendment, unlike the Fourteenth, has no equal protection clause". Nor is a mere lack of uniformity such discrimination as will invalidate the Act under the due process clause of the Fifth Amendment.

The Court also held that the provisions of the Act that no market shall be "designated" unless two-thirds of the tobacco growers vote in favor thereof did not amount to delegation of legislative authority since the power has already been exercised by Congress and the required vote is merely a condition upon which the application of the regulations depends. The delegation of authority to the Secretary of Agriculture to make necessary investigations and establish standards for tobacco clearly "conforms to familiar legislative practice" and is not a delegation of essential legislative functions vested in Congress. The Act "defines the policy of Congress and establishes standards within the framework of which the administrative agent is to supply the details. The provisions of the Act are well within the principle of permissable delegations—".

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*Comments on National Labor Relations Board and Tennessee Valley Authority prepared by Harry B. Merican; Comment on Interstate Commerce Commission prepared by Philip Treibitch.
FEDERAL LEGISLATION

THE FAIR LABOR STANDARDS ACT OF 1938

MORE popularly known as the "Wage and Hour Law", the Fair Labor Standards Act of 1938\(^1\) is probably the most controversial and far-reaching legislative enactment to emerge from the 75th Congress.

After the decision of the United States Supreme Court in *West Coast Hotel Co. v. Parrish*,\(^2\) which upheld the power of a state to legislate minimum wage requirements for women and overruled *Adkins v. Children's Hospital*,\(^3\) the Federal Government evidently felt that the time was at hand to attempt federal control of minimum wages and maximum hours of those subject to such control. Originally proposed by the President in his message to Congress on May 24, 1937,\(^4\) this legislation had a career that bears mute testimony to the storm of debate it aroused and reveals its turbulent progress through Congress.

On the same day that the President proposed the legislation, bills were introduced into the Senate and the House.\(^5\) After hearings conducted by a joint committee of the House and Senate, the Senate Committee on Education and Labor reported to the Senate a somewhat modified bill,\(^6\) which was passed with amendments on July 31, 1937. Two days later the Senate bill was referred to the House Committee on Labor, and after further amendment it was reported to the House on August 7, 1937.\(^7\) On December 17, 1937 the bill was recommitted to the Committee on Labor, and on April 21, 1938 it was again reported to the House.\(^8\) It passed the House with amendments on May 24, 1938. After the Senate had requested and obtained a conference on the bill, the Senate and the House both agreed to the conference report on June 14, 1938. On June 25, 1938 the bill was signed by the President and became a law.

It is the purpose of this article to treat of the provisions relating to wages, hours, and child labor, to indicate in general what classes of employers are covered by the Act, and to consider briefly some constitutional questions occasioned by its enactment.

The basis of the Act, and the policy underlying it, are probably best

\(^2\)300 U. S. 379 (1937).
\(^3\)261 U. S. 525 (1923).
\(^4\)This proposal was reiterated by the President in a subsequent message to Congress delivered on January 3, 1938.
\(^6\)SEN. REP. No. 884, 75th Cong., 1st Sess. (1937).
\(^7\)H. R. REP. No. 1452, 75th Cong., 1st Sess. (1937).
\(^8\)H. R. REP. No. 2182, 75th Cong., 3d Sess. (1938).
stated in the language of Congress. Section 2,9 headed "Finding and Declaration of Policy", provides as follows:

"(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to health, efficiency, and the general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

The intention of Congress to balance the speed desired in attaining the desired objective against possible economic dislocations and to proceed cautiously where an overenthusiastic application might cause an undesirable economic condition is evidenced by subsequent sections of the Act, particularly Section 8,10 relating to wage orders by the Administrator.

MINIMUM WAGES

The provisions as to minimum wages are contained in Sections 611 and 8.12 Section 6 provides for a minimum wage to be paid by every employer to "each of his employees who is engaged in commerce or in the production of goods for commerce". An ultimate minimum wage of forty cents an hour is the goal, but a period of seven years from the effective date (October 24, 1938) is contemplated before it will become mandatory by the terms of the Act. A minimum wage of twenty-five cents an hour is set for the first year, and thirty cents for the next six years, at the termination of which the forty-cents-an-hour minimum takes effect. However, it must be realized that this is only the foundation set for the administration of the Act. It is the rock-bottom minimum, and the Administrator has authority under Section 813 to act upon the recommendation of the Industry Committee and raise the minimum wage for any industry or any reasonable classification within an indus-

10Id. at 1064, U. S. C. at § 208 (Supp. 1938).
11Id. at 1062, U. S. C. at § 206 (Supp. 1938).
12Id. at 1064, U. S. C. at § 208 (Supp. 1938).
13Ibid.
try, but not higher than forty cents an hour. After the expiration of seven years from the effective date the forty-cents-an-hour minimum wage is flatly fixed by the terms of the statute and cannot be altered unless the Industry Committee, "by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness, or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry".

Worthy of note is the provision as to industry committees. The Administrator is charged with the duty of appointing an industry committee for each industry engaged in commerce or in the production of goods for commerce. Three classes are represented in an industry committee; viz., the public, the employees in the industry, and the employers in the industry; and the committee is to consist of an equal number from each group. The Administrator has no authority to make a wage order unless it has been recommended by the committee, which is to "recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry". This device was provided in order to protect employers and the public from arbitrary action by administrative officials and to remove any possibility of such action.

MAXIMUM HOURS

The maximum-hours provisions (Section 7a)\(^4\) apply to the same groups of employees as do the minimum-wage provisions, except for certain exemptions, and likewise provide for a gradual decrease in the permissible length of the workweek. However, the forty-hour-maximum week is to become realized at the expiration of two years from the effective date, and there is no power in the Administrator to vary the schedule set by Congress. A maximum workweek of forty-four hours is set for the first year from the effective date, forty-two hours for the second year, and forty hours after the expiration of the second year. If any employer employs a person in excess of the hours specified, he must compensate such employee for the overtime at the rate of one-and-one-half times the regular rate. It would be more correct to speak of a "standard workweek" than maximum hours, for the Act does not prohibit employment in excess of the hours specified. It merely provides that the employee must be compensated for the extra time over the limit at the increased rate.

These hour requirements, however, do not affect employers who em-

ploy in accordance with contracts that are the result of collective bargain-
ing.\textsuperscript{15} For, except as qualified below, employment in excess of the num-
ber of hours specified is not a violation if (1) the agreement provides that
no employee shall be employed more than one thousand hours during any
period of twenty-six consecutive weeks; or (2) the employee is employed on an annual basis under an agreement which provides that the employee
shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks. In each case the agreement must be the
result of collective bargaining, and the representatives of the employees
must be certified as bona fide by the National Labor Relations Board.
The obvious policy behind these provisions is to remove a possible con-

flict with agreements made between employers and employees under the
National Labor Relations Act. If such a contract had been made by a bona fide employees group, there would not be a violation of the Act
though the employees should be required to work in excess of forty-four hours in certain weeks without overtime compensation. The terms of such an agreement would necessitate proportionately shorter workweeks during the remainder of the period, of course, so that the average workweek for the period would not exceed approximately thirty-eight and one-half hours. However, this privilege is limited to a workday of twelve hours and a workweek of fifty-six hours, any employment in excess of this requiring "time and a half" overtime compensation.

Seasonal industries—The hours provisions are relaxed also in regard
to seasonal industries.\textsuperscript{16} The Administrator is given the authority to find
what industries are of a "seasonal" nature. In such industries the
maximum-hours provisions are inapplicable, but only for a period not exceeding fourteen workweeks in the aggregate in any calendar year.
The limitation requiring "time and a half" overtime compensation for a
workday in excess of twelve hours or a workweek in excess of fifty-six
hours is also applicable to such an industry.

Specific exemptions— Entirely exempted from hours requirements\textsuperscript{17} are
certain classes of employees, such as those engaged in the first processing of milk into dairy products, the ginning and compressing of cotton, or
processing certain materials into sugar.

An exemption is also granted to employees engaged in the first
processing, canning, or packing of seasonal or perishable fresh fruits
or vegetables; or in the first processing, within the "area of production"
(as defined by the Administrator), of any agricultural or horticultural
commodity during seasonal operations; or in the handling, slaughtering,

\textsuperscript{15}Fair Labor Standards Act, § 7 (b); 52 Stat. 1063, 29 U. S. C. § 207 (b) (Supp. 1938).
\textsuperscript{16}Ibid.
\textsuperscript{17}Fair Labor Standards Act, § 7 (c); 52 Stat. 1063, 29 U. S. C. § 207 (c) (Supp. 1938).
or dressing of poultry or livestock. But this exemption is granted for a period of only fourteen weeks in the aggregate in any calendar year. Also exempted are employees subject to maximum-hour regulations by the Interstate Commerce Commission, and employees of an employer subject to the provisions of Part I of the Interstate Commerce Act.  

CHILD LABOR PROVISIONS

The Act excludes from interstate commerce the products of child labor. This is accomplished by Section 12, which provides that "No producer, manufacturer, or dealer, shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed". "Oppressive child labor" is defined by Section 3 (1) as (1) the employment of any employee under 16 years of age, or (2) the employment of an employee between sixteen and eighteen years of age in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find, and by order declare, to be particularly hazardous for the employment of children between such ages or detrimental to their health and well-being.

The employment of children between the ages of fourteen and sixteen is allowed in occupations other than mining and manufacturing, if the Chief of the Children's Bureau concludes that such employment will not interfere with the schooling of the children and their health and well-being.

The child-labor provisions do not apply to any employee in agriculture while not legally required to attend school, or to child actors.

EXEMPTIONS

Besides the exemptions described above, there are other exemptions from both minimum-wage and maximum-hours requirements which have not been mentioned, for the reason that they can more advantageously be treated separately.

Section 13a provides, in this connection, that neither the minimum-wage nor the maximum-hours provisions apply to the following groups:

(1) Any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator);

\[\text{52 STAT. 1067, 29 U. S. C. § 212 (Supp. 1938).}
\[\text{id. at 1060, U. S. C. at § 203 (1) (Supp. 1938).}
\[\text{Fair Labor Standards Act, § 13 (c); 52 STAT. 1067, 29 U. S. C. § 213 (c) (Supp. 1938).}
\[\text{52 STAT. 1067, 29 U. S. C. § 213 (a) (Supp. 1938).}
(2) Any employee of a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce;
(3) Seamen;
(4) Employees of an airway carrier subject to the provisions of Title II of the Railway Labor Act;23
(5) Certain employees engaged in catching, packing, distributing, or cultivating fish or other forms of aquatic life;
(6) Any employee engaged in agriculture;
(7) Any employee to the extent that he is exempted by the order of the Administrator under Section 14 (relating to learners, apprentices, and handicapped workers);
(8) Employees connected with the publication of a weekly or semi-weekly newspaper having a circulation of less than three thousand, if the major part of the circulation is within the county in which published;
(9) Employees of street, suburban, or interurban electric railways or motor bus carriers;
(10) Any individual employed within the "area of production" (as defined by the Administrator) of the handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in the raw or natural state, or canning of agricultural or horticultural commodities for the market, or in the making of butter or cheese or other dairy products.

ENFORCEMENT

An interesting aspect of the Act is the threefold method of enforcement provided. In addition to the authority given the Administrator to enjoin violations of the Act,24 and the Department of Justice to institute criminal prosecution,25 the employee is given the right26 of suing his employer if the latter violates the maximum-hours27 or minimum-wage28 provisions. If the suit is successful, the employee is entitled to his unpaid minimum-wage or overtime compensation, an equal amount in addition as liquidated damages, and also his costs of suit and a reasonable allowance for attorney's fees. Such an action may be brought by any employee or by more than one employee in behalf of himself or themselves and of others similarly situated, or by a representative designated by the employees affected. This provision is expected to prove a strong deterrent to an employer otherwise inclined to violate the Act, and it is also expected to aid in enforcement by removing some of the burden from the administrative agency, thus making the Act to some degree self-enforcing.

25§ 16 (a); 52 Stat. 1069, 29 U. S. C. § 216 (a) (Supp. 1938).
27See note 14, supra.
28See note 11, supra.
Section 15(a)\textsuperscript{29} makes it unlawful for any person:

(1) To transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of Section 6 (minimum wages) or Section 7 (maximum hours), or in violation of any regulation of the Administration under Section 14 (relating to learners, apprentices, and handicapped workers);

(2) To violate any of the provisions of Section 6 or 7, or any order of the Administration under Section 14;

(3) To discharge or discriminate against an employee because of his activity in filing a complaint or testifying in a matter related to the Act;

(4) To violate the child-labor provisions;

(5) To violate any provisions of Section 11(c) (relating to records to be kept by employers) or knowingly to make a false statement or report under Section 11.

**COVERAGE OF THE ACT**

An important and distinctive feature of the Act is its self-executing nature. It applies automatically to certain employees who come within its purview, not by any order or finding of the Administrator, but by the terms of the Act itself. The Administrator, \textit{i.e.}, has no power to enlarge or restrict the scope of the Act or to determine who shall be subject to it.

Of course, the Act, or certain parts of it, have no application to those occupations which are exempted, as outlined above. Aside from these, however, the hours and wages provisions apply to \textit{employees} engaged in commerce or in the production of goods for commerce.\textsuperscript{30} Commerce is defined as "trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof,"\textsuperscript{31} or, roughly, as \textit{interstate commerce}. Hence, whether the statute is applicable in a given situation depends on the nature of the employment of the particular employee. It is not sufficient for the employer to test the application of the Act by the inclusion of his business among those engaged in interstate commerce or the production of goods of commerce; he must look to the employment of each of his employees to ascertain which ones, if any, come within its purview.

Although the Administrator has no power to decide whether an employer is or is not subject to the general terms of the Act, he has conceived it to be his duty to issue interpretative bulletins setting forth the tests which he will follow in determining whether specific industries are covered by the Act, so that employers may have some means of knowing whether it applies to them. Two interpretative bulletins

\footnotesize{\begin{itemize}
  \item \textsuperscript{29}52 Stat. 1068, 29 U. S. C. \textsection 215 (a) (Supp. 1938).
  \item \textsuperscript{30}See notes 11 and 14, \textit{supra}.
  \item \textsuperscript{31}Fair Labor Standards Act, \textsection 3 (b); 52 Stat. 1060, 29 U. S. C. \textsection 203 (b) (Supp. 1938).
\end{itemize}}
(numbers 1 and 5) have been issued concerning the general coverage of the Act. It was announced that a policy of broad interpretation would be followed inasmuch as the declaration of policy in the law itself evidenced that the widest possible coverage was intended by Congress.

Bulletin No. 1 reached the conclusion set forth above as to the general test of the coverage and enumerated two groups of workers included within the Act, viz. (1) those "engaged in interstate commerce", a group that includes, among others, employees in the telegraph, telephone, radio, transportation, and similar industries, and also employees who are an essential part of the "stream of commerce", such as employees of a warehouse whose storage facilities are used in the interstate distribution of goods; (2) those engaged in "the production of goods for (interstate) commerce", which applies typically to employees engaged in manufacturing, processing, or distributing plants that put forth any goods in commerce out of the state in which the plant is located. The foregoing provisions are held to include maintenance workers, watchmen, clerks, stenographers, and messengers, such conclusion being based largely on the definition of "employee" in Section 3(j). It was concluded that "except for special categories of employees within the exemptions of Section 13, all the employees in a place of employment where goods shipped or sold in interstate commerce were produced, are included in the coverage, unless the employer maintains the burden of establishing, as to the particular employees, that their functions are so definitely segregated that they do not contribute to the production of goods for interstate commerce as these terms are broadly defined in the Act".

It was further indicated that the Act is not limited to employees working on an hourly wage, and that salaried and piece workers are entitled to the benefits of the Act. Their remuneration must be converted into terms of an hourly rate.

It was conceded that the Act had no application to plants whose employees work on raw materials derived from within the state if none of the product of the plant moves in interstate commerce, even though the product so manufactured comes into competition with products manufactured elsewhere which move in interstate commerce.

Interpretative bulletin No. 5 contains further opinions of the Administrator as to the scope of the Act. In the determination of the question whether the employees are engaged in the "production of goods for commerce" the test is said to be the intention of the employer at the time of the production of the goods. If the employer intends, hopes,

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or has reason to believe at the time the goods are produced that they will move in interstate commerce he will come within this classification, though later events prevent such a course and the goods are sold entirely within the state. On the other hand, if the employer, at the time of the production of the goods intends them entirely for intra-state consumption, he is not held to be within the Act, though he later does ship them in interstate commerce.

The employees may be engaged in the "production of goods for commerce" even though the employer does not himself ship the goods across state lines; the fact that he passed title to the purchaser within the state of production is immaterial.

The term "production of goods for commerce" is also held to embrace an employer who produces goods and sells them to a further processor within the state, who in turn sells the goods in interstate commerce, if the first producer's goods are a part or ingredient of the second producer's goods. This is held to be true, in some cases, even though the first producer's goods are not technically "ingredients" of those of the second producer, as where the second producer is not the "ultimate consumer". An example of this is the case of an employer who manufactures containers, sells them to another manufacturer within the state, who in turn uses them to hold his product, and some of the finished product is sent outside of the state for sale in the container. In such a case, it is held that the manufacturer of the containers is engaged in "the production of goods for commerce" inasmuch as the "ultimate consumer" is not the second producer, but the out-of-state purchaser.

The term "production of goods for commerce" is also held to include an independent contractor who receives goods from the producer, works on them, and returns them to the manufacturer, who later ships them in interstate commerce.

Employees engaged in the collection and dissemination of information which is transmitted to other states in the form of publications or pamphlets are also held to be within the scope of the Act.

The percentage of goods that an employee works on and that move in interstate commerce is held to be immaterial in the determination of the applicability of the Act. If any goods upon which the employee works move in interstate commerce, he is held subject to the Act.

The statute is held to have no application to employees who work on goods intended for local consumption, even though the raw materials are brought in from outside the state. However, it is indicated that other employees in the same plant who are engaged in interstate activities, such as officials or employees purchasing the raw materials from other states or receiving them from other states, may be within the statute.
Likewise, the Act is held to have no application to a producer of goods that are to be consumed locally by a producer of goods for commerce if the first producer's goods are not a part or an ingredient of some commodity that the second producer is producing for commerce; e.g., a small mine which sells all its coal to a local manufacturer of goods for commerce, the manufacturer using the coal to heat his plant or drive its machinery.

Employees of builders and contractors are held to be generally engaged in local construction and, hence, outside of the Act. But when they are engaged in maintaining or constructing essential instrumentalities of interstate commerce, it is indicated that they will be included. Wholesalers purchasing their goods from outside of the state are advised by the Administrator that they should comply with the Act, even though shipment is made directly to the wholesaler's vendee. While the courts may hold that employees engaged in the local sale of goods removed from the original package are not subject to the Act, there is belief that they are more likely to be held subject to it.

The child-labor provisions have a somewhat different application from those relating to wages and hours, since the child-labor provisions are not limited to employees engaged in commerce or in the production of goods for commerce. The Act merely prohibits shipment in interstate commerce, or the deliverance for shipment, of any goods in the production of which any "oppressive child labor" has been employed.33 This applies to goods produced "in an establishment situated in the United States". Since there is nothing in the definition of "oppressive child labor"34 to limit applicability to employers engaged in the production of goods for commerce, these provisions are evidently applicable to every employer in the United States, whether he is engaged in intrastate or interstate activity. Of course, an employer engaged in intrastate commerce would not be subject to penalties unless he attempted to ship some of such goods in interstate commerce. But as soon as he did so, he would come within the purview of the Act, and would be subject to the specified penalties, which include denying interstate commerce to his goods, and rendering him liable for a fine of $10,000 and imprisonment for six months35 if he attempts such shipment. These penalties for violation may well cause an employer to observe the child-labor provisions even though he is engaged in purely intrastate production.

Constitutional Considerations

Delegation of Power—The outstanding instance of delegation of power

33See note 19, supra.
34See note 20, supra.
to the Administrator in the Act relates to wage orders. He is given authority by Section 8 \(^{298}\) to issue orders establishing the minimum wage, for any industry subject to the Act, above the absolute minimum set by the Act itself, but not above forty cents an hour. In order so to decree, however, he must first cause to be presented before an industry committee the evidence needed to justify such a wage order. The committee must then recommend the highest minimum-wage rates that, on the basis of economic and competitive conditions, it determines will not substantially curtail employment in the industry. Upon the filing of such report the Administrator must give notice to interested persons and an opportunity to be heard; moreover, he is required to approve the recommendations "if he finds the recommendations are made in accordance with the law, are supported by the evidence adduced at the hearing, and taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of the section" (italics supplied).

Subsection (a) declares the policy of the Act to be to reach, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of forty cents an hour. We have, then, as the intelligible principle for the guidance of administrative action the direction that the minimum-wage rate should be set at the highest figure, not exceeding forty cents an hour, which will not substantially curtail employment in the industry. The Administrator is not given any discretionary power to set a different rate than that recommended by the industry committee; he must either affirm the recommendation or disapprove it and refer the matter back to the committee.

In only three cases has the Supreme Court found an unlawful delegation of power in an Act of Congress. In the first of these, *Panama Refining Company v. Ryan*,\(^ {37}\) the delegation was unlawful because there was no legislative pronouncement as to when, or in what circumstances, the President was to prohibit the shipment of oil produced in excess of that allowed by the laws of a state. In *Schechter Poultry Corp. v. United States*\(^ {38}\) it was held that the "rehabilitation of industry and conservation of natural resources" was not a sufficiently intelligible principle to guide the President in approving and promulgating codes of fair competition, and that such a vague and indefinite standard would leave the President free to make law "virtually unfettered". In *Carter v. Carter Coal Company*\(^ {39}\) the objection was that the power to prescribe

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\(^{296}\)See note 11, *supra*.

\(^{297}\)293 U. S. 388 (1935).

\(^{298}\)295 U. S. 495 (1935).

\(^{299}\)298 U. S. 238 (1936).
minimum wages and maximum hours for a group was vested in a majority of the very group to be affected, and that this was clearly arbitrary delegation.

The type of delegation involved in the Act would not seem to be open to any of these objections. It is somewhat analogous to that upheld in Hampton v. United States,\(^4\) by which the President was authorized to ascertain the differences between the costs of production of domestic and foreign articles and to vary customs rates so as to equalize such differences. The following language in the *Ryan* case\(^4\) would seem to be apropos: "Moreover, the Congress may not only give such authorizations to determine specific facts, but may establish primary standards, devolving upon others the duty to carry out the declared legislative policy." There would seem to be no room for the objection that the power given the Administrator is an unconstitutional delegation of legislative power in view of the fact that the subject matter is clearly defined, the administrative action is strictly limited to cases where it will not substantially curtail employment, and the range of action is definitely restricted between limits of twenty-five and forty cents an hour.

The authority conferred on the Administrator to make reasonable classifications within an industry for the purpose of fixing minimum-wage rates\(^4\) stands upon substantially the same footing as the power to make wage orders and is governed by like considerations. Not only must the conclusion be found that the wage rate for each classification will not substantially curtail employment, but also that it will not give a competitive advantage to any group in the industry; and in determining whether such classifications should be made, the industry committee and the Administrator must consider the competitive conditions as affected by transportation, living, and productive costs, the wages established for similar work by collective bargaining contracts, and wages paid for like work by employers who voluntarily maintain minimum-wage standards. These factors, together with the policy of the Act, would seem to furnish a reasonably definite standard to guide the Administrator.

**THE ACT AS A REGULATION OF COMMERCE**

The most important constitutional question raised by the Act, and the one which goes to the very heart of the matter, is whether the Act can be held to be a *valid* regulation of interstate commerce.\(^4\) The

\(^{276}\) U. S. 394 (1928).

\(^{4}\) See note 37, *supra*.


\(^{4}\) The testimony of Robert H. Jackson, now Solicitor General, is illuminating with
answer depends on whether the Act is a *reasonably appropriate means* of regulating interstate commerce. The findings and declaration of policy in Section 2 announce the effect on interstate commerce attributed by Commerce to unduly low wages, long hours, and employment of child labor. While these findings will not preclude the Supreme Court from investigating for itself the relationship of cause and effect, they serve as a guide in determining the purpose of the legislation.

Although it has not been directly decided, there seems to be little room for doubt that the wage and hour provisions can validly be applied to employees *engaged* in interstate commerce. In 1917 it was held that Congress could regulate the hours of employees of an interstate carrier and could "freeze" wages at the current level pending settlement of a labor dispute. It has also been held that Congress, under the power to regulate commerce, can prohibit employers from interfering with the self-organization of employees and can provide that an interstate rail carrier must deal with employee representatives certified by a mediation board set up by Congress. If these are reasonably appropriate means of regulating interstate commerce because of the inhibition of labor disputes, the imposition of a minimum wage and of maximum hours would seem to be fully as relevant. Even as applied to those engaged in interstate commerce who are not employees of carriers, the enactment would seem to be appropriate to the protection of that commerce.

However, the application of the wage and hour provisions to employees engaged in the "production of goods for commerce" is on more dangerous constitutional ground. In an approach toward this aspect of the Act, the decisions in *Hammer v. Dagenhart* and *Carter v. Carter Coal Co.* arise as seeming barriers to its validity. If the employment of child labor in production does not have such a close and substantial relation to interstate commerce as to render control of it by Congress an appropriate means of regulating commerce, there is difficulty in perceiving wherein the wages and hours of employees engaged in production occupy a more favorable position.

regard to the constitutional bases of the bill as originally drafted. See *Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess. (1937)*, pt. 1, pp. 1-89.


*247 U. S. 251* (1918).

*See note 39, supra.*
In the *Carter case*\(^5\) the court condemned the labor provisions (including wage and hour provisions) of the Bituminous Coal Conservation Act,\(^6\) and the distinction between local production and interstate shipment was emphatically reiterated, the conclusion being reached that Congress had no regulatory power over the mining of coal although the coal was intended for interstate shipment.

However, the authority of these cases has apparently been weakened by subsequent decisions of the Court involving application of the National Labor Relations Act\(^5\) to certain employers. Although there has been no explicit overruling in this connection, the Court, nevertheless has demonstrated a different approach and a broader concept of the federal power under the commerce clause. Notwithstanding this, there is doubt whether the doctrine of the *Jones and Laughlin case*\(^5\) can be relied upon to uphold the Act. For although in that case the Court limited the statute to an interpretation which would sustain its constitutionality, that technique would seem to be difficult to apply in construing the present Act. In the *Jones and Laughlin case*\(^5\) the Court was careful to observe that the National Labor Relations Board was given jurisdiction only over labor practices "affecting interstate commerce".\(^5\) But the Fair Labor Standards Act is not confined to cases "affecting commerce"; it is applied to any employee engaged in the production of goods for commerce. While the Act does tend to lessen the likelihood of labor disputes, the Court, in order to uphold it on that basis, would have to find that a labor dispute in every such case had a direct effect on commerce. A prominent attorney, in criticizing the constitutionality of the Act has said: "Whether the power to regulate commerce includes the power to regulate production intended for commerce is not irrevocably settled. The National Labor Relations Board and Anti-Trust cases do not settle this: There the government must in each case show the directness of the burden or interference. Here the statute assumes it."\(^5\)

From the foregoing, however, it does not follow that the Act is unconstitutional. The Supreme Court has repeatedly emphasized the dis-

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\(^5\)Ibid.
\(^5\)Id. at 449, U. S. C. at § 151 (Supp. 1935).
\(^5\)Ibid.
\(^5\)Statement by John C. Gall, counsel for the National Association of Manufacturers. See Wage and Hour Reporter, Nov. 14, 1938, p. 3.
tinction between production and commerce, and the fact that articles are not in interstate commerce until they have passed the production stage and are transmitted in commerce is an axiom. Nevertheless, it has been recognized that certain conditions concerning the production of goods may have a direct relation to interstate commerce and thereby be subject to the regulation of Congress by appropriate legislation.

That the federal power extends to the regulation of methods of competition in interstate commerce is undeniable. The Sherman Act, the Clayton Act, and the Federal Trade Commission Act are all founded upon this power. The power of the Federal Government to regulate local conduct having a real and substantial relation to interstate commerce and tending to violate the Congressional policy of free competition and fair trade practices in interstate commerce has been upheld

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69 Id. at 717, U. S. C. at §§ 41-45 (1934); 48 STAT. 31 (1933), 7 U. S. C. § 610 (1934).
70 Loewe v. Lawlor, 208 U. S. 274 (1908), in which it was held that a combination of labor organizations to boycott an employer and prevent the sale of his goods unless he employed union labor was a violation of the Sherman Act, though the members of the combination were not themselves engaged in interstate commerce.
71 Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 (1925), which held that a strike of mine workers within a state and the damaging of the mine there located, with intent to diminish the supply of non-union coal in other states and thus prevent competition with "union coal", was a violation of the Sherman Act.
72 United States v. Brims, 272 U. S. 549 (1926), which held that a conspiracy of mill owners, contractors, and carpenters to employ only union carpenters, who would refuse to work upon millwork coming from non-union mills outside of the State, was a violation of the Sherman Act.
73 Bedford Cut Stone Co. v. Journeymen Stone Cutters Association, 274 U. S. 37 (1927), which held that a union boycott of stone worked upon by non-union labor, the intent being to curtail the demand for such stone in interstate commerce, was a violation of the Sherman Act, though the members of the union were not engaged in interstate commerce and the stone had come to rest within the state.
74 Brotherhood of Teamsters v. United States, 291 U. S. 293 (1934), which held that an association of wholesale poultry dealers in New York City conspiring to increase the price of poultry was a violation of the Sherman Act, though the object was effected by acts committed entirely within the state and after the poultry had come to rest within the state.
75 While the application of the Federal Trade Commission Act to acts occurring entirely within a state has been somewhat more limited than has the Sherman Act, the cause seems to be the terms of the statute rather than a lack of power by Congress to reach such practices. The Federal Trade Commission Act prohibits "unfair methods of competition in commerce", and the courts have interpreted this to exclude such methods pursued within a single state prior to the movement of the goods in interstate commerce. Nevertheless, the application of the Sherman Act to intrastate activity having a direct effect on interstate commerce would seem to indicate that Congress could give the Federal Trade Commission a broader jurisdiction. The jurisdiction of the Commission over persons
by the courts. Since Congress can prohibit "unfair methods of competition" and empower a commission to define and prohibit such practices, even though they may relate to action before or after the actual interstate commerce, no extension of that power seems necessary to hold that the use of sweatshop methods, the underpayment of labor, and the employment of child labor are unfair methods of competition in interstate commerce, and that these methods of competition can be prohibited by Congress as to employers engaged in the production of goods for commerce. This legislation, even as applied to a producer who ships only a small percentage of his product in interstate commerce, would seem to have a real and substantial relation to the protection of the majority of employers, who maintain decent labor standards from the competition of those making use of such unfair practices, and thus prevent the spread of such conditions among employers engaged in the use of interstate commerce.

What has been said concerning the wage and hour provisions applies as well to those concerning the employment of child labor, though in order to sustain the latter, the Court will need directly to overrule or distinguish *Hammer v. Dagenhart*. This fact was recognized during the committee hearings and it was there stated that one reason for the inclusion of the child-labor provisions in the same bill with the wage and hour provisions was to bolster the former against constitutional attack. The theory behind this thought is that a distinction might

engage in intrastate business has been upheld in cases in which the practice condemned had a direct effect on interstate commerce. See Federal Trade Commission v. Pacific States Paper Trade Association, 273 U. S. 52 (1927) (contract of sale between a purchaser and seller within the state, the goods having been shipped from a mill outside the state at the instance of the seller); Federal Trade Commission v. Wallace, 75 F. (2d) 733 (C. C. A. 8th, 1935) (an attempt by local retail coal dealers to coerce wholesalers from selling to local competitors of members of the association); Federal Trade Commission v. Smith, 1 F. Supp. 247 (S. D. N. Y. 1932) (practice of a utility holding company, which, though not engaged in interstate commerce, owned shares of subsidiary companies that, in turn, controlled operating companies of whose goods one fourth moved in interstate commerce). The Supreme Court, speaking of a method of inducing the sale of "penny variety" candy by use of a scheme which made the price thereof depend upon a number found on the inside of the wrapper, used language which may be prophetic. It was said: "But here, the competitive method is shown to exploit consumers, children who are unable to protect themselves. . . . For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair'." Federal Trade Commission v. Keppel & Bro., 291 U. S. 304, 313 (1934).

—See note 14, supra.

Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess. (1937), pt. 1, pp. 15, 16.
be afforded from the *Hammer case* inasmuch as the child-labor provisions in this Act are apparently part of one comprehensive plan to protect interstate commerce, and not an isolated measure having no direct relation to interstate commerce. This distinction may very well be drawn. Another ground for distinction is the fact that, unlike the situation in the *Hammer case*, the provisions of the Act show an attempt to regulate competition in interstate commerce. Indeed, the *Hammer case* has been said to have been overruled by the decision in *National Labor Relations Board v. Consolidated Edison Co.*, which held that an electric utility engaged in purely intrastate activity was subject to the jurisdiction of the National Labor Relations Board because of the disruptive effect a strike among its employees would have on interstate commerce. While there is doubt whether that decision can truly be said to overrule the *Hammer case*, it at least serves as a signpost illustrating the extent to which the federal power to regulate interstate commerce may be validly applied.

**DUE PROCESS OF LAW**

Even if the Act is found to be a valid exercise of the power to regulate commerce, its defenders will have to face the contention that it deprives certain employers of property or liberty without due process of law.

The nature and limitations of the requirements of due process have been lucidly enunciated by Justice Roberts. "The Fifth Amendment", he stated, "in the field of Federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of an admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation in the object sought to be attained." It was partly to meet the objection of lack of due process that the Act was drawn so as to give the Administrator the power to raise minimum wages up to a limit of forty cents an hour in any industry, and to make reasonable

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64See note 48, *supra.*
68See note 48, *supra.*
classifications in any industry for that purpose, rather than to impose a flat forty-cent rate for all industries. Likewise the modifications of the hours requirements as to seasonal and certain other industries and the relaxation of the minimum-wage requirements as to learners, apprentices, and handicapped workers indicate an attempt to avoid the arbitrary effect which rigid minimum-wage and maximum-hours stipulation would occasion. In view of the modest minimum requirements and the considerations which are to guide the Administrator in making a wage order there appears to be no room for the contention that the act is arbitrary as to any employer.

Nor would the contention that there is lack of due process because of the impairment of freedom of contract seem to be tenable. For while freedom of contract is included within the "liberty" guaranteed in the Fifth Amendment, the latter term does not designate an absolute right and is subject to restriction by a governmental regulation which is reasonable in relation to its subject and which is adopted in the interest of the community. This power of restriction in the public interest extends, moreover, to contracts between employer and employee. The appropriate nature of the wage, hour, and child-labor provisions as a means of protecting interstate commerce may be open to some debate though the factual record constructed by the committee hearings tends to substantiate the reasonable relevancy of them. However, if they are found to be so directly related to the protection of interstate commerce that they support the Act as a regulation of interstate commerce, their substantial relation to the protection of interstate commerce is determined, and the only due-process question which can arise is whether they are arbitrary as to some employers.

The fact that the legislative language is somewhat indefinite concerning the raising of wages would not appear to be violative of due process. The Administrator, upon the recommendation of the industry committee, is to fix the maximum minimum wage for an industry or a classification within an industry "which will not substantially curtail employment in the industry". While this language might be too in-

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71 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 391 (1937).
72 Id. at 379, 392 and cases cited.
73 "Even though Congress in the choice of means to effect a permissible regulation of commerce must conform to due process, it is evident that where, as here, the means chosen are appropriate to the permissible end, there is little scope for the operation of the due process clause." Stone, J., in Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515, 558 (1937).
definite if the provisions were self operating, it would seem to be sufficiently definite for the guidance of an administrative body where a hearing is required before any order can be made.74

WALTER D. MURPHY

74A standard too vague to sustain a self-operating legislative enactment may be sufficiently definite to guide administrative action where notice and hearing are required; Highland v. Russell Car & Snow Plow Co., 279 U. S. 253 (1929); Continental Baking Co. v. Woodring, 286 U. S. 352, 368 (1932).
NOTES

TESTAMENTARY LIBEL

If a suit for testamentary libel were brought today, how would the court decide? Would the estate be held liable? Or would the court turn thumbs down on the cause? The question is not posited in terms of personal liability of the executor, inasmuch as an executor or administrator has never been found personally liable; nor, so far as appears, has his liability ever been seriously suggested. The answer to the question, when it is answered, will be rendered doubly interesting in the light of the present paucity of cases on the point, and the exact numerical balance of the existing decisions.1

At common law the rule is that actio personalis moritur cum persona2; every real or personal action abated on the death of either the sole plaintiff or the sole defendant before verdict and judgment; and so the law remains unless modified by statute. Such statutes have become the rule rather than the exception, but it is necessary to note that, in most cases where provision is made for the survival of a cause, libel and slander are specifically excepted.3 Moreover, such statutes being in derogation of the common law, they should be strictly construed.4

However, in the first two cases5 to be decided, the court refused to follow the common law rule, or, to be more exact, refused to admit that it had any application to the particular problem. It was argued that, since there was no cause of action prior to the death of the testator, the publication of the will created a cause of action against the estate, which was considered to have accrued subsequent to the testator's death, and hence was not abated thereby.6 The executor, in probating the will, was considered to be the agent of the deceased; and the argument was advanced that the deceased must have intended the will to be published. In the older case7 in Pennsylvania, Gallagher's Estate, it is to be noted

1Holding the estate liable, Gallagher's Estate, 10 Pa. Dist. 733 (1900); Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584 (1914).


3Lord Ellenborough in Chamberlain v. Williamson, 2 M. & S. 408, 415 (K. B. 1814);


7Gallagher's Estate, 10 Pa. Dist. 733 (1900); Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584 (1914).


9The liability of a decedent's estate for libellous matter inserted by the decedent in his will is a subject which seems never to have attracted the attention of legal authors
that the Orphans' Court accepted jurisdiction only on the condition that the plaintiff agree to pay a debt, if found to exist, which was the subject of the presumptive libel. Even to a casual reader it appears that the court was willing to take jurisdiction in order to save the executor from the trouble of having to go into the plaintiff's home state to sue for the debt. In *Harris v. Nashville Trust Company*, the Tennessee court cited the *Gallagher case*, and concluded that, unless the old common law rule were disregarded, there would be a wrong committed, without a remedy.

The decisions in these two cases aroused some criticism, mostly derogatory. It was pointed out that the estate should not be bound because of the publication of the will by the executor, that there can be no agency where no principal exists, that agency is ordinarily ended by death, and not created thereby. Moreover, no tort can be based upon an act which is required by law, and the probating of a will is so required. The rule adopted in the *Harris case* and the *Gallagher case* would open the door to evasion of statutes which limit the amount certain beneficiaries may receive under a will. For example, suppose that *X* had an illegitimate son, *Y*, and that the statute prohibited such offspring from receiving more than one sixth of *X*'s property. *X* wills to *Y* one sixth of his property and inserts in the will that he does this in spite of the fact that *Y* is a liar and a thief, knowing that *Y* can disprove the statement. *Y* brings an action for libel, and gets damages therefor in addition to the statutory amount under the will. Also, to hold the estate liable would amount to a tax on the inheritance, rather than upon the testator. It would operate to punish the beneficiaries under the will, rather than the real offender. And, as pointed out by Lord Ellenborough:

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nor to have hitherto received adjudication." (Referring to the *Gallagher case.*) (1901) 15 Harv. L. Rev. 483.

*8128 Tenn. 513, 162 S. W. 584 (1914).*


*10J. Mechem, The Law of Agency (2d ed. 1914) § 26, n. 2; (1914) 23 Yale L. J. 534, 536.*


*12Moore v. Weston, 13 N. D. 574, 102 N. W. 163 (1904).*


*14D. C. Code (1929) Tit. 6, § 68; Ga. Code (1933) § 113-610 (3862); Tenn. Code Ann. (Williams, 1934) § 10942.*

*15(1931) 10 N. C. L. Rev. 88, 89; (1914) 23 Yale L. J. 534, 538.*

*16(1914) 23 Yale L. J. 534, 537; (1931) 10 N. C. L. Rev. 88, 89; (1935) 48 Harv. L. Rev. 1027, 1028.*
"Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased but not of their wrongs, except where these wrongs operate to the temporal injury of the personal state."\(^{17}\) (Italics supplied.)

It would be an exceptional and peculiar case in which it could be said that some pecuniary advantage resulted to the estate by reason of the libel.

Such was the state of affairs when the case of *Citizens' and Southern National Bank v. Hendricks\(^{18}\) came to trial in Georgia. On demurrer the trial court followed the common law and dismissed the action. However, the Georgia Court of Appeals reversed the lower court, stating:

"The probate of a will containing defamatory matter is a publication thereof creating a cause of action against the estate of the testator, which cause of action is considered to have accrued subsequent to the testator's death; hence it is not abated by his death."\(^{10}\)

This seemed to crystallize the rule established in the two earlier cases and to be conclusive of the trend in the United States. This fact was recognized, though criticized adversely.\(^{20}\) However, upon going to the Supreme Court of Georgia, the Court of Appeals was in turn reversed, and the precedent of the older cases in Pennsylvania and Tennessee was brushed aside with these words:

"If a paper executed as a will expresses libelous matter, and the act of the executor in propounding the will is relied on to complete the offense and afford ground for recovery against the estate, such reliance must fail, because the testator has died. If it be said that the act of the executor in propounding the will could be taken into account, the reply is that the executor was a creature or agency of the law to administer the estate, and was not the testator's representative in the continuation of the testator's wrong. The Court of Appeals erred in reversing the judgment of the trial court dismissing the action on general demurrer to the petition."\(^{21}\) (Italics supplied.)

With this decision there can be little serious disagreement in so far as settled law is concerned; and it has the added virtue of keeping the court out of the legislative field.

Apparently there has never been any attempt to saddle liability upon the back of the executor or administrator. It seems safe to say, that if the attempt is ever made, in the absence of a showing of express

\(^{17}\)Chamberlain v. Williamson, 2 M. & S. 408, 415 (K. B. 1814).

\(^{18}\)176 Ga. 692, 168 S. E. 313 (1933). Citation here is to the disposition in the Supreme Court of Georgia.

\(^{19}\)43 Ga. App. 408, 409, 158 S. E. 915, 916 (1931) (Quoting from 36 C. J. 1229, § 184).

\(^{20}\)(1931) 11 B. U. L. Rev. 575; (1931) 16 Minn. L. Rev. 93; (1931) 10 N. C. L. Rev. 88; Freifeld, Libel by Will (1933) 19 A. B. A. J. 301.

\(^{21}\)176 Ga. 692, 697, 168 S. E. 313, 315 (1933). See Note 18, supra.
malice, the effort will be useless. Moreover, a showing of malice would be futile in those jurisdictions which require him to publish the will. Even the court in the *Harris case* conceded:

"It was, of course, the duty of the executor to probate the will and for a suppression thereof criminal liability would have followed. . . . It is not a case, therefore, in which the agent, the executor, should be held to any liability—."22

In any event, the executor would be covered by the mantle of qualified privilege under the rule stated in *White v. Nichols.*23 It is there stated that a communication is privileged:

"Whenever the author and publisher of the alleged slander acted in the bona fide discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests."24

To adopt the finding of the court in the *Hendricks case* would make it even more difficult to hold the executor or administrator personally liable. For, once it is granted that he is "a creature or agency of the law—and—not the testator's representative—",25 though it were conceded that there was a publication by the law, it is apparent that such publication must be entitled, at least, to the same defenses as privilege. It requires no argument to show that, even assuming that there was an allegation of express malice as the true motive, such motive could not possibly be proved against an impersonal and inevitable requirement of the law. This is, of course, another way of saying that the executor should be protected by absolute privilege.

It was at this point that Pennsylvania re-entered the picture and in a well reasoned opinion, this time by the highest court of the state, turned its back upon the *Gallagher case* and, upon a completely new ground, decided against holding the estate liable.

"We believe that the rule which makes the pleading in a judicial proceeding absolutely privileged may properly be applied to a will in which there is no apparent purpose to injure the reputation of anyone, but merely a purpose to insure the distribution of the testator's estate to his intended beneficiaries and to protect it from possible claims of persons whom he does not desire to share in the distribution."

(Italics supplied.)

Though the court stated that the publication of a will should be absolutely privileged, it is evident from the rest of the opinion that the

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122 Tenn. 573, 579, 162 S. W. 584, 585 (1914); see *In re Payne’s Estate*, 290 N. Y. Supp. 407, 414 (Surr. Ct. 1936). "... the petitioning executor should be, as a matter of public policy, absolutely privileged and protected from personal liability. . . ."

123 How. 266 (U. S. 1844).

124 Id. at 286.

126 Ga. 692, 697, 168 S. E. 313, 315 (1933).

court had always an eye to the circumstances of this particular case as justifying the testator to act as he did. Therefore, rather than taking the case as a precedent for a holding of absolute privilege, it would seem safer to say that the case stands for a holding of qualified privilege.

It has been suggested that the difficulty could be solved by deleting the offending portion of the will. However, several courts have held that they have no authority to strike out a part of a will, and the weight of authority is against allowing the expunging of even the non-dispositive portions. Of course, the dispositive words of a will must be kept intact. And a further consideration of this suggestion reveals that in many cases it would amount to no more than a substitution of one problem for another—which words are dispositive and which are non-dispositive—are the offending words necessary to show the testator's intent—and numerous other problems which might arise from the facts in a particular case for which deletion would not furnish a solution. The most obvious criticism of this remedy is, of course, that before the court can reach any decision as to whether to expunge or not, the libel has already been published when the will is offered for probate.

It has been argued that public policy demands a remedy for this

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28 Woodruff v. Hundley, 127 Ala. 640, 29 So. 98 (1900); In re Pforr's Estate, 144 Cal. 121, 77 Pac. 825 (1904).
30 "Now libelous matter contained in a will, whether the same is dispositive in nature or not, may be an unequivocal guide as to what actuated the testator in making a particular distribution. To illustrate, suppose the testator were to say in his will: 'I bequeath to my illegitimate nephew, Richard Roe, the sum of $1.00.' He might go so far as to say that, because of the fact of Richard's illegitimacy, he does not want him to benefit as a distributee of his bounty. To help Richard's case along, let us assume that the testator is mistaken in casting the taint of illegitimacy upon him. The objectionable language could be stricken, true, but it is obvious that in such case, the court would be undertaking to write the testator's will. If the court could do this on its own initiative, and did so, with the motivating language elided, Richard, not being fully advised in the matter, might feel that there was a sound basis for contesting the will. The court would then be placed in the unenviable position of having concealed facts material to such a suit." Freifeld, Libel by Will (1933) 19 A. B. A. J. 301, 302.

Mr. Freifeld also puts the question as to what the court would do if the testator left more to the one libelled than to other beneficiaries, out of sympathy for him because of the condition which is the subject of the libel. Could the libelled party take the extra largesse and, having gained one advantage through the will, also sue for another because of the libel? Id. at 302.

31 In re Payne's Estate, 290 N. Y. Supp. 407, 414 (Surr. Ct. 1936), "... it is necessary for the court to consider the libelous portions of the will in order to eliminate them..."; In re Draske's Will, 290 N. Y. Supp. 581 (Surr. Ct. 1936); Freifeld, Libel by Will (1933) 19 A. B. A. J. 301, 302.
method of wronging a living person. This can be nothing more than a make-weight proposition, because on this score the scales are about evenly balanced. Certainly it would seem that some action by the law-making body would be necessary to change a rule so old in the law as actio personalis moritur cum persona, rather than the resort by the courts to a play upon words to create a newly accrued cause of action where none existed before. Moreover, the argument that justice demands a remedy would apply equally well to many other individual situations for which the courts do not create a remedy in response to the need thereof. Even in the case of libel, no one would contend that if the deceased had published the libelous statement before his death that his estate could be held liable. Yet, in such circumstances, he might have been governed by the most active malice and the need of a remedy would be even greater than in the cases considered here.

A cause of action already subsisting and living dies with the person. How can it logically be said that if the wrong comes to life after the death of the party, and yet must be related back to the deceased in order to give it effectiveness, that such cause of action can return through the period of death unscathed when otherwise it would die with the person? One cannot elect to take only the attributes of a thing which are pleasing to him—if he selects that thing, all of its attributes cling to it (in this case, one of them being abatement). Why should an act of agency, if the executor can be considered the agent of the testator, be given more weight than a deliberate and malicious act completed by one before his death?

Gallagher's Estate, 10 Pa. Dist. 733 (1900); Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584 (1914). "Indeed, it is not unimaginable that even in the orderly administration of the law there are circumstances where it may be possible that pure logic must in some small measure yield to righteous indignation." Citizens and Southern National Bank v. Hendricks, 43 Ga. A. 408, 413, 158 S. E. 915, 917 (1931), rev'd. 176 Ga. 692, 168 S. E. 313 (1933).

In re Payne's Estate, 290 N. Y. Supp. 407, 413 (Surr. Ct. 1936), "... it would seem to be for the public good that the property of any decedent should be disposed of, at his death, in an orderly and lawful manner, despite his abusive..."

"It is conceded, as it must be, that at common law cause of action for slander or libel do not survive the death of either the wrongdoer or the person injured, wherefore, if there be any such survival, it must be by force of a sufficient statute." Catchings v. Hartman, 178 Miss. 672, 174 So. 553 (1937).

Suppose an act committed after death gives rise to a tort against the decedent. For example, A digs a ditch and then dies. X comes along and falls into the ditch and is injured. Or A hires B to assault C and then dies. B then commits the act. Shall leniency be shown only in the case of testamentary libels? (1931) 11 B. U. L. Rev. 575, 576.

But the result reached in the instant case (Hendricks case, before reversal by the Supreme Court of Georgia), however desirable, seems hard to support on established
The Nagle case indicates a satisfactory basis for decision even in the absence of legislative enactment. While, perhaps, not going to the extent of laying down a rule of absolute privilege, it would seem best to pursue a middle course, and hold that publication in a will is qualifiedly privileged so as to require an affirmative showing of express malice on the part of the testator. Of course, this does not remove the objection that the living heirs or beneficiaries are made to bear the burden of the decedent's offense, nor does it limit the extent of publication, as would expunging the offending portion of the will. This merely indicates all the more the need for legislative study so as to blend and incorporate into statute, as far as possible, the good features of all the suggested cures, and to provide therein a remedy for proper cases. But until that time arrives, it is well to consider that the last two cases, representing fifty per cent of the authority, have held that

common law principles. If the tort is not committed until after death, how can an action against the decedent's estate be justified? And if the wrong occurred during the tort feasor's lifetime, the cause of action falls within none of the common law exceptions which survive.” (1931) 16 Minn. L. Rev. 93, 94. (Parenthetical matter supplied.)

“Even if by a fictitious relation of time, such as a disselee may invoke in bringing suits after re-entry, the publication be carried back to his lifetime, the objections of abatement still apply.” (1901) 15 Harv. L. Rev. 483, 484.

*It is to be noted, as was pointed out in the text, supra, that while the trial court in the Nagle case used the words "absolutely privileged" and that the reasoning of the trial court was adopted verbatim by the Supreme Court of Pennsylvania, yet it is evident from a consideration of the opinion as a whole that the court, all the while, was speaking of the special circumstances of the case before it, wherein the testator had shown "no apparent purpose to injure the reputation of anyone..." While using the term "absolutely privileged", it seems apparent that the court was speaking the language of "qualified privilege".

*(1935) 48 Harv. L. Rev. 1027, 1028. “One may publish, by speech or writing, whatever he honestly believes is essential to the protection of his own rights, or to the rights of another, provided the publication be not unnecessarily made to others than to those persons whom the publisher honestly believes can assist him in the protection of his own right, or to those whom he honestly believes will, by reason of a knowledge of the matter published, be better enabled to assert, or to protect from invasion, either their own rights, or the rights of others intrusted to their guardianship.” Towsnheed, Slander and Libel (3d ed. 1877) 351, 352. “...the burden of proof rests on the party claiming to have been slandered to show that the communication was malicious.” Newell, Slander and Libel (4th ed. 1924) § 341. Louisiana Oil Corp. v. Renno, 173 Miss. 609, 616, 157 So. 705, 708 (1934).

“If the executors under such circumstances, in the performance of their duties as executors, may, with impunity, allege the illegitimacy of a claimant, it is difficult to see why the testator himself, foreseeing the claim of a pretended child, may not caution his executors to defend his estate against such a claim.” Nagle v. Nagle, 316 Pa. 507, 511, 175 Atl. 487, 489 (1934) (Court is quoting the trial judge whose opinion the Supreme Court of Pennsylvania adopted). Compare White v. Nichols, 3 How. 266 (U. S. 1844); Bailey v. Holland, 7 App. D. C. 185 (1895).
the estate is not liable. In view of the fact that the *Hendricks case* was decided in the face of, and contrary to, the *Harris case*, and that *Nagle v. Nagle* arose in the same state as *Gallagher's Estate*, it would seem that a new trend, and a more logical one, is indicated.

JOHN F. MCCARTNEY
WAGE-FIXING BY ADMINISTRATIVE AGENCIES—
LEGISLATIVE OR JUDICIAL?

IN THESE days of minimum wage laws, both state and national, the
question represented by the title of this article is bound to become
of pressing importance. The answer to it is necessary in order to
determine the type of hearing which must be held by an administrative
agency before its order fixing wages can be made effective. In deter-
mining the type of hearing necessitated by the due process clauses of
the Fifth and Fourteenth Amendments, certain fundamental principles
must be kept in mind. The first, and most elementary, is that the
hearing prescribed by the statute creating the agency must be given in
all cases. In the absence of statutory requirement, or if the statute
simply requires a hearing without describing its nature, the question as
to the type of hearing required may be answered only in relation to
the function to be discharged by the agency. If the function be purely
legislative, the parties to be effected are entitled only to such hearing
as a legislature would give when considering legislation. But if the
function partakes in any way of a judicial nature, a full and complete
hearing of a judicial character must be given, which hearing must in-
clude not only the right to be heard but also the right to know and to
controvert the evidence of the other side.

The first case involving this matter of wage-fixing has already arisen
in the United States District Court for the District of Minnesota. In
Western Union Telegraph Company v. Industrial Commission of Minne-
sota,1 a three judge federal court granted a temporary injunction against
enforcement by the Industrial Commission of an order prescribing
minimum wages for women and children engaged in telegraphic and
related industries. In this case it was the contention of the plaintiff, in
whose behalf fourteen other employers were permitted to intervene, that
the Commission, in prescribing wages without a judicial hearing at which
the plaintiff would have had knowledge of the evidence and a chance
to controvert it, was depriving it of its property without due process
of law in violation of the Fourteenth Amendment. On the other hand,
the Industrial Commission, in whose behalf the Minnesota Federation
of Labor intervened, contended that no such hearing being required by
the Minnesota statute creating the Commission,2 none was necessary
under fundamental principles of due process. Under authority of the
statute creating the Commission, it had had an investigation made by
an Advisory Board of eleven members, five suggested by the Minnesota
Employer's Association, and five by the Minnesota Federation of Labor,

with the eleventh member appointed by the other ten. Without holding public hearings this Advisory Board made its report and recommendations to the Industrial Commission. The Commission, after public notice, held a public hearing at which all interested persons were invited to appear and give evidence, but no evidence by or on behalf of the Commission was introduced, the facts found by the Advisory Board were not revealed, no witnesses were sworn or examined, and no documentary evidence of any kind was introduced.

Finding the above facts as to the nature of the hearing granted, the court upon general principles of equity, particularly that of a balance of conveniences, granted a temporary injunction pending the full argument of the case on the question of whether or not a hearing of a judicial character was required under the Fourteenth Amendment. It was apparent to the court from Morgan v. United States\(^4\) and Ohio Bell Telephone Company v. Public Utilities Commission,\(^4\) which establish the test of the adequacy of the hearing demanded when a commission is exercising a quasi-judicial function, that the hearing given by the Industrial Commission was inadequate if one of a judicial nature was required.

Thus this same court during the present term will have to face squarely, and give an answer to, the question which is the title of this article. The weakness of analogies and the confused state of the principles of administrative law, which is yet in its infancy, make most difficult, if not futile, an attempt to predict the final answer if the case should ever reach the Supreme Court of the United States.

In the case of a statute like the one in question in the Western Union case, the nature of the hearing required as a condition precedent to action by an administrative agency is to be determined only by the nature of the contemplated action. It has been laid down as a governing principle that if the contemplated action is the promulgation of a general rule operative in the future upon all persons similarly situated, such action is quasi-legislative, and as a condition precedent the administrative body need give only such a hearing as a legislature would be accustomed to give them considering proposed legislation. The classic case coming under this heading is Norwegian Nitrogen Products Company v. United States,\(^6\) wherein Mr. Justice Cardozo, speaking for the Court, characterized the act of the Tariff Commission and the President, in changing the tariff under the Tariff Act of 1922, as a part of the legislative process. Then, speaking of the hearing required by the Act

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\(^4\)304 U. S. 1 (1938).
\(^5\)301 U. S. 292 (1937).
\(^6\)288 U. S. 294 (1933).
to be given by the Commission before it should make its recommendations to the President as to changes in the tariff, he went on to say:

"The inference is, therefore, a strong one that the kind of hearing assured by the statute to those affected by the change is a hearing of the same order as had been given by congressional committees when the legislative process was in the hands of Congress and no one else. To be sure there has been a change of sanction. What was once mere practice has been converted into a legal privilege. But the limits of the privilege were not meant to be greatly different from those of the ancient practice that had shaped the course of legislation."8

But when the contemplated action would involve adjudication of private rights of particular persons and companies, the action is quasi-judicial, and a hearing must be in the nature of a judicial proceeding.7

The difficulty involved in this whole question arises from an exception grafted onto these principles, perhaps even before judges and lawyers were conscious of the principles themselves. As early as 1890 the Supreme Court of the United States in the case of Chicago, M. & St. P. Ry. v. Minnesota created this exception by the use of the following language:

"The question of reasonableness of a rate of charge for transportation by a railroad company, involving as it does the question of reasonableness both as regards the company and as regards the public is eminently a question for judicial investigation requiring due process of law for its determination."8

Using this statement as a springboard the courts have jumped to the conclusion that there is something so different about rate-making, even though the rates be fixed in general for all service by all parties in a given area, as to require a judicial hearing, even though when tested by definition such action would be called legislative. In fact, in most cases where it is necessary to characterize the rate-making function, it is denominated "legislative". The case of Prentis v. Atlantic Coast

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8Id. at 305. Accord: Butterfield v. Stranahan, 192 U. S. 470 (1904).
7Londoner v. Denver, 210 U. S. 373 (1908), special benefit assessments; Southern Ry. v. Virginia, 290 U. S. 190 (1933), order to eliminate grade crossing; Pantazes v. Hays, 15 F. Supp. 1053 (N. D. Iowa 1936), alien deportation; Ott v. Board of Registration in Medicine, 276 Mass. 566, 177 N. E. 542 (1931), revocation of license to practice; Central Ohio Lines v. Public Utilities Comm., 123 Ohio St. 221, 174 N. E. 765 (1931), denial of certificate of convenience and necessity.
8134 U. S. 418, 458 (1890). The peculiar facts of this case, in that the Minnesota statute authorizing rate-making by the Railroad Commission attempted to make such action final and to deny to parties affected any judicial review, may be an explanation of the attitude of the court in insisting upon the judicial nature of the inquiry in this, the first of the rate-making cases. But it must be stated that the classification of rate-making cases is rather illusory in that in deciding such cases the courts have shied away from precedent and have relied on the facts of each particular case.
Line Company is very clear on this point. Speaking for the Court, Mr. Justice Holmes said:

"Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind."  

Accepting this statement given so categorically, one would say that in making rates an administrative body was acting in a quasi-legislative capacity, and that, therefore, only a legislative hearing was necessary. That this conclusion does not follow may be shown by many cases, but by none better than the first Morgan case, in which Mr. Chief Justice Hughes calls rate-making legislative in one part of the opinion, but is careful to say that such a proceeding has special attributes so as to make necessary a judicial hearing. His actual language follows:

"It is a proceeding looking to legislative action in the fixing of rates of market agencies. And, while the order is legislative and gives to the proceeding its distinctive character . . . , it is a proceeding which by virtue of the authority conferred has special attributes. . . . A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi-judicial character."  

It is obvious that the exception in favor of rate-making procedures is well established. What will be the attitude of the courts on the question of procedures of administrative bodies charged with the duty of fixing prices and wages is a question which only the future can answer. Arguing by analogy, it would be possible to hold that price-fixing and wage-fixing by administrative agencies, like rate-making, should be treated as quasi-judicial functions. This seemed to be the inclination of the court in the Western Union case, where, in addition to relying principally on rate-making cases as authority, the court expressed this opinion:

"To determine what constitutes a minimum living wage for women and minors employed in Minnesota under the standards fixed by the Minimum Wage Law of the State of Minnesota would seem to call for something more than mere administrative or executive action. It would seem to require the gathering and weighing of evidence and the exercise of judgment in determining important, difficult and controversial questions of fact. Unless the action of the Commission in this regard is executive merely, its procedure must include a full hearing, and there must be evidence."  

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"211 U. S. 210 (1908).
10 Id. at 226.
12 Id. at 479, 480.
13 Id. at 479, 480.
It is needless to say that because of the newness of the question there is a great scarcity of cases involving a determination of the character of price-fixing and wage-fixing activities of administrative bodies. There has been found but one authoritative case in point, State Board of Milk Control v. Newark Milk Company.\textsuperscript{14} This was a case of an application for an injunction by the Milk Control Board to restrain continued violations by the defendant of the New Jersey Milk Control Law.\textsuperscript{15} The injunction granted in the lower court was affirmed by the Court of Errors and Appeals. On appeal it was contended on behalf of the defendant that in fixing the retail price of milk the Board had acted upon its own investigation and without a judicial hearing, and that, therefore, its order was void. The court disposed of this contention by describing such regulation as a purely administrative function, and added:

\ldots and, even when exercised by a subordinate body, upon which it is conferred, the notice and hearing essential in judicial proceedings is not indispensable to a valid exercise of the power.\textsuperscript{16}

The court insisted that the requirements of due process are met if there is available a review by the courts as to the reasonableness of the order.

It might be thought that Highland Farms Dairy v. Agnew\textsuperscript{17} is authority on this point, but in that case the statements of the court holding that price-fixing is legislative and that a judicial hearing is not required are dicta, and were not passed on by the Supreme Court on appeal. The case was resolved on the point that even after notice the plaintiff had not availed itself of the opportunity to be heard at the hearing offered, and thus had no status to complain as to the character of that hearing.

Thus we find ourselves with three cases touching on the question of price-fixing and wage-fixing which are basically the same thing and governed by the same principles. One of these cases, the New Jersey milk case, is authority for the distinction set out earlier between quasi-legislative and quasi-judicial functions of administrative agencies. Another, The Highland Farms case, contains strong dicta on the same point when the three judge federal court in Virginia in discussing the price-fixing function of the State Milk Commission said:

"The proceeding before the Milk Commission was not quasi-judicial, but legislative. It is true that the act made provision for a public hearing . . . ; but this hearing was to be of the same nature as that held by a legislative committee in considering proposed legislation."\textsuperscript{18}

\textsuperscript{14}118 N. J. Eq. 504, 179 Atl. 116 (1935).
\textsuperscript{15}N. J. Laws 1933, c. 169.
\textsuperscript{16}State Board of Milk Control v. Newark Milk Co., 118 N. J. Eq. 504, 523, 179 Atl. 116, 126 (1935).
\textsuperscript{17}16 F. Supp. 575 (1936).
\textsuperscript{18}Id. at 586.
On the other hand we have the case that prompted this discussion, the *Western Union* case, wherein the three judge federal court in Minnesota, while not directly passing on the question, inclined to the belief that the analogy to the rate-making cases should be controlling.

What will be the final determination of this question is, of course, not apparent, but it depends upon whether, when the question is presented to the United States Supreme Court, the Court will be persuaded by the analogy between rate-making and wage-fixing, and require a judicial hearing in the latter case as it now does in the former. It might be interesting to note in conclusion that the Fair Labor Standards Act of 1938\(^\text{18}\) requires that the Administrator before giving his approval to the recommendations of an industry committee shall, after notice to interested persons, give them an opportunity to be heard, but does not describe in any way the nature of the hearing, or the requirements thereof. It is therefore possible that this Act may give rise to the case that will determine the answer to this question, if the Administrator should decide to give only a legislative hearing before issuance of a wage order.

G. P. O'GRADY

RECENT DECISIONS

ADMINISTRATIVE LAW—Delegation to Board of Power to Revoke Physicians’ Licenses

Plaintiff was a duly licensed physician and surgeon associated with the Koch Cancer Clinic in Detroit. On or about May 1, 1936 he caused to be written, printed and circulated a pamphlet entitled, “Can Tuberculosis be Cured?”, in which the following statement was made: “The Koch antitoxin makes it possible to bring about a complete recovery from tuberculosis, not only in mild forms of the disease, but in far advanced cases that would otherwise be given up as hopeless.” On May 19, 1936 the respondent served upon the petitioner a notice to appear before the Board at its June 10, 1936 meeting, to show cause why his license to practice medicine, surgery and midwifery should not be revoked or suspended for violation of Mich. Comp. Laws (1929) § 6739, providing that, “The board of registration of medicine may refuse to issue or continue a certificate of registration or license provided for in this section, to any person guilty of grossly unprofessional and dishonest conduct. The words ‘unprofessional and dishonest conduct,’ as used in this act, are hereby declared to mean: * * * (d) All advertising of medical business in which grossly improbable statements are made * * *.” On June 2, 1936 petitioner filed a petition for writ of prohibition to restrain the board from proceeding with the hearing to determine whether his license should be revoked or suspended, and on June 11, 1936, an order to show cause was entered by the Supreme Court of Michigan. In respondent’s answer to the order it was shown that on June 11, 1936 the board conducted a partial hearing on the complaint against petitioner. Petitioner claimed that the portion of the act authorizing the revocation or suspension of a medical license because of advertising containing grossly improbable statements was unconstitutional and void, and that by reason of that fact the respondent board was about to exercise a discretion which had not lawfully been given to it. The respondent contended that a writ of prohibition should not issue to restrain the board from action pursuant to statutory authority, and that the delegation of authority to the board to determine grossly improbable statements was proper.

After stating that the issuance of the writ in this case depended largely upon the constitutionality of the statute under which the board was acting, the Court held, “In our opinion, the terms used in the statute have a definite and well recognized meaning. It would be quite impossible for the legislature to enumerate all of the specific statements which might be grossly improbable. The determination of what constituted ‘grossly improbable statements’ can best be left to those who have the education and experience, such as the medical board. Such delegation of power is properly vested in the State board of registration in Medicine.” Warnhuis v. State Board of Registration in Medicine, 281 N. W. 410 (Mich. 1938).

That a state may, in the exercise of the police power, regulate the practice of medicine, is well established. Dent v. West Virginia, 129 U. S. 114 (1889); Hawker v. New York, 170 U. S. 189 (1898); Reetz v. Michigan, 188 U. S. 505 (1903); McNaughton v. Johnson, 242 U. S. 344 (1917). The constitutionality of a statute granting a board of examiners power to revoke a physician’s certificate was carefully and exhaustively considered in State ex rel. Chapman v. State Board of Medical Examiners, 34 Minn. 387, 389, 26 N. W. 123, 124 (1885), where it was said, “The radical fallacy in this chain of argument is the assumption that the revocation of such a license is the exercise of judicial power. . . . It has never been held that the granting, or refusing to grant, such a license as this was the exercise of judicial power; . . . and there is no possible distinction in this respect between refusing to grant a license and revoking one
already granted. Both acts are an exercise of the police power. . . . Therefore the same body which may be vested with the power to grant, or refuse to grant, a license, may also be vested with the power to revoke." *Meffert v. State Board*, 66 Kan. 710, 72 Pac. 247 (1903), *aff'd without discussion*, 195 U. S. 625 (1909).

And the weight of authority is to the effect that a statute providing for the revocation of the license of a physician, or surgeon, or dentist by an officer, board, or commission therein designated is not rendered invalid because the grounds for revocation are stated in the statute in general terms. *Yoshisawa v. Hewitt*, 52 F. (2d) 411, (C. C. A. 9th, 1931), quoting with approval a statement, also quoted in the principal case, from Notes (1920) 5 A. L. R. 94 to this effect. But see *Czarra v. Board*, 25 App. D. C. 443, (1905), holding that so much of the Act of Congress of June 3, 1896, 29 Stat. 198, (1896), as authorized the board of medical supervisors of the District to revoke the license of a medical practitioner upon conviction of "unprofessional or dishonorable conduct," independently of other offenses, was void for uncertainty. The statute in no way defined "unprofessional or dishonorable conduct", and the court said that the phrase was not defined by the common law, nor did the words have any common or generally accepted signification. "What conduct may be of either kind remains, as before, a mere matter of opinion." *Id.* at 451.

As to the question of delegation of legislative power to a board, the rule is that a statute providing for revocation of a physician's license on the ground of unprofessional, dishonest, or dishonorable conduct is not open to that objection, where the act defines such conduct within reasonable, that is, practical limits. In the case of *In re Van Hyning*, 257 Mich. 146, 156, 241 N. W. 207, 208 (1932), when the statute defined "unprofessional and dishonest conduct" to be "having professional connections with, or lending one's name to an illegal practitioner," the Court stated that this definition "leaves nothing to the judgment of the board as to what shall constitute cause for revocation, and definitely enough informs the defendant in advance what acts of professional misconduct may bring about a forfeiture of his license to practice medicine. No more is necessary to satisfy the constitutional requirements." See also *Bennett v. State Board*, 211 Ind. 678, 7 N. E. (2d) 977 (1937). *Contra, Schireson v. Walsh*, 354 Ill. 40, 187 N. E. 921 (1933), but the statute considered in that case attempted to confer upon a state board the power to determine what was a legal question, *i.e.*, what constituted a prima facie case for the revocation of a physician's license, without defining in any way the meaning of "prima facie case".

The principal case is consistent with the modern trend of authority. Power to determine questions of professional ethics, and to recognize professional misconduct, is properly delegated to a board of professional experts, where the statute conferring the power sufficiently defines the limits and outlines the scope of that power. It would, however, seem the part of common fairness to expect the board to illuminate the vagueness of the statute at the earliest possible date by the issuance of regulations, capable of easy amendment, defining with as much particularity as is practicably possible, the acts, or types of acts, that will be deemed violative of the statute, so that the individual may be forewarned and relieved of the risk of acting first and hoping that the views of the regulatory body concerning the propriety of the action will coincide with his own.

JEREMIAH F. MAHONEY.

CORPORATIONS—Parent as General Creditor of Bankrupt Subsidiary

In June 1936, W. A. Henry and another, trustees of the United Telephone and Electric Company, majority stockholder of the United Stores Company which had
been adjudged a voluntary bankrupt May 28, 1936, filed a claim against the bankrupt for $592,350, principal, and $93,979.69, interest, based on a promissory note issued by the bankrupt under date of January 31, 1934. The trustee of the bankrupt, Dolley, and fifteen of its creditors filed exceptions to the claim, setting up as one of the grounds that from the time of its incorporation the bankrupt had been operated as a mere "department, agent, or instrumentality" of the telephone company. Held, claim allowed but subordinated to the claims of other general creditors, the court saying, "It is abundantly clear from the evidence that from May, 1933, on, the relations between the telephone company and the bankrupt were so intimate, the control of the former over the latter so dominating, and the business and assets of the two so commingled, that to recognize the corporate entity of the two companies and to permit the telephone company to assert its claim against the bankrupt on a parity with other general creditors of the bankrupt would work a gross fraud and injustice upon such creditors." Henry v. Dolley et al., 99 F. (2d) 94 (C. C. A. 10th, 1938).

As a general rule a corporation is treated as an entity separate and distinct from its stockholders. This view has been followed where the corporation is a subsidiary of another corporation which is the sole or majority stockholder. Martin v. Development Co. of America, 240 Fed. 42 (C. C. A. 9th, 1917); Berry v. Old South Engraving Co., 283 Mass. 441, 186 N. E. 601 (1933); Ballantine, Separate Entity of Parent and Subsidiary Corporations (1925) 14 Calif. L. Rev. 12. The parent and subsidiary may, however, be treated as constituting but a single entity where the latter can be said to be merely an agency, instrumentality, or adjunct of the former. 1 Fletcher, Cyclopedia of Corporations (perm. ed. 1931) § 43; see cases collected in (1919) 1 A. L. R. 610, and (1925) 39 A. L. R. 1071. The courts have not always been clear as to the standards applied in reaching a conclusion regarding the relationship between a parent and subsidiary corporation, though it is well settled that corporate entity will be disregarded where not to do so will defeat public convenience, justify wrong, protect fraud, or defend crime. Dunnett v. Arn, 71 F. (2d) 912 (C. C. A. 10th, 1934); see Douglass and Shanks, Insulation from Liability through Subsidiary Corporations (1929) 39 Yale L. J. 193.

It is generally recognized that such control as is normally exercised by a stockholder is not sufficient to render the subsidiary the instrumentality of the parent; Owl Fumigating Corp. v. California Cyanide Co., Inc., 30 F. (2d) 812 (C. C. A. 3rd, 1929); nor is the fact that the two corporations have common directors and officers sufficient, without more, to establish the necessary domination. Majestic Co. v. Orpheum Circuit, 21 F. (2d) 720 (C. C. A. 8th, 1927); Taylor et al. v. Standard Gas & Electric Co. et al., 96 F. (2d) 693 (C. C. A. 10th, 1938). The attitude of the courts is well exemplified in the Taylor case, supra, at 704, where the court states, "There is respectable authority for the proposition that to justify the application of the instrumentality rule between parent and subsidiary corporation, there must be present, in addition to the elements of control through stock ownership and common directorates and officers, elements of fraud and wrongdoing on the part of the parent corporation to the detriment of the subsidiary and third persons in their relations to the subsidiary."

Where, as in the principal case, the parent corporation seeks to prove a claim as a general creditor of the bankrupt subsidiary corporation, the claim may be disallowed on either of two general grounds. First, where the parent corporation is not a bona fide creditor of the subsidiary corporation—as where advances of money are made by the parent to the subsidiary with no intent to create a contractual obligation, New York Trust Co. v. Island Oil and Transport Corp., 34 F. (2d) 655 (C. C. A. 2d, 1929); or where the subsidiary corporation was inadequately capitalized at the outset and subsequent advances by the parent corporation are considered as capital contributions
rather than contractual obligations between the two corporations, Albert Richards Co. v. The Mayfair, 287 Mass. 280, 191 N. E. 430 (1934). Second, where the subsidiary corporation is a mere instrumentality, agent, or adjunct of the parent corporation, this result being reached on the general ground that a debtor may not prove a claim in his own bankruptcy. Centmont Corporation v. Marsch, 68 F. (2d) 460 (C. C. A. 1st, 1933); In re Kentucky Wagon Co., 71 F. (2d) 802 (C. C. A. 6th, 1934).

It is interesting to note that the fiction of separate legal entity will be sustained by the court in cases where there is no public policy which demands a restriction of the doctrine. For example, in Marsch v. Southern New England R. R., 230 Mass. 483, 120 N. E. 120 (1918), where X, a creditor of solvent subsidiary corporation, B, attempted to sue the parent corporation, A, the court refused to pierce the corporate veil on the ground that the two corporations were separate legal entities. Upon B's bankruptcy at a later date, the claims of A and X having been allowed, X contended that the parent, A, was not entitled to share equally with other creditors because of the close relationship between the two corporations. The court sustained X's contention, holding that the judgment in favor of A against X in the prior litigation did not bar X from asserting priority over A in the assets of B, since the issue of the existence of contract liability during solvency was not identical with the right to claim as a creditor after bankruptcy of the "instrumentality" subsidiary.

Viewed in the light of the foregoing, it appears that the instant case is soundly decided and would seem to be indicative of an increasing judicial willingness to disregard separate corporate personalities where the organizations, though in form distinct, are in management and control so fused as to constitute a single business unit, and where to do otherwise would result in injustice to third parties.

J. RICHARD BRINDEL.

CRIMINAL LAW—Double Jeopardy—Discharge of Jury Without "Manifest Necessity"

Defendant pleaded not guilty to an indictment and a jury was sworn to try him. Before evidence was taken, the state's witnesses were excused at noon for lunch; and having failed to return by 2 P. M., the prosecuting attorney moved that a juror be withdrawn and a mistrial declared. The court granted the motion over the defendant's objection. Upon a subsequent arraignment, accused pleaded former jeopardy but the plea was overruled and defendant convicted and sentenced. Held, upon appeal, that the defendant having been in jeopardy at the first trial the discharge of the jury without a manifest necessity for such discharge was tantamount to an acquittal, and therefore the plea of double jeopardy was good. State v. Little, 197 S. E. 626 (W. Va. 1938).

The rule is well established that jeopardy begins when the jury is sworn and charged. 1 BISHOP, CRIMINAL LAW (9th ed. 1923) 1014; and after jeopardy has thus attached, the defendant has a right to have the jury pass upon his case and render their verdict. Allen v. State, 52 Fla. 1, 41 So. 593 (1906). However, where a manifest necessity for discharging the jury presents itself, the defendant cannot claim an acquittal if the jury is discharged. United States v. Perez, 9 Wheat. 579 (1824). Just what constitutes a "manifest necessity" has never been abstractly defined. The exigency must arise from the circumstances of each particular case. Gruber v. State, 3 W. Va. 699 (1869).

As to the case under discussion, the weight of authority is that the discharge of the jury on account of the inability of the prosecution to proceed with the trial because of matter affecting witnesses operates as an acquittal, the reason being that it is not a
case of "manifest necessity." Cornero v. United States, 48 F. (2d) 69 (C. C. A. 9th, 1931). The absence of a "manifest necessity" for a discharge of the jury is well illustrated by the case of State v. Calendine, 8 Iowa 288 (1859) (jury discharged because name of state's witness was not indorsed on indictment); People v. Barrett, 2 Caines 304 (N. Y. 1805), (juror withdrawn because prosecutor would not produce a note); Allen v. State, supra, (juror discharged because of absence of witness for the prosecution); Mount v. State, 14 Ohio 295 (1846), (nolle prosequi was entered after jury had been sworn). A few cases, on the other hand, hold that a discharge of the jury under similar circumstances will not operate as a bar to further prosecution of the offense charged. United States v. Coolidge, Fed. Cas. No. 14,858 (1815); State v. Nelson, 7 Ala. 610 (1845); State v. Parker, 66 Iowa 586, 24 N. W. 225 (1885). The English courts seem to follow the minority view. Regina v. Charlesworth, 1 Best & Sm. 460, 121 Eng. Rep. 786 (1861).

The two federal cases of United States v. Watson, Fed. Case No. 16,651 (1868), and United States v. Coolidge, supra, serve to illustrate just how the question of whether or not there is a "manifest necessity" present must be decided upon the facts of each particular case. In the former case a juror was withdrawn because of the illness of the prosecutor and the absence of one of his witnesses; while in the latter case, the prosecutor moved to discharge the jury because one of his witnesses refused to be sworn, having conscientious scruples against taking an oath. The two cases are distinguishable on the basis that while the absence of a witness is of such common occurrence that the prosecution should guard against such a contingency, the refusal of a witness to be sworn is so unusual that the prosecutor cannot be expected to foresee it. Notes (1931) 74 A. L. R. 803, 807, 808.

It has been suggested that a statutory enumeration of cases of "manifest necessity" might help to alleviate the situation; but such recommendation completely ignores the fact that no legislature could possibly foresee all the contingencies which may arise to give birth to "manifest necessities." In the case under consideration, a statute provided that in any criminal case the court could discharge the jury when it appeared that they could not agree on a verdict, or that there was a manifest necessity for the discharge. W. Va. Code Ann. (Michie & Sublett 1937) § 6196. Obviously, the statute was of no help to the court in determining whether or not this was a case of "manifest necessity."

MICHAEL KEEGAN.

LABOR LAW—N. L. R. B.—Rules of Evidence in Procedure—Findings Based on Incompetent Evidence

The National Labor Relations Board brought suit to enforce an order directing the respondent to cease and desist from unfair labor practices and to reinstate three employees, with back pay, and without prejudice to their seniority rights. The Board had found that respondent refused employment to, discharged, and refused to reinstate them because of union membership or activities. Held, respondent had not discriminated against the employees as charged. National Labor Relations Board v. Bell Oil & Gas Co., 98 F. (2d) 406 (C. C. A. 5th, 1938), rehearing denied, 98 F. (2d) 870 (C. C. A. 5th, 1938).

On petition for rehearing, the case is summed up as follows: "In one instance, in the case under review, the sole evidence to support an essential finding of the Board was the incompetent evidence quoted in our opinion. In the others, there was no sub-
stantial evidence to support essential findings. Therefore, as a matter of law, the order was deemed invalid."

It would follow naturally from the distinction drawn by the circuit court, that but for its incompetence, the evidence would have been substantial support for the finding in the one instance. That substantial is not synonymous with competent is apparent from the opinion, in which it is stated, "It is elementary that questions respecting the competency and admissibility of evidence are entirely distinct from those which relate to its effect or sufficiency. ** * * **

That substantial evidence is necessary to support the findings of an administrative tribunal has consistently been held by the courts and does not seem to admit of argument. The relation of competency to substantiability of evidence is not clearly defined by the circuit court's opinion.

Speaking of evidence after the controversy has reached the judicial stage, the circuit court stated, "... that it must be competent and relevant is the general rule which remains in effect in the absence of a legislative intent to the contrary." The court seems to regard no legislative intent controlling the problem other than the restraint placed upon it by § 10 (e) of the Act which provides that the findings shall be conclusive if supported by evidence. 49 Stat. 449 (1935), 29 U. S. C. § 160 (Supp. 1938). The court states that the word "evidence" in this connection refers to the means by which any alleged matter of fact is established or disproved in a court of justice. Speaking of the same paragraph, the court in Ballston-Stillwater Knitting Co. v. N. L. R. B., 98 F. (2d) 758, 760 (C. C. A. 2d, 1938), said, "The statute means that the Board's findings are conclusive if supported by substantial evidence."

A review of prior cases will serve to indicate the general rule as there laid down. In Spiller v. Atchison, Topeka & Santa Fe Ry., 253 U. S. 117 (1920), a case growing out of an order of the Interstate Commerce Commission, the Supreme Court recognized that much of the evidence was hearsay. It held that the order was not to be rejected because based in part on hearsay evidence if the evidence was received without objection and was substantially corroborated by other evidence original and admissible against the parties affected. In Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268 (1926), in which objection was made that some evidence was improperly considered, it was held that a determination by the Interstate Commerce Commission is conclusive if supported by substantial evidence. In Montrose Oil Refining Co. v. St. Louis-San Francisco R. R., 25 F. (2d) 750, 754 (N. D. Tex. 1927), aff'd, 25 F. (2d) 755 (C. C. A. 5th, 1928), cert. denied, 277 U. S. 598 (1928), it was held in regard to the Interstate Commerce Commission that, "Its orders are not invalidated by its refusal or failure to adhere to the strict rules of evidence obtaining in the courts. The evidence hereinafter referred to substantially sustains its findings, and they must stand here for what they are worth." And in John Bene & Sons, Inc. v. Federal Trade Commission, 299 Fed. 468, 471 (C. C. A. 2d, 1924), the court said, "We are of the opinion that evidence or testimony, even though legally incompetent, if of the kind that usually affects fair minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done."

In the principal case it is not clear whether the court feels that incompetent evidence may not be used at all to support a finding. Some of its statements seem so to indicate. It says, "Hearsay and non-expert opinion evidence may not be used in this court as a basis to support the findings of the Board upon which rests an order sought to be enforced." Nor does it confine itself to incompetent evidence of the above type. It seems to take in the entire field when it says: "If the Board should base its finding solely upon evidence obtained by an unconstitutional search, the order resting thereon would be invalid, because such evidence is incompetent."
It is difficult, however, to accept the view that the circuit court wishes to construe the general rule as completely excluding incompetent evidence from consideration. Such a position would be clearly out of accord with the cases cited as well as unnecessary for the determination of the present case since the challenged finding here was based entirely on incompetent evidence, viz. hearsay, and non-expert opinion. It is preferable, if that construction may be given it, to interpret the court's attitude as leaving undetermined the extent to which, short of entire reliance thereon, it will permit a finding to be based at all on incompetent evidence.

It will be of interest to note how far the courts will go in sanctioning incompetent evidence when the occasion arises, as a result of the *dicta* in the Supreme Court decision in *Consolidated Edison Company of New York, Inc. v. N. L. R. B.*, 39 Sup. Ct. 206, 216 (1938). Mr. Chief Justice Hughes, in delivering the opinion of the Court, said: "The companies contend that the Court of Appeals misconceived its power to review the findings and, instead of searching the record to see if they were sustained by 'substantial' evidence, merely considered whether the record was 'wholly barren of evidence' to support them. We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive', means supported by substantial evidence. **** Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The companies urge that the Board received 'remote hearsay' and 'mere rumor.' The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling'. The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. **** But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

For a case where *corroborated* hearsay was held to be "substantial evidence", see *Spiller v. Atchison, Topeka & Santa Fe Ry., supra; Cf. Stephens, Administrative Tribunals and the Rules of Evidence* (1933) 22.

In the principal case the Board did not ask *certiorari*, and the ninety days available to it for that purpose under the rules of court have passed. If the circuit court's contention is correct that the sole evidence to support the finding in the one instance was the incompetent evidence quoted in the opinion, it is likely that *certiorari* would not have changed the result since the quoted evidence hardly seems to meet the test of substantiality given in either the *Consolidated Edison case*, or the *John Bene & Sons, Inc. case*. By so declaring the circuit court could have avoided all reference to the incompetent evidence with its resultant confusion.

JOHN H. FREIFIELD.

MUNICIPAL ORDINANCE—Prohibition of "One Man" Cars—Constitutionality

The City and County of San Francisco passed an ordinance in 1918 prohibiting the operation of "one-man" street cars. The Market Street Railway Company, an operator of cars in San Francisco for forty-two years, was, in 1935, failing financially because of competition from the municipally owned street railway system. Conceiving that bankruptcy could be averted by use of "one-man" cars, the Company secured a decree of the District Court perpetually enjoining the enforcement of the ordinance of 1918 on the ground that it was invalid as applied to the greatly improved "one-man" cars.
of 1935. On appeal held, the ordinance was a valid exercise of the police power and did not contravene the prohibitions of the Fourteenth Amendment. City and County of San Francisco et al. v. Market Street Ry., 98 F. (2d) 628 (C. C. A. 9th, 1938).

To understand why the court upheld the outlawing of "one-man" street cars of 1935, it is necessary to know how the decision was reached. In determining whether there was a reasonable relationship between the end sought and the means employed, the court adopted a self-denying attitude, holding that its independent judgment was limited to the question of whether the plaintiff had sustained its burden of overcoming the constitutionality of the ordinance or whether "the question was fairly debatable." Because of the supposed error of the special master in assuming that the district court could exercise its independent judgment on the law and the facts, the court ignored the findings of the master that the improved "one-man" cars are safer than "two-man" cars; that they are used in principal cities, and are approved by experts and many public utility commissions throughout the United States, including that of California. No significance was attached to the fact that the findings were supported by substantial evidence, the court holding that they need not accept them, even if they had been based on the correct law.

A refusal, by a reviewing court, to consider the evidence and facts relied upon to show the invalidity of a police power measure, is error, unless the evidence and facts cannot conceivably establish that the action of the legislature is arbitrary and unreasonable. Nashville, C. and St. L. Ry. v. Walters, 294 U. S. 405 (1935). Mr. Chief Justice Hughes in Borden's Co. v. Baldwin, 293 U. S. 194, 210 (1934), said, "With the notable expansion of the scope of governmental regulation . . . it becomes necessary for the Court to deal with the facts . . . , they should be presented concretely with appropriate determinations upon evidence so that conclusions shall not be reached without adequate factual support."

Public safety being a legitimate police power purpose, the court was able to find, by relying on facts presumably within its own knowledge, that men might reasonably differ on this choice of means, and thus, the legislative will must prevail. By coupling together the rebuttable presumption of a statute's validity and a disregard of facts to show its invalidity, the presumption became a conclusive rule of law and the doctrine of legislative absolutism was affirmed.

That doctrine has long been repudiated. In Dobbins v. Los Angeles, 195 U. S. 223, 235 (1904) it was contended, "... that the act of the municipality in question cannot be reviewed because so to do would be a substitution of the judgment of the Court for that of the Council on a matter within the exclusive control of the legislative body." Mr. Justice Day pointed out that the language used in Munn v. Illinois, 94 U. S. 113 (1876), to the effect that the legislature is the exclusive judge of the propriety of the police regulation when the matter is within the scope of its power, "... had reference to the facts of the particular case and was certainly not intended to declare the right of . . . a City Council to arbitrarily deprive the citizen of rights protected by the Constitution under the guise of exercising the police powers . . . ."

The court disregarded the cost and financial consequences to the plaintiff. Cost of compliance with safety laws is a proper consideration in determining whether such laws are arbitrary and repugnant to the Fourteenth Amendment. Missouri P. R. R. v. Norwood, 283 U. S. 249 (1931). When the burden of advancing the public convenience is laid upon a particular individual, there must be a reasonable relation between the cost to the individual and the advantage to the public. Nashville, C. and St. L. Ry. v. Walters, supra. In Shreveport v. Shreveport Ry., 38 F. (2d) 945, 946 (C. C. A. 5th, 1930) the appellee showed that it could realize a profit only by using "one-man" cars. The court said, "There could be no doubt that on the showing made appellee
is entitled to relief.” The court, speaking of Sullivan v. Shreveport, 251 U. S. 169 (1917), in which a “two-man” ordinance was held valid—a decision strongly relied upon in the instant case—said, “It is evident that the... case was not intended to go further than to hold that the ordinance was valid as applied to conditions existing at the time... one-man cars were still in the experimental stage... in 1917... Today they are in operation in 103 of 106 cities in the United States... larger than Shreveport.” A valid statute may become invalid by change in the conditions to which it is applied. Chastleton Corp. v. Sinclair, 264 U. S. 543 (1924); Nashville, C. and St. L. Ry. v. Walters, supra.

In the case at hand the court dwelled upon the fact that although the improved “one-man” cars were as safe as “two-man” cars, it was not shown that they would not be even safer manned with two men. Undoubtedly three men on a car would secure still greater safety and convenience to the public. If the legislature may close its eyes to necessities and compel the employment of an additional man on an admittedly safe street car, merely because his presence conduces in some degree to the further safety of the public, it can require the addition of any number of men for the same reason. All such acts would be valid, regardless of the consequences to the employer. Absolute safety is impossible of attainment. In striving for comparative safety the cost and other elements of disadvantage must be considered. If the purpose of safety is served only slightly or incidentally by the legislative act, its operation is unreasonable and arbitrary. Penn. Ry. v. Driscoll, 330 Pa. 97, 198 Atl. 130 (1938). “A city may not impose unnecessary restrictions upon lawful occupations under the guise of protecting the public interest.” Shreveport v. Shreveport Ry., supra, at 946.

If the power of judicial notice is as unrestricted as the use of it in this case infers, the court might have noticed that although the ordinance was theoretically the act of the State, it was actually the order of municipal authorities who had a definite interest in driving their chief competitor in street railway business into bankruptcy. “The question in each is whether the legislature has adopted the statute in exercise of a reasonable discretion or whether its action be a mere excuse for the... oppression or spoilage of a particular case.” Holden v. Hardy, 169 U. S. 366, 398 (1898).

Disregarding the evidence and findings, the court said in the instant case, “... the time has not yet come when the utility of the 'one-man' car has been so far demonstrated as to limit the legislative discretion.” Thus, by recognizing the probative value of usage only and conceding the legislature's power to prohibit use, the legislative will was made supreme.

The decision upholds an unwarranted interference with a lawful occupation. It is a step backward.

RANDAL D. FOSTER.

TAXATION—Income Tax—Improvements by Lessee—When Taxable

The petitioner seeks to recover an amount paid as a deficiency assessment made by the Commissioner of Internal Revenue as additional income tax for 1931. The assessment had been levied on account of improvements made to his property by a lessee, such improvements having been held to be income to the lessor in the year of annexation to the extent of their estimated value at the termination of the lease. The petitioner had purchased the real estate in 1927, and in September, 1930 had leased it for use as a moving picture theatre for a term of ten years, beginning upon completion of improvements to be made. It was agreed between the lessor and lessee that the lessor was to pay for the contemplated improvements up to a specified limit,
and that the lessee was to be responsible for the balance. The lessee also agreed to install the equipment necessary for the successful operation of a modern theatre to become the property of the lessor at the termination of the lease. The work was completed and the lessee took possession of the property on February 1, 1931. The deficiency assessment was based upon the estimated depreciated value at the termination of the lease of the alterations and improvements paid for by the lessee. The Commissioner disallowed a claim for a refund, and the Court of Claims sustained the assessment on the ground that the improvements, when completed, became the property of the lessor and constituted compensation paid by the lessee as additional rent for the use of the leased premises. The petitioner claims that, where improvements are made by a lessee, there is no realization of gain at the time the improvements are completed, and that the increase in value is not income but a capital addition. The Government insists that, assuming the improvements to be income to the lessor at some time, the soundest theory seems to be that such income is taxable at the time the improvements are made. Held, the estimated depreciated value of the improvements made by the lessee was not income to the lessor in the first year of the lease, since the amount included in the total value of the structure reasonably to be attributed to the improvements after use for ten years is not ascertainable by the simple calculations employed by the Commissioner. M. E. Blatt Company v. United States, 59 Sup. Ct. 186 (1938).

The Income Tax Act of 1916 provided, "The net income of a taxable person shall include gains, profits, and income derived from ... sales, or dealings in property, whether real or personal, ... also from interest, rent, dividends ... or gains ... from any source whatsoever:" 39 Stat. 757 (1916). Similar provisions have been carried in successive income tax acts.

For a time after 1916 the Commissioner of Internal Revenue treated improvements that became the property of the lessor when made upon leased land by a lessee as income to the lessor to the extent of their value at the termination of the lease. U. S. Treas. Reg. 33, Art. 4.

But then in Miller v. Gearin, 258 Fed. 225 (C. C. A. 9th, 1919), cert. denied, 250 U. S. 667 (1919), the existing treasury regulation was declared invalid, and it was held that permanent improvements by a lessee were not taxable income of the lessor at termination of the lease. In rendering its decision the court unnecessarily stated that, assuming the improvements to be income derived from the use of property, the time when it was derived was the time when the completed building was added to the real estate and enhanced its value, and, therefore, was taxable income in that year. To the same effect was Cryan v. Wardell, 263 Fed. 248 (N. D. Cal. 1920).

When certiorari was denied in Miller v. Gearin, a change in the regulation was necessary, and, relying on the dictum in that case, the regulations were changed to provide that, when permanent improvements were made by a lessee, the lessor received taxable income at the time such improvements were completed, to the extent of the fair market value of such improvements subject to the lease. Provision was also made for adjustment of the amount in case the termination of the lease was accelerated or the property destroyed. U. S. Treas. Reg. 46, Art. 48. A later amendment gave to the lessor the alternative of spreading over the life of the lease the estimated depreciated value of such improvements at the expiration of the lease, reporting an aliquot part as income for each year of the lease. U. S. Treas. Reg. 62, Art. 48.

In many cases the Board of Tax Appeals affirmed the validity of the new regulations. Brown's Appeal, 4 B. T. A. 1129 (1926); Crosby's Appeal, 4 B. T. A. 1147 (1926); Cataract Ice Co. v. Commissioner, 23 B. T. A. 654 (1931); Hewitt Realty Co. v. Commissioner, 29 B. T. A. 1205 (1934), rev'd, 76 F. (2d) 880 (C. C. A. 2d, 1935). The new regulations also found some approval in the courts. United States v. Boston &
Providence R. R., 37 F. (2d) 670 (C. C. A. 1st, 1930), did not present a question of improvements to realty, but the court drew on the doctrine of Miller v. Gearin by way of analogy to bolster its decision. In Crane v. Commissioner, 68 F. (2d) 640 (C. C. A. 1st, 1934), the majority of the court approved the doctrine of Miller v. Gearin, as incorporated in the regulations, in refusing petitioner’s request for a rehearing of a decision of the Commissioner fixing a deficiency in petitioner’s income tax return for 1927 for failure to report depreciated value of improvements. Improvements had been made by lessee in 1921 and property was sold by lessor in 1927. Petitioner tried to deduct the adjusted value of improvements made by his lessor, but was refused, since he had never reported the same as income. Mr. Justice Morton concurred, but doubted the validity of the existing regulation. He based his decision on the ground that the sale of the premises fixed petitioner’s gain from the transaction, and the gain became taxable as income when it was received in 1927.

However, in Hewitt Realty Co. v. Commissioner, supra, a decision of the Board of Tax Appeals was reversed and the existing regulation declared invalid. Here the petitioner had leased premises and the lessee had erected a new building. The lessee was still in possession under the lease, and the lessor had been assessed a deficiency in his income tax return for failure to declare the value of the improvements. It was held that the gain to the lessee was not taxable income because it was not separately disposable and it had not been realized.

Dominick v. United States, 24 F. Supp. 829 (S. D. N. Y. 1938), presented a case in which the lessor had repossessed and re-let the premises upon which the first lessee had erected improvements. The plaintiff claimed that his gain could not be computed until realized by sale, while the government argued that his gain was realized when he regained possession. The court relied upon dicta in the Hewitt case and held that improvements were not such gain as to be taxable income until the gain was realized by sale.

The result of the decisions, especially since none had the outright approval of the Supreme Court, was that lessors of land on which improvements had been made by a lessee were in a quandary as to whether or not they were liable for income tax in any given situation. Miller v. Gearin, arising in California and silently approved by the Supreme Court, held that improvements were not taxable income at termination of the lease, intimating that they were taxable at time of construction. Hewitt v. Commissioner, arising in New York, held that improvements by the lessee were not taxable income when constructed, strongly intimating that the gain was not taxable until realized by sale, while in Crane v. Commissioner, from the Massachusetts Circuit, the doctrine of Miller v. Gearin was approved, although the concurring opinion of Mr. Justice Morton based the decision on other grounds. Finally, Dominick v. United States, from a New York District Court, held that improvements by a lessee were not taxable income when the lessor had repossessed the premises and re-rented. With different decisions in different circuits and no final decision by the Supreme Court, the tax payer was in a dilemma; should he play on the safe side and make return for the improvements and claim a refund, or should he wait for the government to assess a deficiency? In either case he was faced with expensive litigation to determine his liability.

The instant case does not go very far in solving the problem, since the Court carefully limited its decision to the determination of whether or not under the facts involved the estimated depreciated value of the improvements as of the end of the term was income to the lessor, and negatived any intention of approving any of the theories of a lessor’s liability. However, after deciding that the cost of the lessee’s improvements could not be considered as rent, because its payment was uncertain both
as to amount and time, and that the findings failed to disclose any basis of value on
which to lay an income tax or the time of realization of taxable gain, the Court dis-
cussed some assumptions which may lead to a final solution of the problem. In the
principal opinion, Mr. Justice Butler stated that, assuming that the improvements in-
creased the value of the building, such an increase was an addition to capital, and not
realized income within the meaning of the statute. He further stated that, assuming
that the value of the improvements would be income to the lessor at some time, it
could not be assessed for the year of installation, since the lessor had no right to use
or dispose of them during the term. Even the force of the dicta is weakened by the
concurring opinion of Mr. Justice Stone, who briefly announced that he limited his
decision to an acquiescence in the finding that the facts did not establish that the lessee's
improvements resulted in an increase in the market value of the lessor's land in the
taxable year, and that he did not join in so much of the opinion as discussed what the
result would be if an increase in value had been established.

JOHN C. HARRINGTON.

TORTS—Attractive Nuisance Doctrine—Effect of Age of Child

A boy of almost fifteen years was electrocuted when a wire cable which he was
pulling, and which was used to lower a mast arm holding a light bulb, came in
contact with an uninsulated high-voltage wire, the cable, mast arm and wire all being
attached to defendant's electric transmission line pole. Held, under the doctrine of
attractive nuisance, the question of the boy's contributory negligence was for the jury
and that even though "unquestionably his meddling with the cable set in motion the
sequence of events that caused his death," it should not be held as a matter of law
that his negligence contributed to his death. Ekdahl v. Minnesota Utilities Co., 281
N. W. 517 (Minn. 1938).

This decision exemplifies the tendency, in those jurisdictions recognizing the doctrine
of attractive nuisance, to raise the age limit of children to whom the doctrine will
apply. In Railroad Co. v. Stout, 17 Wall. 657 (U. S. 1873), a case generally con-
sidered as the pioneer in recognizing the doctrine in the United States, the child was
only six years of age. Thirty-two years later in Belt Ry. Co. v. Charters, 123 Ill. App.
322 (1905), it was said that an examination of the cases showed that in nearly every
instance the injured child was less than ten years of age. Then in Briscoe v. Henderson
Lighting & P. Co., 148 N. C. 396, 62 S. E. 600 (1908), the court found no case in
which a boy thirteen years of age, with the usual intelligence of boys of that age, had
been permitted to rely upon the doctrine. Later, in Shaw v. Chicago & A. R. R., 184
S. W. 1151 (Mo. 1916), counsel unearthed one case applying the doctrine to a fourteen-
year-old boy. However, the court said that case was exceptional in its facts. Then
in 1920 a Minnesota court allowed recovery in the case of a fifteen year old boy. Erickson
v. W. J. Gleason & Co., 145 Minn. 64, 176 N. W. 199 (1920). In this decision, which was relied upon by the court in the instant case, the boy was classed
as a child of "immature years."

This classification of a "child of immature years" must be taken to be synonymous
with that of a "child of tender years", the classification pronounced in Railroad Co. v.
Stout, supra, and followed almost unanimously by the courts in subsequent cases in-
volving the attractive nuisance doctrine.

While only one case, Erickson v. Gleason, supra, can be found to sustain the applica-
tion of the doctrine to the boy in the instant case, many decisions deny its application
to children of about the same age, or younger, and this solely on the basis of their age. The maximum age, it is held, cannot exceed that of a "child of tender years" or some equivalent classification. These decisions are representative of courts widespread over the United States. In Branan v. Wimsatt, 54 App. D. C. 374, 379, 298 Fed. 833, 838 (1924), cert. denied, 265 U. S. 591 (1924), a girl of twelve and one-half years was refused recovery, the court saying that the doctrine declared in Railroad Co. v. Stout, supra, excludes minors "... who have reached the age of discretion, or who, knowing the hazard, assume the risk of doing that which will emperil their lives or limbs. ..." In Abbott v. Alabama Power Co., 214 Ala. 281, 107 So. 811 (1926), the doctrine was considered inapplicable in the case of an intelligent boy over fifteen years of age. In Wallace et al. v. Great Western Power Co. of Cal., 204 Cal. 15, 266 Pac. 281 (1928), a twelve year old boy was held guilty of contributory negligence as a matter of law. In Central of Georgia R. R. v. Robins, 209 Ala. 6, 95 So. 367, 369 (1923), it was held as a matter of law that a fifteen year old boy was not within the class to whom the defendant owed the duty invoked. In Kent v. Interstate Public Service Co., 97 Ind. App. 13, 168 N. E. 465 (1929), recovery was not allowed to a healthy boy of fourteen years and five months at the time of his injury because he was therefore sui juris under the law of Indiana and chargeable as a matter of law with the consequences of his acts as an adult. In Gamble v. Uncle Sam Oil Co., 100 Kan. 74, 163 Pac. 627 (1917), it was held that even assuming that a motor truck may be regarded as an attractive nuisance in some cases, it could not be so regarded in the case of an intelligent boy about 15 years of age. It was said in Barnhill's Adm'r v. Mt. Morgan Coal Co., 215 Fed. 608 (E. D. Ky. 1910), that the age limit of "children of tender years," which includes only those who are too young to understand and appreciate danger, cannot go beyond fourteen, and in Louisville & N. R. R. v. Hutton, 220 Ky. 277, 287, 295 S. W. 175, 179 (1927), it was said, "We have found that the courts everywhere refuse to apply the attractive nuisance doctrine, where the infant was as much as, or more than, fourteen years of age." Later Kentucky cases sustain this view; Wright v. L. C. Powers & Sons, 238 Ky. 572, 38 S. W. (2d) 465 (1931); Lipscomb v. Cincinnati, N. & C. St. Ry., 239 Ky. 587, 39 S. W. (2d) 991 (1931); and Columbus Min. Co. v. Napier's Adm'r, 239 Ky. 642, 40 S. W. (2d) 285 (1931), where the doctrine was held inapplicable to a fifteen year old child, the presumption that a child of such age is outside the protected class being conclusive. This view was also taken by an Oklahoma court, where it was said, obiter, that a boy past fourteen was not entitled to the protection of the doctrine. Pollard v. Oklahoma City Ry., 36 Okla. 96, 128 Pac. 300 (1912).

While the courts do not allow the application of the doctrine, under ordinary circumstances, where the child is as much as fourteen years old, the age limit may be raised if it is proved that, on account of his undeveloped mental condition, the child is entitled to be classified with those for whose benefit the doctrine was created. Louisville & N. R. R. v. Hutton, supra; Codell Const. Co. v. Campbell's Guardian et al., 248 Ky. 1, 57 S. W. (2d) 1010 (1933); Dennis' Adm'r v. Kentucky & W. Va. P. Co., 258 Ky. 106, 79 S. W. (2d) 377 (1935). In the instant case the mentality of the boy involved was not discussed.

In refusing to apply the doctrine to a girl of fifteen and one-half years, it was said, in Shaw v. Chicago & A. R. R., supra, that the basis of the doctrine is that the injured party is of such tender years that the "attractive nuisance" would so appeal to childish impulses as, in a sense, to constitute an invitation, and that such appeal should be forseen and care taken to prevent evil consequences.

Bearing the foregoing statement in mind, and considering the fact that in this day, education is not only available to all, but compulsory in most jurisdictions, with the natural result that children today should reasonably be expected to be even more
disciplined in their actions and more capable of readily anticipating the consequences thereof than children of the period in which the doctrine was formulated, it seems logical to conclude that the trend to increase the age limit of those whom the doctrine protects, should be curtailed and that the courts, in cases where the child is as old as the one in the instant case, should be extremely cautious in applying the rule, lest the doctrine be extended to cover the "unreasoning and natural impulses" of persons close to voting age, as was attempted by counsel in Texas Power & Light Co. v. Burt, et al., 104 S. W. (2d) 941 (Tex. 1937). There the "child" sought to be brought within the protection of the doctrine was eighteen years and four months old, five feet eleven inches tall, weighed 148 pounds, was in third year of high school, and of average intelligence for a boy of his age. He had climbed an electric light tower of the power and light company and been shocked by a high tension wire. Although the appellees insisted that the case came within the doctrine of attractive nuisance, the court held the boy was not of such tender age as to bring him within the rule.

JACK W. DURANT.

TORTS—Recovery for Death Due to Mental Shock

This was an action commenced by Rasmussen, but revived and continued by his wife, his administratrix, for damages arising from the sale of a sack of poisoned bran. Benson sold the poisoned bran, not labeled as "poison", to Rasmussen, who fed the bran to his dairy cows and other live stock. Five of the cows died and other live stock was made sick as a result of the feeding. Rasmussen's business was destroyed. It was alleged that as a result of the great mental and nervous shock caused by the poisoning of his live stock, loss of his business, and the fear of communicating the illness to his dairy customers, the distinct probability of which was borne out by expert witnesses, he became fatally ill and died. According to medical testimony, his death resulted from a decompensated heart, caused by excessive emotional disturbance. Held, Rasmussen's death was proximately caused by the negligence of Benson. Rasmussen v. Benson, 280 N. W. 890 (Neb. 1938).

The court, in the instant case, is confronted with the problem of attaching liability for damages for a physical injury resulting from an emotional disturbance produced by the negligence of another although not accompanied by a contemporaneous injury. The older, more conservative courts denied recovery for any emotional disturbances suffered in such circumstances, basing their denials upon the opportunities for fraud on the part of the plaintiff and the difficulties of the defendant in rebutting the plaintiff's claims. Mitchell v. Rochester Ry., 151 N. Y. 107, 45 N. E. 354 (1896); Reed v. Ford, 129 Ky. 471, 112 S. W. 600 (1908); Braun v. Craven, 175 Ill. 401, 51 N. E. 657 (1898).

However, in 1931 a more liberal interpretation of the New York rule declared in Mitchell v. Rochester Ry, supra, though not overruling it, is indicated by a decision allowing recovery to a woman passenger in one of two colliding cars, who after the slight impact stepped from the car presumably uninjured, only to fall in a faint, thereby fracturing her skull. The court held that, "where there has been a physical impact, even though slight, accompanied by shock, there may be a recovery for damages to health caused by shock, even though that shock was the result produced by the impact and fright concurrently." Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431 (1931).

It was observed that claimants were going into court seeking damages for the slightest of impacts and attributing thereto consequent emotional disturbances difficult of objective proof. Consequently the "technical impact" theory was soon found
The instant case is quite patently an extension of the Doctrine of Causation. If the decision is grounded on damages resulting from shock flowing from the loss of Rasmussen's business and consequent bankruptcy, its scope is somewhat narrow but still represents a sizeable extension, in that it allows recovery for emotional disturbance caused by loss of property, whereas, the earlier cases were concerned with fear for personal safety. If founded on Rasmussen's fear for injury to his customers, it greatly extends the orbit of responsibility. The fear in Hambrook v. Stokes Bros., supra, and Bowman v. Williams, supra, was a fear for the safety of members of one's immediate family. In the case at hand, the bounds were extended beyond family ties, encompassing persons of no intimate relation.

Vincent G. Dougherty.
BOOK REVIEWS


I have always thought that cartoonists are remarkable people because they can communicate so much with such little effort on the part of the reader. Now, I do not wish to be misunderstood in thus comparing Professor Taylor's book to a series of cartoons. I intend, in a way, to be highly complimentary. Most people would very likely agree, however, that the best cartoons are not those which supply information but are rather those which place an interpretation on casual information derived from sketchy observations of the experience of others.

The first chapters in Professor Taylor's book contain a certain amount of concise information and include with deft, skillful touches the epitome of social movements and the main thoughts of social philosophers as springboards from which he immediately jumps into counter movements and contrasting thought. He does not begin his thesis with a detailed and step by step account of the past. He gives one the impression that he stands with one foot in the past and the other in the present, so that the interrelation of the past and present are immediately observable. In any event, he dramatically portrays in the first two chapters the scene in which the balance of his remarks are laid and seems to integrate what must be a series of loose ends in the mind of the average well-informed person.

But all of the chapters are not like this. Many of them are more or less purely descriptive and contain resumés of social phenomena with remarkable completeness considering the brevity of treatment. Thus, in his third, fourth, and fifth chapters he portrays the development of labor organization in this country, its objectives and its economic and political programs. He then ties this up with the cooperative movement as an important social trend relating the interests of organized labor to all the rest of us earners, implying, and quite correctly, that the labor movement itself is essentially a labor cooperative to regulate the marketing of their stock in trade. It is true that this part is more suggestive than definitive; but I have no doubt that the author is striving more for a general appreciation than for complete disposition.

In part III, being chapters seven, eight and nine, Professor Taylor sandwiches a socio-legal account of the labor contract, so-called, between a treatment of the legality of labor organizations and the constitutional powers of Congress and our legislatures to enact social changes affecting labor. On the whole, I cannot say that this part is not a fairly good

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account of the subject-matter. I was amused to read in a section dealing with the judicial doctrine of conspiracy as applied to labor combinations the following sentence: "An exception may be made for the corporation in the United States since it has been given the legal status of a person." Surely, this is not ingenuous subscription to Thurman Arnold's "folklore"; but the author courts this suspicion as part of the price he pays for brevity. Then again in the same chapter he fails to suggest what is essentially misleading in the use of the catch-word "malice" by the House of Lords when that august body tosses off its refusal to consider the motivation behind the coercive activities of labor unions. I admire the author's astuteness in using the statements of others to place the blame for the slow progress of labor legislation on the judiciary and not, according to the pious formula, on the Constitution. Personally, I don't mind going down the line on matters of this sort; but in the interests of objectivity, I suppose the author is quite justified.

The next part covers ten chapters. I feel secure in generally approving what the author has done here. He has attempted to portray the convergence on the labor movement of such things as immigration and child, woman, and convict labor. Now, to the audience for whom the author is no doubt writing, even a brief consideration of the long-run effect of these things in the competitive scheme on the wage earnings of heads of families, as well as on the exploitive tactics of manufacturers, is extremely important. In these, as well as in the chapters on income and living standards, minimum wage and maximum hour legislation, some appreciation of the real issues surrounding the constitutional treatment of social legislation is inescapable. The author's treatment should also suggest the resourcefulness of socially minded proponents of legislative schemes to out-flank the Supreme Court in its adherence to traditional interpretations of the Fifth, Tenth and Fourteenth Amendments, although he might have indicated with more clarity that Mr. Zeitgeist is labor's most effective aide. This part includes a treatment of social insurance and social security legislation as well as a chapter on unemployment, its supposed causes, palliatives and alleged cures. I was entertained at the author's classical authority for the W.P.A., and P.W.A., and I am in full accord with his suggestions concerning the public administration of re-employment bureaus.

Part V, including four chapters, apparently purports to be an account of labor law concerning labor disputes and is called "The Government in Industrial Conflicts." As a rather breezy indication of what the state and federal government have done through their official agencies, the courts and legislatures, to control the course of labor's self-help program, I must confess that it is adequate. The author has stressed the un-
conscionable abuse of the injunction against labor which our courts have fostered and has shown why it is abusive. He has shown how labor got the sharp end of the anti-trust laws in the rather unexpected use of this measure against labor activities, but he lost an opportunity to picture the betrayal of labor in the hypocritical sections of the Clayton Act which the politicians promised would free labor from the incubus of the Sherman Act. Then he checks off somewhat categorically the judicial reactions to labor's arsenal of coercive self-help methods. The concluding chapter of this section deals with more recent legislative attempts to obviate industrial distribution by more rational methods of procedure; and although the author has thought of all of the devices, he has not gone into them very deeply.

Now I don't want to seem too critical when I say that this book does not contain the sort of treatment I would include in a volume to which is affixed the title Labor Problems and Labor Law. Not that I think that the author should have brought up to date a tedious encyclopedia like Oakes! But I do think that a series of essays on labor law should be considerably more analytical and critical of the judicial process as it focuses on labor's activities. But a lot more space would, undoubtedly, be necessary for this than Professor Taylor had available. Such an account would certainly have taken up most of his book instead of only a smaller fraction thereof. But perhaps the treatment I have reference to would be more like a lawyer would write for the edification of other lawyers or for advanced students of the social sciences.

The preface indicates that the author has intended to place an "emphasis on labor law" and to include "an analysis of those laws and their interpretation in the courts," but he does not indicate for whose consumption he is writing. I contend that the book should make an excellent text for a college course purporting merely to acquaint students with labor problems and with the law pertaining thereto. I feel sure that the interested and intelligent reader, be he in business or a profession, would profit greatly from reading it. Although it is not intensive, it is certainly comprehensive in its scope and should serve as a useful Baedeker to almost any one who wishes to obtain a general survey of the subject in a thoughtfully integrated one-volume treatment.

CHARLES O. GREGORY*

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TRIAL OF A CIVIL JURY ACTION IN NEW YORK—by Bernard L. Shientag.†

It is not every day that a lawyer who receives the visit of a client can have as his counsel and guide, one who combines the experience of an advocate and of a judge. With this little book of Mr. Justice Shientag’s at hand, however, there is a near approach to the possession of that advantage. It warns one to be wary about what the client tells him; counsels thoroughness in the preparation of the facts and the law; describes what should and suggests what should not be done in the various stages of procedure that lead up to the trial; offers pertinent observations on the selection of jurors; and illustrates what should be done and what should be avoided in the presentation of testimony and the cross-examination of witnesses by examples drawn from the experience of great leaders of the bar. Certainly, one who follows such guidance will be well on the way to win the favorable consideration of judge and jury for his client, and not less for himself.

It is a generous gesture, even if we may suspect that Justice Shientag has been moved to the writing partly by the fact that numbers of those who appear before him lack somewhat of the orderly perfection that would conduce to their own advantage and, in some degree, to the satisfaction of the court. Indeed, he lets it be known, mildly, courteously, always charitably, that many cases that have come before him were not well prepared, and that these and others were not well presented. His mood, however, is not one of impatience or complaint. Rather it is that of a senior who, realizing that lack of experience in many of his juniors may account in some measure for the imperfection witnessed, adopts the medium of a mellow, instructive, almost conversational disquisition in proffering guidance along the whole of the road, from the appearance of the client to the verdict of the jury, and beyond, directing attention to the numerous ambushes along the route behind any of which there be threat from error, omission, or incaution.

By no means the least of the attractions of this little book, which may be read in a single sitting, is the feeling that every trial has in it something of the dramatic element. Here and there, over some seemingly small matter of the mechanism of the trial, the author brings in a reference drawn from the biography of Erskine or Scarlett, of Bowen or Macmillan, of Coleridge or Russell, from Wellman back to Quintilian. He insists that there are rules, and that compliance with them is of the essence, but never forgets that in the application of the rules great reputations have been made by men whose fame transcends in interest the cases in which they appeared.

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There is here a useful reminder to all who enter upon the career of the law. However many specialties there may be, and however many lawyers there may be whose activities do not take them into court, it is the court that is the arena of the law, and it is in the trials in that arena that the great figures of the law have attained the summit of their fame.

**MARTIN CONBOY**

**THE COUNTRY LAWYER: ESSAYS IN DEMOCRACY**—by F. Lyman Windolph†


In this small volume of twelve chapters the author, who has engaged in the general practice of law in Lancaster, Pennsylvania, for more than twenty-five years, presents in essay form his thoughts and observations on democracy and the law. He chooses to call them those of a country lawyer. While Mr. Windolph may be a country lawyer in that he is not of the great metropolis, it is likely that he will be considered distinctly urban by many of his readers who live in regions where a city of 60,000 population, like Tarsus is "no mean city". But as he has defined the term, one who "performs every sort of legal service for every sort of client", the author is a country lawyer and "no arbitrary distinction based on density of population or the like can make him anything else". In delineating the setting in which he has practiced, Mr. Windolph creates for his readers a gentle nostalgia akin to that which is awakened by Stephen Vincent Benét's description of the Pennsylvania towns and countryside in his immortal *John Brown's Body*, and Hervey Allen's *Action at Aquila*. The chapters entitled The Country Lawyer, King Street, and Country Justice, present with understanding the character of the country lawyer's practice; its simplicity, directness, and general wholesomeness. If a skeptic points to a travesty enacted in the country court house at Flemington, New Jersey, the author replies with truth that the lawyers in that case were not country lawyers. From the writing of deeds, wills, and other legal documents to trying every sort of civil and criminal action, the country lawyer's practice throughout remains a profession. Whether or not the training of the country lawyer "has made him learned, his experience ought to make him wise and good".

In discussing the jury system, Mr. Windolph presents a strong case in its favor. He points out that "the function of a jury is not to vote. Its

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function is to deliberate—and thus to come to a general opinion in the way in which Quakers are said to arrive at 'the sense of the meeting'”. It is the author’s belief that the usual verdict which results is both “well grounded and conscientious”. He aptly says that “trial by jury does not presuppose a tribunal composed of twelve persons altogether devoid of ideas or even of prejudices. It does presuppose a tribunal of sufficient intelligence and courage to arrive in spite of prejudice at a just determination of the issue submitted to it”.

In other chapters the author discusses the age old question of defending a bad cause, the sanctity of law, and the Fourteenth Amendment. He believes that democracy “is not fundamentally concerned with majorities or minorities at all. What democracy assumes is unanimity—that is to say a common mind”. In his chapter entitled Two Sins Against Tolerance, which he designates skepticism and bigotry, the author reaches the paradoxical conclusion that “Americans are simultaneously in danger of becoming skeptics as a matter of philosophy and bigots as a matter of fact”. It is the belief of this reviewer that the author’s condemnation as a detestable heresy of the doctrine that “truth and error are subjective matters which rest on nothing more enduring than personal opinion and which have no relation to objective reality” is too sweeping. Certainly as to things which can be proved factually, one thing is true and another is false. But as to things which cannot be proved, right or wrong is a matter of opinion. While as to many of these things the value of opinion varies in accordance with the capacity of the particular person to form a competent opinion. When one reaches pure speculation, anyone’s opinion is as good as anybody else’s. When Mr. Windolph discusses that other sin against tolerance, bigotry, his position is unimpeachable, for as he says “the menace of bigotry is chiefly to be found in (a) ... a dangerous perversion of conservative conduct and leadership”. From here, by natural transition, he arrives at his chapter entitled An Open Letter to the Conservative Majority, a chapter which should be read by every American, conservative, progressive, reactionary, or radical. For here is the country lawyer speaking at his best, he, who apart from the highly specialized practice of the metropolis, has had the leisure and the will to think calmly, wisely, and well about the significance of democracy. “We must protect free institutions at the peril of everything else, because free institutions are the fundamentals of our own case in chief. ... To compass or permit their abridgment in the name of saving democracy is suicidal, because it cuts away the foundation on which democracy stands. It is, politically speaking, the sin against the Holy Ghost—democracy denying itself. A Fascist and a Communist ought to be liberals, perhaps, but a democrat must be one.” The closing chapter is entitled A Letter to My Father, an intelligent,
judicial, yet reverent tribute to him whose blessing descended to the son. Spiritually akin to the first chapter, it helps explain the author.

In the opinion of this reviewer two chapters—one on Hamlet and the other on the religious sects of Pennsylvania, while interesting, seem extraneous and out of place, and readily might have been omitted for the sake of unity. In matters of specific detail one may find fault with the author's statement that study in a law office was "the way in which all the lawyers of America received their legal education up to comparatively recent times". This ignores the fact that the teaching of law began at the College of William and Mary in 1779, that the Litchfield Law School produced brilliant practitioners during its comparatively brief life, and that the Harvard Law School was founded in 1817. The Country Lawyer forms valuable and delightful reading for lawyer and layman alike, while its political philosophy should give hope to those who believe in the American Dream.

THEODORE S. COX*

CONSTITUTIONAL GOVERNMENT AND POLITICS—by Carl Joachim Friedrich.† Harper and Brothers, New York, 1937. $3.50.

Concentrating on the functional, rather than the formal set-up of so-called constitutional governments throughout Europe and the Western Hemisphere, Dr. Friedrich has carried on in the tradition of Finer et al. in an attempt to direct attention to the actual manner in which government activities are carried on. This so-called "debunking" of the formalistic tendencies in teaching comparative governments is by no means new, but it is safe to say that probably none of the earlier attempts has been attended with greater scholarship or less attractive technical presentation. The first must be laid directly to the door of Dr. Freidrich who has constantly exhibited a most scholarly and piercing insight into the machinations of government both in this country and in Europe; the second is due largely to a neglect of the readability aspect on the part of the publishers. Paragraphs, two and in some instances three pages long, where obviously briefer paragraphing is indicated; sentences proportionately lengthy; relegation of notes to the back of the book, all have conspired to detract from the readability of the work. However, if one persists through these mechanical defects, the rewards will be great.

In his general introduction to the study of governments, Dr. Freidrich has set down as the fundamental hypotheses, three principles. The first

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of these is that consent on the part of the governed to the government, and constraint on the part of authority over the people are both necessary in determining the intensity or effectiveness of any given political situation or for that matter, institution. The second factor to be considered is the relative concentration or disunity of the actual political power. Lastly, and most uniquely and significantly, it set forth the principle that many governmental activities are what they are because of what the author is pleased to call the "rule of anticipated reactions". In any discussion of governmental institutions the real significance cannot be realized unless these particular elements are used as the starting points for the discussion. Of these three principles, the first two are more or less generally alluded to, but it is refreshing to note the insistence with which the author discusses the third. Too often the virtues of constitutional governments are sung in given instances when some great right or privilege of the people has been protected, when in reality the shrewdness of the steering politicians should be recognized for something which approximates a self-preservation motive.

There are certain other unusual elements in the work. Bureaucracy is asserted to be the core of modern government; the judiciary comes in for some rather thorough discussion with reference to tenure and appointment; the problems of judicial review is given a new slant; proportional representation is advocated, in spite of the equally scholarly work on the part of German scholars disproving its advisability with the case of the Hitler regime to the contrary.

The rest of the work is a more or less customary discussion of the various departments and agencies in the government machine, and the points made are illustrated with copious examples from the actually existing governments as well as from ample historical allusions. The work is designed primarily as a text-book for college students in the field of government, but there is much in it that will appeal to members of the legal professions, both as to the origin, development, and province of legal activity within states. The candor with which the author has attacked his subject, and the idealistic hope which from time to time find its way into the pages, is mildly inspiring, but one cannot resist the thought that what Dr. Friedrich is trying to do is to set up a pattern according to which all constitutional governments are to be made over.

JAMES F. LEAHIGH*

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This distinguished "artist" of cross-examination has gathered in a small volume a few of the high-lights of his career. Presented in the form of very brief anecdotes, they engage the attention of the reader without effort and point their various morals with clarity and dispatch.

Mr. Wellman came down from New England to New York as an assistant corporation counsel; this post he held for seven years, when DeLancey Nicoll, newly-elected District Attorney, appointed him his first assistant. This, Wellman accepted on condition that he was to be allowed to conduct the "front-page" trials which would arise.1 Mr. Wellman expresses his astonishment as to many of the changes which have come to pass since he left the District Attorney's office. But imagine a present-day District Attorney permitting a subordinate the opportunity to glitter, however briefly, in the limelight! Nevertheless, that was Mr. Wellman's bargain, and Nicoll lived up to it. To the ensuing publicity, Mr. Wellman credits his later success as a trial lawyer.

There are many incidents of the courtroom recounted for the appreciation of the lawyer and the enlightenment of the student. The wave of murder-by-poison cases which occurred during Mr. Wellman's tenure of office make stories which read like fiction. The formula for successful prosecution of such criminals will be found to be a curious admixture of "luck and opportunity."

Mr. Wellman's private practice, including both criminal and civil actions, contributes several interesting cases. The Drawing Room Car case is an example of the unheralded and unsung (because untried in court) triumphs which earn a lawyer his client's undying gratitude.2

Toward the close of his little book, Mr. Wellman devotes several short chapters to the subjects of Travel and Relaxation, Exercise, Old Age, and Destiny.3 He found his relaxation, so necessary after the ardours of court battles, in travel, far away from courts and clients. His annual vacation was the four months of the summer, as contrasted to Rufus Choate, who is quoted as saying that his idea of a lawyer's vacation "was the space of time between the question to the witness and his answer".4 But Mr. Wellman preferred to prolong his life with liberal leisure and exercise accommodated to his years. The final chapters bring his book to a mellow close,

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1P. 22.
4P. 184.
and the advice therein is perhaps more valuable than all the rest of his
gone counsels.

MARK P. STUMPF*

PRELIMINARY STATEMENT IN PATENT INTERFERENCE—by Emerson

There are a good many people in the world doing a good many things
and it is not surprising that frequently a plurality of people do the
same thing at about the same time. It is well known that in the medical
profession there is some doubt as to who originated anaesthetics. The
invention of the first Bell telephone patent was claimed to have been
made by other inventors than Bell. Very early in its existence, the
Patent Office set up procedure for determining who is the first inventor
when an invention is claimed by two or more parties.

The patent laws of most foreign countries make no provision for
priority of invention contests. The patent generally is awarded to the
first who applies for it. In the United States, however, by statute,
the only one entitled to a patent is the first inventor. It is necessary,
therefore, to determine who is the first inventor, when more than one
is before the Patent Office at the same time. The technical term applied
to proceedings to determine priority of invention is, "interference".
When it is found that more than one person is before the Patent Office
with respect to the same invention, an interference is declared and
entered into. The application papers on file for the various parties
in the Patent Office, are of importance and may be relied on, but the
parties in their proofs may go beyond these papers.

The first thing which is done in an interference, is to call on the
parties to file a paper which is analogous to a pleading. Each party
is called on to file a so-called, preliminary statement. This is a statement
in which each party sets up under oath the earliest dates he will claim
for drawings, model, and other details of the reduction and development
of the invention. The content of preliminary statements has been
varied somewhat from time to time but the parties are always strictly
limited to proving the dates set up in their preliminary statements.
Neither party can obtain the benefit of any date earlier than the date
set up in his preliminary statement. It is clear, therefore, that the
preliminary statement is a very important paper and must be carefully,
thoughtfully, and intelligently prepared. It is not unusual to ask for

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permission to amend a preliminary statement. These amendments are grudgingly granted; yet frequently refused entirely. In a way, this seems a harsh procedure, because after the interference proceedings in the Patent Office have terminated, a party may go into a federal court and file an equity suit to determine priority of invention, and in that equity suit he may set up and prove whatever dates he can, irrespective of the dates he may have alleged in his preliminary statement. Naturally, such variations in dates are frowned upon by the courts. The preparation of the preliminary statement for the Patent Office remains, therefore, a very important pleading and its importance is increased with the value and importance of the invention involved. It is not surprising, therefore, to find that the present author is able to fill a fair sized book with the law relating entirely to the pleading which is of interest to those dealing with that very small corner of Patent law. The attention given to the matter by the tribunals of the Patent Office and by the courts is indicated by the fact that the table of cases in this book covers twelve pages.

The author, at one time, was in the Patent Office and in the Interference Division which has specifically to do with preliminary statements. He has had considerable experience in examining the law and stating it in various texts. This is the sixth book he has published in eight years. It is not surprising, therefore, to find that the present volume is a helpful, thoroughly workmanlike job. It will be found substantially essential to the patent lawyer who is going into an interference proceeding.

Some idea of the interesting style of the author may be gained from his explanation of judicial discretion:

"Decision on motion to amend preliminary statement is not an arithmetic task. Taking various factors into consideration, the tribunal exercises a hunch or discretion. The lack of objective standards is designated in Pratt v. Thompson as acting equitably."

The author points out what he conceives to be the distinction between a brief and a text book:

"The practitioner cannot present matters in the crude blunt style of the preceding paragraph. He must improvize imaginary differentiations between precedents and his present case, hinting delicately at the central point. The text book writer, if he does a decent job, must be more forthright."

The way of an inventor involved in an interference in the Patent Office may be eased if he and his attorney carefully examine this book before filing their initial preliminary statement.

KARL FENNING*

*Professor of Patent Law, the Georgetown University Law School, Sometime Assistant United States Commissioner of Patents.
BOOKS RECEIVED

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


