PAUL v. VIRGINIA: THE NEED FOR RE-EXAMINATION

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Four years after "the smoke of the great conflict" between the states, the December term of the Supreme Court announced in the case of Samuel B. Paul v. The Commonwealth of Virginia1 that "issuing a policy of insurance is not a transaction of commerce",—dictum which caused scarcely a ripple of comment in the press of the day. Yet, Paul v. Virginia has not been without marked effect upon the history of the commerce clause.2 In fact, so engrossed has the latter-day bar become with its "obstructive possibilities"3 that sixty-six years later eminent counsel found no difficulty in taking refuge in the decision in opposing on constitutional grounds national regulation of the New York Stock Exchange.4

The establishment by the 75th Congress of the Temporary National Economic Committee5 and the undertaking by this committee of a study and investigation of the insurance industry,6 has again catapulted the Paul case into the foreground of constitutional discussion.

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18 Wall. 168 (U. S. 1868). The decision was rendered for the Court by Mr. Justice Field, November 1, 1869.


2Corwin, The Twilight of the Supreme Court (1937) 185, n. 2.

3Senate Hearings before the Committee on Banking and Currency, 73d Cong. 2d Sess. (1934) 6650.

4Public Res. No. 113, 75th Cong. 3d Sess. (1938) created the Temporary National Economic Committee, composed of six representatives of the Congress, and one representative each of the following departments and agencies: Departments of Justice, Treasury, Labor, Commerce, Securities and Exchange Commission.

*See, Message from the President of the United States Transmitting Recommendations
It is, perhaps, no longer novel commentary that the law is what the courts do and not what they say. But it is profoundly true of constitutional law that what the courts say is conditioned by the compulsions of social demand; and, in no small measure, what the courts have said has been the reflex of judges to the impact of the modern corporation upon the American scene.

While the first third of the nineteenth century witnessed an extraordinary development of corporate activity, it was the war between the states which gave to corporate development its greatest impetus. For the corporate device made possible a transfer of "sovereignty in America from a landed and mercantile aristocracy to the capable hands of a new race of captains of industry."

In the burst of capitalistic activity which followed the period of lush post-war prosperity, the process was accelerated: an ambitious industrialism found in the corporate instrumentality an ideal medium with which to harness the resources of a continent. Financial institutions experienced a mushroom growth. The national barbecue ushered in by the fabulous "High Finance in the Sixties" was in full swing. But it was the unprecedented growth of insurance companies, in particular, which aroused deep concern. Legislative corruption, unscrupu...
lous sales propaganda, fictitious stocks and phantom capital were the ready weapons employed in the bitter rivalry for insurance profits.\footnote{13} Winston, McCurdy and Hyde—titans of the day in the insurance

and the total assets had increased to $175,554,426. \textit{II Massachusetts Insurance Commission, 14th Annual Report (Life) X, XI} (1868).

\textit{Cf.} the following: “With the return of peace in 1865 began the most remarkable period ever experienced in the insurance history of this, or probably any other nation. The progress of the business was in sympathy with that of all other departments of trade. . . . The movements of fire insurance were in sympathy with those of general business. Taking the companies doing business in New York, foreign and domestic, as an illustration, their number increased from 144 at the close of 1864 to 167 at the close of 1869—an increase due entirely to the multiplication of agency companies from other states. The aggregate capital increased during the same time from $41,629,945 to $51,118,602, and the premium income from about $30,000,000 to $43,000,000. . . Agency companies multiplied. The companies increased their capital more than their number, while the risks assumed far outran either.” \textit{Insurance Blue Book} (Centennial Issue 1876-1877) 32.

\textit{The Missouri Insurance Superintendent’s} indictment of the prevailing abuses was emphatic. He stated: “Prior to the passage of the law, there were no police regulations governing either home or foreign companies. Some kept but a few books of any kind, and these in so slovenly a manner that even the officers could tell nothing about the entries. The agents covered the State, wrote on specious and novel plans, and defrauded without fear of penalty. The mutuals were most productive of fraud and mischief. There was nothing to prevent their organization by any poverty-stricken adventurer. Any five or more persons could procure a license from the Secretary of State by merely filing the corporate name and number of directors. Parties by insuring for twelve months became members, and ignorantly gave liens on their property. Premium notes were obtained in that and other States from unwary parties on false pretences, and assessed without stint, while losses would be fought off in the courts.” \textit{See, Insurance Blue Book, op. cit. supra} note 12, at 34. \textit{See, for a similar description of abuses, Barnes, First Annual Report of the Superintendent of the Insurance Department of the State of New York} (1860) 4.

Judge Doe of the New Hampshire Supreme Court gave voice to the popular apprehensions of the insurance business when he stated in \textit{DeLancy v. Insurance Co.}, 52 N. H. 581, 587 (1873): “Some companies, chartered by the legislature as insurance companies, were organized for the purpose of providing one or two of their officers, at headquarters, with lucrative employment,—large compensation for light work,—not for the purpose of insuring property; for the payment of expenses, not of losses. Whether a so-called insurance company was originally started for the purpose of insuring an easily earned income to one or two individuals, or whether it came to that end after a time, the ultimate evil was the same. Names of men of high standing were necessary to represent directors. The directorship, like the rest of the institution and its operations, except the collection of premiums and the division of the same among the collectors, was nominal. Men of eminent respectability were induced to lend their names for the official benefit of a concern of which they ‘knew and were expected to know nothing, but which was represented to them as highly advantageous to the public. There was no stock, no investment of capital, no individual liability, no official responsibility,—nothing but a formal organization for the collection of premiums, and their appropriation as compensation for the services of its operators.”
world—yielded nothing in picturesque rascality to Drew, Fisk and Gould, their counterparts in the contemporary over-world of finance capital.

This steady growth of financial and economic concentration did not pass without protest: the suspicion engendered by the growing power of finance was but a reflection of the confusion of the hopes and fears regarding the social utility of the corporate device. Taney had already voiced the deep anxiety over the growing concentration of financial power, which the corporate form of business organization was promoting, when, as Secretary of the Treasury, he stated

"It is a fixed principle of our political institutions, to guard against the unnecessary accumulation of power over persons and property in all hands; and no hands are less worthy to be trusted with it than those of a moneved corporation." 15

14 For an interesting discussion of these figures and their time, see, HENDRICK, THE STORY OF LIFE INSURANCE (1907) 94 et seq.
15 I Report from the Secretary of the Treasury on the Removal of the Public Deposits from the Bank of the United States. Sen. Doc. No. 2, 23d Cong., 1st Sess. (1833) 20. Nor did this anxiety subside when he became Chief Justice. Cf. Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 11 Pet. 420, 547 (U. S. 1837); Briscoe v. Bank of Kentucky, 11 Pet. 257 (U. S. 1837); Bank of Augusta v. Earle, 13 Pet. 519 (U. S. 1839). Identification of the corporation with special monopolies and the fear that the corporation would infringe upon the "natural rights" of the citizen have been from the earliest times a source of opposition to the corporate form of organization. At the Constitutional Convention of 1787, it was feared that the commerce clause might give Congress the power to create monopolies. This was Mr. Gerry's source of objection. II FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1934) 635. So, too, Mason believed that under "the general clause at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce." Id. at 640. Jefferson summarized the prevailing sentiment in his striking comment on Madison's proposal submitted to the Constitutional Convention that Congress be authorized to grant corporate franchises. This was rejected, Jefferson observed, "as was every other special power except that of giving copyrights to authors and patents to inventors, the general power of incorporation being whittled down to this shred." I THE WRITINGS OF THOMAS JEFFERSON (Ford ed. 1904) 278.

In 1820, Daniel Raymond, the first systematic American political economist, declared in his THOUGHTS ON POLITICAL ECONOMY (Baltimore, 1820) 429: "Every money corporation, therefore, is prima facie, injurious to national wealth; and ought to be looked upon by those who have no money, with jealousy and suspicion. They are, and ought to be considered, as artificial engines of power, contrived by the rich, for the purpose of increasing their already too great ascendency and calculated to destroy that natural equality among men, which God has ordained, and which no government has a right to lend its power to destroying."

Mr. Justice Brandeis, in his dissenting opinion in Liggett Co. v. Lee, 288 U. S. 517, 548 (1933), has portrayed vividly the then prevailing attitude toward the corporation: "Although the value of this instrumentality in commerce and industry was fully recognized, incorporation for business was commonly denied long after it had been freely
But the corporate instrumentality had become too firmly enmeshed in the economic life of the nation for its progress to be halted. Its functions, however, could be restricted. This the state legislatures attempted at a relatively early date. The right to "suspend, alter or repeal" corporate charters were reserved;\(^\text{16}\) the manner of granting corporate charters was altered;\(^\text{17}\) and, finally, statutes were enacted imposing regulation and supervision over certain phases of corporate activity.\(^\text{18}\)

To counteract the growing power of the insurance companies, the states attempted various types of regulation at a relatively early date. Thus, New York, in 1824, required all foreign companies to make reports.\(^\text{19}\) Massachusetts, in 1827, required the agents of foreign companies to file a copy of the company's charter, of the power of attorney pursuant to which they acted, together with a sworn statement of the majority of the directors with respect to the capital stock, debts, invest-

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\(^{17}\) Prior to the panic of 1837 the prevailing method of incorporation for business enterprises had been by special act of the legislature. This was in the tradition of the great eighteenth century trading companies. But the practice lent itself to legislative abuse. Thus, the *North American Review* declared in 1827: "It is notorious, that an act of incorporation is commonly granted to any set of men, who ask it, for almost any purpose, and with almost any powers, which they are pleased to have inserted in their bill." XXIV *NORTH AMERICAN REV.* (1827) 199. Following the panic of 1837, general incorporation laws became common, particularly in the banking field where the abuses of incorporation by special charter had been glaringly revealed. See, I Hammond, *History of Political Parties in the State of New York* (4th ed. 1846) 323 *et seq.*


\(^{19}\) *N. Y. LAWS*, 1824, c. 277, at 340.
ments, etc., of the corporation.\textsuperscript{20} The Massachusetts Act also forbade the corporation from doing business unless it had more than $200,000 paid-in stock, and was restricted by its charter or otherwise to individual risks of not more than 10 per cent of the capital. Many of the states enacted elaborate provisions which were designed to insure the solvency and conservative management of local insurance companies. By 1855, Massachusetts had provided for a board of insurance commissioners,\textsuperscript{21} and in 1859, New York had created the office of Superintendent of Insurance.\textsuperscript{22}

In some of the states, however, retaliatory legislation against the foreign insurance corporation was enacted;\textsuperscript{23} and onerous municipal as well as state taxes were common.\textsuperscript{24} New York, Tennessee, Arkansas, California, Ohio, Wisconsin and Iowa had either enacted deposit laws or contemplated the enactment of such laws.\textsuperscript{25} Restrictions and penalties upon foreign insurance corporations were the legislative order of the day. The companies came to regard these various levies of the state governments "as unconstitutional as well as unjust".\textsuperscript{26} It was not strange,

\textsuperscript{20}Mass. Laws, 1827, c. 141.
\textsuperscript{21}Mass. Acts and Resolves, 1855, c. 124.
\textsuperscript{22}N. Y. Laws, 1859, c. 366.

Thus the Pennsylvania Act of April 23, 1829, imposed a tax of 20\% on all premiums collected by agents of insurance companies incorporated in another state. Penn. Laws (1828-29) 264. Alluding to the Massachusetts requirement that agents of foreign insurance companies were required to give bonds, to make returns, and pay taxes, the Massachusetts Commission in 1851 observed: "It is a significant indication of the estimation in which these outside companies were then held, and which, as a whole, they too well deserved, that these last two statutes were entitled acts to provide against loss by foreign insurance companies—a curious inversion of what is commonly supposed to be the legitimate purpose of insurance. It is quite possible that from this absence of a kindly feeling toward them, they got the misnomer of foreign insurance companies." Insurance Blue Book, op. cit. supra note 12, at 45.

\textsuperscript{23}See, Insurance Blue Book, op. cit. supra note 12, at 32.
\textsuperscript{24}Insurance Blue Book, op. cit. supra note 12, at 32.

Elizer Wright in an article written in 1852 commented upon this practice: "New York has required of each company doing business in that State, wherever chartered, to deposit $100,000 with the State Comptroller for the benefit of the insured in that State. This safeguard is of very doubtful utility, and is surely very awkward. The sum held may be too much or too little, and requiring it tends to discourage the business and confine it to narrow limits, whereas its safety lies in expanding over a broad surface." Id. at 45.

\textsuperscript{25}Cf. the following from a circular in support of a national insurance law, which was widely distributed at the time by C. C. Hine, an editor of the Insurance Monitor: "Legislation in the several states toward the insurance companies of sister states has proceeded in a spirit of persistent and injurious hostility, until it has erected an almost prohibitory burden of taxes, forced loans, deposits, licenses, subsidies, compulsory advertising fees, etc., state, county and municipal, that would surpass the belief of one not familiar there-
therefore, that the insurance companies should turn to the Federal Government for succor.

Relief from the "aggressive acts of hostile legislatures"27 was strongly agitated by the industry during 1865 and 1866. The passage of the National Banking Act of 1864 had suggested to the insurance companies the possibility of extending federal control to the insurance business. And in the next year the companies addressed a Memorial to Congress asking for relief from the burdens of excessive supervision and legislation.28 The Memorial proposed a national incorporation act which would permit insurance companies to become federal institutions in the same manner as national banks. In November of 1865, the companies appointed a committee to draft a suitable law and secure its enactment by Congress.29 By 1868, the companies had succeeded in introducing a bill in the Senate30 conforming in its general provisions to the Memorial of 1865. In general, the bill provided for the appointment of an Insurance Commissioner by the President and the establishment of a Bureau in the Treasury Department where all deposits, fees, and other expenses of agency companies were to be exclusively paid, and their returns made for all other than local business.

At the second annual meeting of the National Board of Fire Underwriters held in New York on February 19 and 20, 1868, the Committee on Legislation and Taxation reported on "the first duty" assigned to it, namely, "proposing some practicable plan to rid the country of unfair state legislation"31 and of "securing, if possible, one general law for the government of Insurance Companies throughout the Union."32 The

with. Generally these laws do not look to the real security of the policyholder or the strength of the companies, but are apparently conceived in a temper of extortion and unfriendliness to enterprises that are the handmaids of commerce and the guardians of all our destructible values." Quoted from Dryden, Addresses and Papers of Life Insurance and Other Subjects (1909) 178-179.

27Insurance Blue Book, op. cit. supra note 12, at 32.
29Insurance Blue Book, op. cit. supra note 12, at 32.
30The Bill is set forth in full in I The Insurance Times (1868) 42-43. Commenting upon this proposal the editor of the Insurance Blue Book wrote some years later, "It is unnecessary to add that this act, implying as it did, the citizenship of these corporations never became law." Insurance Blue Book, op. cit. supra note 12, at 32.
31See, Journal of the Proceedings of the Second Annual Meeting, National Board of Fire Underwriters, (Proceedings of the Executive Committee) (1868-9) 25. Elizur Wright, the most distinguished student of insurance of the day, was likewise unsympathetic to the multifarious State restrictions. See, for example, I The Insurance Times (July, 1868) 263.
32Id. at 25.
Committee reported that there was then before the House Judiciary Committee and the Senate Committee on Commerce a "Bill for the Creation of a National Bureau of Insurance" whose primary purpose was to "secure the relief to which the business of Insurance is entitled." The Committee also urged the necessity for a "test case in opposition to the more monstrous exactions of some of the States, and [to] obtain the decision of the Supreme Court of the United States thereon, with the view to settle forever the unconstitutionality of all such unequal and proscriptive State legislation." During the preceding year, The Executive Committee of the National Board of Fire Underwriters, meeting in Boston on September 11th and 12th, was advised that the Underwriters' Agency of New York had "sometime since determined to test the constitutionality of such laws" and that it had "taken a case from the State of Virginia to the Supreme Court of the United States, involving it is believed every important point on the subject." The Committee further reported:

"This case has so general a bearing on the Insurance interest that some step should be taken to give it moral as well as material support, and at the same time a well directed effort be made to explain and enforce correct views on the people and legislatures of the States. With this view, the undersigned suggests that a small standing Committee be appointed, into whose hands the whole subject shall be placed with authority to employ, at the expense of the National Board, suitable counsel to assist in prosecuting the case before the Supreme Court, and one or more suitable representatives to visit the legislatures of different States, if necessary, and by personal explanation, correspondence, and other proper means, strive to effect the desired changes in their laws."

Since the Virginia statute had been selected for constitutional determination, it may not be amiss at this juncture to indicate Samuel B. Paul's role in the making of constitutional history. Virginia was among the states which had exacted a deposit of the state's bonds as a condition precedent to the right to do business within the State. By an act of the legislature passed on February 3, 1866, it was provided that

\[\text{\textit{Ibid.}}\]

\[\text{\textit{Id. at 26.}}\]

\[\text{\textit{Cf. Proceedings of the National Board of Fire Underwriters (Session of Executive Committee) (1867) 16.}}\]

Referring to the proposed "test case", the Committee on Legislation and Taxation reported at the annual meeting of the National Board of Fire Underwriters referred to above, "that a test case, made up for the express purpose of deciding the legal status of what are termed by some legislatures, Foreign Insurance Companies, on all points material to a proper prosecution of the Insurance business, would be worth all that it would cost; and that the expense of obtaining such decision should be paid out of the general fund of the National Board." \textit{Id. at 26.}

\[\text{\textit{Virginia Acts, 1865-66, c. 96, pp. 206-8; see, also, Virginia Acts, 1865-66, c. 2, § 47.}}\]
no insurance company, not incorporated within the State, should carry on its business within the State without previously obtaining a license for that purpose; and that it should not receive such license until it had deposited with the treasurer of the State bonds of a specified character, to an amount varying from thirty to fifty thousand dollars, according to the extent of the capital employed. A subsequent act passed during the same month declared that no person should, "without a license authorized by law, act as agent for any foreign insurance company" under a penalty of not less than $50 nor exceeding $500 for each offence; and that every person offering to issue, or making a contract or policy of insurance for any company incorporated elsewhere than in the State, should be regarded as an agent of a foreign insurance company.

In May, 1866, Paul, a resident of Virginia, was appointed agent to carry on the general business of fire insurance for Germania Fire Insurance Company, Hanover Fire Insurance Company, Niagara Fire Insurance Company, and the Republic Insurance Company, all incorporated in the State of New York. Paul filed with the Auditor of Public Accounts his authority from the several companies to act as their agent. Thereafter, he applied to the proper officer of the district for a license to act as such agent within the State, and offered to comply with all of the requirements of the statute respecting foreign insurance companies, including a tender of the license tax. However, he declined (it may be presumed upon instructions from the home offices) to comply with the provisions requiring a deposit of bonds with the treasurer of the State. His license was refused. So that the issue might be clearly framed, Paul issued a policy of insurance to a citizen of Virginia without the required license. He was promptly indicted and convicted in the Circuit Court of the city of Petersburg, and was sentenced to pay a fine of $50. On error to the Supreme Court of Appeals of Virginia the judgment below was affirmed and the case was brought on to the Supreme Court, the ground of the writ of error being that the judgment below was in conflict with Article IV, Section 2, of the Constitution. Such, then, were the ingredients of the case which came before the Supreme Court on November 16, 1867.

The "suitable Counsel" which the National Board of Fire Underwriters had engaged "to assist in prosecuting the case before the Supreme Court" were, perhaps, the two most distinguished members of the bar of the day—Benjamin R. Curtis, who had resigned as Associate

Justice of the Supreme Court in March, 1857\(^38\) and James Mandeville Carlisle, of Washington\(^39\).

Now the problem confronting counsel for plaintiff-in-error was not a mere mechanical exercise in the marshalling of major and minor premises; nor was it a case where mere relief from discriminatory legislation would suffice. Relief there had to be. But in granting relief the Court must so determine the issues as to make possible the fulfillment of the program debated in the halls of the insurance conventions and in the pages of the industry's journals. This meant, in effect, that the Court must determine that the states were without power to regulate with respect to the activities of foreign insurance companies. Plainly, if this proposition could be judicially established the way would then be clear for the enactment of the legislative program sponsored by the industry. These inarticulate premises were ingeniously concealed beneath the heavy folds of constitutional logic. Counsel for Paul in substance advanced three major arguments to invalidate the statute in question: (1) a corporation is a citizen; hence, the Virginia statute was in conflict with Article IV, Section 2, of the Constitution, which provides that "the Citizens of each State shall be entitled to all

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\(^{38}\)Curtis' reasons for desiring to retire from the Court have been preserved in a letter to ex-President Fillmore: "The greatly increased expenses of living have rendered the salary attached to the office inadequate to provide a suitable home for my large family in Washington while attending the court there, and to pay my other necessary expenses. I am obliged to expend, in addition to my salary, my entire private income. By leaving my family at my place in the country throughout the year, I might be able to live on the salary, though this is not certain; but it does not consist with my views of my imperative duties to them to pass eight months of the year away from those whom the providence of God has placed nearest to me, and subjected to my care. This alone would be sufficient to decide me to retire from the public service and return to the bar. Nor do I think that, in the present state of the court, or in any state of it which can reasonably be anticipated in my time, my continuance on that bench ought to be deemed of such public importance as to weigh much in favor of my continuing there." Curtis soon became the principal legal spokesman for the "vested interests" and, in particular, the insurance companies. See, *I The Life and Writings of B. R. Curtis* (1879) 250.

\(^{39}\)James Mandeville Carlisle obtained wide publicity as junior counsel to Horace Mann in defense of Daniel Drayton and Edward Sayres, who were tried for larceny in transporting and assisting slaves to escape. Carlisle was also of counsel in the celebrated *Prize cases*, the first of the momentous cases arising out of the Civil War. He was frequently consulted by the legations of the various Central and South American Republics, and in 1852 was retained as standing legal adviser to the British Legation. On the reorganization of the Supreme Court of the District of Columbia in 1863 he refused to take the new oath in that Court, and thereafter confined his practice to the Supreme Court of the United States and the Court of Claims where for the next ten years he held a larger number of briefs than any other practitioner.
Privileges and Immunities of Citizens in the several States”;

(2) the power conferred on Congress “to regulate commerce” did not exclude the commerce carried on by corporations; since the business of insurance is commerce, so ran the argument, Congress had power to regulate the business of insurance; (3) as the statute in question was an attempt to regulate commerce between Virginia and other states of the Union, it encroached upon a subject which was exclusively within the province of Congress: it was not a subject, therefore, upon which the states could legislate in the absence of legislation by Congress.

Mr. Justice Field, speaking for a unanimous Court, met the first contention head on by denying, on the authority of *Bank of Augusta v. Earle*, that a corporation was a citizen entitled to the protection of the privileges and immunities clause. Taney’s decision in the *Bank of Augusta case* is of paramount significance not only in comprehending Field’s position, but as the key to the economic winds of doctrine of the day. As Professor (now Mr. Justice) Frankfurter has recently pointed out, Taney was called upon in the *Bank of Augusta case* “to determine the constitutional status of the corporation in the setting of our federal scheme,” a problem still pressing for solution in our time. Taney’s colleague, Mr. Justice McKinley, had held on circuit that suit could not be brought by a corporation of one state on a transaction consummated by its agent in another, since in the latter state the corporation had no existence—a decision which, as well might be expected, produced alarm and consternation throughout the business world. In

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view of the vast importance of the corporation to the economic life of the country, McKinley’s doctrine was disturbing even to one of Taney’s political and economic views. Fully aware of the practical business necessities of the situation, Taney, speaking for the Court, reversed the decision. But his own views concerning the corporate device are revealed in his treatment of the larger problem. Recognizing its social utility, he, nevertheless, feared its potentialities for abuse. To accommodate these conflicting pressures, Taney was compelled to resort to the doctrine of comity. While a corporation could send its agent into another than its home state and enjoy the protection of the laws of that state, the states must be free to legislate against the encroachment of corporations from without.44 Taney thus gave legal sanction to the obvious reality that corporations were designed to do business outside their state of domicile. And while it was true that corporations acted through persons, corporations did not thereby become citizens. Thus did Taney circumscribe the constitutional rights of the corporation. The sheltering haven of the privileges and immunities clause was denied to the corporation “not because textual analysis or controlling precedents forbade”, but because “having the power to choose, he chose to deny, by reason of his economic and political outlook, the enhancement of strength that such constitutional protection would give.”45

That Field shared Taney’s fears concerning the dangers of the corporation is patent from the language of his opinion. Observing that “at the present day corporations are multiplied to an almost indefinite extent,” he continued, “it is not too much to say that the wealth and business of the country are to a great extent controlled by them.”46 Field perceived the nub of the problem: if foreign corporations were to be permitted to exercise their corporate powers without restriction, the most important business of the states would soon pass into their

capacity to take or discount notes in another State, or to underwrite policies or to buy or sell goods.” II Warren, THE SUPREME COURT IN UNITED STATES HISTORY (1933) 50. While the Bar was almost unanimous in its opposition to the decision, large sections of the Locofo Party, being anti-corporation men, hailed the decision with enthusiasm. See, for example, the opinion of ex-Chancellor Kent in I Law Reporter (July 1838) 57. Especially enthusiastic were the Jackson and Van Buren opponents of the Bank of the United States who saw in the decision “an aftermath of Jackson’s mortal combat with the Bank”. See, Henderson, op. cit. supra note 2, at 42.

“It was not until Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1 (1877), that the significant exception to the doctrine was enunciated, i.e., that a state cannot exclude or unduly burden a foreign corporation engaged in interstate commerce within the state.


hands. Field likewise was astute to see that acceptance of the "corporate citizenship" doctrine urged by counsel would produce unfortunate results. For if foreign corporations were to be accorded the same privileges and rights secured to local corporations, the State would be powerless to charter a domestic company, however restricted, "without at once opening the door to a flood of corporations from other States to engage in the same pursuits." Equalization of corporate rights would mean that the States would be unable to "repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens." Field was concerned that such a result would spell the doom of public control over corporate enterprises since

"it might be of the highest public interest that the number of corporations in the State should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal."^48

Such being his underlying prepossessions, Field found no difficulty in concluding that it was impossible—using Taney's language in the Bank of Augusta case—"upon any sound principle, to give such a construction to the article in question."^49

When it is recalled that Mr. Justice Field was thinking essentially of corporations created by special act, and of charters which conferred special privileges,^50 his reasoning is not altogether strained. Within this intellectual framework there were, as has been seen from the preceding discussion, but two alternatives: either the state must place corporations on an equality with its citizens or it must admit within its borders all foreign corporations to a given business whenever it created any single corporation for that purpose by means of a special act of the legislature. In a climate of opinion where the corporation was regarded with suspicion and special favors looked upon as smacking of "monopoly",^52 such alternatives left no room for choice. Indeed, the

^47Id. at 182.
^48Ibid.
^49Ibid.
^50Cf. "Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided), from individual liability." Id. at 181.
^51See, HENDERSON, op. cit. supra note 2, at 60.
^52Superintendent Barnes of the New York State Department of Insurance wrote in 1868
very terminology of the constitutional provision served as a barrier to bringing the corporation within its protection. Since the earliest time the phrase "privileges and immunities" had been the language employed by the legal draftsmen in describing the exclusive franchises of the great trading monopolies and the domestic monopolies granted by the English Crown. In fact, it had been these precise words which came to be associated with the abuses of sovereignty under the colonial charters—privileges and immunities, which, it will be recalled, in no small measure, were to cost Whitehall its new world Empire.

While it is clear that Article IV, Section 2, of the Constitution is freighted with meaning which is quite to the contrary, it is not at all unlikely, as Henderson has observed, that the identity of phraseology may have led Field to assume that to apply the immunities and privileges clause to corporations would entitle them to claim their exclusive privileges in every state in which they were engaged in doing business. But the heart of plaintiff's case against the invalidity of the statute—which counsel deemed "conclusive" upon the subject—rested in the contention that, Congress having been vested with the power to regulate commerce, including commerce by corporations, it likewise had power to regulate the business of insurance. In rejecting this argument, Field effectively disposed of plaintiff's case. It was readily conceded that Congress had power to control the interstate commerce of corporations. How, then, was the argument vulnerable? To Field the answer was plain: the defect lay in the character of plaintiff's business. Insurance was not commerce. Having thus exorcised a business

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as follows: "The granting of valuable corporate franchises by special charters is not republican in theory, and in general legislative history it has proved to be so demoralizing in its effects, that the democratic rule of inhibiting all special privileges and corporate monopolies has been for years gaining strength, both in our State constitutions and general legislative policy." NEW YORK INSURANCE REPORTS (Barnes' Condensed Ed. 1868) 792. See discussion, supra, note 15.


54It is not without interest in this connection that Alexander Hamilton, in a memorandum submitted in 1791 on the constitutionality of the proposed National Bank, observed that there were certain "palpable omissions" from the powers conferred in the Constitution, and of those "which admit of little, if any, question", he listed "the regulation of policies of insurance." I LEGAL MASTERPIECES (Veeder ed. 1903) 229.

55Cf. "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties
from the realm of interstate commerce, little more was required to round out the decision.

However unrealistic was Field's conception of the nature of insurance—as unrealistic then as now—his classic commentary is understandable in the light of the practical exigencies of government. It must be remembered that the Court was not construing an act of Congress; it had before it a state statute. Therefore, a determination that insurance was a business in interstate commerce would have been tantamount to creating a governmental vacuum: on the one hand, it would have undermined existing state control and, on the other hand, it would have prevented any effective regulation over the insurance business whatsoever.

Judges, no less than the forces of nature, abhor a vacuum. Appreciative of the complexities of a federal system, Field attempted to strike an accommodation between the conflicting pressures of government. It is, however, the fate of judicial decisions that *dictum* uttered in other contexts and growing out of peculiar climates of opinion become rigid constitutional formulae. Such has been the history of Mr. Justice Field's classic commentary upon the nature of insurance. For forty-five years the Supreme Court has consistently adhered to its ruling in *Paul v. Virginia*.56

which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce." 8 Wall. 168, 183 (U. S. 1868). For a trenchant comment on Field's conception of the insurance policy, see HUEBNER, *op. cit. supra* note 28, at 91. Other writers have criticized Field's dictum. See, for example, II WILLOUGHBY, *The Constitution* (1929) §§ 294, 296; I WATSON, *The Constitution* (1910) 520-521; TUNES, *Insurance in Its Relation to the Commerce Clause of the Federal Constitution* (1900) 39 Am. L. Reg. (N. S.) 717. The patent absurdity of Field's reasoning was alluded to by the late Darwin P. Kingsley when he said: "An applicant for life insurance lives in New Jersey and I have a policy on his life ready for delivery on my desk. If I telephone him about the policy, the message is interstate commerce. If I telephone him about the policy, that is interstate commerce. But if I send the policy itself to him by hand or through the mails or by express, that is not interstate commerce." The Chief Justice has had occasion to discuss this basic problem in Electric Bond & Share Co. *v.* Securities and Exchange Commission, 303 U. S. 419 (1937). 56 See, Ducat *v.* Chicago, 10 Wall. 410 (U. S. 1870); Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566 (U. S. 1870); Philadelphia Fire Ass'n *v.* New York, 110 U. S. 110 (1886); Hooper *v.* California, 155 U. S. 648 (1894); Noble *v.* Mitchell, 164 U. S. 367 (1896); New York Life Ins. Co. *v.* Cravens, 178 U. S. 389 (1899); Nutting *v.* Massachusetts, 183 U. S.
In 1913, the insurance problem was again presented to the Court in *New York Life Insurance Company v. Deer Lodge County.* It is not without significance that the decision of the majority turned on precisely the same practical considerations that dictated Field's decision in the progenitor case: the Congress had not legislated in the insurance field; to have upset a host of state regulatory and taxing laws would have left the insurance companies free for the time being from all control, despite the enormous growth of the insurance business since the decision in *Paul v. Virginia.* A majority of the Court was, therefore, constrained to "invoke the sanction of the rule of stare decisis."

Over a quarter of a century has elapsed since the Supreme Court last had before it a case involving the problems of the insurance industry. During this quarter of a century the changes in the business of

553 (1901); *New York Life Ins. Co. v. Deer Lodge County,* 231 U. S. 495 (1913).

Even so astute a student of constitutional law as Dean Landis appears to have accepted uncritically the paralyzing effect of Field's dictum. For in an opinion rendered to Messrs. Carter, Ledyard & Milburn, New York City, after reviewing the cases cited above, he was able to state: "These cases, of course, only establish that the business of insurance is not immune from State regulation as being interstate commerce. The corollary that the business of insurance cannot be regulated by the Federal Government on the ground that it is not interstate commerce would seem to follow." (Ital. supplied). See, *Hearings before the Senate Committee on Banking and Currency,* S. RES. 84, 73d Cong., 1st Sess. (1934) 6646. That Field's dictum has become an *idee fixe* may be seen from the fact that the Senate Committee on the Judiciary gave as its opinion that the Federal Government was without power to supervise and regulate the business of insurance "except in the District of Columbia, the Territories, and the insular possessions of the United States." It is not without irony that the memorandum in support of its one paragraph opinion, which the Committee agreed to make available, has never been produced. See, *Sen. Rept. No. 4406,* 59th Cong., 1st Sess. (1906).

*231* U. S. 495 (1913). Dean Emeritus Roscoe Pound was of counsel for plaintiff-in-error.

*Id.* at 502. That Chief Justice (then Associate Justice) Hughes should have joined the dissent is, perhaps, not surprising in view of his intimate experience with the insurance business derived from his investigation of New York insurance companies in 1906. See, *Testimony taken before the Joint Committee of the State and Assembly of the State of New York to investigate and examine into the business and affairs of Life Insurance Companies doing business in the State of New York* (1905). The gravamen of the Court's reasoning appears from the following: "We have already pointed out that if insurance is commerce whenever it is between citizens of different states, then all control over it is taken from the States and the legislation regulations which this Court has heretofore sustained must be declared invalid." *Id.* at 509. It should be noted, however, that the Court did not hold that the interstate aspects of the insurance business were in themselves beyond the boundaries of federal authority had federal control over those interstate aspects been attempted. The Court concluded only that the interstate aspects which plaintiff relied upon were but incidental to the principal business which was a local matter and that the incidental interstate aspects could not remove the local business from state control.
insurance have been even more fundamental and far-reaching than was witnessed during the forty odd years culminating in the Court's decision in the Deer Lodge County case.\textsuperscript{50}

Today, one of the most significant aspects of the insurance business, and which distinguishes it from those phases of the business heretofore presented to the Court, is the scope of its investment activities.\textsuperscript{60} To enlarge upon the implications of the control by our great insurance companies over their tremendous pools of capital, the effect of these reservoirs of capital upon the capital and securities markets\textsuperscript{61} and their relation to the national economy, would carry the discussion beyond the confines of this paper. But the question remains: Would the Supreme Court, upon an appropriate record involving an act of Congress and in the light of the altered significance of the insurance problem, perpetuate its ruling that insurance is not commerce?

\textsuperscript{50}See note 57, supra.

\textsuperscript{60}It should be noted that counsel in the Deer Lodge County case did not present to the Court an argument revolving about the nature and scope of insurance company investments. As indicative of the widespread ramifications and economic effects of insurance companies, it may be noted that as of December 31, 1937, 49 legal reserve life insurance companies, representing 92% of the assets of all legal reserve companies doing business in the United States, had assets aggregating $24,241,000,000. For the specific nature of insurance company investments, which affect all segments of the national economy, see Report of the Annual Proceedings of the Association of Life Insurance Presidents (1938).

\textsuperscript{61}The impact of insurance companies upon the capital markets is graphically demonstrated in the increasing acquisition of corporate securities through private placement, \textit{i.e.}, the sale by the issuer to a small group of purchasers without public offering and without the utilization of the existing investment banking machinery. For the period from January, 1934, through June, 1938, life insurance companies constituted by far the largest and most important group of purchasers of issues placed privately. It is estimated that for this period life insurance companies acquired approximately 86% of all registered private placings. At the close of 1938, of a total of approximately $1,890,000,000 of new corporate issues, approximately $590,000,000, or 31% of the 81 new issues were privately placed.
THE CONSTITUTION AND THE CONFLICT OF LAWS

JAMES BARCLAY SMITH*

Much that has been written in recent years on what is called "the conflict of laws" seems more inclined to the practice of demonology than to the amelioration of the legal order. Another tendency which contributes no more to American inter-state well being is the fetishism bestowed upon the subject "conflict of laws" as if it were a thing and objective in itself and not merely an abrasive in the legal machinery. Within the cult promiscuous endogamy has caused the descending theories to suffer from atavism. It is basilary that before there can be any conflict there must be more than one source of sovereignty. The occasion of the issue arises from the political order and accepted governmental units as they are integrated into nationality. The legitimate function of standards of interpretation must be to embrocate the points at which the several systems impinge. The history of theories seems to follow and not to dictate the political order. It is not so much a French, Italian, or German theory, but that in Italy the city was the basic political unit, in France the province, and in Germany the state. When national consciousness characterized the political thought of Holland, upon achieving independence, the questions of differences became those arising between independent sovereigns. When nationalization was completed in Italy, France, and Germany, a similar reaction followed as the former political units were subordinated to national and territorial autonomy. The term "municipal" comes to refer to the internal law of the nation, and the word "state" to indicate the new political integer, the nation and national personality. If there were only a single sovereign in the world no deobstruent would be necessary. Whatever might be its virtues, the facts preclude the approach, if reality is material, on the broad basis of demotics and necessitate an initial inquiry into the nature and purpose of the political order under national personality and integrity.

If the political unit enjoys complete sovereignty there is no medium

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other than the force of arms by which the will of any other government can be directly executed within its territory. Here conflict-of-law theories may have great missionary utility if designed to convert such sovereign to catholic equation of Christian principles to the end that social and economic conditions may be ameliorated through rules of law. A wholly different problem exists if the political unit charged with the adjudication of extra-territorial activities is not a complete sovereign. If choice is controlled, the preliminary question is not what it might do but what it must do. This study is concerned with the latter. Until an issue falls outside this command there is no "conflict of laws". With us, our several "states" are bound by a common covenant. The initial study must, therefore, be of that covenant, the Constitution of the United States of America. Only areas beyond its control can involve problems of the same stature as those in private international law. The subject is Constitutional Law. During the past few years, statements, typical of which is the following—"there has been a tendency on the part of the Supreme Court of the United States in late years to extend the application of various provisions of the Federal Constitution to matters of Conflict of Laws"—have been common in legal literature. The language of the Supreme Court on another issue may indicate the underlying deficiency of such concepts—"no sense of nationalism, and only a cosmic sense of belonging to the human family." The erroneous classification may be partly explained by the fact that for many years no course in Constitutional Law was offered in our law schools, or at least was not required, while dynamic leadership in the subject of Conflict of Laws was Japanesing the unprotected territory. To one whose study begins with the integration of the Constitution and the body-politic it might seem a sort of political atheism. Through the use of the word political I do not intend any narrow or partisan sense, but the Greek meaning of the term as referring to the best needs of the city or state.

There can be no dissent from the obvious truth that correction of the ataxia suffered between the parts of a people, common by nature, was the primary objective sought through the present Constitution. This could only be achieved by political autonomy in regard to important points of common interest. "For all the great purposes for which the Federal government was formed, we are one common people, with one common country." Several provisions of the Constitution endow the nation with singleness of source of standards for specific purposes, as, for example,
the commerce clause. They are the *foramen magnum* into the conflicting international character of the states' sovereignty and laws under the Confederacy which previously existed. Their expanding and absorptive function has been discussed elsewhere\(^5\) and will be referred to later in this study. Only one stipulation of the social compact\(^6\) dealt with the recognition of the official governmental action of one state by the others. It is to it that we must turn for information.

When one considers the experiences of the leaders of the Constitutional Convention during the travail of the United States of America from colonial dependency, through Confederacy to national energy, the explanation is obvious of the clearness with which they perceived that if the new government was to be an effective one, it should possess, through some of its organs, power to annul conflicting state laws. During the Convention of 1787 proposals were repeatedly urged which would expressly confer such a power upon the national legislature, courts, or a council of revision composed of the executive acting with a "convenient number of the national judiciary". It was even proposed, with the same purpose, that the federal executive should appoint the governors of the states. These proposals were rejected and the only express provision of the Federal Constitution which affects the supremacy of the Federal Constitution and the laws is the one that provides that "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." But the national government could not be effective if its powers were subject to conflicting interpretations by the courts of the several states, with the interpretation of the federal powers by the highest court of any state final and conclusive within that state. So, in the third article of the Constitution it has been broadly declared that "The judicial power shall extend to all cases arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority".

Fully recognizing that there can be no uniformity where many


\(^{2}\)In Munn v. Illinois, 94 U. S. 113. 124 (1877), the Court said: "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.'"
sovereigns interpret and construe even the same rule, the framers of the Constitution set about to establish an effective machinery through the super-state which was to establish and enforce uniformity among the several states. The records of the Constitutional Convention and the pages of The Federalist still throb with the pulse of those patriotic men. Their creed was that the “vigor of government is essential to the security of liberty”. What other effect could result from the many years of suffering under the chaos resulting from lack of coordinated effort for unified activity? In reference to the previous contributions and retaliations enforced among the states they say:

“We may be assured, by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruption of the public tranquility.”

They set about with a zeal and fervor perhaps not rivaled at any other time in history to build into and vest in centralized control such powers as they believed would best effect and perpetuate their ideals.

One of these powers, and by no means one to which they gave a minor role, was:

“The power of prescribing, by general laws, the manner in which the public acts, records, and judicial proceedings of each state, shall be proved, and the effect they shall have in other states is an evident and valuable improvement on the clause relating to this subject in the articles of confederation. The meaning of the latter is extremely indeterminate; and can be of little importance under any interpretation which it will bear. The power here established, may be rendered a very convenient instrument of justice and be particularly beneficial on the borders of contiguous states, where the effects liable to justice may be suddenly and secretly translated in any stage of the process, within a foreign jurisdiction.”

The records of the Constitutional Convention show that a great amount of deliberation was given to the full faith and credit clause and that it reached its final mandatory form only after many revisions. The mandatory form and the power given to Congress to prescribe the manner of proof were incorporated with a view to nationalization and uniformity with a super-structure in the Federal Government empowered to compel uniformity, for, as a member remarked, “If the Legislature were not allowed to declare the effect the provision would amount to nothing more than what now takes place among all Independent Nations.”

The inherent weakness of the Confederation from a national aspect was

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1 The Federalist (Hallowell, ed. 1857) 196.
2 Id. at 198. See Pierson, The Federalist in the Supreme Court (1924) 33 Yale L. J. 728.
the lack of central power. The uncertainty and chaos were augmented by
the rivalry and jealousies existing among the several states. The ex-
periences of the leaders of the Constitutional Convention and the em-
barrassment resulting from this lack of central authority had been burned
into their very souls by the fire of patriotism which animated them
throughout the Revolution and afterwards. They recognized that the
elements comprehended within the full faith and credit clause might serve
either to aid or defeat the union depending upon how far citizens of one
state might depend upon the Constitution to enforce their rights in other
states. It was with this in view that they swept aside any power of states
to deny the effect given to the public acts, records, and judicial pro-
cedings of any other state.10

In regard to the recognition to be extended a foreign (French) judg-
ment, the Supreme Court in Hilton v. Guyot11 gives us an interesting
historical sketch of the period.

"The law upon this subject, as understood in the United States, at the time of
their separation from the mother country, was clearly set forth by Chief Justice
Parsons, speaking for the Supreme Judicial Court of Massachusetts, in 1813,
and by Mr. Justice Story in his Commentaries on the Constitution of the United
States, published in 1833. Both those eminent jurists declared that by the law
of England the general rule was that foreign judgments were only \textit{prima facie}
evidence of the matter which they purported to decide; and that by the common
law, before the American Revolution, all the courts of the several Colonies and
States were deemed foreign to each other, and consequently judgments rendered
by any of them were considered as foreign judgments, and their merits \textit{reexam}-
inable in another Colony, not only as to the jurisdiction of the court which
pronounced them, but also as to the merits of the controversy, to the extent to
which they were understood to be \textit{reexam}inable in England. And they noted that,
in order to remove that inconvenience, statutes had been passed in Massachusetts.
and in some of the other Colonies, by which judgments rendered by a court of
competent jurisdiction in a neighboring Colony could not be impeached. Bissell
Story on the Constitution (1st ed.) §§ 1306, 1307.

"It was because of that condition of the law, as between the American Colonies
and States, that the United States, at the very beginning of their existence as a
nation, ordained that full faith and credit should be given to the judgments of
one of the States of the Union in the courts of another of those States.

"By the Articles of the Confederation of 1777, art. 4, § 3, 'Full faith and credit
shall be given, in each of these States, to the records, acts, and judicial proceedings

\textsuperscript{10}The very purpose of the full faith and credit clause was to alter the status of the
everal states as independent foreign sovereignties, each free to ignore obligations created
under the laws or by the judicial proceedings of the others, and to make them integral parts of
a single nation throughout which a remedy upon a just obligation might be demanded as of
right, irrespective of the state of its origin." Milwaukee County v. M. E. White Co., 296
U. S. 268, 276 (1935).
\textsuperscript{11}159 U. S. 113 (1895).
of the courts and magistrates of every other State.' 1 Stat. 4. By the Constitution of the United States, Art. 4, § 1, 'Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.' And the first Congress of the United States under the Constitution, after prescribing the manner in which the records and judicial proceedings of the courts of any State should be authenticated and proved, enacted that 'the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken.' Act of May 26, 1790, c. 11, 1 Stat. 122; Rev. Stat. § 905.'

While the full faith and credit clause was introduced into the Constitution to forestall and overcome the conditions existing under the Confederation, it was little used at first. One reason was the great difficulty of travel and lack of facility for interstate commerce. Another reason was that the infant ship of state was launched upon a stormy sea. A nation of limited powers moving in an atmosphere fearful of centralized authority and composed of states jealous of their vague sovereignty naturally would not be preoccupied with its administrative organization. We find the Supreme Court frequently bemoaning among themselves that issues testing the strength of the national government and tending to centralize national power should be raised at the time; and with their hearts in their mouths the intrepid helmsmen guided their uncertain course in the face of powerful opposition. With the very existence of their beloved nation and constitution at stake, they must not fan the embers of discontent when the issue did not determine the future course and the power of the Federal Government.

The clause was enacted specifically and has been declared to be limited to the internal regulation and recognition of relations among the several states and has no application to international relationship. It is clearly within the province of independent sovereigns to grant such jurisdiction to their own courts as they may see fit. No such discretion exists among the states of the United States on any issue within the scope of the full faith and credit clause. The object of the clause was to suspend and extinguish independent sovereign action by the several states on matters included therein, and to do this in so far as it would tend to national unity and uniformity. "Comity" is a term applied to certain discretionary actions between sovereigns. In so far as any issue may be within the scope of the full faith and credit clause, there is no justification or occasion for the

\(^{12}\)Id. at 180-182.

\(^{13}\)For the early problems of statemanship see Warren, The Supreme Court in the United States (1922).
exercise of "comity" or "conformity to local policy". As the full faith and credit clause operates through and as part of the law of the forum, obviously no state rule or law can exist in conflict therewith. The problem we are concerned with arises whenever a sovereign is confronted with the question of whether to apply its own rules of law or those of some other sovereign. The latter phase may also involve the determination of which of several sovereigns, other than the forum, should be recognized as the source of applicable standards. Actually there is no possibility of a conflict of laws as in every case there is some controlling sovereign force. When the operative facts are associated with the laws of some state or states other than the forum, the task of the forum is the determination of the standard of interpretation, and, for convenience, is said to arise from a conflict of laws. There is no novelty to the conditions in so far at least as differences between systems of national law are concerned. Such have existed from the earliest times. Because of limited travel and commerce their adjustment was of little public importance.

Peoples were provincial and "had little desire to learn, or to borrow, from each other; and indifference, if not contempt, was the habitual state of almost every ancient nation in regard to the internal polity of all others." Such interest was awakened by several forces. The Crusades gave contact, the Rennaissance brought interest, and commercial expansion caused dependency upon the laws of other nations. Travel, migration, and commerce gave public importance to foreign laws. Then, as now, no independent government could give direct application and execution of its own laws within the territory of another. To gain commercial advantages, however, it became expedient for the latter to give some recognition to such rules. Further, as intercourse between nations increased, motives of decency and fair-play prompted the forum to preserve intact imported legal relations. These were reciprocal concessions or courtesies, and, for convenience, the application of the rules of law of another by the adjudicating sovereign was done as a matter of comity. Obviously this concession was of the country not of its agency, whether judicial or executive. The latter department of government usually treats with matters between nations which involve their corporate personality, while the judiciary usually handles the claims of individuals. It is only with the latter that we are here concerned. But, by whatever agency the concession was made, it was basically political, and, however

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14See Borchard, Diplomatic Protection of Citizens Abroad (1915).
15Story, Conflict of Laws (1834) § 1.
worded, was an expression of public policy by the sovereign. Much of the chaos within the United States as to the applicable standards has been due to inversion in approach and oversight of the limitations upon the sovereignty of members. Modification of territorial absolutism is a partial abandonment of the egregious egoism in which Justice Story found the explanation for the dearth of early adjudication. How else could such a complete sovereign carry-off the occasion than by an act of courtesy. The original special significance of the word “comity” generally loses its diplomatic aspect and, as juristic thought becomes more civilized and complete, the selection of rules of foreign source in lieu of those of the forum becomes incidental to the normal administration of justice guided by general principles. Comity never meant the stepping aside of the forum sovereign to permit another to enforce its laws ex proprio vigore but only that the forum would itself apply a rule the same as that of the other sovereign. But the motivation was political expediency. When the inquiry returns to our own inter-state relations we find no examination as to the political organization or theory. The conclusion that there is no difference in the freedom to choose the applicable standards for the interpretation of imported operative facts by the State of New York than is enjoyed by Germany is jumped at. It seems to have resulted more from an expression in Story’s Conflict of Laws than from anything else. (It should be called the Topsy theory.) It is equivalent to finding that Justice Story was ignorant of the Constitution because he used the word “state” interchangeably with the word nation and we are united states. If the conclusion is not absurd upon its face its fallacy is obvious when his objectives are examined. In the first place he had previously published what is still the most authoritative treatise on the Constitution. His preliminary statements refer to his subject as “a branch of international jurisprudence” and distinguishes the same from the “municipal law” of a nation. Throughout the treatise when the freedom of national choice is transplanted to an American state and encounters constitutional limitation the domination of the latter is fully recognized, for example, the contract clause. Finally he says:

“The mode, by which the laws, records, and judgments of the different states composing the American Union, are to be verified, has been prescribed by Congress, pursuant to an authority given in the Constitution of the United States. It is, therefore, wholly unnecessary, to dwell upon this subject, as these regulations are properly a part of our own municipal law; and do not strictly belong to a treatise on international law.”

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17See Story, op. cit. supra note 15.
18See Cook, supra note 1, at 368.
19Story, Conflict of Laws (1834), § 644. In a note thereto he refers to his previous
Whenever a litigant applies to the courts of any state properly alleging a cause of action therein, based on facts occurring in another state, there is treatise on the Constitution. There we find: "§ 1303. The articles of confederation contained a provision on the same subject. It was, that 'full faith and credit shall be given in each of the States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.' It has been said, that the meaning of this clause is extremely indeterminate; and that it was of but little importance, under any interpretation which it would bear. The latter remark may admit of much question, and is certainly quite too loose and general in its texture. But there can be no difficulty in affirming, that the authority given to Congress, under the constitution, to prescribe the form and effect of the proof is a valuable improvement, and confers additional certainty as to the true nature and import of the clause. The clause, as reported in the first draft of the Constitution, was, "that full faith and credit shall be given in each state to the acts of the legislature, and to the records and judicial proceedings of the courts and magistrates of every other State." The amendment was subsequently reported, substantially in the form in which it now stands, except that the words in the introductory clause, were, "Full faith and credit ought to be given," (instead of "shall"); and, in the next clause, the legislature shall, (instead of, the "Congress may"); and in the concluding clause, "and the effect, which judgments obtained in one State shall have in another" (instead of, "and the effect thereof"). The latter was substituted by the vote of six States against three; the others were adopted without opposition; and the whole clause, as thus amended, passed without any division."

"§ 1309. Let us then examine, what is the true meaning and interpretation of each section of the clause. 'Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.' The language is positive, and declaratory, leaving nothing to future legislation. 'Full faith and credit shall be given;' what, then, is meant by full faith and credit? Does it import no more than that the same faith and credit are to be given to them, which, by the comity of nations, is ordinarily conceded to all foreign judgments? Or is it intended to give them a more conclusive efficiency, approaching to, if not identical with, that of domestic judgments; so that, if the jurisdiction of the court be established, the judgment shall be conclusive as to the merits? The latter seems to be the true object of the clause; and, indeed, it seems difficult to assign any other adequate motive for the insertion of the clause, both in the confederation and in the Constitution. The framers of both instruments must be presumed to have known, that by the general comity of nations, and the long-established rules of the common law, both in England and America, foreign judgments were prima facie evidence of their own correctness. They might be impugned for their injustice, or irregularity; but they were admitted to be a good ground of action here, and stood firm, until impeached and overthrown by competent evidence introduced by the adverse party. It is hardly conceivable, that so much solicitude should have been exhibited to introduce, as between confederated States, much less between States united under the same national government, a clause merely affirmative of an established rule of law, and not denied to the humblest or most distant foreign nation. It was hardly supposable, that the states would deal less favorably with each other on such a subject, where they could not but have a common interest, than with foreigners. A motive of a higher kind must naturally have directed them to the provision. It must have been 'to form a more perfect union,' and to give to each State a higher security and confidence in the others, by attributing a superior sanctity and conclusiveness to the public acts and judicial proceedings of all. There could be no reasonable objection to such a course. On the other hand, there were many reasons in its favor. The States were united in an indissoluble bond with each other. The commercial and other intercourse with each other would be
ordinarily no option with the forum, as to whether to entertain the same or to deny it on the grounds of public policy, or on a question of comity, or otherwise.\textsuperscript{20} It is impossible for any issue \textit{within} the scope of the full faith and credit clause to be contrary to the local policy. Under our system of government and by express declaration of the Constitution itself, the provisions thereof are the supreme law of the land. The full faith and credit clause operates through and is a part of laws and public policy of every court, state and federal, in the United States. The Constitution itself specifically declares the so-called local policy and any act of a state legislature or any other rule which is in conflict with the scope of the full faith and credit clause is unconstitutional. This was the thing the framers of the Constitution and the first Congress had in mind when they drafted the rules of appellate jurisdiction. Review might be had constant, and infinitely diversified. Credit would be everywhere given and received; the rights and property would belong to citizens of every State, in many other States than that in which they resided. Under such circumstances, it could scarcely consist with the peace of society, or with the interest and security of individuals, with the public or with private good, that questions and titles, once deliberately tried and decided in one State, should be open to litigation again and again, as often as either of the parties, or their privies should choose to remove from one jurisdiction to another. It would occasion infinite injustice, after such trial and decision, again to open and re-examine all the merits of the case. It might be done at a distance from the original place of the transaction; after the removal or death of witnesses, or the loss of other testimony; after a long lapse of time, and under circumstances wholly unfavorable to a just understanding of the case."

"§1310. It should be said, that the judgment might be unjust upon the merits, or erroneous in point of law, the proper answer is, that if true, that would furnish no ground for interference; for the evils of a new trial would be greater than it would cure. Every such judgment ought to be presumed to be correct, and founded in justice. And what security is there, that the new judgment upon the re-examination, would be more just, or more conformable to law, than the first? What State has a right to proclaim, that the judgments of its own courts are better founded in law or in justice, than those of any other State? The evils of introducing a general system of re-examination of the judicial proceedings of other States, whose connections are so intimate, and whose rights are so interwoven with our own, would far outweigh any supposable benefits from an imagined superior justice in a few cases. Motives of this sort, founded upon an enlarged confidence, and reciprocal duties, might well be presumed to have entered into the minds of the framers of the confederation, and the Constitution. They intended to give, not only faith and credit to the public acts, records, and judicial proceedings of each of the States, such as belonged to those of all foreign nations and tribunals; but to give to them full faith and credit; that is, to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied, any more than in the State where they originated." 2 Story, \textit{Commentaries on the Constitution} (5th ed. 1891) §§ 1303, 1309, 1310.

\textsuperscript{20} . . . the room left for the play of conflicting policies is a narrow one. . . . For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in a large measure, the general principle of international law by which local policy is permitted to dominate rules of comity." Broderick \textit{v.} Rosner, 294 U. S. 629, 642-643 (1935).
only where a federal right was denied. The Judiciary Act of 1789 specifically provided for review as of right where, among other things, the validity of a statute of or any authority exercised under any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States were drawn in question and the decision was in favor of their validity. Thus, any attempt to circumscribe the uniformity provided for was immediately subject to the control of the national power through the Supreme Court.21

21If it is possible for a right to exist without a remedy, comparatively at least, this anomaly existed, prior to 1914, whenever a private right involving a federal question was asserted and upheld in state court. The injured party might seek relief by review only where his case fell within the provisions contemplated by Congress to preserve the supremacy of the Federal Government. These provisions were first given effect in § 25 of the Judiciary Act of 1789. It was repealed and re-enacted in the Revised Statutes as § 709. Slight amendment was made in 1875. As re-enacted in § 237 of the Judicial Code, it provides that: "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or a statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ." 36 Stat. 1156 (1911). (Italics added). The purpose of federal review was two-fold: (1) to safeguard the powers of the United States, and (2) to safeguard the rights which individuals might claim under the Constitution, statutes, or authority of the United States.

If a federal question was set up in the state court and the decision of the state court upholds the federal right set up, it was quite clear that there was no review by the United States Supreme Court, although one of the parties to the suit in the state court was injured by such holding. The party against whom the federal right was set up had no right to a final decision of this question by the highest federal court, although he might have been as much interested and his rights as much affected as was the other party. (See, for example, Ives v. South Buffalo Ry., 201 N. Y. 271, 94 N. E. 431 (1911), holding Workmen's Compensation law in conflict with Federal Constitution). Where the state decision sustained the federal right, it was final and conclusive, and, in such a case, the state court was the final interpreter of the Federal Constitution and laws.

The form of the section probably resulted from the fact that when the Federal Judiciary Act was first framed, it was assumed that the state courts would be too liberal in upholding state laws attacked as violating federal rights. It was apprehended that the judicial tribunals of the state would incline to the support of the state authority against the federal government, and there was thought to be need only of checking state encroachments on federal power in
The "public policy" expression has found its way into judicial language by no extraordinary means. Several things may have introduced its use. Two of them stand out. In dealing with the subject of the Conflict of Laws, in the language of Mr. Justice Holmes, "state courts do not always have the Constitution vividly present in their minds." This was especially true of the state courts immediately upon the adoption of the Constitution. As we have seen, during colonial existence, the states or colonies properly applied and correctly used "comity" and were independent to deny or assume jurisdiction of any cause of action arising in another state in terms of "public policy". With the opposition to and ignorance of the Constitution, or without either of these, the state courts continued to talk in the language in which they were trained. They talked, and naturally talked, of comity and public policy. These terms were seamed into their language by the work of Mr. Justice Story, whose book appeared in 1834, and on the crest of the states'-rights tide. This book deals with the conflict of laws between strictly sovereign countries. It was not a safe guide, and was not intended to be a guide, on a conflict of laws between the states of the

this way, not of protecting the states themselves from state courts which might enforce federal limitations more strictly than the United States Supreme Court itself. The position assumed quite clearly existed until well into the nineteenth century, and probably until the freer use within recent years of the judicial power to annual legislation. But we find the conditions changed and that the states themselves and their citizens really need the protection of the United States Supreme Court against the strict and often illiberal decisions of their own courts on federal questions.

In passing it should be noted that the jurisdictional element is the federal question and review is in no manner dependent upon any diversity of citizenship or amount involved.

In 1914 § 237 was amended. This amendment did not molest the existing machinery of the writ of error review. The enacting clause provides for the amendment by addition. It did, however, give a certiorari power to review where all the elements necessary for review on writ of error are present except that the decision of the state court was adverse to the asserted federal right. On its face this seems a vast extension of federal control into a field exclusively occupied by the states. It may be answered, for example, with a state decision holding a state statute invalid. The statute was held invalid because the court said it believed the enacting legislature had no power to do so under the Constitution of the United States. Now, if on review, the Supreme Court of the United States declares that the state did have such power, it may be said that the amendment rather increases than decreases the power of the states. Nevertheless, if a state is considered as a unit, and speaking through its highest court sees fit to declare a particular statute objectionable where it might as well have sustained it; in fact, the amendment permits the federal power to override the expressed will of the state to that extent. But being so, the result is highly desirable.

No important cases appear under the amendment of 1914. The constantly increasing pressure upon the Supreme Court induced Congress to again modify the provision for review of judgment of state courts. It is interesting to observe that during the first 125 years of National existence it was not seen fit to make substantial change in the provisions of § 25 of the Judiciary Act of 1789, but that six changes were effected in the following thirteen years.
Union. The Supreme Court was loath to irritate the opposition to national centralization and readily fell into lip-service to the term. No case has been found, however, where the matter was in issue in which the court gave countenance to any such general privilege. In the language of the Supreme Court, the object of the Constitution was "an harmonious distribution of justice through the Union, to confine the states, in the exercise of their judicial sovereignty, to cases between their own citizens; to prevent, in fact, the exercise of that very power over the rights of citizens of other states, which the origin of the contract might be supposed to give to each state; and thus, to obviate that conflictus legum which has employed the pens of Huberus and various others, and which anyone who studies the subject may perceive, it is infinitely more easy to prevent than to adjust."

This rule of the fundamental and supreme law of the land operating through the forum extends to every part of the territory of the United States. It neither acts as a rule of local law by way of incorporation of rules of other states, nor does it serve to enforce the "vested rights" of other states. The right of a litigant is not vested in him, so as to tag

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"See LEFLAR, A TREATISE ON THE ARKANSAS LAW OF CONFLICTS OF LAWS (1938) 50-52: "Conflicting Theories. The Bealian point of view, manifest throughout the Restatement, is one of almost automatic recognition and enforcement of extrastate rights which are 'vested' by reason of having arisen under and been created by the law of the place where a particular transaction occurred. If the transaction itself were interstate, Beale would give it location by selecting a 'vital element' in it, and would treat the rights of the parties as 'vested' according to the law of the place where that vital element occurred. Any state in which suit was brought would discover by reference to the 'proper law' exactly what rights and obligations already existed, and would enforce those and no others, being permitted to deny enforcement in rare instances only on the ground that foreign-created right was opposed to 'strong local public policy.' Generally speaking, the only compulsion required that any particular court accept and enforce the territorial law thus selected would be the compulsion of the common law, the fact that the decision would be branded 'wrong' if it did not apply the 'proper law.' Federal Constitutional requirements were recognized, but were not deemed to be inherent in the law of Conflict of Laws."

"The anti-Bealian point of view acquired much of its impetus from the fact that in some areas of Conflict of Laws there were more 'wrong' decisions than right ones, according to the rules laid down by Beale, and that in others the courts by lip service appeared to follow orthodox territorial law concepts yet in fact were achieving whatever result seemed to them right in individual cases. Analysis of the mass of decisions tended to produce a conclusion that a court passing on a Conflict of Laws problem treated foreign law not as law but as fact to the extent of merely considering it along with all the other facts in the case and giving it whatever significance it as a fact merited in the particular case. By this theory there was no such thing as a right becoming 'vested' by automatic application of the territorially 'proper law' in any event, and no such thing as a 'foreign-created right' at all; no right came into existence except as it was created by a court which declared it to exist and rendered judgment accordingly. Enforcement of claims based on extra-state facts was thus deemed to be largely a matter of comity, though the hospitality of comity was found
him about, by the laws of the state in which the events may have occurred. Whatever right he may have to assert his operative facts in the courts of a state other than that in which they occurred is vested in him by the Constitution of the United States. It seems that a vested right must be expressed in terms of a conclusion of law. So also are the legal consequences of any given group of operative facts expressed to constitute a vested right in whatever sense the term is used, or whether the elements thereof may vary under different circumstances; given a "vested right", it is not a variable, but a certainty and of itself unchanging. Legal consequences do not spring spontaneously from human activity, but only from such human activity as is subject to some legal system. Where \( A \) contracts with \( B \) in state \( X \) and sues for a breach thereof in state \( Y \), if he is asserting a vested right of \( X \) in \( Y \), it must be in terms of legal consequence and as a conclusion of law. If that invariable conclusion defined his right or constituted it, by the terms employed, of necessity nothing to be seldom refused. The rallying-point of the anti-Beallians was a claim to realism and against conceptualism, a claim that they analyzed the decisions in terms of what the courts actually do rather than in terms of the concepts about which the judges in their opinion talk. This contest between the 'realists' and the 'conservatives' in legal thinking is by no means peculiar to the law of Conflict of Laws, but it has been especially hard fought in this field." A Note states, "For articles presenting the 'realist' point of view, see Cook, The Logical and Legal Bases of the Conflict Laws (1924) 33 Yale L. Jour. 457; Lorenzen, Territoriality, Public Policy, and the Conflict of Laws (1924) 33 Yale L. Jour. 736; Yntema, The Hornbook Method and the Conflict of Laws (1928) 37 Yale L. Jour. 468; Heilman, Judicial Method and Economic Objectives in Conflict of Laws (1934) 43 Yale L. Jour. 1082; Arnold, Institute Priests and Yale Observers (1936) 84 U. of Pa. L. Rev. 811. Compare Goodrich, Institute Bards and Yale Reviewers (1936) 84 U. of Pa. L. Rev. 449."

Without doubt the constitutional requirement, Article IV, § 1, ... implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home. This is clearly the logical result of the principles announced ... in Mills v. Duryee, and steadily adhered to ever since. The claim of the railroad company is that by law and usage in Illinois the operative effect of its charter in that state is to make such a contract as that now sued on ultra vires.

"Whenever it becomes necessary under this requirement of the Constitution for a court of one state, in order to give faith and credit to a public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. No court of a state is charged with knowledge of the laws of another state; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon. This court, and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof of the laws of the several states of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here. This was expressly decided in Hanly v. Donoghue, in respect to the faith and credit to be given by the courts of one state to the judgments of the courts of another state, and it is equally applicable to the faith and credit due in one state to the public acts of another." Chicago & Alton R. R. v. Wiggins Ferry Co., 119 U. S. 615, 622 (1887).
could remain for the forum but to give it enforceability. If $A$ asserts his claim in $Z$, a sovereign state, obviously sovereignty may extend such comity as it may see fit. But the states of the United States are not sovereign and must extend full faith and credit to the public acts, records, and judicial proceedings of every other state. Now, as the Supreme Court defines the operation of this clause, $A$'s only right is to assert his facts in $Y$'s forum. These facts have no definite and unchangeable form in terms of enforceability. They may not be expressed in terms of legal consequence or as a conclusion of law. They may only be asserted as required by the procedural rules of the forum. They are composed of the particular events and the rules of law of the state with which they are associated. They may vary from forum to forum, as for example, if they had been asserted in $P$, $D$, or $Q$, instead of $Y$, as the opinion of the court in which they are asserted might vary from the opinion of some other court in attaching legal consequence thereto.  

The forum in which these facts are asserted then determines whether or not a cause of action has been stated and proceeds to draw its own conclusions of law. The duty of the forum to determine this issue arises, and can arise, only by the authority and mandate of its own sovereign. $R$ can invoke the exercise of this authority; he cannot assert the authority of the State of $X$. As the party in whose favor the full faith and credit clause operates derives therefrom a legal right, the effect of the constitutional provision must be to impose a duty upon the forum. The duty so imposed is to adjudicate the issue as the forum understands the state's law applicable to the facts. The constitutional rule thus operates in, through, and as a part of the law of the forum. In order to establish what legal consequences the forum should attach to the facts, the rules applicable under the full faith and credit clause must be proved as facts, as any other element of the cause, in order to be given operative effect. The enforcement is not of a foreign right, but of a right reflected by the operation of the Federal Constitution.

A state court must not evade a federal right asserted. Thus the plaintiff has a right to have his facts considered by the forum and a rea-

24The distinction between a mistaken interpretation by the forum of the rules of law of another state recognized as providing the standards for the interpretation of the operative facts, and the refusal to recognize their applicability must be borne in mind. As the forum construes the laws of another state, the interpretation is not one of local law which is decisive upon the Supreme Court. Grand Gulf R. R. & Bk. Co. v. Marshall, 12 How. 165 (U. S. 1851); McCullough v. Virginia, 172 U. S. 102 (1898); Bandholzer v. New York Life Insurance Co., 178 U. S. 402 (1900); Johnson v. New York Life Insurance Co., 187 U. S. 491 (1903); Eastern Building & Loan Ass'n v. Williamson, 189 U. S. 122 (1903); Finney v. Guy, 189 U. S. 335 (1903); Smithsonian Institution v. St. John, 214 U. S. 19 (1909); Western Life Indemnity Co. v. Rupp, 235 U. S. 261 (1914); Pennsylvania Insurance Co. v. Gold Issue Co., 243 U. S. 93 (1917).
reasonable construction placed upon them. Where one of such facts is a rule of law of another state and is not properly pleaded, the forum has full independence in adjudging legal consequence to the facts properly asserted under the rules of procedure of the forum. If such a fact (rule) is properly asserted, the independent construction of the forum is limited to a reasonable construction thereof. It may not deny validity to it, but may construe it in good faith. The assertion is not in terms of a conclusion of law defining legal consequence to operative facts, but of a fact to be considered with the events associated therewith. The legal consequence to be attached to all the facts asserted will be expressed in a conclusion of law by the forum. The rule of law of the other state which is to be proved as a fact in the forum may be evidenced by an act of the legislature or a decision of the courts of the state to which the litigants were not parties. The rule of law so proved furnishes no mechanical measure; it is merely a rule of law to be construed and applied in the judgment of the forum. Arbitrary action undoubtedly would be reviewed by the Supreme Court of the United States, but judicial error is not a denial of good faith. The forum must recognize the rule of law asserted as a fact, but the construction thereof is in the discretion of the court so far as it "is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right." 25

Nor under the operation of the full faith and credit clause do the laws of \( X \) become a part of the laws of \( Y \) by incorporation. 26 In \( Y \), the rules of law of \( X \) are facts and may only be asserted with the other facts essential to constitute a cause of action. 27 Whether or not any pleading,

26To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit." Lynde v. Lynde, 181 U. S. 183, 187 (1901).
27Courts of one State do not take judicial notice of the laws of another State, whether written or unwritten. They must be proved as facts The law of New York was so proved in this case, and the contention is that it was not rightly construed by the South Carolina courts; that the law of New York which entered into and formed a part of the contract sued on was not given by those courts the same force and effect that it had in New York, and that hence the rights secured by the Constitution of the United States to the plaintiff in error were denied. If it appeared that the South Carolina courts, without questioning the validity simply construed a statute of New York, no Federal question would be presented." Eastern B. & L. Association v. Williamson, 189 U. S. 122, 125 (1903). The reasoning of this case is extended in Finney v. Guy, 189 U. S. 335, 340, 343 (1903). The Court says: "If the case had been on trial upon issues of fact [case was submitted on demurrer], among them being one as to what the law of Minnesota was, . . . and a witness learned in the law of Minnesota had testified what such law was, as deduced by him from those statutes and decisions, his testimony would not, even though uncontradicted, conclude the court upon that issue. Although the law of a foreign jurisdiction may be proved as a fact, yet the
invoking the jurisdiction of the forum, alleges a cause of action, is
determined not by any a priori test, but upon whether, in the opinion of the
court, a cause of action has been stated. In no court in the United States,
state or federal, is it necessary for a party to plead specially the general
laws of the state in which the court is sitting. For the purpose of giving
judicial cognizance to facts occurring anywhere in the territory of the
United States, the jurisdiction of the forum, by operation of this clause of
the Federal Constitution, extends from the Philippine Islands to Puerto
Rico and from Alaska to the Canal Zone. It seems hardly appropriate to
describe such a system as one of "local" law. It is local only in the sense
of the jurisdiction of the forum. Territorially it is of national scope.

This brings us to the keystone of the arch of uniformity, in a conflict
of laws sense, which spans the geographic lines of the several states and
bridges the gap between the place where the events occurred and the forum
in which they are asserted. The full faith and credit clause has two vital
aspects. The first is the positive duty of the court to adjudicate the
facts when properly alleged in the forum. While I have found no adequate
discussion of this point, obviously the particular events must be associated
and identified with the rules of law of some particular state in order to fall
within the operation of the full faith and credit clause. Thus if in a given
case, there is a conflict of laws between States X and Z and the facts
asserted occurred in both in such a manner as not, under the existing rules
of the choice of laws, to be identified with either, there is no defined duty
on Y forum to give faith and credit to either. But the federal machinery
to establish uniformity does not break down nor encounter any impassible
barrier in this dilemma. If the parties or either of them properly alleges
and brings before the court (state or inferior federal), in accordance with
the rules of procedure therein, or the decision thereof necessarily draws
in question a claim of federal right under the full faith and credit clause,

evidence of a witness stating what the law of the foreign jurisdiction is, founded upon the
terms of a statute, and the decisions of the courts thereon as to its meaning and effect, is
really a matter of opinion, although proved as a fact, and the courts are not concluded thereby
from themselves consulting and construing the statutes and decisions which have been
themselves proved, or from deducing a result from their own examination of them that may
differ from that of a witness upon same matter. In other words, statutes or decisions having
been proved or otherwise properly brought to the attention of the court, it may itself
deduce from them an opinion as to what the law of the foreign jurisdiction is, without being
conclusively bound by the testimony of a witness who gives his opinion as to the law, which
he deduces from those very statutes and decisions.

"This right and duty of the courts to themselves construe the statutes and decisions are
not altered because the law of the foreign State and the various decisions of its courts are
alleged to be as set forth in a pleading which is demurred to instead of being proved on
a trial."
then jurisdiction for review exists in the Supreme Court of the United States. Having jurisdiction and the case before it on the merits, it may proceed to lay down such rules of its own as it may see fit to remove the uncertainty and identify the events in question with the rules of law of either X or Z. In order to determine whether or not full faith and credit has been given to the rules of law of a particular state, it necessarily must determine whether or not the events alleged were so identified therewith as to be within this clause of the Constitution. Whether or not the Supreme Court will proceed to remove the conflict by a rule of uniformity depends entirely on whether it feels a substantial question is presented. It has seen fit in many cases in the past to replace cankerous questions with simple rules of uniformity and will continue to do so in the future where commercial, social, and political pressure have convinced the Court that the occasion is auspicious in the national interest.

Again, it seems appropriate to outline the growth of national power. We first find independent autonomous colonial states followed by a confederation which added little to national unity. The Constitution was created by champions of centralized power and national unity. They launched the new state and for a brief period protected and expanded their ideals. Then follows the rising tide of states'-rights clamor culminating in the Civil War. War hysteria concentrated autocratic powers in the national governmental organs and produced, among other constitutional changes, the Fourteenth Amendment. Cries of "states'-rights" and "state sovereignty", thereafter, form only an echo of the past. The advent of the first chief justice and the court composed of members who had actually aided in framing the Constitution found little or no occasion to construe Article 4, Section 1. The Great Chief Justice, as has already been suggested, was too great a statesman to press the application, but acted fearlessly in so far as he was compelled to do so. While there was some expansion of the exercise of national power under Chief Justice Taney, neither was he the champion of such, nor can his era be pointed to as one of nationalistic centralization. How the language of "public policy of the forum" and "comity" were written into judicial thought has been pointed out. The political aspect is not alone important. We must picture the difficulties of commercial and social communication. The Court itself was horsebacking from Massachusetts to Georgia, and some of its members were compelled to abandon the bench because of the hardship of circuit riding. Can we picture the late Chief Justice Taft descending the steps of the state house in Washington, with his saddle bags over his arm, to gallop through the wilds of Maryland forests to Baltimore and Philadelphia, days in the distance? Even The Federalist, while never
faltering in championing uniformity and central power, suggests that the special importance of the operation of the full faith and credit clause was along the borders of contiguous states. Now London and San Francisco are not more distant from each other than were New York and Camden in 1789. These suggestions of the mores of the times are outlined to indicate how little necessity existed, how this was resented and hedged about, how the language was made foreign to, and how courts and counsel became weaned away from the only provision originally contained in the Constitution for avoiding conflicts between the laws of the several states. While only one provision was made, it was adequate and comprehensive. Its disuse gave rise to a contortion of provisions of the subsequent amendments to inadequately perform what the full faith and credit clause was specially designed to accomplish.

The Supreme Court has been feeling its way. In the early history of the Court commercial intercourse gave little occasion for the application of the constitutional question here presented. During this period of non-action a great volume of state rules of law have grown up with a resulting wilderness of conflicting rules through which only the Supreme Court may penetrate to blaze a trail of constitutional uniformity.

These conclusions, heretical of my earlier accepted teaching, are derived from no torah but result from a thorough study of the entire body of materials as a unit. No other method will disclose the course of decision. The labor should provide expiation. The legal literature on the subject Conflict of Laws indicates a process of reasoning into which this or that case is sandwiched to buttress a particular theory. To meet this and fully support my conclusions would require a detailed analysis of the whole record. That must be done subsequently as space does not permit it here. We can, however, observe a number of recent judicial trends which indicate the course of adjustments between the political units of our bicameral system.

We have dealt with the purpose and function of the full faith and credit clause. Complete treatment requires, in addition, an examination of (1) its operation in regard to things which are within it; (2) its scope and comprehension, which includes (2a) distinctions between substance and procedure; (3) the defense of local public policy; and (4) the choice of states or the identification of the facts with the legal system of some state. It is the purpose of this paper to merely observe the nature of these problems leaving the detailed analysis to another time.

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28Prior to 1850 there were only four definitive cases. They followed the date of the adoption of the Constitution and each other in intervals of seven, nineteen, five, nineteen, and eleven years respectively.
The operation of the full faith and credit clause has been referred to in the discussion of its function. From the first opinion on the circuit, *Armstrong v. Carson*,26 by Mr. Justice Wilson who was a member of the committee which prepared the clause in the Constitutional Convention, the Court has recognized the political nationalizing effect of the clause. When the facts asserted in the forum are completely identified with the laws of some other state of the Union, the litigant has a federal right under the Constitution operating in and through the forum that the forum shall recognize the applicability of the foreign law and in good faith30 adjudicate the legal relations arising from the facts as it understands the controlling standards. The litigant must claim the federal right and prove the laws of the other state.31 The forum must attach the same legal consequences to the fact that it finds they would have had at home.32

Much greater difficulty is associated with the determination of the comprehensiveness of the terms "public acts, records, and judicial proceedings" the effect of which is mirrored in the full faith and credit clause at the forum. This problem necessarily tends to merge into the third and fourth but separate treatment is helpful. When we seek to divine future official action, it seems elementary that the determination of the nature of the political order and the ends it seeks are preliminary to any sound advice as to how it should conduct its relations with other sovereigns. Under the Confederacy prior to the creation of our present system, the

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26 Dall. 302 (U. S. 1794).
27 Cf. note 23, supra.
29 Mills v. Duryee, 7 Cranch 481 (U. S. 1813); McElmoyle v. Cohen, 13 Pet. 312 (U. S. 1839); Hancock National Bank v. Farnum, 176 U. S. 640, 643 (1900): "In other words, the local effect of public acts, records, and judicial proceedings must be recognized everywhere through the United States." Allen v. Alleghany Co., 196 U. S. 458 (1905) turns upon matters of proof and construction—on what and how the forum must operate. In discussing the *Chicago & Alton R. R. v. Wiggins Ferry Co. case*, the Court said: "We held that the law of Illinois to have effect should have been proved as a fact, either by decisions of its courts or by law or usage in that State; that state courts are not charged with a knowledge of the laws of another State; but they have to be proved, and that while Federal courts exercising their original jurisdiction are bound to take notice of the laws of the several States, yet this court, when exercising its appellate jurisdiction from state courts, whatever was matter of fact in that court is matter of fact here. No proof having been offered to support the averment that the contract was in violation of the laws of Illinois, the defense relying on the general claim that the contract was illegal, it was held that no Federal question was involved, and the case was dismissed. It was said that it should have appeared on the face of the record that the facts presented for adjudication made it necessary for the court to consider the act of incorporation in view of the peculiar jurisprudence in Illinois, rather than the general law of the land." Allen v. Alleghany Co., 196 U. S. 458, 464 (1905); Adams v. Saenger. 303 U. S. 59 (1938).
several states bore an international relationship to each other. The Articles themselves recognized that each state was "sovereign" to itself, and that "The States severally enter into a firm league of friendship." The resulting league had no effective national personality or territorial autonomy. The absence of any common standards or government resulted, through practices of the states, in chaotic conditions. These practices were the reflection of provincialism upon international jealousy. Spite was expressed in cumulative discriminations and in sanctions in which the vehicles of commercial enterprise were mired, and war, civil and international, was imminent. In particular, contracts were repudiated, remedy was denied to non-residents, imports from other states were discriminated against, and residents were discharged from obligations incurred in other states. From these come the clauses which made us a common commercial people. The commerce clause precluded tariffs and embargoes. Sojourners were assured of the privileges and immunities given by each state to its own citizens, and each state was prohibited from discriminating in favor of its own citizens and against the citizens of other states. And when operative facts occurred in one state the common covenant provided that interstate venue should not excuse the application of its laws and the litigant was given a federal right that they should receive full faith and credit by the forum. The most comprehensive possible language was used, and its scope includes all legal relations, subject to equation in a justiciable controversy whether as an enforceable claim to performance or by way of defense, defined by the law of the state in which the events transpired. And the legislative history shows that when the official conduct of any state described judicially recognizable legal relations, it was such official governmental declaraton that was intended by "public acts, records, and judicial proceedings". It was never intended that only such societal standards of a state as were expressed by some particular agency and in some peculiar manner should measure the scope of the clause. They were dealing with interstate relations and the question was, had the state defined the legal effect of operative facts, and not where they were defined. To the Congress was given the authority to establish a uniform manner of proving the applicable state's rules of law in the tribunals of other states. While for many years only judgment creditors sought aid through the first section of the Fourth Article that does not mean that the protection of the constitutional pro-

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vision was thereby pruned any more than non-use caused atrophy of the privileges and immunities clause of the Fourteenth Amendment.\(^{34}\) No opinion from \textit{Armstrong v. Carson}\(^{35}\) to date holds to any such position and many indicate the broadest possible meaning.\(^{26}\)

Some years ago when I began to advance the interpretation of the full faith and credit clause herein declared, I was met with positive opinions that the scope did not include statutory laws or in fact anything beyond \textit{adjudicated} rights. The fallacy of that reply arose from the failure to observe the political stature of a state and to recognize that governmental authority may be expressed by any appropriate agency whether judicial or otherwise. \textit{John Hancock Mutual Life Insurance Company v. Yates} closed the discussion on that point but made no change in the previously existing meaning.\(^{37}\)

It is clear that full faith includes official action establishing standards of societal control in so far as particular judgments and acts of the state legislature are concerned. There is equal certainty that all the states' publicly established rules of law are equally "public acts". A law or rule of law is nothing more than a description of the legal consequences which

\(^{26}\)2 Dall. 302 (U. S. 1794).
\(^{37}\)299 U. S. 178 (1936). The Court says: "Because the statute is a 'public act', faith and credit must be given to its provisions as fully as if the materiality of this specific misrepresentation in the application, and the consequent non-existence of liability, had been declared by a judgment of a New York Court." \textit{Id.} at 183. (The venue was in Georgia.) It is interesting to note in passing, that under § 237 of the Judicial Code by which review is had of state decisions under Fourth Article claims the phrase "statute of any state" is used. A leading authority says in a carefully prepared note: "'A statute of any State' is not limited to enactments of the State legislature, but includes every act, legislative in character, to which the state gives the force of law, such as a municipal ordinance fixing rates, orders of state commissions and other agencies exercising delegated legislative authority. \textit{King Manufacturing Co. v. City Council of Augusta} (1928) 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801; \textit{Live Oak Water Users' Ass'n v. Railroad Commission of State of California} (1926) 269 U. S. 354, 46 S. Ct. 149, 70 L. Ed. 305; \textit{Hamilton v. Regents of University of California} (1934) 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343. See § 107.02, n. 8 \textit{supra}. p. 3565."
\(^{38}\)Moore's, \textit{Federal Practice} (1938) 3581, n. 3. Under J. C. § 266 (the companion section for correlation of state action with federal supremacy) the same author says of similar phrasing: "\textit{Oklahoma Natural Gas Co. v. Russell} (1923) 261 U. S. 290, 43 S. Ct. 353, 67 L. Ed. 659, holding 28 U. S. C. sec. 380 applicable to actions attacking orders of state boards or commissions, even though the constitutionality of a statute under which the board or commission acted was not attacked." \textit{Id.} at 3565, n. 9.
shall flow from contemplated conduct. Such standard may be derived
from the declaration of the judiciary as well as from the legislative branch
of government. One of the phenomena of this whole problem is that in
a "common law" system this could be doubted. The court of last resort
of the state, acting for the state, finds or declares the rule and "whether
it be said to make or to declare the law, it deals with the law of the State
with equal authority however its functions may be described." That
the "common law" of a state is as much the law of the state as its legis-
lature's enactment is no longer a point of contention. In commercial
cases between citizens of different states, and in many tort situations, the
federal courts in the past frequently departed from the views entertained
by state courts. This is now held to have been unconstitutional and the
"substantive rules of common law applicable in a State whether they be
local in their nature or 'general', be they commercial law or a part of the
law of torts" control. The federal courts are bound to follow the decisions
of the courts of the state in which the controversy arose. However
declared, rules of law publicly declared by governmental authority are
"public acts, records, or judicial proceedings" of which the forum must
take cognizance, when properly claimed, to measure the legal relations
between the parties to imported controversies. Upon the decision of
Erie Railroad v. Tompkins, the contention was widely advanced that if
there were no state statute or decision the federal court would, in this
situation, be functus officio, but this was groundless, "The subject is now
to be governed, even in the absence of statute, by the decisions of the
appropriate state court. The doctrine applies though the question of
construction arises not in an action at law, but in a suit in equity.
Application of the 'state law' to the present case, or any other contro-
versy controlled by Erie Railroad v. Tompkins, does not present the dis-
putants with duties difficult or strange. The parties and the federal courts
must now search for and apply the entire body of substantive law govern-
ing an identical action in the state courts. Hitherto, even in what were
termed matters of 'general' law, counsel had to investigate the enact-
ments of the state legislature. Now they must merely broaden their
inquiry to include decisions of the state courts, just as they would in a
case tried in the state court, and just as they have always done in actions
brought in the federal courts involving what were known as matters of
'local' law". By the same reasoning the forum must arrive, as in other

*Erie Railroad v. Tompkins, 304 U. S. 64, 78 (1938).
full faith cases, at the conclusion it believes the court of the state from which the controversy arose would reach.\footnote{Congress must have contemplated all recognized legal standards, customary or otherwise, when it said that the effect in the forum should be that had "by law or usage in the courts of the state from whence [they] are taken." \textit{1 Stat. 122} (1790).}

Intertwined with the scope of the clause and the capacity of the forum state to resist on the grounds of opposing public policy is the question of jurisdiction which seems at times to make a carom on both. Probably questions of jurisdiction developed with judgments of conviction in criminal cases and gave rise to the Anglo-Saxon concept of locality of crimes. On the civil side we see the old writ of right falling into disuse because the inability to get personal service, during absence in the Crusades, caused the litigant to lose his writ. Since the time of Conrad II, we find the English-speaking people demanding that no decree be entered against a citizen unless he be given notice, permitted to hear the evidence supporting the charges, given an opportunity to present his own defense, and that the judgment be responsive to the charges and based upon the evidence. This is due process of law. Anything less has always been regarded as tyranny. Foreign courts, and domestic courts during the early stages of germination of departmentalization in England when the judges were more the special agents of the crown than disinterested administrators, were probably inclined to disregard this fundamental doctrine when aliens were involved. The result was that foreign judgments were never entitled in Anglo-American courts to conclusiveness for any purpose. It was not the purpose of the Constitution to increase the territoriality of an adjudicating state nor to give star-chamber authority to disregard due process concepts. Thus Justice Story says:

"If a judgment is conclusive in the state, where it is pronounced, it is equally conclusive elsewhere. If reexamimable there, it is open to the same inquiries in every other state.\footnote{Citing Mills \textit{v. Duryee}, \textit{7 Cranch 481} (U. S. 1813); Hampden \textit{v. McConnel}, \textit{3 Wheat. 234}, (U. S. 1818); \textit{1 Kent's Comm.} (1826) \textsection 12; \textit{Sergeant, Constitutional Law} (1830) c. 13.} It is, therefore, put upon the same footing, as a domestic judgment. But this does not prevent an inquiry into the jurisdiction of the court, in which the original judgment was given, to pronounce it, or the right of the state itself to exercise authority over the persons, or the subject matter. The Constitution did not mean to confer a new power or jurisdiction; but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the territory."\footnote{\textit{Story, Commentaries on the Constitution of the United States} (1833) \textsection 1313. McElmoyre \textit{v. Cohen}, \textit{13 Pet. 312} (U. S. 1839), should be considered with the previous note.}

This limitation on judicial power has always been recognized by the Supreme Court. Certainly, since 1868, it can not be doubted when the
jurisdictional fact has not been fairly presented for adjudication. A judgment which is itself a denial of due process of law is not entitled to full faith and credit. Obviously the Constitution does not invalidate and

"Thompson v. Whitman, 18 Wall. 437, 460-462, 468-469 (U. S. 1873). This was an action of trespass for taking and carrying away goods, originally brought in the courts of the state of New York but removed by the defendant, now plaintiff in error, to the federal courts. A special plea set up a judgment under a New Jersey statute by two justices of the peace.

"The main question in the cause is, whether the record produced by the defendant was conclusive of the jurisdictional facts therein contained. It stated with due particularity, sufficient facts to give the justices jurisdiction under the law of New Jersey. Could that statement be questioned collaterally in another action brought in another State? If it could be, the ruling of the court was substantially correct. If not, there was error. It is true that the court charged generally that the record was only prima facie evidence of the facts stated therein; but as the jurisdictional question was the principal question at issue, and as the jury was required to find specially thereon, the charge may be regarded as having reference to the question of jurisdiction.

"Without that provision of the Constitution of the United States which declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and the act of Congress passed to carry it into effect, it is clear that the record in question would not be conclusive as to the facts necessary to give the justices . . . jurisdiction, whatever might be its effect in New Jersey. In any other State it would be regarded like any foreign judgment; and as to a foreign judgment it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or the thing.

"It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each State equivalent to domestic judgments in every other State, or at least of giving to them in every other State the same effect, in all respects, which they have in the State where rendered. And the language of this court in Mills v. Duryee seemed to give countenance to this idea . . . .

"But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted, to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court . . . . On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the Law of 1790, and notwithstanding the averments contained in the record of the judgment in itself. This is decisive of the case."

Pennoyer v. Neff, 95 U. S. 714, 729 (1877), is conclusive on the nonlitigated jurisdictional fact. The Court said, "The force and effect of judgments rendered against non-residents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States and of the several States, as attempts have been made to enforce such judgments in States other than those in which they were rendered, under the provision of the Constitution requiring [full faith and credit] . . . . In the earlier cases, it was supposed that the act gave to all judgments the same effect in other States which they had by law in the State where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the State itself to exercise authority over the person or the subject-matter."
at the same time give effect to the same acts. In none of these cases was an issue of jurisdiction litigated. It was such cases that caused the potential hazard against which the common law rule relative to foreign judgments was created for protection. (Even a foreign appellate court could ratify the miscarriage of justice.) The same would be true of a non-responsive judgment.

A wholly different situation is presented when the contending states are subject to common political bonds under an appellate court bound to preserve the integrity of the states as much as to enforce their common political covenant. When there is no equally representative and impartial court collateral attack is a self-defense measure.


47 In order to understand the dispositions made in cases such as Allen v. Alleghany Co., 196 U. S. 458 (1905); Pennsylvania R. R. v. Hughes, 191 U. S. 477 (1903); Bagley v. General Fire Extinguisher Co., 212 U. S. 477 (1909); and many others, it is necessary to make an exhaustive study of all cases describing appellate procedure, as to what questions may be raised, by whom, how, and when, and what questions the Supreme Court will review—the detailed preparation of the record and the attitude of the Court. Such an examination is not within the scope of this paper. But as a number of cases have been disposed of upon the record, the procedural parry, by which the Court avoided discussing the merits of cases thrust upon it, should be clearly understood. Some discussion of the procedure is appropriate here.

Turning again to the Constitution, we find in Article III, § 2, cl. 2, that “in all the other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make.” Pursuant thereto, the first Congress provided in § 25 of the Judiciary Act of 1789 for review by the Supreme Court of State decisions. This is set out above in note 20.

Increasing pressure on the Supreme Court led to the Act of 1916, 39 Stat. 726 (1916), 28 U. S. C. § 344 (1934), which amended § 237 of the Judicial Code by restatement. It withdrew from the right to review by writ of error a judgment of the highest state court denying a federal right, title, or immunity, and permitted the jurisdiction of the Supreme Court to be invoked, in such a case, only on a petition for a writ of certiorari. It excludes any overlapping of writs of error and certiorari; if any existed under the Act of 1914, and makes them mutually exclusive—writ of error will be dismissed if certiorari is appropriate, and certiorari will be denied if error should have been sought. The harshness of the operation of this provision is apparent in Zucht v. King, 260 U. S. 174 (1922). The case was before the Court on writ of error. It also involved another question reviewable on writ of certiorari. The case was dismissed as the first question was said not to be a “substantial” one, although the second question was a “substantial” one.

The contract amendment (42 Stat. 366 (1922)) repealed in 1925 (43 Stat. 492 (1925)) is omitted.

Section 237 was amended by the Act of February 13, 1925, 43 Stat. 937 (1925) 28 U. S. C. § 344 (1934). This was a part of the Judge's Bill in Congress to revise the Judicial Code. It was prepared by a committee of the Supreme Court under the Chairmanship of Mr. Justice McReynolds. It withdraws from the provisions relating to the writ of error “or
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this were so, if the jurisdictional facts had not been litigated, it would have been possible for the states to defeat the federal power if such judgments were entitled to full faith and credit. It was for this reason that the Judiciary Act of 1789 assured review by the Supreme Court of the United States of all constitutional issues adjudicated in the state courts. As a judgment could be pronounced without adjudicating, for example, because there had been no notice, appearance, or opportunity for defense, the most elementary feature of fair hearing could be ignored. By such means not only could due process be denied, but the purpose of the original privilege and immunities clause, as well as others, could be thwarted. In such cases there would be no corrective appellate process, because there would be no opportunity to appeal. It is elementary that expediency and finality are primary tests of wholesome administration of justice. The any authority exercised under any state" leaving only questions of the validity of a statute of any state. It extends the use of the writ of certiorari to all cases formerly included in both writs. It allows a case to be considered on a writ of certiorari although brought up on a writ of error when error is not the proper way to invoke the jurisdiction of the Supreme Court. Both writs are comprehensive in operation, that is, the case will not be dismissed because the other is more appropriate. There is no longer any need to procure both to insure against defeat if the other should have been sought. At the same time, review as of right still remains where the requirements of the provisions of writ of error are satisfied. But review may now be had only in the discretion of the Supreme Court (on certiorari) except in two classes of cases, namely, (1) where the validity of the Federal Constitution or a treaty or statute of the United States is questioned and the decision is against the validity, and (2) where the validity of the statute of a state under the Federal Constitution, treaty or law is questioned and the decision is in favor of its validity.

In any event the federal question presented must be a "substantial" one to entitle a claimant to review either by writ of error or certiorari. When the question involved appears of unsubstantial nature, a writ for review will either be denied or dismissed as the case may be. Miller v. Drainage District, 256 U. S. 129 (1921).

The general rule that a state decision will not be reviewed where sufficient non-federal grounds exist to support the decision, cannot be invoked to deny jurisdiction and to dismiss a suit of certiorari where, although the decision is expressly so based, the basis is untenable. Whether the federal right, properly asserted, was denied or given due recognition, is a question on which the claimants are entitled to invoke the judgment of the Supreme Court. On review, that Court will determine whether the right asserted was denied in express terms or in substance and effect, as by putting forward non-federal grounds of decision which were without any fair or substantial support. This is a material qualification upon the rule "and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof." Ward v. Love County, 253 U. S. 17, 23 (1920).


"It is a fundamental principle of jurisprudence, arising from the very nature of courts
necessary corollary is that errors in a due process judicial proceeding may not be the basis for collateral attack but can only be corrected by writ of error, appeal, or certiorari. The purpose of appellate jurisdiction is corrective process, and the rule is universal that where specifically applicable remedies are provided as part of the administration of justice, the plan of government cannot be defeated by ignoring them and seeking other and secondary relief. In this connection it must be borne in mind that corrective process under Section 237 of the Judicial Code is as available under pleas of denial of constitutional right under any other clause as it is to claims arising under the Fourth Article.

The purpose of "due process" is to allow the individual to have notice and to defend before a court which adjudicates upon the record. The rule that a judgment is conclusive as to all media concludendi is founded upon the opportunity for correction of mistakes by appeal. Where the person or thing is not before the court there is neither judgment nor mistake, but only the high-handed tyranny of the Star Chamber. The of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court competent jurisdiction cannot afterwards be disputed between the same parties. Southern Pacific Railroad v. United States, 168 U. S. 1, 48. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction." Frank v. Mangum, 237 U. S. 309, 333 (1915). Also, "It is 'the well-established general rule that a writ of habeas corpus cannot be utilized for the purpose of proceedings in error.'" United States v. Valante, 264 U. S. 563, 564 (1924); Craig v. Hecht, 263 U. S. 255, 277 (1923), and cases cited.

See Smith, supra note 48, at 459.

"Nothing is better settled in Federal jurisprudence than that the jurisdiction of this court in such cases depends upon the assertion of a right, title, privilege or immunity under the Federal Constitution or laws set up and denied in the state courts." Pennsylvania R. R. v. Hughes, 191 U. S. 477, 485 (1903). There is no holding that a federal question did not exist. The case holds that a federal question must be asserted in order to have the judgment thereon reviewed by writ of error.

A judgment is conclusive as to all the media concludendi; and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon a mistake of law. Of course a want of jurisdiction over either the person or the subject-matter might be shown. But as the jurisdiction of the Missouri court is not open to dispute, the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law. . . . In this case the Missouri court no doubt supposed that the award was binding by the law of Mississippi. If it was mistaken it made a natural mistake. The validity of its judgment, even in Mississippi, is, as we believe, the result of the Constitution as it always has been understood, and is not a matter to arouse the susceptibilities of the States, all of which are equally concerned in the question and equally on both sides." Faulkner v. Lum, 210 U. S. 230, 237-238 (1908).

In other words, the defendant Wiley could show collaterally that he was not legally before the court—as he was not in any just sense—if his appearance was entered and judgment confessed by one who had, in fact, at the time, no authority to do either; and, consequently, that the court was without jurisdiction to proceed except on legal notice to him.
Constitution does not compel that which it prohibits—of course, such a sham may be collaterally exposed in a court of justice. If, however, the jurisdiction depends upon a fact and the existence of that fact is contested or presented for adjudication by the court, corrective process is available on appeal, and the hazard of tyrannous abuse is non-existent. In the United States a supreme appellate court impartially representing all states assures each state of impartial treatment and eliminates the occasion for self-defense measures necessary to independent sovereigns. No collateral attack is justifiable for error in the adjudication of a so-called jurisdictional fact as it creates no greater jeopardy to due process than error in the determination of any other fact which measures the legal relations of the parties and as such is a condition precedent to a decision and mandate in favor of one of them.\(^\text{54}\) This does not include sham judgments any more than the full faith and credit clause is satisfied by the forum saying one thing and doing another.\(^\text{55}\) No serious question can be raised to this conclusion other than as to jurisdictional facts and it is here concluded that none is justified as to them. The reasoning and result of the cases support this conclusion.\(^\text{56}\) "... When the matter of fact or law on which jurisdiction depends was not litigated in the original suit it is a matter to be adjudicated in the suit founded upon the judgment."\(^\text{57}\) The pleas of no

or without his appearance in person or by an attorney authorized to represent him. If law and usage in Ohio were to the contrary, then, such law and usage would be in conflict with the Constitution of the United States; for it is thoroughly settled that a personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law." National Exchange Bank v. Wiley, 195 U. S. 257, 268 (1904). While this case is sometimes cited as holding that facts passed upon by a court having jurisdiction thereof might be questioned in collateral attack without violating the full faith and credit clause, the language of the court does not justify the statement. That to which validity is denied cannot at the same time be given validity.

\(^\text{54}\)In Chicago, R. I. & P. Ry. v. Schendel, 270 U. S. 611 (1926), the applicable law depended upon a jurisdictional fact. Its adjudication was held to be res adjudicata.


\(^\text{56}\)Cf. Grand Gulf R. R. & Bk. Co. v. Marshall, 12 How. 165 (U. S. 1851); Christmas v. Russell, 5 Wall. 290 (U. S. 1866); Harding v. Harding, 198 U. S. 317 (1905); Fauntleroy v. Lum, 210 U. S. 230 (1908); Marin v. Augedahl, 247 U. S. 142 (1918); Reynolds v. Stockton, 140 U. S. 254, 264 (1891): "The requirements of that section are fulfilled when a judgment rendered in a court of one State, which has jurisdiction of the subject matter and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another State"; Chamblin v. Chamblin, 362 Ill. 588, 1 N. E. (2d) 73 (1936).

\(^\text{57}\)Adam v. Saenger, 303 U. S. 59, 62 (1938). The Texas "court's conclusion that the California court was without jurisdiction presents an issue not litigated in the California suit which must be determined in the present one." Ibid. (Italics added).
jurisdiction in pronouncing the judgment for which full faith and credit is sought is a wholesome one in its proper sphere and serves to elutriate the administration of justice, but is not available to muddy the course of justice by litigious delays and needless repetition. When the jurisdictional fact has been litigated the issue is closed. In no other place does the expression of legal standards appear so haemophilic as in the attempt to distinguish procedure from substance. The Tompkins decision has added a new contestant to the battalia jockeying for advantage in the chance of venue, but it affords analogy, if not parallel, to the position of the full faith and credit clause. Broadly stated, those rules which, upon all of the facts, determine the rights of the parties are rules of substance; while those rules which guide the manner of disclosing the facts to the court are rules of procedure. Every court sitting in any state must now apply the substantive law of the state from which the controversy arose. The duty of the forum is to ascertain the legal effect of the laws of that state. The effect which the operative facts had “by law or usage in the courts of the state from which they are taken” is that to which full faith and credit must be given. By reference to the contract clause we see that when the forum preserves the result bargained for by the obligor the adjustment of the means of the achievement to its convenience is not a change of the effect of the contract. Providing an equally convenient route to the same destination changes neither the goal nor its attractiveness, but an increase of the downs or yards would change the effect of the bargain because of the increased risk of failure. If by “law or usage” the state with which the facts are identified permits a party to succeed by showing facts a, b, and c, because fact d is presumed, it cannot be said that to require him to make the same proof of d as of a, b, and c would be to give the same effect as by law or usage had at home. In many cases the rejection of the presumption would be the equivalent of the loss of the legal relation. Where the evidence is known only to the party against whom the presumption operates, the refusal of the forum to

58 At any event, if the first court had “jurisdiction”, however that fact be determined, its judgment is within the Fourth Article, and, conversely, if not, its judgment is not entitled to full faith and credit. Pennoyer v. Neff, 95 U. S. 714 (1877); Atherton v. Atherton, 181 U. S. 155 (1901); Haddock v. Haddock, 201 U. S. 562 (1906), where, having determined the absence of jurisdiction of the courts of Connecticut of the question in issue, nothing remained within the operation of the full faith and credit clause; Thompson v. Thompson, 226 U. S. 551 (1913).


recognize the presumption confers a complete defense. The denial of credit to the other state's law or usage is more exaggerated when the question of burden of proof is involved. Whenever the result of the case will be materially effected by a presumption or burden-of-proof rule of the state in which the controversy arose, the refusal of the forum to recognize its applicability is a denial of full faith and credit to the laws of other states. Obviously, it is the force of the rule in the state of origin which determines its importance to the legal relation in that state. Destruction of the capacity to prove an essential operative fact is not different in kind from a denial of the rule of law or right which flows from the fact if proved. In John Hancock Mutual Life Insurance Company v. Yates\(^61\) a presumption of fact was integrated into the contract by statute. The Court said that no question of remedy was presented.\(^62\) The fact that the Court under the doctrine of Swift v. Tyson, which dealt with substantive law, uniformly held that the law governing burden of proof lay in the field of general law in which the federal courts were not bound by state law seems to establish that such rules are not purely procedural or adjective. Rules of presumption and burden of proof are entitled to full faith and credit as much as any other rules which measure the legal relations of the parties.\(^63\) Only if this is true can the uniformity sought by the full faith and credit clause be secured. Otherwise, the cause of action or defense is varied with the chance of venue and mal-practice, which is associated with the search for a favorable forum, is invited. Uniformity of result, the objective of the Constitution, would be defeated. This is emphasized when other clauses are considered. The uniformity of result, achieved only by singleness of the source of standards which control it, was dealt with in two ways in three clauses. The Constitution stipulates that the United States shall be the source of the standards which control the result of human conduct within the scope of the commerce and the ad-

\(^{61}\)299 U. S. 178 (1936).

\(^{62}\)In Central Vermont Ry. v. White, 238 U. S. 507, 512 (1915), the Court said: "But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those States the plaintiff is as much under the necessity of proving one of these facts as the other; . . . and as to neither can it be said that the burden is imposed upon every plaintiff, to establish all the facts necessary to make out his cause of action." (Italics added). New Orleans & Northeastern R. R. v. Harris, 247 U. S. 367, 372 (1918); Hill v. Smith, 260 U. S. 592, 594 (1923); Herron v. Southern Pac. Co., 283 U. S. 91, 93, 94 (1931); Miller v. Union Pac. R. R., 290 U. S. 227 (1933).

\(^{63}\)See Story, Conflicts of Laws (1834) § 635.
miralty clauses. As to matters within the scope of the full faith and credit clause, the laws of the state from which the controversy arises are made the exclusive measure of legal relations and their result. There is no doubt that the federal rule controls where the admiralty and commerce clauses apply. There should be none as to the applicability of similar rules of the state where the facts occurred when the full faith and credit clause applies.

When a legal relation, arising under the laws of a state other than that in which the court sits, is within the full faith and credit clause, the forum has no choice as to the applicable law. The question then arises, are all other-state legal relations translated through the forum by that clause, or may the forum have some interest not subordinated to the common plan? If so, it must be on the grounds of an over-riding “public policy”. Public policy is no more than the expression of political judgment by the sovereign. To learn if conduct is violative of political standards we must ground the interpretation on terms of legislative purpose. As has been developed at length, the objective of the stipulation in the first section of the Fourth Article was to promote uniformity and simplicity by giving the same effect everywhere to operative facts occurring in any one state.64 But, as in all other clauses, it is only when the welfare of all the states would be furthered, either as to inter-state relations or as to grants to the nation, that we find the letter of the covenant being applied. This process will be discussed at more length with the determination of which state’s laws are to be applied when the facts are related to more than one state. It is conspicuous throughout the whole plan that the states were preserved and in many instances left supreme. They were left supreme as to state matters but subordinated to the common good in common matters. It is this elementary principle which supplies the fulcrum sought in all cases of balance between our governments—state and state, or state and national. It was never the purpose in part or in whole to interfere with the internal order of any state unless the conduct be less important to that state than it is to all of the states as a political family. When a controversy arising in one state is sued on in another, the Constitution excludes any, willy-nilly, “choice of law” or “formulation of rules of reference” which is the privilege of a forum sovereign not bound by any such covenant. When a state determines to apply its own laws in such a case it must show that the cause is not within the constitutional mandate.

Primarily, in the preservation of the integrity of the state, was the retention of exclusive physical control within its territorial limits. It is the forum which gives effect to the legal relation and not the state of

64 Cf. notes 4, 10, and 20, supra.
origin. When a judgment claim is involved the state whose court pronounced the judgment cannot send its sheriff into other states to compel compliance. It is the state where the performance will transpire that must give effect to the judgment—the same effect that it finds the original judgment would have had at home. The political authority is that of the forum, but its expression is directed by the common stipulation. If one agrees to keep and feed his neighbor's son in the same manner to which the boy is accustomed, it will be the keeper and not the neighbor whose authority is expressed in the boy's treatment. A full-faith performance of this promise does not mean that if the star-boarder proves to be a degenerate the keeper must submit his family to be outraged. Self-defense ultimately replaces neighborliness. On the other hand if a neighbor and his young son had been imprisoned for a violation of the criminal laws, for our good samaritan to have the boy released to his custody would not necessarily involve any interference with the good order and decency of his home, because the immoral action would have no relation to the discipline of the custodian's household.

It was never the purpose of the Fourth Article to thrust grossly offensive conduct upon any state. If Christmas v. Russell\(^5\) and Fauntleroy v. Lom\(^6\) teach anything, it is that when the conduct within the forum, based upon the public acts, records or judicial proceedings of another state, does not of itself interfere with the social order, the duty of the forum is to give the claim full faith and credit. This is so because enforcing the common purpose does not endanger the capacity of the forum state. Such request will not be to do the acts which give rise to the claim asserted in the forum. The claim will be nothing more than a demand that the other party pay money or deliver property by way of compensation. When Kenney v. Supreme Lodge\(^5\) and McKneit v. St. Louis & San Francisco Railway\(^6\) were superimposed upon Slater v. Mexican National Railroad,\(^9\) the debate should have been closed. Broderick v. Rosner\(^9\) is based on this distinction. Rejection of money or property demands which are consistent with the ordinary business of courts of general jurisdiction is not the maintenance of public policy for internal police by the forum, but is an attempt to dictate the moral standards of another state. "But it may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject-matter and

\(^5\) Wall. 290 (U. S. 1866).
\(^6\) 252 U. S. 411 (1920).
\(^7\) 194 U. S. 120 (1904). This was not a full-faith case.
\(^8\) 294 U. S. 629 (1935).
the parties.\textsuperscript{7\textdegree} It is none of the forum's business what is made lawful by the laws of another state. Certainly it does not promote the harmony of the political family for the forum to impute unchastity to her sister. She is not the keeper of her sister's conscience but only of her own virtue. In the Kenney and McKnett cases the only inquiry was as to whether the ordinary jurisdiction of the forum court was appropriate to enforce the right described by the laws of another government of the bicameral system. When the duty is found, it cannot be evaded by the adoption of any special rule of liability or procedure. In Milwaukee County v. White Company\textsuperscript{72} the same question was answered in the affirmative, and the claim was found to be civil in nature. After making the comment quoted in the previous note, the Court concluded that giving full faith and credit could not endanger the internal police of the forum. Being so, it could not be of as much importance to the forum to decline jurisdiction as recognition of the obligation is to the common plan. Therefore, as stated in the Rosner case, the subject-matter was not one as to which the alleged public policy of the forum could be controlling.

While in Loughran v. Loughran\textsuperscript{73} and the series of cases culminating in Clark v. Willard\textsuperscript{74} it was held that when a legal relation is established by the applicable state's laws it is not subject to modification by other states. A wholly different situation exists when, to evade the legal consequence of the applicable state laws, a transaction is migratorily conducted. Certainly it was not the purpose of the Constitution to undermine proper state internal action by creating asylum for culprits or promoting fraud upon the state sovereignty. When a relationship is identified with and remains subject to the laws of the forum, there can be no violation of the first section of the Fourth Article by the forum refusing to recognize a claim of applicability of other-state laws.\textsuperscript{75} Neither is a judgment which

\textsuperscript{7\textdegree}Id. at 643.
\textsuperscript{72}296 U. S. 268 (1935), cited supra note 10.
\textsuperscript{73}292 U. S. 216 (1934).
\textsuperscript{74}294 U. S. 211 (1935).
\textsuperscript{75}Did the court [Mass.] fail to give effect to Federal rights [full faith and credit] when it applied the provisions of the statute to this case, and, therefore, refused to enforce the South Dakota decree? In coming to the solution of this question it is essential, we repeat, to bear always in mind that the prohibitions of the statute are directed solely to citizens of Massachusetts domiciled therein, and that it only forbids the enforcement in Massachusetts of a divorce obtained in another State by a citizen of Massachusetts who, in fraud of the laws of the State of Massachusetts, whilst retaining his domicil, goes into another State for the purpose of there procuring a decree of divorce." Again the court says, "This disregards the fact that the prohibitions of the statute, so far as necessary to be considered for the purposes of this case, are directed, not against the enforcement of divorces obtained in other States as to persons domiciled in such States, but against the execution in Massachusetts of decrees of divorce obtained in other States by persons who are domiciled in Massachusetts
is procured by fraud upon the pronouncing court one which must be recognized in other states. This, similarly, is not the public act of another state. The distinction, as in other cases, must turn again upon whether the deception prevents an adjudication upon the merits or merely concerns the determination of a litigated issue. Where the deception is perpetrated on the court by the state there is a denial of due process of law if no corrective process is provided. The same reasons make self-defense methods available in the forum when the effect of fraud causes the "judgment" not to be the act of the pronouncing court.

Notice has already been taken of the Anglo-American concept of jurisdiction for criminal prosecution, which in these nations is regarded as essentially territorial. Other nations provide for the punishment of crimes committed by nationals abroad. While an independent nation is free to decide whether to honor a requisition for criminals taking asylum within its territory, cooperation in the suppression of crime is a matter of international concern and is the common subject of treaty. The Jay Treaty with Great Britain of 1794 contained a provision for extradition. When the Constitution was drafted it would have been possible to have modified the doctrine of territoriality of crimes. But it was so congenitally ingrained in the common thought that no modification was made. On the contrary it was raised and emphasized. When we examine the Fourth Article we see civil causes of action made uniform throughout the nation by every state being expressly obligated to give the effect declared by the laws of the state in which the cause arose. The opposite theory is expressed when we come to criminal actions. As to them the duty of the asylum state is not to entertain the prosecution and enforce the criminal laws of other states, but to honor the requisition for the extradition of the criminal so that he may "be removed to the State having jurisdiction of the crime." This section deals only with the criminal proceedings, and

and who go into such other States with the purpose of practicing a fraud upon the laws of the State of their domicil; that is, to procure a divorce without obtaining a bona fide domicil in such other State." Andrews v. Andrews, 188 U. S. 14, 29, 31 (1903). (Italics added).


78Art. 4 § 2, cl. 2. On this and the following clause Story says: "§ 1809. But, however the point may be as to foreign nations, it cannot be questioned that it is of vital importance to the public administration of criminal justice, and the security of the respective States, that criminals, who have committed crimes therein, should not find an asylum in other States, but should be surrendered up for trial and punishment. It is a power most salutary in its general operation, by discouraging crimes and cutting off the chances of escape from punish-
in the technical sense of the administration of criminal justice—a person charged, with treason, felony, or other crime. It does not involve claims enforceable in civil proceedings whether they are called penalties or not. It is only the proceeding in the public administration of criminal justice based on the common law theory of territoriality of crimes and their prosecution by the state that is within this section as distinguished from the first section. The test as to what section applies must be found in the answer to the question—is it a charge by the state to punish an offense against the public dignity and justice, or is it a claim enforceable in a civil proceeding?

In the discussion of jurisdiction we had occasion to observe that due process in a procedural sense simply means a fair trial under accepted standards. Service of process within the forum is only one element. Where obstacles are raised to the presentation of the defendant's "case" which threaten, by themselves, to prevent attendance and presentation of evidence, fairness ceases to be adjective of the trial. Any proceedings in violation of the due process requirement is not within the full faith and credit clause. Where the cause of action bears no relation to any activity local to the forum, the defendant is a non-resident, and it appears that the forum is chosen only because the plaintiff is advised that his chances of recovery would be better there or to harass the defendant, the defendant


can insist that retention of jurisdiction would be a denial of due process because oppressive and unreasonable. This is the doctrine of forum non conveniens and springs from very different roots than the doctrine of local public policy. The former looks at the relations of the parties and, for the purpose of fairly equalizing their positions, balances the convenience or facility of suit in the forum with venue elsewhere. If retention of jurisdiction would, upon all considerations, be oppressive and unreasonable a plea of forum non conveniens must be granted as of right under the due process clause. On the other hand, as we have seen, most of what is called the doctrine or defense of local public policy is nothing but the fatuous egoism of the forum. Obviously there is no election in the forum state to discriminate against non-residents in the use of her courts and threatened retaliation is immaterial. These conclusions are fully supported when the results of Anglo-American Provision Company v. Davis Provision Company,81 as related to Kenney v. Supreme Lodge82 and McKnett v. St. Louis & San Francisco Railway,83 are compared with the reasoning of the cases culminating in International Milling Company v. Columbia Transportation Company.84 As the Anglo-American case was an appropriate one in which to apply the doctrine of forum non conveniens, there was no problem under the full faith and credit clause. In no other place does the universal rule of construction, the intention of the parties or the legislature, receive such practical treatment as in the application of the constitutional provisions. This must be so or the vital elasticity of the body politic must soon undergo atrophy.85

In all cases the ultimate test must be whether the whole political scheme will be furthered by finding a fact group within a grant to the common government or within an obligation of between-states harmony. Of course the Supreme Court is the final arbiter. This we have seen in the jurisdiction and forum-non-conveniens cases where the line is to be drawn between what the Constitution prohibits and what it compels. In the latter class of cases the inquiry is whether there is such a relation between the residence or activities of the litigant and the forum chosen for the suit as to make the choice a natural and suitable one in which to compel the defendant to answer. The conclusion does not depend simply upon whether it is burdensome for the defendant to respond, but whether the burden will be oppressive and unreasonable. Similarly with the problem of local-public-policy. The claim of the forum state for self-expression

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81 191 U. S. 373 (1903).
82 292 U. S. 230 (1934).
83 252 U. S. 411 (1920).
84 292 U. S. 511 (1934).
85 The powers of the national government were granted "in a constitution, intended to endure for ages to come and consequently, to be adapted to the various crises of human affairs." McCulloch v. Maryland, 4 Wheat. 316, 415 (U. S. 1819).
is not to be silenced by giving literal and automatic effect to the full faith and credit clause, and thus compelling the forum to put aside its own plans, but by appraising the governmental interest of each state. Thus in *Alaska Packers Association v. Industrial Accident Commission*, where a carefully worked-out plan of social rehabilitation would be scrapped by arbitrary application leaving both the state and the individual jetsam upon a sea of literalism, the Court found that the national interest in uniformity did not call for the application of the Fourth Article. Where, however, there is no overriding interest and benefit in the forum state, then the general plan applies.

So far our discussion has been concerned only with cases in which there was no question as to the identification of the facts with some one state. When we find the facts have some association with more than one state, the importance of the political modification of the states by the common covenant and its practical operation, as they raise obligations on the forum, is greatly increased. Where the forum state is a complete and independent sovereign, the determination of the applicable standard of interpretation of operative facts includes the complete and arbitrary privilege of choosing its own local law. Two general fact groups are presented: (1) when the facts have some association with the forum and another state, and (2) when the facts have association with two or more states none of which is the forum. When the facts have no identification with the forum state the local law is inapplicable to any legal relation within the scope of the full faith and credit clause. In every case (as it must be under the full faith and credit clause) the forum is primarily concerned with the state from which the controversy arose, and not with some abstract theory of choice of law. The same inquiry is now required in the federal court under the *Tompkins case*. This makes the task, in its ultimate forum, one of identification of the facts with some state. It is not a *choice of state* but an identification of a state. The constitutional political objective was to obtain commercial stability by providing the simplest possible test and to assure uniformity, and by stipulation to remove the points of conflict between the states’ authority. With these purposes must be considered the elementary rule of construction *ut res magis valeat quam pereat*. Finally

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87 See note 10, supra.

there can be no denial of full faith and credit to the laws of another state unless the facts are so completely identified with it that it may be said that no other state could reasonably lay claim to them.

Most of the cases have considered only the forum and some other state and involved no problem of determination but only whether the forum gave effect to the applicable other-state’s laws. In any situation in which the Court has provided the test for state identification, whether as between the forum and another state, or as between two states other than the forum, for the forum to apply the law of any other state than the one so identified would involve a denial of full faith and credit to the applicable laws.

The constitutional purpose was not to empower State A to authorize conduct in State B offensive to B’s internal policy. This is very different from having the consequence of conduct done in A enforced in a civil action in B’s courts. This is so fully recognized that even a judicial decree procured to effect a fraud upon the applicable law was held without credence.80 By parity of reasoning, any relationship which is so intimately a part of the moral, social, or political fiber of a state as to affect its governmental capacity must be held subject only to the laws of that state. There are two conspicuous examples of these members of a state’s fireside. As the state is the largest social unit, the family is the smallest. In no place could the right of self-defense and the needs of uniformity be so clear. The family is and must continue to be the basis of our social order if our plan is to survive. It holds a complex and abiding relationship to the state whose laws protect the home and which in turn is founded upon its integrity. The process of identification of the state which is the seat of the family has been developed in “jurisdiction” cases, but the issue is the same. The other example referred to is the corporation. Whatever may be its juristic weakness, the concept is well established with us that corporate personality is derived by grant of franchise. This franchise in turn is held to be within the protection of the contract clause. The legal theory of the “thing” makes even more indispensable the effecting of the standards of control of the incorporating state. Whatever is held to be a part or parcel of the stature of this legal off-spring of the incorporating state is necessarily integrated into its laws.81 When these cases just cited are considered with Ogden v. Saunders82 there is nothing novel, much less surprising, in the decisions in Aetna Life Insurance Company v. Dunken

81Neblett v. Carpenter, 59 Sup. Ct. 170 (1938); Sovereign Camp v. Bolin, 305 U. S. 66 (1938), and cases cited.
8212 Wheat. 213 (U. S. 1827).
and Modern Woodmen v. Mixer. The same consideration compelled the results reached in Loughran v. Loughran and Direction Der Disconto-Gesellschaft v. United States Steel Corporation. The laws of the home state of the family and the corporate off-spring gave character to the legal relation which was presented to the forum for recognition. A similar situation was involved in Clark v. Willard. While there are thus some complex relationships which by their intimacy with the social and political order are normally localized in their protecting or parent state, it is quite possible to acquire a quasi-foster parentage or protecting legal system. In Wheeling Steel Corporation v. Fox the theory of the Bank of Augusta v. Earle was found to be out-moded by modern conditions. By the same token the doctrine of jurisdiction culminating in the Boston Bank Stock case does not preclude more than one state, when each bears a continuous substantial relationship and has extended protection to a taxpayer in his residence and enjoyment of his property under its protection, from levying an estate tax. As their respective jurisdiction may be limited by the relative benefit-protection relationship, equity may require a non-destructive apportionment.

Three other phases of the constitutional plan of uniformity remain for discussion: migratory interests, legal relations in regard to land or chattels integrated into the common mass of property and economic structure of a state, and the absorptive capacity of grants of power to the United States. As to the first two, the cases are not numerous, but they do establish fundamental bases of departure. The preservation of the political authority of a state necessitates the recognition of its primary interest in the control of conduct within its territory. It is only by the force of the positive law of the place with which the conduct is identified that legal relations result. The legal relations which follow from such localized conduct are entitled

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98 266 U. S. 389 (1924); 267 U. S. 544 (1925).
100 267 U. S. 22 (1925).
102 298 U. S. 193 (1936).
103 13 Pet. 519 (U. S. 1839).
104 First National Bank v. Maine, 284 U. S. 312 (1932).
105 Dorrance v. Martin, 298 U. S. 678 (1936). There was no litigation of the question of whether or not there had been a protection-benefit taxable relationship in New Jersey, in the Pennsylvania decision which would foreclose litigation thereof by the operation of the full faith and credit clause. The basis of the New Jersey claim had not been litigated in the Pennsylvania action. Cf. Union Transit Co. v. Kentucky, 199 U. S. 194 (1905), for the theory of jurisdiction for taxation. The inter-state balance should be preserved. Cf. Fargo v. Hart, 193 U. S. 490 (1904), Adams Co. v. Storen, 304 U. S. 307 (1938) and Western, etc. v. Bureau, 303 U. S. 250 (1938)
to recognition in the courts of other states. There is no power, independently of the Constitution, in one state to authorize or direct conduct in another state which is inconsistent with its internal standards of human control, nor is there anything in the Constitution that causes such effect. In *Loughran v. Loughran*\(^1\)\(^{101}\) State \(A\) had said that the divorce was absolute but that the parties could not remarry. But \(A\) had no authority to say that they could not remarry in \(B\). The relationship created by \(A\) which might be recognized in \(B\) was that the divorcee was an unmarried woman. When, as such, she married in \(B\) it was for \(B\) to say what ceremony created the relation of husband and wife. The lands of the husband were located in \(A\). It was within \(A\)'s power to direct intestate succession and to fix dower interests.\(^1\)\(^{102}\) \(A\) having said that a widow was entitled to dower the only question remaining was whether the claimant was such widow. \(B\)'s laws made her a wife and the husband's death brought her within the classification of \(A\) of those entitled to the interest claimed in the lands. \(A\) was neither able to control conduct of the parties in \(B\), nor to refuse to recognize the legal consequences attached by \(B\) to their conduct in \(B\). There was no claim of authority from \(B\) to do any acts in \(A\) prohibited by \(A\), nor was anything declared illegal by \(A\) inherent in the claim or connected with the relief sought. \(A\) did not make being a widow illegal. \(A\) said that a surviving wife should have dower. \(B\)'s laws made her a wife. Her husband's death made her a widow.\(^1\)\(^{103}\) In *Clark v. Williard*\(^1\)\(^{104}\) the Iowa laws made Clark the transferee and owner of the corporation's property. That ownership, the legal consequence of the transaction in Iowa, had to be recognized by Montana. The control of the property was subject to the laws of Montana wherein the property was located. Iowa was powerless to compel Montana to give up her standards for the control of property or conduct in Montana. Conversely, Montana was compelled to recognize the legal consequences attached by Iowa to the conduct in Iowa.\(^1\)\(^{105}\)

This results in a power, in the state where property is located, to control is disposition, much broader than is commonly exercised; for example, by statute or otherwise, succession laws of the domicil of the decedent are commonly accepted by the state wherein the property is

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\(^{101}\)292 U. S. 216 (1934).


\(^{104}\)294 U. S. 211 (1935).

\(^{105}\)Cf. Direction Der Disconto-Gesellschaft v. United States Steel Corp., 267 U. S. 22 (1925), reasoning in accord.
Where there is a substantial relation between the facts and several other states, the forum, having no interest of its own, should uphold the legality of the transaction if valid under either law. All are members of the political family of friendly and equal states. The rule that the thing should be given effect, the presumption of validity in private acts, and the stronger presumption of virtue of the sister state's standard of conduct combine to uphold the transactions; but if there is no basis for identifying the cause of action with one state anymore than another with which it is also associated, the forum is privileged to choose. Of course if there is no claim of the applicability of the law of any other state, the application of its own laws by the forum does not constitute reversible error.

In the grants to the central government and the prohibitions on state action, the purpose to make us a common people under uniform standards is much more pronounced. There are three classes of these unifying factors: (1) the complete withdrawal of state sovereignty by an express prohibition, (2) those which grant exclusive control of a subject to the common government, and (3) those which condition state control on the non-exertion of the power granted to the United States. In neither of the first two can there be any problem involving choice between the laws of the several states because as to the subject matter of these stipulations in the Constitution there can be no state laws. In the last class there are two outstanding provisions, namely, the commerce power, and the treaty-making power. The operation of the commerce clause has been developed at length elsewhere, and here only the consequence of its operation is relevant. Both the second and third classifications apply to the function of the commerce clause. As to those transactions which fall within the second class, no state standards are applicable and so no conflict can arise either between states or between a state and the national government. Uniformity is commanded by the Constitution by the exclusion of the states regardless of action by Congress. In matters within the authority of Congress to control under the commerce clause, if that control has not been assumed and the balance of importance for regulation points to the states, then the states have jurisdiction and diversity of state laws may result. These, as other state laws, are subject to the operation of the full faith and credit clause. Under the treaty-making power a

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107 Cf. Crandall v. Nevada, 6 Wall. 35 (U. S. 1868).

108 Smith, supra note 5, 43 Dick. L. Rev. at 1.
similar federal absorptive process may operate on subject matters previously within state jurisdiction. The action of Congress in either case ousts the states of jurisdiction with resulting singleness of source of legal standards and the integration of the whole of the territory within the United States under a single government.

What may be the wisest rule or theory of choice, where choice is free, of several laws is not the quest of this paper. Within the political structure defined by the purpose of the Constitution there can be no conflict of laws, and therein the subject is Constitutional law. The controls of the Constitution upon the members of the political family bound together under it are not extended to relationship with "states" not members of the United States. There are many places where constitutional provisions find different functions when an international element appears in the fact group. This is demonstrated in the difference in the result reached in the Boston Bank Stock case and that of Burnet v. Brooks. A similar element was involved in the difference in result reached in United States v. Curtiss-Wright Export Corporation from that of Panama Refining Company v. Ryan and Schechter Poultry Corporation v. United States. A complete analogy to the Tremblay case is found in the interpretation of the second clause of the second section of the Fourth Article in the United States v. Rauscher and Lascelles v. Georgia.

The full faith and credit clause and the acts of Congress herein discussed have given the Supreme Court of the United States the power to establish rules and remove uncertainty in all cases involving the choice and applicability of the rules of law of one of two or more states. That power has been exercised in the past and a present willingness to exercise it indicates extended use in the future. Invariably jurisdiction has been taken by the Court only where it has found a serious conflict of state authorities and consequent resulting uncertainty. Undoubtedly the Court will not volunteer rules, but will continue to respond to the pressure supplied by the importance of the problem. The cases indicate that the response will be more ready in the future.

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**Cf.** the bankruptcy clause, etc.

**Aetna Life Insurance Co. v. Tremblay, 223 U. S. 185 (1912); Huntington v. Attrill, 146 U. S. 657 (1892).**

**284 U. S. 312 (1932).**

**299 U. S. 304 (1936).**

**295 U. S. 495 (1935).**

**Cf. note 78, supra.**

**148 U. S. 537 (1893).**

**288 U. S. 378 (1933).**

**293 U. S. 388 (1935).**

**223 U. S. 185 (1912).**

**119 U. S. 407 (1886).**

**If this thesis is sound it does not call for the abatement of the course in Conflict of Laws. But the contrary, by allocation to its proper area, permits it to function to the extent of its own constructive capacity in a field where great opportunity for service awaits.
THE SUPREME COURT OF THE UNITED STATES*

SHERMAN ANTI-TRUST LAW—AGREEMENTS IN RESTRAINT OF TRADE

The Supreme Court rendered its first opinion of the present term in a cause involving charges of restraint of trade under the Sherman Act in Interstate Circuit, Inc. v. United States, and Paramount Pictures Distributing Company v. United States. The appellants in the first case were exhibitors of motion pictures, affiliated with each other and with Paramount Pictures Distributing Company. The appellants in the latter case were film distributors charged to be or to have been engaged in a conspiracy in restraint of trade with each other and with the appellant exhibitors.

In 1934, Interstate Circuit, Inc., notified each of the distributor appellants by identical letters that it would not agree to purchase films for exhibition at its first-run theatres unless the distributors bound themselves to restrict licenses for subsequent runs of the same films to exhibitors maintaining a specified minimum admission price and abstaining from showing those films as part of a double-feature program. Similar prerequisites were set forth in relation to any subsequent contract with Texas Consolidated Theatres, Inc., for the purchase of films for exhibition in its theatres in the Rio Grande Valley. The court below found that the agreements made subsequent to this letter of notification, and in substantial conformity to its demands, constituted an unreasonable restraint of trade. It, therefore, enjoined enforcement or renewal of said contracts. Upon appeal to the Supreme Court, the case was remanded because of failure of the trial court to state findings of fact and conclusions of law as required by Equity Rule 70½. The instructions of the Supreme Court having been complied with, the case was returned to that Court for review on the merits.

The majority opinion upheld the findings of the trial court that the distributor appellants agreed and conspired among themselves to take uniform action on the demands of exhibitor appellants; that the former carried out such agreement; that the effect was to deprive low-income members of the various communities of opportunity to see the best pictures; and that the restrictions imposed resulted in increased income.

*Written March 1, 1939.

26 Syr. 209 (1890); 15 U. S. C. § 1 (1934).

59 S. Ct. 467 (Feb. 13, 1939). The two cases, Nos. 269 and 270, October Term, 1938, were consolidated for purposes of decision.


to both distributor and exhibitor appellants and in the diversion of business from subsequent-run exhibitors to the latter. 5

The Court held that the inferences drawn by the trial court concerning an agreement among the distributors, from all the circumstances presented, were correct. The difficulty of obtaining concrete evidence was recognized, as was the failure of defendants below to submit testimony of those officials who were in a position to know whether or not concerted action had been taken. The Court declared, however, that it was not necessary to find an express agreement and that it was sufficient that appellants knowingly participated in a scheme the necessary effect of which was to restrain commerce, even in the absence of a previous agreement.

It was further held that while the distributor appellants might have imposed conditions such as those which restricted subsequent-run exhibitors, in order to protect their copyright monopolies, they might not use such tactics for the purpose of protecting Interstate Circuit’s business from competition. In the opinion of the Court, the exhibitor appellants had, in fact, coerced the distributors into assisting them to control their competitors.

Finally, the Court took into consideration the unreasonableness of the restraint exercised. The competition at which it was aimed was found not to be unfair or unreasonable. Nevertheless, the subsequent-run exhibitors were forced to accede to the restrictions because of their need for the films, even though their business suffered, while the distributor and exhibitor appellants realized increased incomes. The patrons of the theatres also suffered as a result of these practices. In the view of the Court, “The benefit (to appellants) at such a cost, does not justify the restraint.”

Three members of the Court dissented from the majority opinion. 6 In their view, the evidence did not support the finding relative to conspiracy, and the scheme devised was not such as to fall within the meaning of the statute, as it had thus far been construed. While the minority agreed that monopoly might not be cloaked by the exercise of rights under the Copyright Law, 7 it contended that a property right was vested in the holder and that the latter might dispose of or lease his products as he deemed best. The agreement under consideration was declared to be merely an arrangement of terms governing such sale or lease. It was further

5Mr. Justice Stone rendered the majority opinion, the Chief Justice and Associate Justices Black, Brandeis and Reed concurring. Mr. Justice Frankfurter took no part in the consideration or decision of the case.
6Mr. Justice Roberts wrote the minority opinion, Associate Justices Butler and McReynolds concurring.
asserted that the present decision of the Court would result in the limitation of the right of a copyright or patent holder to dispose of his products under terms which would protect his agent from "cutthroat" competition.

The minority opinion adverted to the absence of any diminution of competition, maintenance of the established prices of films to licensees, and the objective of supporting existing good-will, in support of the thesis that the restraint was reasonable. In conclusion it was stated that once the property right conferred by the Copyright Law was recognized, a contract containing an agreement reasonably to restrain trade in protection of the rights granted by the owner should have been sustained.

The decision in this case, especially so far as it relates to the necessity of proof of an express agreement, is of timely interest, in view of the recent decision of the Federal Government to sue a group of rubber manufacturing concerns for damages under the Sherman Act. It would seem that under the rule applied in the principal case, an agreement may be constructively established where identical bids are repeatedly filed, if it can be shown that basic costs of production differ substantially.

**WAGNER ACT—BOARD ORDERS—SUPPORTING EVIDENCE**

In two recent decisions relative to the National Labor Relations Act, the Supreme Court adopted the same restrictive attitude toward the actions of the National Labor Relations Board, in giving effect to the statute, which characterized its decision in *Consolidated Edison Co. of New York v. National Labor Relations Board.*

The first of these cases was *National Labor Relations Board v. Columbian Enameling and Stamping Company, Inc.* The administrative agency had found that the respondent had violated subsections (1) and (5) of Section 8 of the Act by refusing to bargain collectively with the authorized representatives of its employees. It therefore ordered the employer to cease and desist from that practice and to reinstate certain employees who had unlawfully been discharged. The Circuit Court of

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*A similar problem was presented to the Circuit Court of Appeals for the Third Circuit in the case of Vitagrap, Inc. v. Perelman, 95 F. (2d) 142 (C. C. A. 3d, 1938). In a suit for an injunction under Section 16 of the Clayton Act, 38 STAT. 731 (1914), 15 U. S. C. § 16 (1934), exhibitors sought to have distributors of motion pictures restrained from exacting an agreement from them not to carry double-feature programs. The restriction was held violative of the anti-trust laws. See, (1938) 27 GEORGETOWN LAW JOURNAL 238. Certiorari has been denied, Vitagrap, Inc. v. Perelman, 59 Sup. Ct. 68 (Oct. 10, 1938).


**59** Sup. Ct. 206 (Dec. 5, 1938).

**59** Sup. Ct. 501 (Feb. 27, 1939).

**NLRB** 181 (1936).
Appeals for the Seventh Circuit, while admitting that a violation of the statute had occurred, denied enforcement of this order on the ground that the employees were entitled to no relief because, by going on strike in breach of an agreement, they sought (through the application of the Board) to enter a court of equity with unclean hands.\(^\text{13}\)

The Supreme Court sustained the conclusion of the lower tribunal, but on other grounds. It was held that the evidence of a refusal to bargain collectively was insufficient to support the administrative order. In the opinion of the Court there was no proof that the president of respondent, in refusing to meet the conciliators of the Department of Labor together with representatives of the complainant union, knew that the former had been requested by the latter to seek such a conference. Reference was made to the declaration in the *Consolidated Edison case* that Board findings must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." To this was added the requirement that the evidence be sufficient to justify a refusal to direct a verdict when the conclusion sought to be drawn was a question of fact, had the cause been before a jury. *Appalachian Electric Power Co. v. National Labor Relations Board*\(^\text{14}\) was one of several cases cited as authority for this further restriction placed upon findings of the administrative agency. The Court concluded that, in the absence of knowledge that the conciliators were expressing the willingness of the labor organization for an opportunity to negotiate, refusal to meet with the government officers and the union officials could not be deemed to contravene the terms of the Act.\(^\text{15}\)

The minority considered that the evidence, viewed in the light of existing circumstances, supported the findings of the Board. In their view, it seemed highly improbable that a lengthy conference could have been held between respondent's president and the conciliators without some reference to the request of the union for a meeting. It was pointed out that the retraction of an agreement to confer, made upon this occasion, did not occur until plant operations had been resumed under the protection of militia. Furthermore the dissenting opinion adverted to the holding of the court below that the evidence was sufficient to sustain the findings of the administrative agency upon which the order was based. In regard to the order to reinstate, the dissenting justices were of the opinion that

\(^{13}\)96 F. (2d) 948 (C. C. A. 7th, 1938).

\(^{14}\)93 F. (2d) 985 (C. C. A. 4th, 1938).

\(^{15}\)Mr. Justice Stone wrote the opinion for the Court, the Chief Justice and Associate Justices Butler, McReynolds and Roberts concurring. Mr. Justice Frankfurter took no part in the consideration or the decision of this case.
the employees named therein came within the protection of subsection (3) of Section 2 of the Act. In their opinion, a disagreement over the terms of a contract between an employer and a labor organization was a labor dispute within the meaning of the Act.16

The decision in this case marks another instance in which the Court has chosen to re-examine and to evaluate for itself the evidence adduced before an administrative body. In this case, such action is particularly open to criticism, since, apparently, three judges of the circuit court of appeals17 and two Justices of the Supreme Court agreed that the evidence, found by the Board to have been adequate, was sufficient to support the findings. Under such circumstances, it would appear that any doubts should have been resolved in favor of the determination of the administrative body. The instant case also presents a feature similar to that in the second Morgan case15 where the Court ignored the previous basis of determination and took an entirely new ground on which to found its decision. As a result, the question as to whether the "clean hands" doctrine is applicable to an action brought by an administrative agency under a statute, which indirectly affects third parties, is left undecided.

The second case was that of National Labor Relations Board v. Fansteel Metallurgical Corporation.19 The matter came to the Court following refusal of the Circuit Court of Appeals for the Seventh Circuit to enforce any part of the Board's order20 requiring the respondent to cease and desist from violating subsections (1), (2) and (5) of Section 8 of the Act and to reinstate certain of its employees. The basis of the action taken by the court below was its holding that the employees had placed themselves beyond the protection of the Act by continuing to engage in a "sit-down" strike in violation of an injunction issued by a state court.21

The Supreme Court reversed the inferior tribunal so far as the enforcement of the cease and desist orders was concerned.22 It was held that there was sufficient evidence to sustain the findings of fact upon which the orders were founded.

The chief holding of the Court related to the power of the Board to order reinstatement of those workers who had engaged in, or had aided

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1659 Sup. Ct. 490 (Feb. 27, 1939).
175 NLRB 930 (1938).
188 F. (2d) 375 (C. C. A. 7th, 1938).
19The Chief Justice wrote the majority opinion, in which he was joined by Associate Justices Butler, McReynolds and Roberts. Mr. Justice Frankfurter took no part in the consideration or decision of the case.
and abetted, the "sit-down". In the opinion of the Court, the respondent had the right to discharge the employees who had unlawfully taken possession of its property. The Court refused to accept petitioner's arguments that respondent had, by its violation of the statute, caused the strike; that the workers remained employees within the meaning of the statute; and that the orders of reinstatement would give effect to the policies of the Act. The Court was of the opinion that the statute provided an adequate remedy for any injury incurred as a result of respondent's unfair labor practices. It declared that the unlawful conduct of the employer did not make it an outlaw and give employees the right to commit the acts of violence which they had perpetrated. "To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." In addition, it was held that workers on strike did not retain their status as employees, within the meaning of subsection (3) of Section 2, where they attempted, by acts of force and violence, to gain their demands. “When the employees resorted to that sort of compulsion they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the legal rights which the statute was designed to conserve.” Finally, the Court stated that the Board's power to require affirmative action which would effectuate the policies of the Act was limited to remedial measures and might not be used to inflict punishment. Its conclusion was that in this instance the Board had exceeded the limits of the discretion granted it by ordering the employer to reinstate those who had engaged in the "sit-down".

The Court found nothing improper in the re-employment of some of the participants in the unlawful occupation of respondent's premises, since it considered that the lawful discharge of all strikers concerned gave the employer the right to select its employees upon resumption of activities. It also supported the contention of respondents that the discharge covered not only those within the plant when notice of discharge was given, but those who aided the strikers in keeping possession of the premises by furnishing them with supplies.

While, as stated above, the Court upheld the Board's order that the company cease and desist from giving support to a company dominated union, it refused to grant enforcement of the order to recognize the complainant union as the representative of its employees without an election being held.23

23In this respect the ruling differed from that in National Labor Relations Board v.
In a concurring opinion, Mr. Justice Stone agreed with the conclusions reached by the Chief Justice, except that he declared that those who assisted the strikers remained employees within the meaning of the Act, since they had not been present at the time of the discharge and were not included within its scope at that time.

Mr. Justice Reed, in a dissenting opinion, declared that the workers clearly came within the terms of subsection (3) of Section 2 of the Act. He emphasized the fact that the purpose of that provision was to maintain the status of strikers as employees following the commission of an unfair labor practice or the commencement of a labor dispute, and to deprive the employer of the right to change that position during the continuance of the strike. In his view, the employees were eligible for re-employment despite their unlawful conduct, if the Board considered such action most conducive to industrial peace. It was pointed out that the order of the Board did not operate to condone the violence or lawlessness of the strikers and that the law afforded adequate remedies for such misconduct. He asserted that “Congress sought by clear language to eliminate this prolific source of ill feeling [refusal to bargain collectively] by the provision just quoted [subsection 3 of Section 2] which should be interpreted in accordance with its language as continuing the eligibility of a striker for reinstatement, regardless of conduct by the striker or action by the employer.”

As the dissenting opinion clearly states, the chief source of danger in adopting the view of the majority in regard to the right of the employer to discharge under such circumstances as here obtained is that “As now construed by the Court, the employer may discharge any striker, with or without cause, so long as the discharge is not used to interfere with self organization or collective bargaining. Friction easily engendered by labor strife may readily give rise to conduct, from nose-thumbing to sabotage, which will give fair occasion for discharge on grounds other than those prohibited by the Labor Act.”

In one respect, at least, the respondent was indirectly permitted to profit by its disregard of the Act and the public policy announced by it. The unlawful refusal to bargain with the union was, admittedly, the cause of the strike. Yet, when resumption of plant operations with new personnel resulted in the elimination of the union, the employer was permitted to continue free of any obligation to bargain collectively unless it could be shown that the union was able to re-establish itself as bargaining agent.

Remington Rand, Inc., 94 F. (2d) 862 (C. C. A. 2d, 1938), cert. denied, 304 U. S. 576 (1938), in which the employer was required to bargain collectively with the complainant union, subject to a bona fide questioning by the employer of the right of the union to act as representative of the employees, in which case an election was to be held.

Mr. Justice Black concurred in this dissent.
for the body of employees as constituted subsequent to the reopening of the plant.

Unless the application of this decision is very narrowly restricted, the principle enunciated may operate to permit actions of employers, strongly opposed to the exercise by their workers of the right to organize, deliberately to engage in activities likely to provoke violence in some degree, in order to carry to completion a series of acts which, considered independently of the violence of the employees, would contravene the National Labor Relations Act, and to free such employers from the consequences of their own unlawful conduct. It is to be hoped that such a restricted application will be obtained in the near future.

HARRY B. MERICAN.

COPYRIGHT LAWS—REQUIREMENT OF PROMPT DEPOSIT IN COPYRIGHT OFFICE

That under the present Copyright Act a copyright is perfected merely by publication and notice, and is not conditioned by the requirement that copies be deposited promptly in the copyright office, was held by the Court in *Washingtonian Pub. Co., Inc. v. Pearson.* It is sufficient that the copies of the work upon which a copyright is claimed are deposited in the copyright office at any time prior to the suit for infringement of the copyright. The requirement of Section 12 of the Act that copies of the work be deposited in the copyright office "promptly" after the securing of a copyright by publication was held by the Court to be too indefinite in itself to be the basis for denying so valuable a right as a copyright. Section 12, it was held, must be read together with Section 13, which alone determines the extent to which the requirement in Section 12 is to be enforced. In support of its interpretation of the statute, the Court cited the views expressed by the Register of Copyrights in a letter to the Librarian of Congress suggesting that the word "promptly" be eliminated from Section 12 since no significance was being attached to it.

25 It is interesting, in considering the possibility of provocation, to note the activities of the labor spy employed by respondents and discharged two months before the commencement of the strike. The record shows testimony to the effect that this man was extremely militant and was considered the most radical man in the union. Following his discharge, he urged his fellow employees to strike for the purpose of forcing a satisfactory adjustment of his alleged grievance. On other occasions he declared that the strike was the only effective weapon for use by workers in achieving their aims. Record, pp. 387-389; 394-395.


A dissenting opinion written by Mr. Justice Black, and concurred in by Mr. Justice Reed and Mr. Justice Roberts, differed sharply from the views of the majority of the Court. The opinion carefully reviewed every copyright statute prior to the present Act of 1909, and showed that the public grant of a monopoly on "productions of the human mind" in the form of a copyright always had been made only after strict compliance with the copyright statutes, and the requirement of a prompt deposit in the present statute had not been met in the case at bar by a deposit fourteen months after publication. Ever since the first copyright statute in 1790, the minority contended, the requirement of a deposit was an integral part of the legislative plan, in order to provide the public with full information on copyright monopolies. The sole change in this legislative plan which was effected by the 1909 Act, the minority insisted, was the making of the requirement of deposit a condition subsequent to perfection of the copyright, rather than a condition precedent, which it had been before the enactment of the statute. The effect of the prevailing opinion, it was contended, is to practically dispense with the requirement of deposit until it is necessary to bring suit to prevent infringement of the copyright, unless the Register of Copyrights should demand it under Section 13.

The minority further insisted that, far from being merely a provision for the enforcement of the requirements of Section 12, Section 13 has as its purpose the effectuating of the second phase of the historic dual policy of Congress in regard to copyrights—that of preserving worthy works for the use of the public.

Further, the suggestion in the prevailing opinion that its views have the support of administrative interpretation was sharply challenged on the ground that the settled interpretation of the present statute required prompt deposit after publication, defining "prompt" as meaning "without unnecessary delay". The letter of the Register of Copyrights to which the prevailing opinion referred was an interdepartmental communication made public almost six years after the filing of suit in the principal case.

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1 Stat. 124, 125 (1790).
4 The majority opinion made only slight reference to an administrative interpretation of the statute, and then to a letter which appeared to be a change from a previous interpretation of long standing. That administrative interpretations of a statute are entitled to great weight was decided by the Court on the same day as the principal case in Bowen v. Johnston, 59 Sup. Ct. 442 (Jan. 30, 1939). See also, Costanzo v. Tillinghast, 287 U. S. 341 (1932).
The divergent views of the members of the Court in the principal case seem to represent more than a difference of opinion as to the interpretation of a statute. They raise also questions of public policy in regard to copyrights. This is expressed in the dissent by the statement that "It is of far greater importance to the public today than it was in 1790, 1831, 1870 or 1891, that public record be made of copyright monopolies . . . since these privileges have been extended by statute to include almost every conceivable type of production of the human mind." That the legislative scheme in regard to copyright monopolies has been changed, is conceded in both opinions. Whether this change has been brought about by the Act itself, or by the Court's interpretation of the Act, is now immaterial. The opinion leaves no doubt that a change has been made.

PHILIP TREIBITCH.

Where an administrative interpretation of long standing has been changed, the former interpretation is nevertheless entitled to be given great weight. United States v. Chicago N. S. & M. R. R., 288 U. S. 1 (1933). Only where the interpretation has been plainly wrong is it to be disregarded. Houghton v. Payne, 194 U. S. 88 (1904).

"The majority opinion stated: "The Act of 1909 is a complete revision of the copyright laws, different from the earlier Act both in scheme and language." 59 Sup. Ct. 397, 400 (Jan. 30, 1939)."
"STOP crime at its source" is a slogan for a program that has long had the endorsement of the American public.

The "source" is the youth of the nation.

Yet today the problem of the juvenile delinquent is still far from solution. It is one that challenges the jurist as well as the social worker. Its importance cannot be overemphasized. The Honorable Julian M. Mack, Judge of the Sixth Circuit Court of Appeals and one of the country's recognized authorities in the field, has said: "The problem of the delinquent child, though juristically comparatively simple, is in its social significance of the greatest importance, for upon its wise solution depends the future of many of the rising generation".1

Recognizing the fact that juvenile delinquency is the very heart of the problem of crime prevention, the Congress passed at its last session the bill which is now known as the Federal Juvenile Delinquency Act.2 The Act, applicable to juvenile offenders in the federal system, has been acclaimed as a progressive step in the right direction and is in keeping with the improvements effected in federal criminal procedure under the administration of The Honorable Homer S. Cummings as Attorney General of the United States.3

For a better understanding of the Act and its purposes it is well to examine briefly the historical treatment of youthful criminal offenders and the development of the theory of juvenile delinquency, particularly in respect to youthful violators of federal laws.

HISTORICAL BACKGROUND

At common law only a child under seven was deemed incapable of committing a crime. The child offender was treated the same as an adult. English common law contains numerous instances of capital punishment and long terms of imprisonment imposed upon children. As late as 1833 a death sentence was pronounced upon a child of nine who broke a glass and stole two pennyworth of paint.

In the United States we find several instances where the rigor of the common law with respect to children was manifested by imposition of the death sentence upon children of twelve years of age tried and convicted

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1Mack. The Juvenile Court (1909) 23 Harv. L. Rev. 104.
upon a charge of murder. However, this harsh rule of the common law was modified by new concepts in the United States toward the close of the nineteenth century. Accordingly, the states began to deal with the child offender on a non-criminal basis, and social methods gradually were substituted for penal methods. Not until 1899, however, was the concept of juvenile delinquency concretely manifested in the establishment of a juvenile court in Chicago. Since that time forty-six states have adopted legislation providing for special courts to deal with juvenile cases.

In the federal system, however, child offenders were subject to the same mode of prosecution as adults. Under the ordinary criminal procedure they were arrested, brought before the committing magistrate, bound over to regular term of court, indicted by grand jury, and prosecuted in open court.

This failure to distinguish between the adult criminal and the youthful delinquent resulted in a pressing social problem which was apparently ignored until 1931. In that year the report of the National Commission on Law Observance and Enforcement focused the spotlight of public opinion upon the sorry plight of juvenile offenders in the federal jurisdiction.

Direct results of the Commission's investigation and findings with respect to juvenile delinquency soon followed. Attorney General Mitchell, shortly thereafter, set forth a plan whereby efforts would be made by the Federal Government to have juvenile cases handled by state authorities if the latter would accept responsibility for their care and had the facilities to do so properly. This policy was enacted into legislation by Congress in the Act of June 11, 1932. The law was grounded upon the theory that

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Footnotes:


5Under earlier Massachusetts law there was a provision for the presence of an officer of the State Board of Charity at the trial of juvenile cases with an opportunity for investigation and recommendations. Mass. Acts & Resolves (1869) c. 453, § 4:

6New York in 1877 prohibited the placing of any child under fourteen in any prison or place of confinement in company with adults charged with or convicted of crime, unless unaccompanied by a proper official. N. Y. Laws (1877) c. 428, § 4.

7Ill. Laws (1899) 131.

8Neither Maine nor Wyoming has juvenile courts.

9"Children are not just small adults. To be sure they are adults in the making but they are at a stage of development which so far removes them from adulthood that child and adult are for the most part strangers to one another." White, The Child, His Nature, and His Needs (1924) 195.

10This Commission was created by President Hoover in 1929. It was composed of George W. Wickersham, Chairman, Henry W. Anderson, Newton D. Baker, Dean Ada L. Comstock, Judge William I. Grubb, Judge William S. Kenyon, Monte M. Temann, Frank J. Loesch, Kenneth Mackintosh, Judge Paul J. McCormick, and Dean Roscoe Pound.

local communities should accept responsibility for their own problems and, since the causes of juvenile delinquency are usually local, that the means of their correction should likewise be local.

While theoretically the Act was the desired remedy, the impossibility of its beneficial administration was gradually revealed. For in some localities facilities for the care of juveniles were found to be either inadequate or completely lacking; in certain instances local authorities refused to accept responsibility; and in others the unsatisfactorily low age limits for juvenile court jurisdiction prevented the diversion to local authorities of all cases considered to be properly within their province.¹¹

Thus, early in 1938 the Department of Justice was confronted with the alarming fact that only about five per cent of the federal juvenile cases were being diverted to local authorities.¹² More than ninety per cent were remaining in the federal system, which meant that they were subject to the same mode of criminal procedure as the adult offender.¹³ Obviously the Act was failing its purpose. To have continued in an attempt to administer it, therefore, would have only aggravated an unhealthy social condition.

According to former Attorney General Cummings the Department of Justice, in its examination for a solution of the problem presented by these conditions, was faced with two alternatives, namely, (1) setting up a separate system of courts with a separate system of judges; or (2) modifying federal criminal procedure to allow for a flexible chancery proceeding.¹⁴ For reasons concerning which we may only speculate the latter course was chosen.

PARENS PATRIAE

It may be reasonably supposed, however, that such selection of chancery proceedings was influenced, among other reasons, by the doctrine of parens patriae.¹⁵ Having its roots in the common law of England, this doctrine,

¹¹Cummings, Federal Law and the Juvenile Delinquent (address before the Association of Juvenile Court Judges of America, Cleveland, Ohio, July 29, 1938) 6.
¹²Summary of Minutes of Meeting of the Bureau of Prisons of the Department of Justice and the Children's Bureau of the Department of Labor to Discuss Treatment of Federal Juvenile Delinquents (1938) 3.
¹³Because of the infrequent terms of court and the necessity for grand jury indictments, federal juveniles were being held in jail from one day to ten months before being brought to trial. During the fiscal year ended June 30, 1937, for example, the number of days juveniles under eighteen years of age were held in jail pending trial totaled one hundred years. Ibid.
¹⁴Cummings, Federal Law and the Juvenile Delinquent (address before the Association of Juvenile Court Judges of America, Cleveland, Ohio, July 29, 1938) 6.
¹⁵For an interesting discussion of this doctrine see Roseman, PARENS PATRIAE (1925) 4 Ore. L. Rev. 233.
simply stated, holds that the sovereign power of guardianship over persons under disability, such as minors, insane and incompetent persons, orphans, etc., is inherent in the crown. Historically, the king entrusted the exercise of this sovereign prerogative, especially in respect to minors, to the Lord Chancellor, "the keeper of the king's conscience" and holder of the privy seal. While the chancellor generally acted only where a property right was involved, his jurisdiction over all phases of the child's well being was recognized.16

In the United States it has been generally held that this sovereign power passed, after the Revolution and the subsequent creation of the dual system of government, to the legislatures of the several states.17 Upon this ground the constitutionality of the juvenile delinquency statutes of many of the states has been upheld.18

In the case of Mormon Church v. United States,19 however, it was held that the United States could act as parens patriae over the Territory of Utah. The theory of this case apparently was that the legislature is the parens patriae and that, since Congress made the laws for the Territory, the United States was the parens patriae. On the authority of this case it would seem that since Congress legislates for the District of Columbia the United States is the parens patriae for the District and a juvenile delinquency act for the District may be predicated upon this theory.

Although the issue as to whether the Federal Government may act as parens patriae with respect to juveniles who have violated the laws of the United States has never been decided, in the light of these cases it may be concluded that an attempt to empower such action might be impractical. With reference to this particular point the words of the National Commission on Law Observance and Enforcement are clearly apropos: "The power parens patriae is so intimately a State function, that it would seem unwise to place it within the judicial power of the United States even though there be no constitutional objections."

16Thus it is interesting to note that Lord Eldon took away the children of the Duke of Wellesley because of the latter's profligate conduct. Wellesley v. Duke of Beaufort, 2 Russ. 1 (Ch. 1827). The poet Shelley, too, was deprived of the custody of his children because he declared himself to be an atheist. Shelley v. Westbrooke, Jacob Rep. 266 (Ch. 1821).

17Fontain v. Ravenal, 58 U. S. 369 (1854); In re Burrus, 136 U. S. 586 (1890); In re Barry, 42 Fed. 113 (C. C. S. D. N. Y. 1844); Hoadly v. Chase, 126 Fed. 818 (C. C. D. Ind. 1904).


19136 U. S. 1 (1890).

provisions of the act examined

Section I provides that for purposes of the Act a juvenile is a person seventeen years of age or under and defines juvenile delinquency as "an offense against the laws of the United States committed by a juvenile and not punishable by death or life imprisonment". Federal offenders who have not attained their eighteenth birthday may come within the purview of the Act. The age of the person is determined as of the time that the offense was committed.

Under Section II exceptions to the jurisdiction of the Act are provided for in the following instances: (1) Where the offense committed is punishable by life imprisonment or death; (2) where the case can properly be diverted to state authorities pursuant to the provisions of the Act of June 11, 1932, referred to above; (3) where the offender does not consent in writing to the procedure under the Act; and (4) where, in the opinion of the United States attorney, the case should be dealt with under regular criminal procedure in the public interest.

Where procedure under the Act is invoked, Section II further provides that the offender shall be prosecuted by information as a juvenile delinquent on the charge of juvenile delinquency, and prosecution for the specific offense against the federal law alleged to have been committed by him is prohibited. Thus, the juvenile is given the opportunity to avoid the stigma that usually attaches to a criminal prosecution in open court.

It is to be noted that the consent of the accused must be secured before proceedings are instituted under the Act. As a safeguard, moreover, against unwitting or unintelligent consent on the part of the accused, Section II requires that the consent be given in writing before the judge of the district court having jurisdiction of the offense, who "shall fully apprise the juvenile of his rights and of the consequences of such consent". The United States attorneys, moreover, are instructed to assure themselves that the juvenile has been fully apprised of his rights and of the consequences of such consent, if given, and understands them. They are advised to include a statement to that effect either in the consent or the minutes of the court.

If the case is one which may properly be handled under the Act and if the juvenile has consented to the proceeding, the accused is then prosecuted

21 A circular issued to all United States attorneys, probation officers, and marshals by Joseph B. Keenan, former Assistant to the Attorney General, containing instructions for the effective administration of the Act, states: "The procedure authorized by this Act shall be applied in the cases of all persons who have not reached their 18th birthday at the time of the offense."


23 U. S. Dep't of Justice Circular No. 3154 (1938) 3.
as a juvenile delinquent. The trial, in the nature of an informal proceeding, may be held in chambers or elsewhere and the jury is dispensed with, the consent of the juvenile to be prosecuted on a charge of juvenile delinquency being regarded as a waiver of trial by jury. The legal implications raised by the provisions of Sections II and III will be commented upon subsequently.

From a sociological standpoint a most important provision is that which provides for discretionary treatment of the delinquent. Formerly the court committed juveniles to either a penitentiary, reformatory, or training school. While the use of probation was permissible, the environment or home setting of the juvenile was frequently found to dissuade the court from employing probation. Under the new Act the court may use probation or may "commit the delinquent to the custody of the Attorney General," who is empowered to place the juvenile in a public or private institution. According to authorization contained in this Section, furthermore, the juvenile may be placed in a foster home, thereby nullifying the effects of adverse environment, which is a prime cause of youthful crime.

Additional improvements, from a broad social aspect, in the handling of youthful offenders in the federal system are provided for in Section V. Previously, juvenile offenders had been detained chiefly in jails pending trial. Unless such is deemed absolutely necessary now, however, it is forbidden. The Attorney General is to be immediately notified of the arrest and he may designate a juvenile home for the detention of the accused. Where jail detention is employed, it is provided that the juvenile must be held in custody in a room apart from adult offenders. Arresting officers are advised that, whenever feasible, the juvenile should be released in the custody of parents, relatives, or other responsible persons pending action of the court.

Under the Act the United States Board of Parole is vested with authority to parole delinquents committed to correctional institutions. Formerly the parole of those placed in a training school was handled by the school. Such, then, are the salient portions of the Act.

CONSTITUTIONAL ISSUES INVOLVED

Passing on to a consideration of the constitutional questions raised by Sections II and III, we are confronted, as regards the provision for ob-

26 Ibid.
27 U. S. Dep't of Justice Circular No. 3154 (1938) 2.
taining the consent of the accused, with the query as to whether or not a
minor is sufficiently "sui juris" to waive his right to a trial by jury. That
an adult may waive this right has been clearly established.29 But there
are no cases in the federal jurisdiction expressly involving the question of
the waiver of this right by a minor. State courts, however, have held that
an infant, like an adult, may waive this protective guarantee.30 In addi-
tion there are dicta to the effect that an infant may waive a jury trial in
New Jersey,31 Massachusetts,32 and Texas.33 In the absence of a federal
decision on this point an inference at least may be drawn that the federal
juvenile offender may likewise waive the right to trial by jury.

Section II provides, as we have seen, for institution of proceedings, after
the consent of the juvenile has been obtained, by means of an informa-
tion.34 Although the charge is that of "juvenile delinquency", the offense
giving rise to that charge may be a felony, which is an "infamous crime"
because it is punishable by imprisonment in the state prison or peni-
tentiary. (In determining whether an offense is infamous, the law thus
looks to the punishment that may be accorded the accused, rather than to
the moral turpitude of the Act or the punishment that actually was
accorded.35)

The Fifth Amendment to the Constitution of the United States provides,
however, that "no person shall be held to answer for a capital or otherwise
infamous crime unless on presentment or indictment of a Grand Jury."  
Hence, there arises the question of, whether this constitutional provision,
requiring indictment by a grand jury, may be dispensed with on the
strength of the juvenile's consent.

Again we find no decision on this particular point. Dicta to the effect
that indictment by grand jury is a personal privilege which may be waived
like all other personal privileges based on constitutional provisions36 is

30People ex rel. Crowe v. Fisher, 303 Ill. 430, 135 N. E. 751 (1922); People ex rel.
Sammons v. Wandell, 21 Hun 515 (N. Y. 1880).
31In re Daniecke, 117 N. J. Eq. 527, 177 Atl. 91 (1935), aff'd, 119 N. J. Eq. 359, 183 Atl.
298 (1936).
33Gordon v. State, 89 Tex. Cr. R. 59, 228 S. W. 1095 (1921).
34In such event such person shall be prosecuted by information on the charge of juvenile
delinquency and no prosecution shall be instituted for the specific offense alleged to have
been committed by him."
36Powers v. United States, 223 U. S. 303 (1912). The provision in the Constitution against
self incrimination reads as follows: "... nor shall be compelled in any criminal case to
be a witness against himself. ... " (U. S. Const., Fifth Amendment).

Daniels v. United States, 17 F. (2d) 339 (C. C. A. 9th, 1927). The provision for a
found in *United States v. Gill*. It is said that the trend of authority today is in favor of the doctrine that a party in a criminal case may waive irregularities and rights, whether constitutional or statutory, very much the same as in a civil case.

The Attorney General's Conference on Crime, moreover, specifically recommended permitting trial upon information as well as indictment, and declared, "Where indictment by grand jury remains a constitutional requirement, waiver should be allowed."

**ATTEMPTED EVALUATION OF THE ACT**

To date, approximately 313 cases have been disposed of under the chancery provisions of the Federal Juvenile Delinquency Act, and the sociological purposes that prompted passage of it are evidently being realized, as is shown by numerous commendations from the bench and bar throughout the nation. An evaluation of its benefits, of course,

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*speedy trial states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . " (U. S. Const., Sixth Amendment).

Diaz v. United States, 223 U. S. 442 (1912). The right of an accused to be confronted with witnesses is provided thus: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . " (U. S. Const., Sixth Amendment).

Levin v. United States, 5 F. (2d) 598 (C. C. A. 9th, 1925). The provision against double jeopardy reads: " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . " (U. S. Const., Fifth Amendment).

Waxman v. United States, 12 F. (2d) 775 (C. C. A. 9th, 1926). The provision relating to unreasonable searches and seizures states: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . " (U. S. Const., Fourth Amendment).

Schick v. United States, 195 U. S. 65 (1904). The right to be represented by counsel is provided thus: "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." (U. S. Const., Sixth Amendment).

Patton v. United States, 159 U. S. 500 (1895). The right to a trial by jury in criminal cases: "The Trial of all Crimes except in Cases of Impeachment shall be by Jury . . . " (U. S. Const., Art. 3, § 2). "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . " (U. S. Const., Sixth Amendment).

*55 F. (2d) 399 (D. N. M. 1931). The court held in this case, however, that in the absence of enabling legislation by Congress, the United States Attorney is without authority to charge by information where the offense amounts to a Felony, even though the defendant waived the indictment.

*14 AM. JUR. 848, § 119.

*Convoked by The Honorable Homer S. Cummings and held Dec. 10-13, 1934 in Washington, D. C.


can be made only on the basis of its contribution to society as a whole. For, as one commentator has said: "Society cannot but gain if we concentrate our efforts on turning minors back from the threshold of prison."\textsuperscript{42}

ROBERT T. MURPHY.

\textsuperscript{42}Walsh, Book Review (1939) 27 GEORGETOWN LAW JOURNAL 398.
BANKRUPTCY UNDER THE CHANDLER ACT: ANALYSIS*

In his two preceding papers the writer has outlined the background and legislative history of the Chandler Act of 1938.¹ The present paper, continuing the attempt to present a comprehensive summary of the more important phases of that Act, will analyze its remedial amendments and innovations with respect to Chapters I to IX of the amended Bankruptcy Act of 1898.

In Section 1² (Chapter I) the Chandler Act restores the alphabetical order which had originally been set up in the Act, clarifies, corrects, and strengthens the existing definitions, and adds new definitions for the terms "bona fide purchaser," "date of adjudication," "farmer," "relatives," and the phrase "to record". As stated under Section 1 (12),³ in explaining the need for the words "or the appeal is dismissed", which define "date of adjudication" in relation to the prior definition of "adjudication", the National Bankruptcy Conference (hereinafter referred to as the Conference) pointed out that this phrase was necessary in view of the conflict between the cases of Moore Bros. v. Cowan⁴ and In re: Lee.⁵

To the same extent as is permitted to creditors under the respective state laws, the bankruptcy courts created by Section 2⁶ can deal with dower, curtesy, or community interests in the bankrupt's property. They may close estates for want of prosecution, reopen estates for proper cause, and remove trustees on their own motion and for cause. The newly enacted subdivision (21) of Section 2⁷ gives the bankruptcy courts the

*This paper is a sequel to the two papers respectively entitled Bankruptcy under the Chandler Act: Background and Bankruptcy Under the Chandler Act: Legislative History and Summary prepared by the same writer, which appeared in the December 1938 and January 1939 issues of the GEORGETOWN LAW JOURNAL.

¹The reader is referred to (1) Conferee Jacob I. Weinstein’s excellent detailed analysis, which contains an authentic statement, with explanations, of the source of every provision of the Act and the multifold changes made by it in the former law; WEINSTEIN, THE BANKRUPTCY LAW OF 1938 (1938); and (2) HANNA AND MC LAUGHLIN, BANKRUPTCY ACT AS AMENDED, INCLUDING THE CHANDLER ACT WITH ANNOTATIONS (1938), an authoritative pamphlet that explains the sources of the various sections in the Chandler Act, with annotations to the more important court decisions and law journal articles on the subject.

³Id. at 840, 11 U. S. C. at § 1 (12).
⁴173 Ala. 536, 55 So. 903 (1911).
⁷Id. at 842, 11 U. S. C. at § 11 (21).

²Id. at 844, 11 U. S. C. at § 21; see Treiman, Acts of Bankruptcy; A Medieval Concept in Modern Bankruptcy Law (1938) 52 HARV. L. REV. 189-215 for an interesting exploratory discussion in respect of the possible elimination of the "act of bankruptcy" concept in the future and suggested substitution of an approach which would lay more emphasis on the fundamental insolvency function of the bankruptcy law.

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necessary power to regulate the administration of equity receiverships, assignments for the benefit of creditors, and the like, supervened by bankruptcy proceedings within the four-month period.

In Section 38 (Chapter III) the third "act of bankruptcy" of the Chandler Act combines the old third and fourth acts of bankruptcy, thereby eliminating any ambiguity that might have arisen in view of the similarity between them. The Act separates the two distinct acts of bankruptcy contained in the old fifth act of bankruptcy, making a "general assignment" and an "appointment of a receiver" the fourth and fifth acts of bankruptcy, respectively. The fifth act broadens the scope of such act of bankruptcy in order to reach a former widely prevalent type of wasteful, inefficient, and collusive equity receivership. This type began under the guise of the debtor's being solvent but temporarily embarrassed and assumed to work out his difficulties if given time and the protection of the court. But it invariably led, after safe termination of the four-month period wherein a supervening bankruptcy might have been commenced, to recognition of the fact that the debtor was insolvent. Then liquidation ensued. As a result heavy expenses were incurred and substantial losses were suffered, and as a consequence there was usually little or nothing left for creditors. This Section, moreover, with regard to the running of the four-month period, comprehensively restates and sets up an inclusive, uniform, and effective test, which is also used in Sections 60(a), 60(b),9 and 67(3).10 The confusing clause "who is insolvent" has been deleted from the subsection as amended by the Act.

Subsections (c) and (d) of Section 3 clarify the provisions relative to the defenses that may be asserted by a bankrupt as his burden of proof. Subsection (d) is amended for the first time in order to reach all of the acts of bankruptcy where insolvency or solvency is a material issue in the contest between the petitioning creditors and the alleged bankrupt. The procedure authorized in the amended subsection has been approved by the courts in West Company v. Lea11 and Young and Holland Co. v. Brands Bros.12

The confusing phrase "any unincorporated company" has been removed from Section 413 inasmuch as the definition of "corporation" set forth under Section 1(8),14 includes unincorporated companies. This change restricts involuntary proceedings to moneyed, business, or commercial

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11174 U. S. 590 (1899).
12162 Fed. 663 (C. C. A. 1st, 1908).
unincorporated companies. Section 4 fixes the date of the commission of the act of bankruptcy as the time of reference for determining the bankrupt's status as a wage earner or farmer.

The many defective partnership provisions of the old Section 5, which had not been revised once since their enactment in 1898, have been remedied by the Act. Section 5, as amended, permits the filing of a joint petition by or against the partnership as an entity and one or more of the partners. Non-joining partners may contest the proceedings. Where all general partners are individually adjudged bankrupt the partnership entity itself, without further petition, may also be adjudged bankrupt. Where cause therefor is presented, a separate trustee may be appointed for the estate of an individual bankrupt partner. The individual general partners are not discharged upon the discharge of the partnership. The Section, as expanded, includes limited partnerships and preserves the applicable state statutes in respect of the order of distribution in cases of limited partnerships.

Section 6, relating to exemptions of bankrupts, has been clarified so that a bankrupt will not be able to profit from the assets recovered by the trustee in undoing the fraudulent acts of the bankrupt at the expense of the creditors. The decisions have been in conflict as to whether a bankrupt may come in and amend his schedules and claim his exemption out of the recovered property fraudulently disposed of by him.

Section 7 clarifies and adds to the duties of bankrupts. The bankrupt is required to attend and be examined at the first meeting of his creditors and at the hearing upon the objections to his discharge, if any. The time of filing the schedules has been shortened with respect to involuntary petitions. The voluntary bankrupt is now required to file schedules with the bankruptcy petition. Section 7(a)(8) requires the scheduling of all contingent, unliquidated, or disputed claims. Section 7(a)(9) provides for the filing by the bankrupt of a statement of affairs at least five days prior to the first meeting of his creditors. The expense of long-drawn-out examinations for the purpose of determining intimate information for the use of the trustee and creditors in respect of the debtor's

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15 Id. at 845, 11 U. S. C. at § 23.
16 Id. at 847, 11 U. S. C. at § 24.
17 Compare on the one hand, In re Osborn, 104 Fed. 780 (W. D. N. Y. 1900); In re Ziff, 225 Fed. 323 (E. D. Ala. 1915); In re Soper, 173 Fed. 116 (D. Neb. 1909); In re Tollett, 106 Fed 866 (C. C. A. 6th, 1901); and In re Thompson, 115 Fed. 924 (S. D. Ga. 1902); with, on the other hand, In re Wishnefsky, 181 Fed. 896 (D. N. J. 1910); In re Long, 116 Fed. 113 (E. D. Pa. 1902); In re Evans, 116 Fed. 909 (E. D. N. C. 1902); and In re Coddington, 126 Fed. 891 (M. D. Pa. 1904).
financial condition will thus be reduced or saved. The causes of his failure and a brief recital of his prior operations are noted as a basis for his later examination. (This new duty was one of the features of the Hastings-Michener Bill.19) The bankrupt is also required to prepare and file, upon order of the court, a sworn inventory, giving the cost of his merchandise and other property as of the date of bankruptcy. This is intended to strengthen turn-over proceedings. The officers, directors, stockholders, and like persons may be required to perform the duties imposed upon a bankrupt corporation.

Section 820 has been amended to preserve the rights of creditors in case of death of the bankrupt. By the decision of Siegel v. Wells21 the doctrine of Hull v. Dicks,22 by which the estate of the deceased bankrupt vested in the trustee in bankruptcy, who was given the right of a lien creditor but was charged with the allowances for the bankrupt's widow and children, was extended to states where the death of a debtor does not affect liens. As amended, this Section attempts to insure against regarding it as a limitation or restriction of Section 47(a),23 because it may apply to any particular state and preserves to the spouse and children of a deceased bankrupt the bankrupt's right to exemptions, where such exemptions have not been set aside or allowed before death, to the exclusion of his personal representatives.

Section 1024 deals with the apprehension and extradition of bankrupts. Section 10(c) is designed to cure the defect indicated by the Supreme Court of the United States in Ginsburg & Sons v. Popkin,25 which held that under former Section 9(b), the president of a bankrupt corporation could not be detained for examination as to the affairs of the bankrupt corporation, inasmuch as he was not the bankrupt, and therefore could not be apprehended or extradited upon his refusal to present himself for examination.

Section 11(e)26 permits a receiver as well as a trustee to sue upon claims of the estate within two years after the date of adjudication instead of two years after the date of closing the bankrupt's estate, as the former law provided. The operation of both federal and state statutes of limi-
tions affecting debts which are provable under the Act are suspended, as provided in Section 11(f).

Former Section 12 has been incorporated in Chapter XI of the Act.

Section 14 has been revised so that an adjudication of a person other than a corporation automatically operates as an application for a discharge. The bankrupt may, however, waive this right. In cases of corporations an application for a discharge must be filed within six months after the adjudication. Provision is made for a stay until the discharge is disposed of. If no application is filed by a corporation within six months, or if a bankrupt other than a corporation files a waiver, or if the discharge after hearing is not granted, the right to a discharge is terminated. This Section provides for an examination of the bankrupt on every application for discharge, and provision is made for the intervention of the United States Attorney in behalf of the public interest when requested by the court. The trustee may now interpose objections to a discharge without the authorization of the creditors, as was formerly required. Ample notice to all parties in interest is provided for under the Act.

To avoid the consequences of fraud on the part of any bankrupt, Section 21 provides for the filing of a certified copy of the bankruptcy petition in every county in which the bankrupt owns or has an interest in realty. A purchaser or lienor for a present fair consideration, who has no actual knowledge, is not charged with constructive notice if such certified copy is not filed. The same provisions apply to judicial sales.

Section 21(a) permits the examination of designated persons, including the bankrupt and spouse, by a creditor without the previous condition precedent of appointing a receiver, as indicated in Cameron v. United States.

To overcome the injustice which resulted from the lack of the right in federal equity court cases to call a hostile witness for cross-examination without being bound by his testimony, Section 21(j) was passed.

Section 22 provides for referring petitions to a referee at any time by the court. The procedure in partnership cases under amended Section

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27Id. at 849, 11 U. S. C. at § 29 (f).
28Id. at 905-916, 11 U. S. C. at §§ 701-799.
29Id. at 850, 11 U. S. C. at § 32.
30Id. at 852, 11 U. S. C. at § 44.
31231 U. S. 710 (1914).
18 28 is made to conform to the amended provisions of Section 5. 28 Other procedural improvements (outlined in Chapter IV) provide for delivery of copies of the notice of the taking of depositions; clarify the provisions, so that the spouse of the bankrupt may clearly be examined relative to the financial affairs of the bankrupt, regardless of federal or state laws to the contrary; 27 provide that communications addressed not only by or to creditors but also by or to receivers, trustees, their attorneys, and referees shall be privileged; require that receivers have the same qualifications as trustees; provide that the death or removal of a receiver shall not abate the proceedings; and include receivers with trustees in the provisions relative to compromises and arbitration of controversies.

Section 24 28 provides but one method by which the appellate jurisdiction, which is vested in the Circuit Courts of Appeals of the United States and the United States Court of Appeals of the District of Columbia, may be exercised, and that is by appeal and in the form and manner of an appeal. Jurisdiction upon appeal from a judgment on a verdict rendered by a jury extends to matters of law only. Appeals from orders, judgments, and decrees involving less than $500 can be taken only upon allowance of the appellate court.

The scope of Section 29 29 dealing with "Offenses", has been broadened to apply to debtor-relief proceedings. The provisions dealing with reporting misconduct to the United States Attorneys outlined in Sections 29 (e) have been made more workable. The language defining the offenses has been clarified. Provision has been made for reports to referees of investigations by United States Attorneys in an attempt to strengthen the Act in the enforcement of its criminal provisions.

Chapter V is purely administrative, and the majority of the amendments to this Chapter are either conforming or clarifying. Referees must now be members in good standing at the bar of the district court in which appointed; must reside within the territorial limits of the bankruptcy court; and must have their offices within the judicial district in which they are appointed. 40

To increase efficiency, Section 37 41 requires that, insofar as possible,
the number of referees should be limited, with a view to employing referees on a full-time basis. The territorial jurisdiction of referees has been extended by Section 38\(^4\) to be co-extensive with the limits of the jurisdiction of the courts appointing them. Subject to review, they now have the power to grant, deny, or revoke discharges; to confirm, or refuse to confirm, arrangements or wage-earner plans; or to set aside the confirmation of such arrangements or plans and reinstate the cases as outlined under Section 39.\(^4\) The practice regarding petitions for the review of referees’ decisions is set up by Section 39(c) and is intended to clarify and make uniform the practice on review. Section 40\(^4\) authorizes the court to restrict the compensation of the referees from becoming excessive. Section 41(a)\(^5\) has improved the practice in contempt proceedings by modifying the provision with respect to attendance of a witness at a place more than 100 miles from his residence. His lawful mileage and fee for one day’s attendance must first be paid or tendered him in requiring his attendance. With respect to the hearing for punishment the practice has been clarified by Section 41(b).\(^6\)

An innovation appears in recognizing and giving creditors’ committees official standing and the right to submit to the court any question affecting administration under Section 44.\(^7\) Creditors who are relatives of individual bankrupts, or of stockholders, officers, or directors of bankrupt corporations, are excluded under Section 44(a) and 44(b) from the right to participate in the appointment of a trustee or the appointment of a creditors’ committee.

Section 44(c),\(^8\) allowing an attorney for a general creditor to act as an attorney for a receiver or trustee, was enacted as a result of (1) a persuasive showing that in the case of *In re Mayflower Hat Co. Inc.*\(^9\) the general creditors of a bankrupt, in the court’s opinion, could act as receiver or trustee and should, therefore, be allowed to be represented by their attorney, and (2) the ruling in the case of *In re Rury*\(^10\) to the effect that a general creditor does not hold any adverse interest which would disqualify his attorney.

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\(^{4}\)Id. at 857, 11 U. S. C. at § 66.

\(^{5}\)Id. at 858, 11 U. S. C. at § 67.

\(^{6}\)Id. at 859, 11 U. S. C. at § 68.

\(^{7}\)Id. at 859, 11 U. S. C. at § 69 (a).

\(^{8}\)Id. at 859, 11 U. S. C. at § 69 (b).

\(^{9}\)Id. at 860, 11 U. S. C. at § 72.

\(^{10}\)Id. at 860, 11 U. S. C. at § 72 (c).

\(^{65}\) F. (2d) 330 (C. C. A. 2d, 1933); see also 68 F. (2d) 703, 704 (C. C. A. 2d, 1934).

\(^{82}\) F. (2d) 331 (C. C. A. 9th, 1924), reharing denied, ibid.
Section 4551 requires that receivers and trustees be competent or authorized to perform their duties and reside or have an office in the judicial district within which they are appointed. The duties of the trustee in bankruptcy proceedings proper are outlined in procedural sequence in Section 47(a).  

In very small cases not more than $100 will be allowed to the trustee by the court, as provided in Section 48(c)(1). The court may, by virtue of Section 50(n), after receiving notice of any breach of any obligation, summarily enforce the liability to the United States on the surety bonds entered into by the referees, receivers, and/or trustees. Section 51, in outlining the duties of clerks, remedies a defect in the prior law by clause (3), which permits the collection of proper fees of the clerk and referee in each ancillary proceeding before the filing of the petition whereby the ancillary proceeding is instituted. Section 53 expands the scope of the Attorney General's annual report to Congress to include additional statistical tables indicating the operation and efficiency of administration of the Act for the entire country, by states, federal districts, and divisions thereof. The judge or referee is mandatorily required to examine publicly the bankrupt or cause him to be examined at the first meeting of creditors.

Section 57 contains improvements in respect of the proof and allowance of claims. Section 57(n) provides that claims, to be allowed, should be filed within six months after the date set for the first meeting of creditors, instead of the date of adjudication. This Section now includes, among the provable claims, the tax and other claims of the United States and of any state or subdivision thereof. This provision was passed to overcome decisions which held that the bar time provided in the old bankruptcy law was not binding upon the United States, and inferentially on any government or municipality or other sovereign body, and that the sovereign was not barred by laches in delaying to enforce its rights. The administration of estates will undoubtedly hereafter be accelerated and a distribution will become more certain, definite, and actually realized.

53 Id. at 860, 11 U. S. C. at § 75 (a).
54 Id. at 862, 11 U. S. C. at § 76 (c) (1).
55 Id. at 864, 11 U. S. C. at § 78 (n).
56 Id. at 864, 11 U. S. C. at § 79.
57 Id. at 864, 11 U. S. C. at § 81.
58 Id. at 865, 11 U. S. C. at § 91.
59 Id. at 866, 11 U. S. C. at § 93.
The amendments made to Section 59(d) follow the judicial interpretations placed upon the former law by the courts and are declarative of such case-made law.

Section 59(e) is amended so that the bankrupt's relatives, or persons interested in the bankrupt corporation, creditors who have participated in the act of bankruptcy, fully-secured creditors, and creditors who have received void or voidable preferences, liens, or transfers, are to be excluded in computing the number of creditors and in determining the number of creditors required to join in the bankruptcy petition.

The right of creditors to file an answer and oppose the bankruptcy petition has been eliminated from Sections 18(b) and 59(f). Section 59(g) makes the Act more flexible in operation by giving the petitioning creditors the right to file a list of creditors upon the bankrupt's failing to file such list, just as they have the right to do in involuntary cases after adjudication, and provides for the disposition of no-asset pauper cases which are not prosecuted because of non-payment of costs. Section 59(h) provides that a creditor is not disqualified from being a petitioning creditor merely because such creditor participated in or consented to an equity receivership or an assignment for the benefit of creditors in a prior matter or judicial proceeding having for its purpose the settlement of the debtor's affairs or the liquidation of his property.

The definition of preference has been restated more accurately and comprehensively in Section 60 of the Act, eliminating overlapping and discarded phrasing. In view of the United States Supreme Court's decision in Palmer Clay Products Co. v. Brown the percentage test has been stated in substantially the language of the old provision as regards the effect of the transfer. Section 60(b) has been recast by deleting the repetition of the definition and by restating the text in a more direct and inclusive manner. It now accords more fully with the objective of eliminating secret transfers, and makes the test operative even though the transfer may never have actually become perfected.

Rules applicable to the liquidation of bankrupt stockbrokers have been

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5In re Macklem, 22 F. (2d) 426 (D. Md. 1927); In re Phillips Co., Inc., 28 F. (2d) 299 (M. D. Pa. 1928).
6Id. at 851, 11 U. S. C. at § 41 (b).
7Id. at 868, 11 U. S. C. at § 95 (f).
8Id. at 868, 11 U. S. C. at § 95 (g).
9Id. at 868, 11 U. S. C. at § 95 (h).
10Id. at 869-872, 11 U. S. C. at § 96.
adopted in a new Section 60(e) to make the law uniform and to avoid inequalities in distribution. Upon the bankruptcy of a stockbroker the proceeds on hand for the purchase or from the sale of the securities of the cash and margin accounts are to be distributed proportionately according to the respective equities of the cash and margin customers in their respective accounts. Moneys and or securities or the proceeds therefrom specifically earmarked and set aside for customers more than four months before bankruptcy, or if within such four months while the stockbroker was solvent, are not so treated but may be claimed by such customers. Section 60(e)(4) provides that unless securities are specifically allocated or physically set aside for a customer, and remain so at the date of bankruptcy, they are to be placed into the fund for distribution to all customers of the single class.

By the force and effect given to Section 60(e)(2) and (5), whenever a broker, during insolvency, makes delivery to some margin customers and at the same time is unable to fulfill the same obligation in respect to other such customers, the property so transferred is to be recoverable by the trustee if the essentials of a preference or illegal transfer, as defined in Sections 60, 67 and 70 exist.

Section 63 now includes among the provable claims any contingent debts, contingent contractual liabilities, and claims for anticipatory breach of contract executory in whole or in part. A claim is not provable under the Act if it is not deemed capable of liquidation, or if liquidation of it would cause undue delay. The claims of traveling or city salesmen who may be selling one or more kinds of goods for a bankrupt, but who are not acting exclusively for him, are included in the priorities of Section 64. All state priorities have been deleted except in the case of a landlord, and that priority is restricted to rent for actual use and occupancy accruing with three months before bankruptcy.

Section 65 provides that a first dividend shall be declared within thirty days after the date set for the first meeting of creditors, if certain favorable conditions exist, and often thereafter under similar conditions. A more expeditious administration of bankrupts' estates is confidently to be

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[Note: The text contains references to statutes and other legal sources, which are not transcribed here.]
expected as a result. The provisions in Section 66\textsuperscript{78} regarding the handling of unclaimed moneys have been improved.

Section 67\textsuperscript{79} has been greatly improved. Its title has been expanded from "Liens" to "Liens and Fraudulent Transfers" in order to reflect its actual contents. Former Sections 67(a), (b), and (d) have been omitted inasmuch as their substance has been incorporated in the recasting of Sections 60, 67, and 70. Former Sections 67(c) and 67(f) cover the same matter and have been combined in the new Section 67(a). Finally, as regards the first of the two classes of fraudulent transfers covered by former Section 67(e), \textit{viz.}, transfers made with intent to hinder, delay, or defraud creditors, the provision has been expanded by incorporating in Section 60(d)\textsuperscript{80} the salient provisions of the Uniform Fraudulent Conveyance Act;\textsuperscript{81} and as regards the second of these two classes of transfers, \textit{viz.}, those void against creditors under applicable state laws, such transfers are now covered by Section 70(e).\textsuperscript{82}

Section 69(a) and (b)\textsuperscript{83} of the Act contain portions of the former deleted Section 3(e). Section 69(b) has been made to conform to Section 50(n).\textsuperscript{84}

Section 69(c)\textsuperscript{85} clarifies and makes uniform the practice in regard to the appointment of ancillary receivers. Section 69(d)\textsuperscript{86} makes clear the exclusive and paramount jurisdiction of the bankruptcy court over property dealt with in a prior equity receivership or like proceeding which is superseded by a bankruptcy proceeding. It protects the equity receiver or trustee in the continued administration of the estate (in the interest of conserving the assets thereof where he has not been divested of possession) between the filing of the involuntary petition and the adjudication.

Section 70\textsuperscript{87} cures a serious defect by vesting the trustee with title to the property as of the date of filing of petition in bankruptcy, instead of the date of adjudication. To correct prevalent abuses, title to realty interests which, within six months after bankruptcy, become assignable interests or

\textsuperscript{78}Id. at 875, 11 U. S. C. at § 106.
\textsuperscript{79}See note 73, \textit{supra}.
\textsuperscript{80}See note 69, \textit{supra}.
\textsuperscript{83}Id. at 879, 11 U. S. C. at § 109 (a) (b).
\textsuperscript{84}See note 54, \textit{supra}.
\textsuperscript{86}Id. at 879, 11 U. S. C. at § 109 (d).
\textsuperscript{87}Id. at 879-882, 11 U. S. C. at § 110.
estates, or give rise to powers in the bankrupt to acquire assignable interests or estates, are also vested in the trustee. The trustee is vested with all of the defenses available to the bankrupt. The appointment of a single appraiser is permitted by Section 70(f) which also provides for the appointment of only resident auctioneers of the judicial district in which the property to be sold is located. The provisions dealing with the revesting of title in the bankrupt have been made to conform to the provisions of the new chapter dealing with debtor relief, and are stated in Section 70(i).

Section 72\(^{58}\) is clarified to refer clearly only to compensation for the services required by the Chandler Act. Additional compensation may be received by a court officer who renders services not required under the Act.

Chapter VIII of the former Act, entitled “Provision for the Relief of Debtors”, included former Sections 73 to 77B, inclusive. The salient features of former Section 74 have been incorporated into the new Chapter XI.\(^{60}\) Jurisdictional Sections 73 and 77A of the old law have been eliminated by the Chandler Act. Section 75 of the prior Act will expire March 4, 1940. Section 76 of the previous law, relating to extension of the secondary liability of any person under the Act of June 7, 1934, has been repealed by the Chandler Act. Section 77,\(^{61}\) which was rewritten and expanded on August 25, 1935 and amended on June 26, 1936, has not been amended by the Chandler Act. Former Sections 77A and 77B have been recast and incorporated into Chapter X\(^{61}\) of the new Act, which has greatly expanded the law with respect to corporate reorganizations.

Chapters XII,\(^{62}\) XIII,\(^{63}\) and XIV,\(^{64}\) created by the Chandler Act, deal respectively with real-property arrangements other than by corporations, with wage-earner plans, and with Maritime Commission liens. Except for two minor amendments to subsections (b) and (s) of Section 75,\(^{65}\) Sections 75 and 77 of the prior law are the only Sections in Chapter VIII which were not affected by the Chandler Act.

Chapter X of the former law, entitled “Debt Readjustments by Municipalities and Taxing Districts” and containing Sections 81-84, was passed

\(^{58}\) Id. at 883, 11 U. S. C. at § 112.

\(^{59}\) See note 28, supra.


\(^{62}\) Id. at 916-929, 11 U. S. C. at §§ 801-926.

\(^{63}\) Id. at 930-938, 11 U. S. C. at §§ 1001-1086.

\(^{64}\) Id. at 938-939, 11 U. S. C. at §§ 1101-1103.

\(^{64}\) Id. at 939, 11 U. S. C. at § 203 (b).
August 19, 1937\textsuperscript{96} to overcome the constitutional objections to Sections 78, 79, and 80 (Chapter IX), which were declared unconstitutional on May 25, 1936.\textsuperscript{97} Former Chapter X was declared constitutional by the Supreme Court on April 25, 1938.\textsuperscript{98} It is a temporary law, expiring July 1, 1940, and has been renumbered as Chapter IX in the Chandler Act.

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\textsuperscript{97}Ashton v. Cameron County Water Improvement District, 298 U. S. 513 (1936); \textit{rehearing denied}, 299 U. S. 619 (1936).
NOTES

LIQUOR CONTROL RETURNS TO THE STATES:
TWENTY-FIRST AMENDMENT

The Twenty-First Amendment to the United States Constitution provides:

Section 1. The eighteenth article of amendment to the Constitution of the
United States is hereby repealed.

Section 2. The transportation or importation into any state, territory, or
possession of the United States for delivery or use therein of intoxicating liquors,
in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified
as an amendment to the Constitution by convention in the several states, as
provided in the Constitution, within seven years from the date of the submission
hereof to the states by the Congress.

I

Attempts by the Federal Government to regulate the transportation
and consumption of intoxicating liquors have been confined principally
to two amendments to the Federal Constitution and various acts of Con-
gress.1 The Twenty-First, or Repeal Amendment, was ratified December
5, 1933, and repealed the Eighteenth, or Prohibition Amendment. The
second section of the Twenty-First Amendment, which prohibits trans-
portation of liquor into any state for use in violation of state law, has been
the most frequently litigated provision of the Repeal Amendment since
it became part of the supreme law of the land.

Two recent cases2 decided by the United States Supreme Court in-
volving construction of Section 2 have crystallized the principles of con-
stitutional law arising out of the construction of the Amendment. What
some critics3 believed to have been an indecisive declaration of the Court
on the settlement of the conflict between the federal commerce power
and the power to control liquor importations by the individual states in the
case of State Board of Equalization v. Young’s Market Company,4 has

1U. S. CONST., Amend. XVIII; U. S. CONST., Amend. XXI: The Wilson Original Packages
Act, 26 Stat. 313 (1890); Webb-Kenyon Act, 37 Stat. 699 (1915); § 5 of the postal
service appropriation act for the fiscal year 1918 (39 Stat. 1069, 18 U. S. C. § 341 (1917))
known as the Reed Amendment.

2Indianapolis Brewing Co., Inc. v. Liquor Control Commission of State of Michigan, 59
59 Sup. Ct. 256 (1939).

3Johnson and Kessler, The Liquor License System—Its Origin and Constitutional De-
velopment (1938) 15 N. Y. U. L. Q. Rev. 380; Skilton, State Power under the Twenty-
First Amendment (1938) 7 Brooklyn L. Rev. 342; (1939) 4 Mo. L. Rev. 68.

4299 U. S. 59 (1936).
been clarified in the cases of Joseph S. Finch & Company v. McKittrick, Attorney General of Missouri,\(^5\) and Indianapolis Brewing Company v. The Liquor Control Commission of State of Michigan,\(^6\) decided during the present term of the Court.

In order to better understand the status of liquor control in this country today, it is necessary to review briefly the various attempts at regulation propounded by Congress, and to compare these legislative controls with the treatment they have received in the courts in contrast with the construction placed upon the Twenty-First Amendment.

II

From the earliest time the power to control liquor traffic has been recognized as an incident to the general police power.\(^7\) This was recognized in the United States to be a valid part of the police power of the individual states, so long as the exercise of such powers did not interfere with the right of the federal government to control interstate commerce. The United States Supreme Court enunciated this principal in the case of Leisy v. Hardin,\(^8\) when it held that a "dry" state could not prevent the importation of liquor into that state and the sale by the consignee of such liquor in the original package. A state which wished to prevent the sale of liquor within its borders thus found its policy thwarted to that extent. The Leisy case held that regardless of the individual views of particular states as to "deleterious or dangerous qualities of particular articles" the Court could not declare that any article which Congress recognized as a subject of interstate commerce was within such description, or that whatever subjects are thus recognized could be controlled by state laws amounting to regulations, while they retained their interstate character.

As a result of the problems raised in the Leisy case, Congress in 1890 made its first attempt to define by legislation the boundaries between state and interstate control of the liquor traffic.\(^9\) The "original package" doctrine by which the Court had branded liquor as a subject of interstate commerce aroused considerable indignation in Congress because by this loop-hole the states were frustrated from effectively controlling their own liquor traffic. The result was the passage of the Wilson Act\(^10\) which provided:

\(^5\)59 Sup. Ct. 256 (1939).
\(^6\)59 Sup. Ct. 254 (1939).
\(^7\)Boston Beer Co. v. Massachusetts, 115 Mass. 153 (1874).
\(^8\)135 U. S. 100 (1890).
\(^9\)The Wilson Original Packages Act, 26 STAT. 313 (1890).
\(^10\)26 STAT. 313 (1890).
"All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."\(^{11}\)

The Wilson Act was tested in the Supreme Court in the case of *Rhodes v. Iowa*.\(^{12}\) It was contended that by reason of this Act of Congress a state liquor control law of Iowa\(^{13}\) could be applied to a shipment of liquor while it was in transit and before it had reached the consignee. In this case a constable had seized a wooden box marked "groceries", but which contained liquor, while it lay on a platform in the freight depot in Burlington, Iowa, en route from Illinois. The Court was called upon to decide whether or not the liquor had been seized before delivery. In a divided opinion the tribunal held that "arrival" meant arrival *in the hands of the consignee* and that a state was without power to limit or interfere with the importation of liquor until it had reached its destination. Justice Gray, dissenting to the Rhodes decision on behalf of himself and Justices Harlan and Brown, declared the majority opinion did not give effect to the police power reserved to each state by the Constitution and recognized by the Wilson Act. He pointed out that state statutes taxing the sale of intoxicating liquors transported from other states have been treated as valid or invalid depending upon whether the state laws made any discrimination in favor of liquors manufactured within the state, and did not turn on the interstate commerce issue.\(^{14}\)

On the matter of discrimination, speaking of state liquor laws in connection with the Wilson Act, the court in *Scott v. Donald*\(^{15}\) stated that "such a law (state) may forbid entirely the manufacture and sale of intoxicating liquors, and be valid; or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the state cannot, under the congressional legislation referred to (Wilson Act) establish a system which in effect discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."\(^{16}\) The note struck in *Scott v. Donald* was a

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\(^{11}\)Ibid. [Italics supplied.]

\(^{12}\)170 U. S. 412 (1898).

\(^{13}\)Iowa Code (McClain's Annotated, 1880) § 1553, ¶ 2410.

\(^{14}\)170 U. S. 412, 426 (1898).

\(^{15}\)165 U. S. 58 (1897).

\(^{16}\)Id. at 100. Accord: Vance v. Vandercook Co., 170 U. S. 438 (1898), and Minneapolis Brewing Co. v. McGillivray, 104 F. 258 (C. C. S. D. S. D. 1900). Under the principles
plaintive cry for Section 2 of the Twenty-First Amendment and the construction to be placed upon that Section by the Supreme Court in *State Board of Equalization v. Young's Market Company,*¹⁷ and subsequent cases.¹⁸

The enactment of the Webb-Kenyon Act¹⁹ by Congress on March 1, 1913, began another phase of control and illustrates an intent to give the states an entirely free hand in the regulation, importation and transportation of liquor. This Act was the second federal statute²⁰ passed on the subject of liquor control. It provided:

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, . . . which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."²¹

This Act came up for construction by the Supreme Court four years later in the case of *Clark Distilling Company v. Western Maryland Ry. and the State of West Virginia.*²² Shortly after the Webb-Kenyon Act was passed, West Virginia by amendment to its code in 1915²³ prohibited the importation by carriers of intoxicating liquors intended for personal use and the receipt and possession of such liquors, when so introduced for personal consumption. The State had been granted an injunction restraining carriers from bringing intoxicating liquors within its borders. The distilling company then sought to force the defendant carrier and the State, as intervenor, to carry and allow the importation of intoxicating liquors sold by the plaintiff. The Court in another divided opinion declared the West Virginia statute to be valid and held that the Webb-

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¹⁷ 299 U. S. 59 (1936).
²⁰ 36 Stat. 313 (1890).
²² 242 U. S. 311 (1917).
Kenyon Act divesting liquor of the character of interstate commerce was constitutional.

The third attempt by Congress to control the liquor traffic came with the passage of the so-called Reed "Bone Dry" Amendment, of March 3, 1917,24 providing that anyone ordering, purchasing, or causing intoxicating liquors to be transported in interstate commerce into any state whose laws prohibited the manufacture or sale of intoxicating liquors for beverage purposes would be punished.25 Exceptions were made in the Amendment for use of liquor for scientific, sacramental, medicinal and mechanical purposes. Two years later the Supreme Court was called upon to test the validity of this Amendment in the case of United States v. Hill.26 The facts of the case were that Hill had purchased one quart of liquor in Kentucky intending to take it to West Virginia for his personal use as a beverage, and for that reason he carried it upon his person on a trip by common carrier into the latter state, whose laws permitted such importation but forbade manufacturing or the sale for beverage purposes. In another divided opinion, the Court held that the Reed amendment applied and that Hill had violated it notwithstanding the fact that West Virginia allowed him to purchase one quart of liquor a month for his own consumption. Justice McReynolds, author of a vigorous dissent to the decision in the Hill case, pointed out that when Hill carried liquor for personal use into West Virginia, he had done only what that State permitted and that the Reed Amendment was in no proper sense a regulation of interstate commerce but was instead a direct intermeddling with the state's internal affairs. The federal statute, he said, was a more complete prohibition than that imposed by the state itself.

The liquor traffic problem entered a fourth era with the ratification of the Prohibition Amendment27 to the Federal Constitution on January 29, 1919, and the passage of the Volstead Act.28 The result of this blanket prohibition on the manufacture, sale or transportation of intoxicating liquors was to make the Federal Government and the individual state governments partners in the enforcement of prohibition. But it was not a happy combination, being nurtured in discord from the start.

2439 Stat. 1069 (1917). Which was a rider to the postal service appropriation act for the fiscal year 1918.
25The Webb-Kenyon Act was a Prohibition "without a sanction". The Reed Amendment was an attempt to provide teeth for the measure by including a penalty for transportation of intoxicating liquor in interstate commerce into any state whose laws prohibited the manufacture or sale of liquor for beverage purposes.
26248 U. S. 420 (1919).
28Ibid.
The difficulties encountered in enforcing the Eighteenth Amendment gradually led to a move in Congress for the repeal of Prohibition and the return of liquor control and regulation to the states.

In 1932, therefore, a joint resolution was introduced in the Senate by Senator Blaine, of Wisconsin, chairman of the Senate Judiciary Committee who declared:

"The effect of the joint resolution is to effectuate a complete repeal of the eighteenth amendment and to take out of the Federal Constitution the power of Congress relating to Prohibition except insofar as the Congress may assist the several states which desire Prohibition in the protection of those states."29

Senator Blaine added that the purpose of the joint resolution was to leave the matter of liquor control to the states, that they could adopt any system of regulation they might deem wise "without any constitutional inhibition or control by Congress."30

Later, during the debate on Section 2 of the Twenty-First Amendment as presented to the full membership of the Senate by the Judiciary Committee, Senator Blaine re-emphasized the intent of the legislation, namely, to insure to the states control over the traffic in intoxicating liquors.31 He said:

"... When our government was organized and the Constitution of the United States adopted, the states surrendered control over and regulation of interstate commerce. This proposal is restoring to the states, in effect, the right to regulate commerce respecting a single commodity ... namely, intoxicating liquor. In other words the state is not surrendering any power that it possesses but rather by reason of this provision, in effect acquires powers that it has not at this time.

"The committee felt that since Congress had acted (Webb-Kenyon Act) and had definitely legislated upon this question, and while that legislation had been sustained by the Supreme Court, yet it was sustained by a divided court and that we could well afford to guarantee to the so-called dry states the protection designed by section 2."32

Senator Borah, of Idaho, continuing the debate on Section 2, argued dispassionately in favor of its adoption. In a scholarly recital of the history of attempts by the Federal Government to regulate the liquor traffic, he cited the divided opinions of the Supreme Court in upholding federal legislation and declared that it was necessary to settle the policy regarding intoxicating liquor once and for all. The best way to accomplish

2976 Cong. Rec. 64 (1932). (Italics supplied.)
30Ibid.
31Ibid.
32Ibid. (Italics supplied.)
this, he said, would be to leave these matters to the states to control and regulate under their traditional police powers.\textsuperscript{33}

The Twenty-First Amendment, including Section 2, was passed by the House and Senate on February 20, 1933, and was quickly ratified by three-fourths of the states acting through specially assembled conventions\textsuperscript{34} as provided in Section 3.

The first case to reach the Supreme Court challenging the sweeping provisions in Section 2 was \textit{Premier-Pabst Sales Company v. Grosscup},\textsuperscript{35} on May 18, 1936, but it was doomed to failure since the case was dismissed on other than constitutional grounds. The Premier-Pabst Sales Company, a Delaware corporation, distributing Illinois and Wisconsin beer, in Pennsylvania, had failed to comply with a Pennsylvania statute discriminating between distributors who sold beer made within the state and those who sold imported beer. The statute required the former to pay a license fee of $400 and the latter to pay $900. Instead of applying for a $900 license, the company sought an injunction to restrain enforcement of the measure, claiming it violated the federal commerce clause and the equal protection clause of the Fourteenth Amendment. Justice Brandeis, in his opinion dismissing the appeal, held that the company had no standing on which to base its allegations since, in the first place, it was ineligible to apply for a Pennsylvania license under a state statute conditioning the issuance of such licenses on the proof that the corporation's officers, directors, and 51 per cent of its stockholders must have been residents of the state for a period of at least two years prior to the application for a license. Since no license could legally issue to the company for that reason in the first place, it could not claim injury by the alleged unconstitutional discrimination.

Less than six months later the Court was called upon to construe Section 2 in a proper case, and this time enunciated the clear-cut effect of the Section in an unanimous opinion written by Justice Brandeis in \textit{State Board of Equalization of California v. Young's Market Company}.\textsuperscript{36} A California statute imposed a license fee of $500 for the privilege of importing beer to any place within the state's borders. The Young's Market Co., a domestic corporation, joined with individual citizens of California, as plaintiff, challenging the state law as violating the federal commerce clause and the equal protection clause of the Fourteenth Amendment.

\textsuperscript{33}76 Cong. Rec. 4170-4172 (1933).

\textsuperscript{34}The ratification of the Twenty-First Amendment by state conventions marked an important innovation in American Government. See \textit{Brown, Ratification of the Twenty-First Amendment to the Constitution of the United States} (1938).

\textsuperscript{35}298 U. S. 226 (1936).

\textsuperscript{36}299 U. S. 59 (1936).
Each plaintiff was engaged in selling beer imported from Missouri or Wisconsin and each had a $50 wholesaler's license which entitled the holder to sell beer lawfully possessed to licensed dealers, whether it be imported or of domestic make, but they had refused to take out the $500 license. The State Board, as defendant, alleged the validity of the statute under sanction of Section 2 of the Twenty-First Amendment.

In holding the state law valid, Justice Brandeis declared that prior to the Twenty-First Amendment, the imposition by a state of a discriminatory tax on importers of intoxicating liquors would have been void as a direct burden on interstate commerce, and not because it resulted in discrimination as such. Emphasizing that the commerce clause confers upon individuals and corporations the right to import merchandise free, except as Congress may otherwise provide, the Court pointed out that Section 2 of the Amendment prohibiting the transportation or importation of intoxicating liquors into any state in violation of the laws thereof abrogated the right to import free, so far as concerns intoxicating liquors. Thus, by a literal and perforce a liberal construction of this Section, the Court from the beginning has refused to hamstring its meaning as it did with the Sixteenth Amendment\(^{37}\) and the subsequent strict construction accorded the taxing power therein.\(^{38}\)

In answer to the contention that the California statute was not a reasonable use of the police power, the Court significantly declared that it could not say that a high license fee for the privilege of importing liquors was not reasonable and added that "the words used (in Section 2) are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes." Thus the Court proceeded to give the states the whole rope for purposes either of "hanging" themselves with the broad authority conferred and denting the federal structure by springing the first big leak in the federal power over interstate commerce, or, dependent upon the wisdom displayed in state legislative policy, a useful weapon to wield in behalf of public health, safety, morals and welfare. Leaving the commerce question, the tribunal proceeded to a discussion of equal protection.

Mincing few words the Court dealt with this issue by declaring that "... A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth"\(^{39}\) and that the classification in

\(^{37}\)The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U. S. Const., Amend. XVI.


\(^{39}\)299 U. S. 59, 64 (1936). It is interesting to note that a similar sweeping statement
taxation made by California rested on conditions requiring difference in treatment. A classification discriminating between an importer of intoxicating liquors and a wholesaler of domestic liquors was indubitably reasonable and valid.

The stage was set for the next case martyr to walk the "Section 2 Gangplank".

The Joseph Triner Corporation, an Illinois corporation engaged in the manufacture of intoxicating liquor, secured from the Minnesota Liquor Control Commissioner a license to sell such liquors in Minnesota at wholesale. Following this and on April 29, 1935, the Minnesota legislature passed an act providing that "No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors containing more than 25 per cent alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the Patent Office of the United States." The Triner Corporation had for sale in Minnesota a stock of liquor of more than 25 per cent alcohol with brands that were not registered in the United States Patent Office, and sought an injunction against state officials to enjoin interference with its business, alleging violation of the equal protection clause since Minnesota liquor manufacturers and wholesalers could sell their product in the state without having to register brands in the United States Patent Office.

The Supreme Court very briefly, but succinctly, denied the claim for an injunction and strengthened its stand on equal protection made in the Young's Market Company case. Justice Brandeis, again speaking for the entire Court, declared that "...since the adoption of the Twenty-First Amendment, the equal protection clause is not applicable to imported

was made by Chief Justice White in the case of Brushaber v. Union Pacific Ry., 240 U. S. 1. 24 (1916), where he declared that the due process clause of the Fifth Amendment was not a limitation upon the taxing power conferred upon Congress by Article I, Section 8 of the Constitution, and the Income Tax (Sixteenth) Amendment to the Constitution. To support his contention, he says: "...it is equally well settled...that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause". That the Court had to literally "eat its own words" as voiced in Chief Justice White's opinion and assume just the opposite stand exactly sixteen years later can be gathered from the brief, but brutally to the point, declaration by Justice Sutherland in the case of Heiner v. Donnan, 285 U. S. 312, 326 (1932), wherein he said: "That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process clause of the Fifth Amendment is settled." The Court may, or may not, in years to come, accord the statement by Justice Brandeis that "a classification recognized by the Twenty-First Amendment cannot be forbidden by the Fourteenth" the same treatment as it did the pronouncement of Chief Justice White in the Brushaber case.

\textsuperscript{a}MINN. STAT. (Mason, Supp. 1938) §§ 3200-78.

\textsuperscript{b}299 U. S. 59 (1936).
intoxicating liquor"; that registered brands of foreign manufacturers may be imported into a state while unregistered brands of the same manufacturer may not be, although identical in kind, ingredient and quality, is a reasonable incident of a state's power to control liquor traffic under Section 2 of the Amendment.

Following this decision came the two most recent cases seeking salvation from the broad powers accorded the states by Section 2. On January 3, 1939, the decisions in both Indianapolis Brewing Company v. The Liquor Control Commission of the State of Michigan, and Finch & Company v. McKittrick, Attorney General of Missouri, were announced, again by Justice Brandeis. The effect of these decisions should have put to rest any fears that the Court's opinion in the Young's Market Company case had been indecisive and that it would eventually be stringently limited.

In the first of the above mentioned cases, the Indianapolis Brewing Company, an Indiana corporation manufacturing beer in that state, was

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*At the time the Triner case was decided it was apparently unnecessary for the Court to make such a sweeping declaration that the states, under the Twenty-First Amendment could make classifications in regard to intoxicating liquor whether they be reasonable or unreasonable. The classification in the Triner case was a reasonable one, according to the Court, and the decision should have stopped there. Later in the Finch and Indianapolis Brewing Company cases there arose the proper factual situation upon which the Court could declare that an unreasonable classification made by the state in its efforts to control liquor traffic would not be barred by the equal protection clause of the Fourteenth Amendment. The pronouncement of the Court in the Triner case was premature.

*On Dec. 22, 1938, a three-judge federal court was convened in the District of Columbia to hear a suit for an injunction brought by William Jameson & Co., Inc., a Delaware importing concern, against Secretary of the Treasury Morgenthau and others, to enjoin enforcement of an order of the Federal Alcohol Administration. The Company had imported Scotch whiskey from Scotland, but the liquor was held in custody at the Port of New York by order of the federal agency on the ground that the whiskey had not been properly labeled and that it hadn't been accompanied by a certificate issued by the British government attesting to the quality of the liquor. The Company claimed the right to import the whiskey free from any regulation by Congress, under Section Two of the Twenty-First Amendment. In denying this contention, the Court, speaking through Justice Adkins, declared that the Amendment did not destroy the power of Congress to regulate foreign commerce with regard to liquor importation to this country, and also that the federal commerce power continued except as modified by the Amendment. The statement of the court is noteworthy since it raises the interesting question as to what Congress might do, under the Twenty-First Amendment, if either the states of Virginia or Maryland, both contiguous to the District of Columbia, a federal jurisdiction, should legislate against the importation of liquor manufactured in the District of Columbia. Jameson & Co., Inc. v. Morgenthau, 25 F. Supp. 771 (D. C. 1938).

*59 Sup. Ct. 254 (1939).

*59 Sup. Ct. 256 (1939).
prevented from shipping its product to Michigan dealers by an act of the Michigan legislature prohibiting the dealers from selling any beer manufactured in a state which by its laws discriminated against beer made in Michigan. The Michigan Liquor Control Commission was directed by the act to declare what states discriminated against Michigan-made liquors, and among the states so named was Indiana. The Indianapolis Brewing Company sued to enjoin enforcement of the statute, contending that despite Section 2 of the Twenty-First Amendment, the Michigan law violated the federal commerce clause, and the due process and equal protection clauses of the Fourteenth Amendment; and asserted that the law was "retaliatory" in its effect, which could not be permitted under any interpretation of Section 2. The Court, denying the injunction, held the statute to be valid, whether retaliatory or not; restated its holding in the Young's Market Company case that the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause, and found no violation of due process in the activities of the state liquor commission. The discrimination between domestic and imported intoxicating liquors, or between different imported intoxicating liquors, the justices again reiterated, is not prohibited by the equal protection clause of the Fourteenth Amendment.

It was left to the decision in Finch & Company v. McKittrick, to muffle the last embittered plea that Section 2 was entirely at odds with the commerce power of the Federal Government, and that in the event of a conflict between the two, the latter should prevail. The State of Missouri, on April 8, 1937, enacted a statute, sometimes called the Missouri Anti-Discrimination Act and sometimes the Missouri Retaliation Act. It prohibited the purchase, sale, receipt or possession, by any licensee, of liquor manufactured in a "state in which discrimination exists" and declared unlawful the transportation or importation of such liquor into Missouri from another state deemed discriminatory by conditions outlined in the Act. The Attorney General of Missouri, in accordance with the statute, filed certificates declaring that the states of Indiana, Pennsylvania, Michigan and Massachusetts were states in which discrimination existed. To enjoin enforcement of this measure, five suits were brought, of which this case was one, by plaintiffs manufacturing beer in one of the states designated by the Attorney General to be discriminatory. The claim that the statute was unconstitutional was based substantially on the contention that it violated the federal commerce clause. It was urged

*59 Sup. Ct. 256 (1939).
in argument for the Finch Company that the Missouri law did not relate to protection of the health, safety and morality, or the promotion of the social welfare, but that it was merely an *economic weapon of retaliation* and that it should not be protected as valid under the Twenty-First Amendment.\(^{50}\) In very clear language the Court stated that since the ratification of the Amendment, "the right of a State to prohibit or regulate the importation of intoxicating liquor *is not limited by the commerce clause*",\(^{51}\) and that the words used in Section 2 are sufficiently clear to confer upon the states power to *forbid all importations which do not comply with the conditions which they prescribe*.

A review of the foregoing cases that have arisen under the Twenty-First Amendment can lead to but one conclusion—intoxicating liquor, for all intents and purposes, is a matter outside federal control. It has been returned to the states to regulate or prohibit as public policy deems necessary, unhampered and free from legal "detours" disguised as inter-state commerce and equal protection.

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\(^{50}\) The argument that a state law prohibiting or regulating the importation of certain articles may amount to an economic retaliation was before the Court in the case of Whitfield \(v.\) Ohio, 297 U. S. 431 (1936), and was dismissed by that tribunal. In the *Whitfield case*, there was involved the federal act of January 19, 1929, known as the Hawes-Cooper Act, which provided that convict-made goods (with certain exceptions) transported into any state should be subject upon arrival, whether in the original packages or otherwise, to the operation of state laws as if produced within the state. An Ohio statute prohibited the sale of convict-made goods from being imported into that state, the statute being based on the theory that the sale of convict-made goods in competition with the products of free labor was an evil. The Supreme Court upheld the Ohio law and thereby sanctioned the policy of the state legislation, namely, to promote the growth and prosperity of private industry within the state. For a similar case on convict-made goods, see Kentucky Whip & Collar Co. \(v.\) Illinois Central Ry., 299 U. S. 334 (1937).

\(^{51}\) 59 Sup. Ct. 256, 257 (1939). (Italics supplied.)
A RECENT DEVELOPMENT IN AUTOMOBILE GUEST STATUTES

The Legislature of Connecticut recently repealed its so-called automobile guest statute:¹ and in doing so, caused the question as to the feasibility of these statutes to arise once again as a topic for discussion among those who concern themselves with automobile liability. This type of statute, changing the common law requirement of ordinary negligence on the part of the owner or operator of an automobile² to the more restrictive requisites of "gross negligence," "willful and wanton misconduct", "intentional misconduct", etc., has been enacted in twenty-seven states.³

Of this number, the statutes of Kentucky, Delaware, and Oregon, were declared unconstitutional;⁴ but subsequent amendments to the Delaware and Oregon laws made them constitutional.⁵ Taken collectively, these guest statutes use fourteen distinct phrases to limit the liability of the owner or operator of a motor vehicle for personal injuries and death resulting to his guest. Those limitations include "gross negligence,"⁶ "gross and wanton negligence",⁷ "heedlessness",⁸ "intentional act",⁹ "intoxication",¹⁰ "reckless disregard of the rights of others",¹¹ "reckless-

⁴Ludwig v. Johnson, 243 Ky. 533, 49 S. W. (2d) 347 (1932); Coleman v. Rhodes, 35 Del. 120, 159 Atl. 649 (1932); Stewart v. Houke, 127 Ore. 589, 271 Pac. 998 (1928).
⁵Davis v. Gallegger, 57 Del. 380, 183 Atl. 620 (1936); Perozzi v. Ganciere, 149 Ore. 330, 40 P. (2d) 1009 (1935).
⁷Kan.
⁸Conn., N. M., S. C., Tex.
⁹Colo., Conn., Del., Idaho, Ind., Ky., N. M., Ore., S. C., Tex., Wash.
¹⁰Cal., N. D., Ore., Utah.
¹¹Conn., Idaho, Ind., N. M., Ore., S. C., Tex.
ness', "under the influence of liquor", "willful and wanton disregard of the rights of others", "willful and wanton misconduct", "willful or wanton disregard of the rights of others", "willful or wanton misconduct", and "willful negligence". It is interesting to note that several of the states, notably Connecticut, have included two or more of the above-mentioned phrases in their statutes.

Two states, solely by judicial ruling, have adopted a standard of "gross negligence"; or, as it is more commonly called, the "Massachusetts Rule." These two states (Massachusetts and Georgia), by judicial decisions, arrive at the result intended by the guest statutes by prohibiting recovery unless the accident causing injury to the guest is due to the gross negligence of the owner or driver of the car.

A survey of the interpretations placed upon the enumerated statutes leads to the conclusion that the negligence which amounts to a violation of these so-called guest statutes cannot be stated in any general way. One can only look to the terms of the statutes, and then to the facts of each particular case; because the courts, in their application of these principles to factual situations, very rarely characterize the acts of the defendant as negligence as a matter of law. Whether or not there is such negligence as the statute requires is ordinarily a question for the jury and the courts do not usually interfere with the finding.

Another conclusion that may be safely stated is that while the differences among the statutes do not appear to be real differences, yet it seems that a statute which authorizes a guest to recover for "gross negligence" is more liberal to the guest than those statutes containing other types of limitations upon the guest's recovery.

Aside from these conclusions, it is difficult to make any other general statements regarding the judicial interpretations placed upon the statutes. One can only surmise that the courts, in construing the statutes, approached the problem with one thought uppermost in their minds—the guest must not recover unless he clearly shows that his case is within the statute. The result has been too many tortured constructions of statutes which were designed to protect the insurance companies, but not to completely shut off the guest's right to recover. The trend has always been towards favoring the defendant.

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19Iowa, Mont. 20Iowa, Neb.


19Ark., Cal., Nev., N. D., Utah. 22Del.

18 Ala., Ohio. 23Vt.


A glance at the cases relative to "guest statutes" will show just how these terms "gross negligence", "heedlessness and recklessness", "willful and wanton misconduct", "intoxication", and "intentional act" have been construed. The Supreme Judicial court of Massachusetts has defined "gross negligence" as "an act or omission respecting legal duty of an aggravated character, as distinguished from a mere failure to exercise ordinary care." The Supreme Court of Michigan, however, holds that there are no degrees of negligence. The California courts have laid down the rule that gross negligence is a question of fact and not a question of law. The courts of Nebraska define gross negligence as "great or excessive negligence"; but the Oregon courts consider it as "conduct which indicates an indifference to the probable consequences of the act." Vermont adopted the definition of the Massachusetts courts.

The Supreme Court of Errors and Appeals of Connecticut interpreted the phrase "heedlessness or his reckless disregard of the rights of others" as meaning "heedless and reckless disregard of the rights of others." The courts of Indiana and Iowa follow this interpretation. The Connecticut court has also pointed out that if a person realizes that a course of conduct, if persisted in, would be harmful, this realization is sufficient to constitute recklessness.

"Willful misconduct" has been declared by the California courts to involve "deliberate, intentional or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on part of the culpable person, that danger is likely to result therefrom." The Illinois courts hold that the Plaintiff need only show a conscious indifference to the consequences of the act. The Michigan Supreme Court laid down

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22 See, MALCOLM, AUTOMOBILE GUEST LAW (1937) 63-196.
24 Grabowski v. Seyler, 261 Mich. 473, 246 N. W. 189 (1933). See HARPER, THE LAW OF TORT (1933) 74, citing other authorities in support of this view which the author indicates to be the correct one.
25 Krause v. Rarity, 210 Cal. 644, 293 P. 62 (1930). As a result of this and similar decisions, the California Legislature in 1931 eliminated the term "gross negligence".
28 Shaw v. Moore, 104 Vt. 529, 162 Atl. 373 (1932).
what seems to be the most widely accepted test for “willful and wanton misconduct”:

1. Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another;
2. Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand;
3. The omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.\(^{34}\)

As to the question of recovery under the statutes, when the operator of a car is intoxicated, the courts seem to agree that the defendant is drunk when, as the result of consuming liquor, his senses have been dulled to the extent that he can no longer exercise the care and caution which a sober and prudent man would exercise under the same circumstances.\(^{35}\)

The most glaring example of the misconstruction given to these statutes is exemplified by the courts of Washington, which interpreted a statute requiring the plaintiff to show that the operator intended the accident, to mean that the plaintiff was required to show that the operator intended the injuries resulting from the accident. This is, in effect, requiring the guest to show criminal negligence on the part of the operator of the car. Surely, this was not the intention of the legislature.\(^{36}\)

Aside from the fact that the first guest statutes were enacted in Connecticut, Iowa and Oregon in 1927, there is little that may be said concerning the history of these statutes. There is no doubt, however, that the movement leading up to the enactment of these statutes was sponsored by executive officers of liability insurance companies. Their arguments for the adoption of these statutes were, in effect, that the insurance companies, the real defendants, were often the victims of collusive suits; that the companies were often forced to settle through their claim departments as a matter of business expediency, even when it was apparent that there was no legal liability; and that the continually increasing number of claims presented would necessarily result in increased premiums.\(^{37}\) Of these three arguments, that concerning collusive suits, is perhaps the best. It is only natural to assume that if a motorist has had an accident and hurt a passenger who also happens to be a friend, if the friend can recover from the insurance company without any immediate expense to the owner or operator, the latter will not only lack interest in

\(^{34}\)Willett v. Smith, 260 Mich. 101, 244 N. W. 246 (1932).

\(^{35}\)Knickrihm v. Hazel, 3 Cal. App. (2d) 721, 40 P. (2d) 305 (1935); Foster v. Redding, 97 Colo. 4, 45 P. (2d) 940 (1935).

\(^{36}\)Parker v. Taylor, 81 P. (2d) 806 (Wash, 1938).

\(^{37}\)Malcolm, Automobile Guest Law (1937) 2, 3.
the outcome of the case, but may also perjure himself in order to help his friend recover from the company.38 Furthermore, if both the motorist and the injured passenger are aware that the insurance company has a claim department for settling claims out of court, it is more than likely that the driver of the car will be only too willing to assume responsibility for the accident regardless of his legal liability.

Taken collectively, these contentions seem to justify the abrogation of the common law rule of ordinary negligence and the substitution of the statutory requirements of "gross negligence", "willful and wanton misconduct", etc. But, have these statutes had the effect of doing justice to both the insurance companies and the injured automobile guests? Many lawyers and legislators now feel that the statutes, instead of distributing the equities among the insurance companies and the non-paying guests, have virtually left the latter remediless. A survey of all the cases decided under the guest statutes lends weight to this conclusion.29

Disregarding for a moment the hopelessly confusing judicial interpretation of these so-called guests statutes, let us examine the merits of the arguments advanced in favor of the enactment of these statutes. In the first place, the argument that these statutes would prevent collusion between the motorist and his injured passenger to prove ordinary negligence seems to disregard the fact that the same collusive effort could be made to prove gross negligence or willful and wanton misconduct. It is merely a question of how much more perjuring is necessary to show gross negligence than is necessary to show ordinary negligence. Since the matter of gross negligence or lack of gross negligence is usually left to the jury, there seems to be little doubt that a dishonest motorist can just as easily meet the requirement of negligence established by the guest statutes.

The threat of increased premiums has failed to materialize. In Connecticut, every insurance-carrying automobile owner knows that his premiums have not been increased since the statute was repealed. He also knows that there was no reduction at the time the guest statute was enacted.40

One of the reasons advanced for the repeal of the Connecticut statute was that the operation of the law left an economic loss in its wake. Doctors, nurses, hospitals, etc., were often compelled to bear large losses

39For a classification of cases in all jurisdictions on the basis of particular elements of fault, see: 4 Blashfield, Cyclopedia of Automobile Law and Practice (perm. ed. 1935) 115; and the following annotations: 74 A. L. R. 1198 (1931); 86 A. L. R. 1145 (1933).
40The writer has relied upon the personal observations of Hon. Joseph P. Cooney, member of the Connecticut Legislature at the time the "Guest Statute" was repealed, as expressed in a written communication sent to the writer on December 13, 1938.
because their patients had the status of a guest at the time he was injured. This reason, which springs from experience, should bear great weight in any discussion concerning the feasibility of guest statutes. It does seem unfair to throw an economic loss upon a whole community in order that insurance companies, which can adjust their premiums to cover their losses, may be afforded greater protection against collusive suits. When one contrasts the argument of collusion with that of an economic loss to a whole community, and then considers that the statutes will not necessarily prevent collusion anyway, the argument of the insurance companies seems to fall by the wayside.

Another reason for the repeal of the statute was that the motorist had a moral obligation to care for his injured passenger. Regardless of who is the real defendant, the owner of the car or the insurance company, the moral obligation to take care of the injured guest remains. If the motorist wishes to shift the obligation to an insurance company he can do so by the payment of a reasonable premium. If the insurance company wishes, it may assume the risk and adjust the premiums according to the judicial or statutory requirement of caution and prudence demanded of the person whom it insures. Whether the motorist is required to exercise great care or slight care, the moral obligation to exercise some care remains, and the concern of the insurer should be reflected only in the premiums it charges the insured. This concern should not amount to depriving an injured guest of his right to recover; nor should it amount to causing an economic loss to those who administer to the injured passengers.

The repeal of the Connecticut statute seems to be in line with the trend toward compulsory insurance, which, after all, is based on the theory of economic loss. Protection against that loss can be secured for a reasonable premium. Compelling every person who owns an automobile to secure himself against a suit for negligence, regardless of the degree required, seems to be the only solution to the confusion existing under these guest statutes.

MICHAEL P. KEEGAN.
RECENT DECISIONS

ADMINISTRATIVE LAW—Preliminary Orders—Equity—Jurisdiction to Enjoin

Having originally represented that individual cost data submitted to it by coal producers would be kept confidential, the National Bituminous Coal Commission, in March, 1938, announced that at a public hearing to be held thereafter for the determination of the weighted average cost of coal production in the calendar year 1936, the cost data obtained from individual coal producers would be made available for inspection and introduction in evidence. After unsuccessfully making formal objection to the Commission, one of the present petitioners with others, relying upon § 6 (b) of the Bituminous Coal Act of 1937, 50 STAT. 85 (1937), 15 U. S. C. § 836 (b) (Supp. 1938) (providing for judicial review of Commission orders) asked review of the Commission's action in the Court of Appeals for the District of Columbia. That court, holding that the order was not subject to judicial review, dismissed the petition. Mallory Coal Co. v. National Bituminous Coal Commission, 99 F. (2d) 399 (App. D. C. 1938). A month later the petitioners, by bill filed in the District Court of the United States for the District of Columbia, sought an injunction against the threatened disclosure, averring the unauthorized nature of the Commission's proposed action, and impending irreparable damage. The District Court accepted jurisdiction and (on the merits) dismissed the bill upon motion. Upon appeal, the Court of Appeals for the District of Columbia concluded that the District Court had no jurisdiction over the controversy, and upon that ground approved the dismissal, 101 F. (2d) 426 (App. D. C. 1938). On review by certiorari the United States Supreme Court held the District Court was correct (1) in assuming jurisdiction of the case, and (2) in dismissing the bill. Utah Fuel Co. v. National Bituminous Coal Commission, 59 Sup. Ct. 409 (1939).

In common with other recent legislation of a regulatory nature, the Bituminous Coal Act of 1937, supra, provides that judicial review of the Commission's orders shall be vested exclusively in the United States Circuit Courts of Appeal and the United States Court of Appeals for the District of Columbia. The language of the Act in this respect is almost identical with the review provision of the Securities Exchange Act, 48 STAT. 901, 15 U. S. C. § 78y (a) (1934); and of the Federal Power Act, 49 STAT. 860 (1935), 16 U. S. C. § 825 (l) (b) (Supp. 1938). It is similar in substance with the review provision of the National Labor Relations Act, 49 STAT. 449 (1935), 29 U. S. C. § 160 (f) (Supp. 1938), of which the Supreme Court has said, "Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court." National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U. S. 1, 47 (1937).

Considering the "exclusiveness" of judicial review thus provided for, it is appropriate to examine the development of the judicial review of orders of the Interstate Commerce Commission under the Urgent Deficiencies Act, which provides for an original hearing before a three judge court, one of whom must be a circuit court judge; decrees may be appealed directly to the Supreme Court. 38 STAT. 219 (1913), 28 U. S. C. §§ 41 (28). 46, 47 (1934). In holding the extraordinary features of this review justified by the character of cases to which it applied, and the public importance of decisions thereof, the Supreme Court said, "In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays
ordinarily incident to litigation." *United States v. Griffin*, 303 U. S. 226, 233 (1938). But it became evident that Congress could not have intended to include every order within the scope of this review, and so "This Court concluded that, as the intent of Congress was 'to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal,' there was jurisdiction to set aside only those kinds of orders which there was jurisdiction to enforce." *United States v. Griffin*, *supra*, at 233; Proctor & Gamble Co. v. United States, 225 U. S. 282 (1912).


In defining the scope of the "exclusive" judicial review provided by statute, the question necessarily arose as to the possibility of judicial review of administrative orders not included in that definition. On the same day on which the Court of Appeals for the District of Columbia, in the instant decision, stated its opinion that Congress "intended judicial review of the Commission's orders to be given exclusively by the United States circuit courts of appeals or by the United States Court of Appeals for the District of Columbia", the United States Supreme Court held that an order of the Interstate Commerce Commission similar in its preliminary, procedural aspects to that involved in the instant case, was subject to judicial scrutiny by a single judge District Court under the Court's general equity jurisdiction, inasmuch as the Commission's determination, while in a sense preliminary, did finally determine the rights of the complaining carriers. The order there under consideration merely determined that the railway line of the respondent was not an "interurban" electric railway, and therefore was not exempted from the application of the Railway Labor Act, 48 STAT. 1185, 45 U. S. C. § 151 (1934). *Shields et al. v. Utah Idaho Central R. R.*, 59 Sup. Ct. 160 (1938). In upholding the jurisdiction of the District Court to maintain a bill for injunction in the instant decision, the Supreme Court relied solely on the *Shields case*, *supra*, and stated further, "The jurisdiction of a District Court is to be 'determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not'", citing *Hart v. B. F. Keith Vaudeville Exchange*, 262 U. S. 271, 273 (1923); also *Binderup v. Pathe Exchange Inc.*, 263 U. S. 291, 305 (1923); *United States v. Archibald McNeil & Sons*, 267 U. S. 302, 307 (1925).

The significance of the instant decision to the administrative agencies of the Federal Government lies not merely in its failure to supply a definition of the types of preliminary orders that may be restrained; it lies rather in the possibility that preliminary, procedural orders may be exposed to "ill-considered action by a single judge, and . . . the delays ordinarily incident to litigation", from which final orders are safeguarded. The case also raises the serious question as to the extent to which the administrative process may now be interrupted by the exercise of the general equity jurisdiction. Nowhere does the court define the limits beyond which such interruptions may not be allowed.
A possible solution may be found by analogy to the courts' treatment of Rev. Stat. § 3224 (1878), 26 U. S. C. § 1543 (1934), which provides: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." As early as 1875, it was held that an injunction would be granted where the collector's actions were so capricious that the imposition was a nullity. Kissinger v. Bean, 14 Fed. Cas. No. 7,853 (E. D. Wis. 1875). In 1916, there was the intimation that injunctive relief might be afforded where "... by some extraordinary and entirely exceptional circumstance its provisions are not applicable". Dodge v. Osborn, 240 U. S. 118, 122 (1916). See also Miller v. Standard Nut Margarine Co., 284 U. S. 498, 509 (1932); cf. Allen v. Regents of the University System of Georgia, 304 U. S. 439 (1938), (1938) 27 GEORGETOWN LAW JOURNAL 237. A similar elastic standard, permitting the courts to treat each case on its own facts as concerns the existence or non-existence of "extraordinary circumstances", may be adopted as the modus operandi of the rule laid down in the Shields case, supra, and re-affirmed in the instant case.

WILLIAM H. EDMONDS.

ADMINISTRATIVE LAW—Official Acts—Liability of Officers if Actuated by Malice

The plaintiff, after acquittal on charges of violating the banking laws of the United States, filed an action of malicious prosecution against the Comptroller of the Currency, the Receiver of the Commercial National Bank of the District of Columbia, the General Counsel for the Division of Insolvent Banks of the Treasury Department, the Deputies Comptroller of the Currency of the United States, the United States Attorney and the Assistant United States Attorney for the District of Columbia, and a Special Agent of the Bureau of Investigation. Plaintiff contended, (1) that the defendants had acted without the scope of their authority, and (2) that defendants had acted in a wanton, malicious and unlawful manner to his damage. Held, the presence of malice or other bad motives is not sufficient to impose civil liability upon these officers acting within the scope of their authority. Cooper v. O'Connor, 99 F. (2d) 135 (App. D. C. 1938), cert. denied, 59 Sup. Ct. 146 (1938).

It has long been recognized that judges of courts of record are not liable personally when acting within their jurisdiction because of a mistake of fact occurring in the exercise of their judgment or discretion, or because of an erroneous construction or application of the law, irrespective of the purpose of the officer in so acting. Bradley v. Fisher, 13 Wall. 335 (U. S. 1871). The immunity has been extended likewise to the highest executive, members of the cabinet and legislators. Marbury v. Madison, 1 Cranch 137 (U. S. 1803); Sutherland v. Governor, 29 Mich. 320 (1874); Druecker v. Salomon, 21 Wis. 628 (1867). Absolute immunity has been extended to this class of officials because such an immunity will tend to encourage responsible men to participate in public affairs, and since the state commands the exercise of discretion, it would be unfair to penalize the official should he err in judgment. Note, Liability of Officers with Discretionary Powers for Error in Exercise of Judgment (1931) 17 Va. L. Rev. 817. All courts are in accord with these principles.

Where the law, in words or by implication, commits to any officer the duty of looking into facts and acting upon them, not in a way which is specifically direct, but after exercising a discretion in its nature judicial, the function is termed quasi-judicial. It is unquestioned that an official performing quasi-judicial functions, in
good faith and from honest motives, is not liable personally for injuries resulting from the performance of his duties. Grove v. Van Duyn, 44 N. J. L. 654 (1882). It is when the acts of an official are prompted by willful, corrupt or malicious motives that the cases are in confusion.

Two groups of judicial opinions, each relying upon a different doctrine, constitute the confusion. Those courts which hold that they will not inquire into the motives prompting the acts of a quasi-judicial official acting within the scope of his authority rely upon that public policy extended for the protection of the judiciary. Spalding v. Vilas, 161 U. S. 483 (1896). The other group relies on the public policy that quasi-judicial officials whose acts are prompted by malicious and willful motives cannot properly exercise their discretionary powers and, hence, are not to be protected. Speyer v. School District, 82 Colo. 534, 261 Pac. 859 (1927).

In Spalding v. Vilas, supra, the Supreme Court held that it would not inquire into motives prompting the acts of a Cabinet Member when that official was acting within the scope of his authority. The Court relied largely upon cases involving the immunity of members of the judiciary. For a recent case involving the immunity of judges see Fletcher v. Wheat, 100 F. (2d) 432 (App. D. C. 1938). Relying upon the Spalding case, the doctrine was extended in Lang v. Wood, 92 F. (2d) 211 (App. D. C. 1937) to include lesser officials, namely members of the United States Parole Board, the Director of Prisons, and a warden of a federal penitentiary. Accord: Sweeney v. Young, 82 N. H. 159, 131 Atl. 155 (1925); Moran v. McClearns, 60 Barb. 388 (N. Y. 1871); Rains v. Simpson, 50 Tex. 495 (1878).

Those courts following this line of decisions hold that the obligation to do justice is owed to the state, not to the parties coming in contact with the official. It naturally follows that no tort liability exists in the absence of a duty, and the proper party to proceed against such an official is the state in the form of impeachment proceedings or other appropriate action. Sweeney v. Young, supra.

The opposing doctrine is well stated in the following quotation, "A person may act in his own right from any motive if his act is lawful, but a public officer must act without malice or, at least, must in good faith pursue a right purpose." Speyer v. School District, supra, at 538, 261 Pac. 859, 860. There the plaintiff sought to enjoin the defendants, school officials, who it was alleged, had maliciously, unlawfully and without just cause and with the express intent of destroying the plaintiff's business, promulgated and were enforcing a rule that school children be required to eat lunch in the school building unless requested by their parents to be excused. The court held that the plaintiff had stated a cause of action. It would be of no consequence if injuries resulted to plaintiff's enterprises or that defendants were glad they did if the act was done in good faith and for the benefit of the pupils. Accord: Gregory v. Brooks, 37 Conn. 365 (1870); Elmore v. Overton, 104 Ind. 548, 4 N. E. 197 (1885); State v. Mowry, 119 Kan. 74, 237 Pac. 1032 (1925); Pike v. Megoun, 44 Mo. 491 (1869).

There can be no reconciliation between that public policy which aims to protect the people by protecting their officials and that public policy which aims to protect the people by permitting an action against the official as an individual unless it be such as may be derived from the fact that the protection of the former is usually restricted to officials of greater dignity than those against whom the latter is applied.

HENRY M. CHICK.
This case presents the question whether the exercise of jurisdiction by a state court over the administration of a trust deprives a federal court of jurisdiction in a suit involving the same subject matter. In 1906, Gerald P. Fitzgerald created a trust whereby he provided for alimony payments to his recently divorced wife, and payments to their children. He performed the agreement until 1910, when he repudiated it. Thompson, one of the trustees, Lida, the divorced wife, and one of the sons brought suit in equity in a common pleas court of Pennsylvania, asking performance of the trust agreement. The relief sought was granted.

The agreement was amended and modified in 1915, upon petition of the trustees, and in May, 1925, the trustees acknowledged receipt of all sums due under the modified agreement, whereupon the court directed that satisfaction of the decree be entered of record. In October, 1925, the trustees filed an account, which was confirmed; and again in July, 1930, a second and partial account was filed. On the next day, Lida and her son filed a bill in equity in the United States District Court against the trustees, alleging mismanagement. The trustees moved to dismiss the bill because the state court had exclusive jurisdiction, but the federal court denied the motion.

The suits proceeded in both courts until May, 1937, when the trustees presented a petition to the state court asking for a rule requiring the plaintiffs in the federal court to show cause why they should not be restrained from prosecuting their suit in that court. The rule was made absolute, and in July, 1937, John Fitzgerald, the son, asked the federal court to restrain the defendants in that suit from proceeding in the state court. The federal court temporarily enjoined the defendants in September, 1937, and in March, 1938, the Supreme Court of Pennsylvania affirmed the order of the common pleas court enjoining the petitioners in this case from prosecuting in the federal court. On the very same day the district court held that it had jurisdiction notwithstanding the proceedings in the common pleas court. The Supreme Court of the United States granted certiorari. Held, the filing of an account by the trustees under a voluntary trust agreement, being a proceeding quasi in rem under the law of Pennsylvania, the filing of the second and partial account in the common pleas court in July, 1930, gave the Pennsylvania court exclusive jurisdiction, and hence the beneficiaries under the trust were properly enjoined from proceeding in the federal court. Princess Lida of Thurn and Taxis v. Thompson, 59 Sup. Ct. 275 (1939).

It is well settled that where the same suit is being prosecuted simultaneously in a state and federal court, and the two suits are in rem, the court which has possession of control of the property which is the subject of the litigation secures prior jurisdiction, and may maintain and exercise that jurisdiction to the exclusion of the other court. Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189 (1935). That this principle is not restricted to cases where the property actually has been seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshall assets, administer trusts, or liquidate estates, and in suits of a similar nature, is well illustrated by the cases of Farmers' Loan and Trust Co. v. Lake Street Elevated R. R., 177 U. S. 51 (1900); Palmer v. Texas, 212 U. S. 118 (1908); United States v. Bank of New York, 296 U. S. 463 (1936).

The foundation for the decision in the present case is found in the cases of Thompson v. Fitzgerald, 329 Pa. 497, 198 Atl. 58 (1938), and Hershey v. First National Bank and Trust Co., 22 F. Supp. 517 (M. D. Pa. 1938). Both of these
cases laid down the rule that where a proceeding for accounting was instituted in a common pleas court of Pennsylvania, that jurisdiction attached, and principles of comity required the federal courts not to assume jurisdiction.

This principle of comity, while it is a reason for these salutary decisions, is not always determinative of which court has jurisdiction, for while the rule of this case is well settled, yet it is also well settled that where the judgment sought is strictly in personam, both the state and federal courts may proceed with the litigation concurrently until judgment is obtained in one of them which may be set up as res judicata in the other. Byrd-Frost, Inc. v. Elder, 93 F. (2d) 30 (1937).

The reason for the distinction between proceedings in rem, or quasi in rem, and proceedings in personam is difficult to perceive. That the court having possession or control of the property in the former case obtains exclusive jurisdiction, and does not secure exclusive jurisdiction in the latter case is a rule that makes for nice technicalities but offends logic. Why the principle of comity should not be observed in both cases is not readily apparent.

MICHAEL P. KEEGAN.

DECLARATORY JUDGMENT—Availability to Establish Citizenship

Appellee, a young lady born in the United States of naturalized Swedish parents who subsequently repatriated themselves to their native Sweden, elected on reaching her majority to return to the United States. An American citizen's passport was issued to her and she was admitted; but after several years she was threatened with deportation on the grounds that she had lost her citizenship when her father had re-acquired his Swedish nationality and took her to Sweden where she had lived about seventeen years. She brought suit asking, inter alia, a judgment declaring her status as a citizen of the United States. The trial court concluded that the case was properly brought under the Declaratory Judgment Act and issued a decree holding her to be a citizen. On appeal—held, affirmed. Perkins, Sec'y. of Labor v. Elg, 99 F. (2d) 408 (App. D. C. 1938).


Despite the fact that by its terms the Act extends to all types of questions (except with respect to federal taxes) the greatest (hitherto almost exclusive) use that has been made of it has been in patent and insurance litigation, a type of litigation naturally suited to declaratory judgment relief. Lately a more widespread reliance is being placed on the Act in aid of other types of subject matter. This trend is exemplified by the principal case and by the following cases in which the courts have recognized declaratory judgment relief as properly applied for although not necessarily warranted by the facts presented. Putnam v. Ickes, 78 F. (2d) 223 (App. D. C. 1935); Board of Comm'r's for Buras Levee Dist. v. Cockrell, 91 F. (2d) 412 (C. C. A. 5th, 1937), cert. denied, 302 U. S. 740 (1937) (concerning public lands, land patents

The utility of such relief is demonstrated by the instant case where the court said: "There is no other proceeding at law by which appellee could obtain an adjudication that she is a United States citizen,—certainly none by which she can obtain that adjudication without being subject to arrest and confinement until her case may be heard on a petition of habeas corpus".

It should be observed that in entertaining requests for declaratory judgments the courts are not relaxing the constitutional requirement that there be an actual controversy. In practically every case that has been examined the courts have gone to some length in establishing that an actual controversy existed. In the present case the court carefully pointed out that although the appellee had not yet been arrested and hence could not bring habeas corpus proceedings, still "she is entitled to a declaration of her political status, for her rights as a citizen are valuable rights . . . and an actual and vital controversy exists between her and the government in relation to them".

It is to be hoped that there will be a further development and continued use of the Declaratory Judgment Act since it manifestly aids prospective defendants to whom great delay in determining their rights might prove harmful. Possibly the new line of attack will facilitate and speed to the Supreme Court questions as to the constitutionality of legislation which otherwise might be long impeded. Cf. Currin v. Wallace, supra, where the declaratory judgment served as the medium of testing the validity of the Tobacco Inspection Act, 49 Stat. 731 (1935), 7 U. S. C. § 511 (Supp. 1938).

SIDNEY M. GOLDBEIN.

DEPORTATION—Defenses—State Statutory Pardon

This proceeding for writ of habeas corpus was to secure release from custody under a warrant of deportation based upon the prisoner's conviction of a felony. He contended that the provision of the Immigration Act that aliens convicted of crimes
involving moral turpitude shall not be deported if they have been pardoned, applies to an alien who has been convicted and has served his sentence in a state having a statute providing that punishment endured shall have like effects as pardon by governor. Held, that such alien may not be deported. Perkins v. United States ex rel. Malesevic, 99 F. (2d) 225 (C. C. A. 3rd, 1938).

The alien appellee was arrested upon a warrant issued under § 19 of the Immigration Act 39 Stat. 889 (1917), 8 U. S. C. § 155 (1934), which provides in part: "The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned." It was decided that appellee was entitled to the benefit of this clause if he had been pardoned.

Pa. Stat. Ann. (Purdon, 1930) Tit. 19, § 893, provides: "Where any person hath been or shall be convicted of any felony and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured shall have the like effects and consequences as a pardon by the governor ...". This law was passed in 1860.

The appellee, having been convicted of housebreaking and larceny and having served his sentence therefor, claimed the benefit of the statute. The United States contended that the Pennsylvania statute, supra, does not provide for the kind of pardon contemplated by the Immigration Act. On this point the District Court had said, "The Pennsylvania statute, while undoubtedly mainly designed as a relief to a harassed executive, is just as much a pardon—and probably just about as wise—as many bestowed by governor or board of pardons. If the pardon granted by it was not in actual contemplation of the Congress, it at least comes within the wording of the federal statute; and, in such case, the act being plainly within the constitutional power of the Congress, it is not the province of this court to read into it a limitation not plainly expressed." 17 F. Supp. 851, 853 (W. D. Pa. 1936).

The decision of the District Court was affirmed on the following reasoning: Since the decision in Erie R. R. v. Tompkins, 304 U. S. 64 (1938), the effect of the pardon statute must be determined by decisions of the Supreme Court of Pennsylvania, which had indicated in Diehl v. Rodgers, 169 Pa. 316, 32 Atl. 424 (1895), that the effect of the statute was exactly that of an unconditional gubernatorial pardon.

The opinion of the Circuit Court (divided 2-1) is not convincing in three respects: First, regardless of Erie R. R. v. Tompkins, supra, the federal courts have consistently followed the state supreme courts in their interpretations of state statutes, the Tompkins case simply extending this policy to their interpretations of the common law. Second, the case of Diehl v. Rodgers, supra, involved the determination of the effect of a pardon by the governor and by no means clearly indicates the effect of the statutory pardon involved in this case. It could hardly add anything to what the state legislature said in the act itself. Finally, the real question in the principal case is the construction of a federal statute, a matter in which the federal courts have never required help from the state courts. Lyeth v. Hoey, 59 Sup. Ct. 155 (1938). Obviously, the effect of the pardon as to matters of state jurisdiction is for the state to determine; but nothing in the Tompkins case leads to the conclusion that decisions of the state courts are to govern the construction of federal laws in matters of exclusive federal jurisdiction, such as deportation of aliens.

It is submitted that the decision of the district judge and the reasoning supporting it are correct. The affirming decision is therefore correct, but the opinion supporting it is entirely unconvincing. The dissent was based on the ground that the
federal statute should be construed to call for an individual pardon granted by the
pardonng power on the facts of each individual case", which Malesevic's pardon
obviously was not. While this view is logical and sensible, it is, in the absence of
support from the legislative history of the act (no evidence of which appears in the
opinion) an attempt at judicial legislation, which is undesirable.

It appears, however, that Congress should take steps to amend the Immigration
Act to prevent its partial nullification by state action such as the blanket pardon
statute involved in this case, or, for that matter, executive pardons based upon reasons
of state policy entirely foreign to the purpose of the pardon provision of the
Immigration Act.

PAUL FITZPATRICK.

INSURANCE—Interpretation of Words "External, Violent and Accidental Means"

This action was brought in the federal district court in Virginia by the beneficiary
of a life insurance policy under its double indemnity provisions. The policy provided
for payment of double the amount of insurance if death resulted from bodily injuries
cased by "external, violent and accidental means". The insured, being in good
health, submitted himself for a blood transfusion to save the life of his child. After
the necessary examination had been made, the physician injected a needle into a
vein of the insured who died from shock or heart failure before a tablespoon of blood
had been withdrawn. The lower court allowed recovery, and on appeal this was
reversed. Held, on rehearing, that because of the discovery by the court, after its
reversal of the decision of the lower court, of a state precedent to the effect that
the means of death in this case, by the law of Virginia, are to be held to be "external,
violent and accidental" the decision of the district court must be affirmed. American

In applying the state law in this case, the court followed the holding of the Supreme
Court of the United States in Erie R. R. v. Tompkins, 304 U. S. 64 (1938). The
applicability of the doctrine of the Erie case to the construction of insurance con-
tracts had been approved previously in Ruhlin v. New York Life Ins. Co., 304 U. S.
202 (1938) which was decided seven days after the epochal overthrow of what Mr.
Justice Brandeis in the Erie case characterized as "an unconstitutional course of con-
duct". The federal court now must construe the contract according to the law of the
state wherein it is made, i. e., where the policy is delivered.

In the first hearing of the instant case, the court searched for state precedent on
the subject under consideration, and having found what it thought to be the latest
state ruling in Newsoms v. Commercial Casualty Ins. Co., 147 Va. 471, 137 S. E.
456 (1927), it denied recovery. A rehearing was then allowed and the court
reversed itself on finding that the Supreme Court of Appeals of Virginia had recently
adopted a different line of reasoning in Ocean Accident & Guarantee Corp. v. Glover,
165 Va. 283, 182 S. E. 221 (1935).

The two Virginia cases, supra, exemplify the two opposing trends of judicial
thought on the subject of "accidental means". Most modern accident policies pro-
vide for recovery by the insured or beneficiary only when the injury is caused by
"external, violent and accidental means"... and the difficulty arises in interpreting
the meaning of the term "accidental means". The Newsoms decision, supra, follows
the school of thought headed by the Supreme Court of the United States as expressed
in *Landress v. Phoenix Ins. Co.*, 291 U. S. 491 (1934) where it was said that "It is not enough that death or injury was accidental in the understanding of the average man . . . that the result of exposure was something unforeseen, unsuspected, extraordinary, an unlooked for mishap and so an accident", for the insurance is not against accidental result but against accidental means. The late Mr. Justice Cardozo dissented vigorously in the *Landress case*, reiterating the doctrine he had previously asserted, as a member of the Court of Appeals of New York, in *Lewis v. Ocean Accident and Guarantee Corp.*, 224 N. Y. 18, 120 N. E. 56 (1918). His theory was that the meaning of the phrase "accidental means" to the average man is the meaning that the courts should give these words and that with such a test the technical distinction adopted by the Supreme Court between "accidental means" and "accidental result" must fall. Or as he expressed it: "Where a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence, by accidental means . . . If there was no accident in the means, there was none in the result, for the two were inseparable . . . There was an accident throughout or there was no accident." *Landress v. Phoenix Ins. Co.*, 291 U. S. 491, 496 (1934). Thus according to the Cardozo theory "accidental means" and "accidental result" are, in effect, synonymous terms.

The dissenting opinion in the *Landress case, supra*, finds expression once more in the Virginia Court's holding in *Ocean Accident and Guarantee Corp. v. Glover, supra*, which placed that court among those holding that the test of what are or are not "accidental means" is the one "that is applied in the common speech of man."

It seems to be the aim of the "Cardozo" adherents to break down the distinction that the courts have recognized between "accidental means" and "accidental results", so that the terms of the insurance contract will not have technical, legal meanings but that instead the meaning will be that of common everyday usage. It is an attempt to make the insurance policy more understandable, and in so doing, to allow recovery where otherwise there could have been none. When the act is intentionally done, but the result is not the natural or probable consequence of the means which produced it, and the actor did not intend to produce it, the result is produced by accidental means as in *Mutual Life Ins. Co. v. Dodge*, 71 F. (2d) 486 (C. C. A. 4th, 1926) (death caused by hypersensibility to novocaine used in operation); *Mutual Accident Ass'n v. Barry*, 131 U. S. 100 (1888) (death resulted from a four foot jump which injured insured's stomach); *Western Traveler's Ass'n v. Smith*, 85 Fed. 401 (C. C. A. 8th, 1898) (death resulted from septicemia due to skin abrasion caused by improperly fitting shoes).

FREDERICK R. TOURKOW.

LABOR LAW—Labor Disputes—Injunctions—Effect of Wagner Act on Norris-LaGuardia Act

Two labor unions, one an A. F. of L. affiliate and the other a C. I. O. affiliate, were competing in an effort to recruit the plaintiff's employees into their ranks. Both claimed the right to bargain for the employees. The plaintiff was willing to bargain with either union, provided it was certified by the National Labor Relations Board as being representative of its employees. The C. I. O. affiliate sought such certification from the Board, but the A. F. of L. union continued to picket, and, as alleged by the plaintiff, to interfere with the plaintiff's business. Plaintiff sought an injunc-
tion from a federal court to restrain the activities of the defendant. The latter, relying on the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U. S. C. § 101-115 (1934), contended that the plaintiff did not allege the facts requisite to give the court jurisdiction to issue the injunction. Held, that since the labor dispute did not exist, the Norris-LaGuardia Act was inapplicable and the injunction was properly issued. Union Premier Food Stores Inc. v. Retail Food Clerks and Managers Union Local 1357, 98 F. (2d) 821 (C. C. A. 3rd, 1938).

In arriving at its conclusion that a labor dispute did not exist, the court reasoned that, since the question involved was representation of the plaintiff's employees, which the N. L. R. B. had undertaken to decide under the Wagner Act, 49 Stat. 449 (1935), 29 U. S. C. § 151-166 (Supp. 1938), the question could not properly be a subject of dispute between the parties to the suit. But even if it were conceded that there was no labor dispute between the parties to the suit, it is plain that under § 13 (a) of the Norris-LaGuardia Act, the labor dispute need not be between the parties to the suit for the Act to become applicable. There was a labor dispute between the unions involved.

The Wagner Act provides that the organization representing a majority of the employees shall be their representative for the purposes of collective bargaining. This does not mean, however, that a minority union may not have a bona fide interest in seeking to arrange terms and conditions of employment, and competing with the majority union for recruits and the right of representing the employees. That a minority union may be involved in a labor dispute under the Norris-LaGuardia Act is indicated by § 13 (c), which provides that the disputants need not stand in the proximate relation of employer and employee. A recognition of this legitimate interest of the minority union to compete with the majority for the right of representation formed the basis of the dissenting opinion in the principal case which, relying on the Supreme Court's holding in Lauf v. Skinner, 303 U. S. 323 (1938), contended that the case was one arising out of a labor dispute. This view is shared by all other courts which had occasion to consider the question since the decision in the Lauf case. Grace Co. v. Williams, 96 F. (2d) 473 (C. C. A. 8th, 1938); Donnelly v. Int'l Ladies Garment Workers Union, 99 F. (2d) 309 (C. C. A. 8th, 1938) Cert. denied, 59 Sup. Ct. 364 (1938); Blankenship v. Kurfman, 96 F. (2d) 450 (C. C. A. 7th, 1938); Sharpe & Dohme v. Storage Warehouse Employees Union Local No. 18571, 24 F. Supp. 701 (E. D. Pa. 1938); Houston etc. Lines v. Local 886, 24 F. Supp. 619 (W. D. Okla. 1938).

The Norris-LaGuardia Act and the Wagner Act are not basically in conflict. The latter was enacted subsequent to the Norris-LaGuardia Act, and can be considered as superseding the provisions of that Act only where there is a conflict. Cf. Virginia Ry. v. System Federation No. 40, 300 U. S. 515 (1937). In but one instance is the Norris-LaGuardia Act rendered inapplicable by express provision of the Wagner Act. Section 10 (h) reads: "When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the [Norris-LaGuardia] Act..."

The district court in the principal case thought that this provision suspended the Norris-LaGuardia Act whenever the N. L. R. B. took jurisdiction of a question, but the circuit court of appeals was unanimous in holding that § 10 (h) applies only when a court has before it for consideration a final order of the N. L. R. B. The court
in the *Donnelly case*, *supra*, thought likewise. The Norris-LaGuardia Act, then, is expressly restricted by the Wagner Act in only a limited sense.

That no further restriction was intended is evidenced by § 13 of the Wagner Act that "Nothing in this Act shall be construed so as to interfere or impede or diminish the right to strike." If Congress thought it wise to leave the right of a labor union to strike unaffected by the Wagner Act, it can hardly be argued that it intended to have the same Act permit the federal courts to enjoin other ordinary activities of a labor union unhampered by the restraints which the Norris-LaGuardia Act requires that they observe.

The Norris-LaGuardia Act, in taking from the federal courts the power to enjoin a union from peacefully and truthfully advertising the facts of a labor dispute in which it has a legitimate interest, may seem to conflict with the Wagner Act in circumstances like those existing in the principal case. The employer is precluded by the Wagner Act from bargaining with the union, yet the Norris-LaGuardia Act prevents a federal court from enjoining truthful and peaceful publicity, including lawful picketing, on the part of the union. The conflict, however, is more apparent than real. Courts have previously recognized the substantial threat to a labor union's interests which a plant not employing its members presents, *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184 (1921); *Exchange Bakery v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927), and the right of a labor union to publicize in a peaceful and truthful manner the facts of a situation which threatens its interests. *Senn v. Tile Layers Protective Union No. 5*, 301 U. S. 468 (1937). The Norris-LaGuardia Act does little more than protect the union in its right peacefully and truthfully to publicize its interests. While the employer may not, because of the Wagner Act, bargain with the union or compel his employees to join it, the Wagner Act does not protect the employees from persuasion by the union nor deny to the union the right to inform the public of the facts of a situation in which its interests are affected. The employer in such a situation is in a difficult position, but he is equally at liberty to appeal to the public, and the public, not the court, is left as final judge of the dispute. *Senn v. Tile Layers Protective Union, supra*.

The Norris-LaGuardia Act does not prevent a court from enjoining fraud or violence on the part of the union. When a union does engage in fraud and violence, compliance by the employer with the requirements of the Wagner Act may make it easier for him to secure an injunction under the Norris-LaGuardia Act. *Cf. Donnelly v. Int'l Ladies Garment Workers*, *supra*. The Act merely permits peaceful and truthful activity on the part of a labor union, reconciling the rights of freedom of speech and assembly with some of the economic problems of our industrial civilization. In doing that, it is not in conflict with the Wagner Act, and its provisions are not superseded by the latter Act except in the one situation mentioned.

PHILIP TREIBITCH.

PARTNERSHIP—Insurance—Rights of Designated Beneficiary where Premiums are Paid from Partnership Funds

Plaintiff's decedent and his brother, the defendant here, being partners, each insured his life by two policies, one policy naming the co-partner, the other naming the wife of the insured, as beneficiary. The premiums on all four policies were paid out of partnership funds. In this suit by the widow, as administratrix, of the de-
ceased partner against the surviving partner for a dissolution and an accounting, the evidence showed the agreement of the partners to be that, upon the death of one of them, the proceeds of that policy naming the surviving partner as beneficiary should be paid to the deceased's estate in representation of his interest in the firm other than in cash on hand. With respect to the other policy, naming the deceased's wife as beneficiary, held, the widow was entitled to the proceeds of that policy naming her as beneficiary, in spite of the fact that the premiums for that policy were also paid out of the partnership funds. Rollman v. Rollman, 2 A. (2d) 15 (Md. 1938).

Respecting the question here presented of the rights of the widow in the policy naming her as beneficiary, where the premiums were paid from partnership funds, no direct precedent has been found. In a somewhat similar case it has been held that, if the co-partner consents, a member of an insolvent partnership may use its assets to pay premiums on a life policy payable to his wife. Hanover National Bank v. Klein, 64 Miss. 141. 8 So. 208 (1886). There, however, the partner was bona fide indebted to his wife, so that her right, as against partnership creditors, depended rather upon her status as creditor than as designated beneficiary.

The instant opinion, in upholding the right of the widow as against the partnership, though it does not expressly so state, apparently considers the proceeds of the policy payable to her as individual, rather than as partnership, property in contradistinction to the policies payable to the partners, which as the evidence showed were expressly referred to by the partners as "partnership policies".

By the rule of common law that property purchased with partnership funds ordinarily becomes partnership property, insurance so purchased would become a partnership asset. Tebbetts v. Dearborn, 74 Me. 392 (1883). But the general rule was, even at common law, limited to cases where the partners' intention to the contrary did not clearly appear. Walton v. Butler, 29 Beav. 428, 54 Eng. Rep. 693 (1861); Maybin v. Moorman, 21 S. C. 346 (1884). And the rule of common law, so limited, has since been re-declared by statute. Uniform Partnership Act § 8 (2). The mere use of partnership funds in the acquisition of property does not necessarily make it firm property. Whitcomb v. Whitcomb, 55 Vt. 76, 81 Atl. 97 (1911); but the question is, in final analysis, purely one of intention. Green v. Whaley. 71 Mo. 636, 197 S. W. 355 (1917).

In Noel v. Noel, 173 Md. 152, 195 Atl. 315 (1937), it was held that the plaintiff, widow and surviving partner, was entitled to follow the profits of the partnership fraudulently converted, concealed and removed by her husband, the deceased partner, and to impress upon them a trust for the benefit of the partnership, and, after discharge of the partnership liability, for her own sole use and benefit under the terms of the contract of partnership. In that case the agreement was that the profits of the partnership should, on the death of one of the partners, belong to the survivor. If it is competent for the partners so to agree between themselves, it is not a great step further to say that they might agree for the interest of the deceased partner to pass and belong to his widow, especially when, as in the instant case, there is no evasion of the Statute of Wills.

Whether the insurance here payable to the widow be considered as individual property, or as partnership property subject to such a trust as was allowed in Noel v. Noel, supra, would seem not to affect the result appreciably in the instant case, since the partners had adjusted their liabilities inter se by the agreement that the other policies should stand for and represent the interest of each, and since the rights of partnership creditors are not presented to complicate the problem of the distribution of assets.
By the agreement of the partners as to the policies payable to each, a method was provided by them for fixing the interest of either in the event of death. This it is competent for the parties to do, provided they act without fraud, deceit or concealment. *Madden v. Shaw*, 277 Mass. 71, 177 N. E. 820 (1931).

For the court thereafter to hold that a policy on its face payable to the partner’s widow is partnership property, when it was never referred to as such by the partners, and when to do so would alter the representative amounts to be paid to the deceased partner’s estate, would in effect be declaring a new and different agreement for the parties. *See Cassidy & Hogard v. Jenkins & Cassidy*, 226 Ky. 828, 11 S. W. (2d) 946, 61 A. L. R. 1198 (1928).

It would seem more consonant with sound theory and with the intention of the partners to deem the sums paid by way of premiums, on those policies wherein the wives were beneficiaries, to have been in the nature of withdrawals by the partners for individual use, the liability for which was adjusted by them, together with all other liabilities *inter se*, by their agreement that the proceeds of the other policies should be representative of their separate interests in the firm other than in cash on hand.

JOHN P. CAMPBELL.

**TORT—Liability of Infant as Affected by Public Policy**

Action by an infant against his infant sister to recover damages for personal injuries sustained due to defendant’s negligent operation of an automobile in which plaintiff was a passenger. From a judgment awarding damages, as found, and costs, and from an order denying motion for a new trial, defendant appealed, primarily on the ground that “public policy” prohibited the maintenance of the action. *Held, inter alia*, (1) the state has no public policy cognizable by the courts which is not derived, or derivable by clear implication, from the established laws of the state as found in the constitution, statutes, and judicial decisions; (2) the action is maintainable. *Rozell v. Rosell*, 8 N. Y. Supp. (2d) 901 (3d Dep’t 1939).

The expression “public policy” does not lend itself to precise definition. It has been described as a “wide domain of shifting sands”. *McKendree v. Southern States Life Ins. Co.*, 112 S. C. 335, 338, 99 S. E. 806, 807 (1919). The term in itself imports something that is uncertain and fluctuating, varying with changing economic needs, social customs, and moral aspirations of a people. *Story Contracts* (5th ed. 1874) § 675. In the present instance, the Appellate Division, finding no inhibition in the constitution, the laws, the course of administration, or the decisions of the Court of Appeals of the State of New York, turned to the philosophy of the common law, and to the decisions of sister states, for guidance.

Defendant’s reliance on the “public policy” theory was based on the serious disturbance to the family relationship, tending toward the disruption of the family unit, which, it was contended, would follow the court’s sanction of an action between parties of the blood-relationship involved. The court gave short shrift to this contention, being of the opinion, without a dissenting voice, that the well-established rule that a minor child cannot sue his parent for a tort is not to be extended (by the courts) so as to bar an action by a like plaintiff against an infant brother or sister, although both parties are unemancipated, are without separate estates, and reside in the same household.
It is to be observed that, in the instant case, the owner of the vehicle was not involved in the action. The identity, the status, or the ultimate responsibility, if any, of this unheralded individual does not appear. The record is silent as to him, except that counsel for the defendant, in argument, had stated that the owner was protected by liability insurance, without which, he asserted, "this action never would have been instituted." The court very properly ignored the accompanying, unsupported contention that this situation was "an invitation to fraud"; it declined (it is to be inferred) to consider the collateral matter of ultimate pecuniary liability or the question, not in issue, of collusion. Whether or not the protection of the policy, if any, was extended by an "omnibus clause" to this defendant, as a person coming within a defined group, cannot, of course, be inferred from the record. On this subject, see (1938) 27 Georgetown Law Journal 93.

The court, then, confined its deliberations to the underlying problem: whether or not an infant may sue his infant sister for a tort.

An infant is liable, in the same manner as an adult, for a tort not connected with or arising out of contract. Vasse v. Smith, 6 Cranch 226 (U. S. 1810); Stearns v. Wallace, 59 N. H. 595 (1879). While age and capacity of the tort-feasor are important in their bearing on the matter of negligence, they were not placed in issue on this occasion, defendant being a normal girl of sixteen years. The cases which hold the infant tort-feasor civilly liable proceed on the propriety, or, it might be said, the "public policy", of holding all persons liable for actual damages committed by them. Jaggard, Torts 159. Lord Kenyon once said, in Jennings v. Randall, 8 Term. 335, 337 (K. B. 1799), "...if an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a Court of Justice."

If it be conceded that the infant is civilly liable, what shield, if any, is provided the tort-feasor because of the blood-relationship of the injured? It is well-established that a minor child may not maintain an action ex delicto against his parent. Sorrentino v. Sorrentino, 248 N. Y. 626. 162 N. E. 551 (1928). Due to the fact that English decisions afford no precedent, it has been said that no such action was maintainable at common law. Judge Cooley intimated that "the policy . . . is so questionable that we may well doubt if the right will ever be sanctioned". Cooley, Torts (2d ed. 1888) 197. The action is forbidden even after the child becomes of age, if the injury sued upon is referable to the period of minority. So well is this principle recognized that very few attempts have been made to institute actions of this nature, whether before or after the attainment of majority. Roller v. Roller, 37 Wash. 242. 79 Pac. 788 (1905).

The reason is not far to seek: spiritual considerations beside, a civilized society is erected on the framework of the family units. As integral parts of that framework there exist the reciprocal rights and obligations, of loyalty, devotion, nurture, obedience, of parent and child. A sound "public policy" will not tolerate private litigation which will tend to weaken those foundations. The court in Hewellette v. George, 68 Miss. 703. 9 So. 885 (1891), the first case involving this question, it appears, to come before any appellate court in this country or in England, expressed the concept of the interests to be conserved in this fashion: "The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society . . . " forbidden to the minor child the right to civil redress for personal injuries suffered at the hands of the parent.

Can it properly be said that this prohibition negates the ancient maxim ubi jus ibi
remedium? The theory of the cases under consideration, it would seem, is that the "right" is not within the intention of the "jus", that is to say, a right recognised by the law.

Further, can it properly be said that it is essential to a sound "public policy" that the immunity of the parent (an immunity, be it observed, in the interest of society at large) be extended to kin, however close, who do not occupy toward the injured the peculiar parental relationship? The few decided cases hold that it can not. The Supreme Court of Wisconsin, in Bielke v. Knaack, 207 Wis. 490, 242 N. W. 176 (1932), held that a minor child, injured in an automobile collision, might sue his older brother whose negligent operation of the automobile caused his injuries, although both resided in the same household. The court said: "Defendant... relies upon Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927) which holds that a minor child may not bring an action against his father for a tort committed upon the former by the latter. We are not disposed to extend the rule of the Wick case and hold that a brother may not sue a brother for a tort, even though both resided in the same home. No authority supporting defendant's contention... has been called to our attention, and we have not been able to find any. We perceive no sound reason for holding that a brother should not be liable to a brother for a tort committed upon him". Defendant in the Bielke case was slightly over twenty-one years of age, although dependent upon his parents for support and residing at home. However, the court later indicated that its holding in the Bielke case need not be restricted to the suit of a minor against an adult brother, in saying: "If he may sue such brother,... it is no great stretch from that to hold that he may sue a brother (residing in the same household) slightly under that age...". Munsert v. Farmers Mut. Auto. Ins. Co., 281 N. W. 671, 673 (Wis. 1938).

The paucity of cases on this score may, perhaps, be accounted for by the innate decency of humankind, including the reluctance of the legal fraternity to become involved in litigation of this nature. The cynic may contend that the true reason lies in the knowledge that a judgment would be nugatory, except in those cases which, as was intimated in the present action, involve third-party liability. Whether, in the absence of positive legislation by the formulators of "public policy", the courts should refuse to entertain like actions, is a highly debatable, although not as yet controversial, question.

J. W. HUYSSOON.
BOOK REVIEWS

LAWYERS AND THE PROMOTION OF JUSTICE—by Esther Lucile Brown.†

This suggestive study, which is "the fifth in a series dealing with the present status of certain established or emerging professions in the United States", appearing under the auspices of the Russell Sage Foundation, deals with many current problems connected with the legal profession. It does not pretend to solve them, nor indeed to offer much in the way of original thought, but rather the author seeks to "draw the Thing as she sees it". The bases of the study are periodicals, Bar Association reports, Bar committee reports and other like sources, from which the author has moulded a volume that practicing lawyers, law teachers, bar examiners and others concerned with the legal profession might well profit by reading.

After an all too brief and inadequate introduction by way of the Evolution of the legal profession in the United States, the author plunges into the much mooted question of legal education in the United States, treating such subjects as the number of law schools and their students, the "approved" and the "unapproved" school, methods of teaching, full time versus the part time teacher, and other subjects of equally as controversial a character. The comparison indicating the lack of uniformity in law school curricula, with medical schools where many of the courses are prescribed by the Council of the American Medical Association, is not particularly convincing as demonstrating the need for uniformity in law school curricula, for the very obvious reason that a tonsilectomy or an appendectomy call for the same operating technique, whether performed in Maine or California, but the laws of those states are not necessarily identical, nor the needs of law students in them the same. Nevertheless, the discussion of legal education in the United States and particularly the haphazard—though somewhat improved in recent years—method of admission to the Bar, with the unfortunate laxity still existing in some states, cannot but show up many of our shortcomings in comparison, say, with the British bar. Much of our troubles are inherent—and perhaps incurable—in the fact that we have forty-nine jurisdictions where applicants for admission to practice law may apply, each one specializing to a greater or less extent in the laws peculiar to it.

National organizations such as The American Bar Association, The Lawyers Guild (whose existence has been too brief to demonstrate its

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usefulness or permanence), the Association of American Law Schools, National Conference of Bar Examiners, American Judicature Society, are briefly treated and their achievements, as well as their shortcomings, are noted.

The data showing the number of practicing lawyers, and more particularly the study of their incomes, make rather cheerless reading for those prone to look upon the practice of the profession as a means to affluence.

The author does not mince matters when it comes to weaknesses and defects in the administration of the law, such as the law's delay and its uncertainties—a complaint almost as hoary with age as the law itself—excessive cost of litigation, the reluctance of the Bar itself to get rid of its unscrupulous members, the failure of the profession to accept its social responsibilities, criticisms which in many instances are certainly well merited. However, some encouraging signs are noted such as the American Law Institute's Restatement of the Law, the activities of Judicial Councils, the creation of small claims courts, the existence of legal aid organizations and public defenders, the latter designed to make easier and cheaper a resort to the courts for those of moderate means. The tendency to increased resort to arbitration is noted.

The growth of the so-called administrative commissions or agencies, both State and Federal, is attributed to the fact "that the judicial system has been too slow, cumbersome, and ineffectual to deal with situations where speed, flexibility, and specialized knowledge are essential". Despite this need and the accomplishments of such governmental agencies, the writer concedes "they have not acquired the high sanction and dignity accorded the Courts. Their actions have been considered bureaucratic, the wisdom of their rulings has been criticised, and their fairness challenged"—a viewpoint shared by many. The merits and demerits of these agencies, the extent of their authority, and judicial control over and review of their actions, are all acute questions today, and it would be a bold person indeed who would attempt to predict what form a final adjustment of the relations between the courts and these administrative agencies will take.

On the subject of uniform state laws, some accomplishments are noted, but here again the fundamental nature of our federated state offers inherent difficulties. States may and generally will in time adopt uniform acts relating to business transactions such as the Uniform Negotiable Instruments Act, the Uniform Warehouse Receipts Act, and others of similar character. The real difficulties arise when it comes to acts affecting the domestic and social relations of the inhabitants of a
state, such as an uniform divorce law, all of which is adverted to by the author.

The so-called "integrated bar" is considered but it is such a recent development that no really worth-while conclusions can as yet be drawn as to its effect upon the lawyer and the promotion of justice. It remains to be seen whether the hopes of its proponents will be realized.

In setting forth her conclusions, the author readily admits the complexity of the problems confronting the Bench and the Bar, but finds in recent developments signs encouraging enough to lead to the belief that "there is evolving the realization that the services of both the legal profession and the public are needed, and that only through their working together can there be broad and continued progress in the promotion of justice".

For those members of the Bar who feel there is no room for improvement in the administration of justice—if any such there still be—and the relations existing between the Bar and the public, this volume will come as a shock to their ultra-conservatism and self-satisfaction; to others of the bench and bar it may prove interesting to learn how the author, not herself a member of the profession, regards the profession and its members in the light of present day social and economic conditions.

WILLIAM H. WHITE, JR.


The accomplished compiler of this work warns us upon his first page that it is not a casebook of the usual type; and it is clear from the body of the book that it is not to be judged as are ordinary collections of cases upon criminal law and criminal procedure. The preface to this, the second edition, propounds what appears to be the fundamental thesis of the work in these words: "Whether a student plans to practise in the criminal law field, or seeks only to that understanding of social relations and their problems which every lawyer ought to possess, he must have more than a mere knowledge, however detailed, of the particular activities which the law declares punishable. No one, for instance, can wisely evaluate the particular rules of the law, nor intelligently predict their developments, without careful consideration of the social objectives of the law, and the theories upon which it is built."

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Again in his preface to the first edition Professor Waite, for reasons which he states, insists that "Decisions must therefore be studied against a background of social and economic conditions, political theories and commonly accepted ideals."

Quite possibly, to express one's dissent from these propositions is only to betray one's lack of comprehension. But if these and other sentences of like drift and effect are correctly understood, we are told that the practitioner in the criminal courts must know, not only his criminal law, but the philosophy which underlies that law, and must be possessed of a background which is of essentially other content and purview than the law of crimes existing and operating for the time being. The author's language implies pretty clearly, if it does not positively import, that for the proper prosecution or defence of criminals, counsel must have an adequate acquaintance with the so-called science of sociology and must be prepared to discuss with the court all the economic theories which may have contributed to the present day legal institutions affecting assault, burglary, arson and other crimes.

Far be it from the present writer to deny that a lawyer, even a criminal lawyer, ought to be an intelligent man. Certainly, any one undertaking to practise a liberal profession should know many things not embraced in the knowledge required by his professional activities, such as some history, philosophy and polite literature; it may conduce to his success if he is well acquainted with the plays of Shakespeare, and more than one eminent lawyer has sometimes scored a point by an apt Scriptural quotation. No doubt the wide culture appropriate to a legal practitioner properly, perhaps necessarily, covers the theories of social science and political economy, whether or not he accepts all or any of such theories. Moreover, it is probably true that in some countries the courts will act upon particular ideologies in the administration of the criminal and other law; in Russia, for instance, it would hardly do to quote Adam Smith's dogma that the chief purpose of government is to protect those who have property against those who have not; and in the courts of certain other countries the economic and political principles underlying the common law would meet anything but a cordial welcome. But it is hardly conceivable that any American judge would lay down as the law of a criminal case one of his political or sociological doctrines which is at variance with the law written in the books: even a judge who believes with Proudhon that property is theft would not have the hardihood to tell the jury in a case of larceny that the real criminal is the man whose goods were stolen and the thief should be acquitted because he had the right to steal.
In the same vein of thought running through the last quotation the preface to the first edition insists:

"As judges' views are apt to be those of their own social group, it is therefore important to know what doctrines then prevailed as to individualism or collectivism, as to the 'natural and inalienable' rights of men or the complete submergence of individual privilege in social necessity, as to the importance of property or the sanctity of life, and what other social and economic theories existed which might have affected the decision. If it can be shown that ideas now prevail which differ materially from those adhered to when the precedents were declared, an evasion of those precedents may be predicted."

This passage seems to confound the exigencies of present practice with the study of legal history. Of course, one whose purpose is an intelligent retrospect of the law must note the mutations of legal institutes and endeavor to account for them as rationally as possible; and any such accounting involves inquiry into the social conditions, the political theories and the economic forces existing at various periods. The vicissitudes of the environment wherein the law has grown up since Anglo-Saxon times to the present day has necessarily altered, at various eras and in numerous particulars, the complexion, and even the controlling principles, of the jurisprudence in operation at any given date: the development from feudalism to industrialism could not be accomplished without frequent shifts from one social theory to another. Again of course, the well rounded lawyer ought to know at least the outlines of the story of his profession. But to say that he is going to need this knowledge in his forensic activities, or at any rate to say that he will use it as Professor Waite indicates, is a conclusion which does not seem to follow. The historical changes, and the mutable sociological dogmas which caused them, are of the past; the law of the criminal practitioner is an existing fact, which for the present moment at least, and whilst he is in contact with it, is immutable.

No doubt, the present system is constantly changing, chiefly (in modern times) under statutory innovations which reflect the social and economic theories of the legislature. But so far as the courts are concerned, they are now, as in the past, as Mr. Waite quotes in his second preface, "confined from molar to molecular action." So a judge, even of advanced ideas, sitting in a contract case, would not feel at liberty to dispense with a consideration "as a bit of medieval nonsense"; and so a judge, though a devout Marxist would hardly have the courage to justify a common law murder as a commendable incident of the class struggle. It may be conceded that in certain cases of civil litigation,
and in passing upon some matters of constitutional law or kindred subjects, the individual judge is influenced by his individual notions of economics or his personal prejudices, or by those of the social group to which he belongs; quite likely a body of strikers would be at a disadvantage in a federal court as compared with their status before a judge elected by working people. But such judicial idiosyncrasies can hardly be called features of today's criminal law, still less a part of the legal doctrine which we have to impart to our young men. At all events, the scheme of expounding the law of crimes and exhibiting the procedure in the prosecution of crimes against a background of sociology and economics is not likely to commend itself, as necessary or effective, to those fathers of our students who practise in such cases. The present reviewer has prosecuted criminals and defended criminals, but has never had occasion to discuss with the court his own or other theories as to the purpose or the growth of the criminal law; he has never told the judge that larceny ought, for one reason or another, to be punished or not to be punished, or that peine forte et dure was abolished before either of us was born; and any argument or suggestion of that kind would have met with but scant courtesy from the bench.

So much, perhaps too much, has been said of Mr. Waite's propositions, not for the sake of disputing them, for they may now be sound—the old order changeth, yielding place to new. But the thesis is stated as explanatory of the book's purpose and scheme; and it accounts for the fact that the work differs largely in design and execution from the generally accepted exposition of the subject. A great proportion of the material consists of articles by various authors who discuss divers matters which are more or less related to criminal law but do not state any legal doctrines, certainly not any aspect of such doctrines as are discussed in the court room. Thus, the first chapter is entitled The Purpose of Criminal Liability, and it runs to twenty-five pages, of which six pages carry cases not very distinctly explaining why crime should be reprehended, and nineteen pages present essays by several authorities who present different theories as to the purpose of punishment, whether it is vengeful, retributive, deterrent or of other operation, actual, supposed or intended. All of which is wholly unavailable to counsel trying a case, and not likely to help him much even in negotiating with the judge concerning the sentence. The chapter ends with some legislation regarding punishment from Michigan, some from Mexico, some from Soviet Russia, and certain principles proposed for adoption in other contemplated legislation upon the same subject. Not infrequently a like excursus presenting the views of some eminent authority is interpolated among
judicial decisions declaring the actual law; as for example, along with some excellent cases upon insanity are articles upon The Notion of Mental Disorder, Expert Testimony and Psycopathic Personality, together with statutes from California and Massachusetts and the provisions of the Italian Code relating to insanity, and certain legislation upon that subject recommended by thoughtful reformers. Of course this material is not the law prevailing in America, nor does it apparently conduce to an understanding of the actual law; and some of it is altogether in the domain of psychiatry, such as the article from which these lines may be extracted:

"Mental aberrations that are psychogenic in origin have an etiology, a developmental history, involving mental functioning at every step. Where these aberrations are not traumatic in origin, i.e., are not results of an emotional shock from a particular experience, but the result of the gradual entrenchment of certain conflicting emotional attitudes, we will for the present (only) grant the possibility of the individual's bringing the conflicting elements into consciousness during the earlier stages and resolving the whole matter rationally. So that, insofar as capacity for rational judgment involves responsibility, the person is for the moment considered as at the earlier time responsible for the later appearance of the aberration. But when the aberration has developed in all its distorted character, the person is as helpless with regard to it as in the case of those psychoses which are rooted in neurological causes. And it is as little susceptible to reason. The conflicting elements are sometimes split off from the main personality and completely out of its direct control. . . . Again in the course of time, the aberration of the anti-social trend becomes part of the warp and woof of the personality so that the person thinks and evaluates in its terms."

Undoubtedly one as well educated as a lawyer ought to be should be able to read this paragraph understandingly; though even one with an academic degree might have difficulty unless he has had more thorough training in the classics than most colleges nowadays afford. Undoubtedly also one who prosecutes or defends criminal cases must learn something about mental disorders. But there may be a question whether in his preparatory study for the bar he should be expected to explore the more recondite mysteries of psychiatry. The passage quoted looks like an attempt to sound "the abysmal deeps of personality," which the poet tells us lie bare only to the eye of Omiscience. If, however, one who is not an alienist correctly interprets the technical terminology, the meaning is that continued evil doing tends to become chronic, that vicious habits harden into inveteracy, and that persistent yielding to
pernicious impulses engenders an abnormal emotional condition which will control conduct. This is what in early youth we learned from the admonition of our elders, fortified by apt apothegms found in Holy Writ. The fact being established, there is again the question whether anything is gained in the instruction of youth by calling the perverted condition schizophrenia or by some other technical name. And there may be the further question whether in a given case proof of such condition so induced gives rise to a debatable point of law.

The doubt which occurs to the reviewer, prejudiced no doubt by his sordid experiences as an occasional practitioner in criminal courts, is whether the direction of a student’s mind toward things collateral to the law of crimes does not limit unduly his acquisition of those practical things which he must use in the courtroom. In reading Professor Waite’s copious collection of articles upon the philosophy of punishment, matters to be considered in the reform of existing methods, and like subjects more or less directly related to criminology, one is tempted to paraphrase a famous military epigram and say that, as a piece of propaganda it is magnificent but it is not law.

Actually, as it appears, the elaboration of the theoretical features of the subject has cramped the compiler in his development of elements more intimately connected with the law of Crimes and of Criminal Procedure. For instance, we do not learn the definitions of felony and misdemeanor, or of principal and accessory; at any rate, those terms are not found in the index and, if there are any cases or commentary matter elucidating the distinctions, such expositions have escaped a somewhat careful attention to the contents of the book. In like manner, and presumably upon like principle of selection, the procedural portion of the work omits to touch upon demurrers, motions to quash, the arrest of judgment, aider by verdict and some other features of practice which are of frequent occurrence and often of capital importance. Upon the Unwritten Law there is an article of nearly three pages, though so far as that subject presents any legal question, it might have been disposed of in the concise fashion of the celebrated chapter entitled Snakes in Ireland. Under the head of Extradition the book offers nineteen pages of cases and other matter upon Interstate Rendition, which is an adequate allowance and the cases are well chosen; but Foreign Extradition is relegated to a brief note which cites sundry articles to be found in legal periodicals, and upon Federal Removal there seems to be nothing at all.

These instances exemplify the manner and the extent of the restriction necessitated by devoting so large a portion of the work to subjects
only at most collateral to the actual administration of criminal justice. But the fundamental difficulty of the compiler lies in his endeavor to develop the two subjects of criminal law and criminal procedure in a single volume of manageable bulk. Mr. Waite, or his publishers, allowed 818 pages for both. A *laudator temporis acti*, now perhaps only a *vox clamantis in deserto*, remembers that not many years ago he taught the substantive law of crimes from the case-book of Mr. Beale, who gave 890 closely printed pages to that branch alone. In his experience the instructor found Mr. Beale’s cases none too voluminous for an adequate exposition of the subject, and in a course of sixty hours, there was no time to spare for procedure. Also in an endeavor, extending through some thirty years, to teach the latter subject, the same instructor has found thirty hours hardly adequate to inculcate the beggarly elements of the law. And it is believed that every practitioner will agree that it is impossible to combine the two courses with even measurable success in either, or to embody in a practicable volume the cases needed for even rudimentary instruction in both. Of course, it is much the fashion to think of criminal law and criminal procedure as substance and accident, and to assume that if one knows the law of crimes, he can draw indictments, know when to object to evidence of a confession, recognize a *corpus delicti* when he sees one, and deal skilfully with a grand jury of illegal impanelment or irregular conduct—as if these things came by nature like eating and drinking. But, practically, as every one knows who has had experience in the courts, to treat the procedure in criminal cases as incidental to the law of Crimes is about as efficacious as to impart the art of navigation as an adjunct to the science of astronomy; you may have a fair astronomer, but you will have a sailor in whose vessel you would prefer not to take passage.

When we turn from Professor Waite’s pedagogical theories to his cases, it appears that his practice is considerably better than his professed principles. It would be difficult to find in this collection any judicial discussion of the subjects which this article has called collateral to the law, and by which the compiler sets so much store. On the contrary, the cases concern themselves with the law and not at all with propaganda. In fact, they are, for the most part, such cases as would be selected by an instructor desiring to prepare young men for service in the courts; the judges do not exploit their opinions relative to the philosophic foundations of the legal system which they administer and they seldom, if ever, undertake to tell where that system is in need of reform or how it ought to be improved. Without particular mention of certain topics which are especially well developed, and without
suggesting a few cases that might profitably be replaced by others which for one reason or another seem better adopted to elucidate certain points, it may be said that Mr. Waite's selection is judicious—much more so, indeed than he gives the reader reason to expect from his prefaces and from the learned essays which are interspersed among the more substantial matter of judicial authorship. One who accepts as sound the professor's conception of legal pedagogy would probably find it difficult to say wherein the work could be improved. If the present article should seem drawn in a temper somewhat critical, and reflects reactionary notions of proper professional training, let the dissent from Mr. Waite's thesis be attributed to the incorrigible Philistinism of a commonplace practitioner.

CHARLES A. KEIGWIN*


Devotees of the ancient shibboleths stand aghast upon the intrusion of those who with appraising eyes view the monuments of the past. No fears of wanton vandalism, however, need disturb reverent legalists in the presence of this study by the Department of Justice. Here is a work of calm scholarship, done with scalpel and microscope, to be sure, but nevertheless meticulous in its detail, respectful in its attitude, and earnest in its endeavor.

We of the law, are cursed with too much reasoning premised upon rules of thumb learned at school. The niceties of discussion and opinion which are the threads of the cloth of jurisprudence do not appeal to the student mind. We learn a rule—a slogan—and thereafter in our practice we parrot the rule, and that to us is the law. It is therefore positively refreshing to examine a work which takes the time and trouble to re-create the situations which gave rise to the pronouncements of the court and to assay the probabilities had surrounding circumstances been different.

Two impressions will come to any reader of the little volume—one of congratulation upon the detail of research (the arguments of counsel

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in the pertinent cases, the Congressional debates, the Governors' messages upon the ratification of the Amendment, the legislative debates in the States, all with copious footnoting), the other of agreement that the Department is well justified in suggesting a re-examination of the whole subject matter. One cannot follow the development of the views of the Court without concluding that this rule of immunity should be re-tested in the light of the ever-expanding field of governmental activity and of modern economic fact. On this proposition the authors present a convincing argument.

The basic justice of taxing all people alike, whether they work for the Government or for a private employer, pervades the whole discussion, and strikes, as indeed it must, a sympathetic chord in the mind of any reader.

The Study is in two Parts: I—The Immunity Rule, and II—The Sixteenth Amendment. The general argument is likewise in two distinct parts. The first part is that the Court would be most likely now to hold differently in such cases as the Pollock case, Collector v. Day, etc., and to hold that Congress has now, and always had, the power to impose an income tax on the salaries of State employees and officers and on the interest on State bonds. The second part is that if the Court would not so hold, nevertheless, the Sixteenth Amendment is an additional grant of the taxing power to the Federal Government and therefore a statute imposing such tax would be valid in view of the provisions of that Amendment.

In Part I the decision in McCulloch v. Maryland is re-examined, the spread of fifty years between that case and Collector v. Day is vivified, the somewhat tortuous course of cases since that day is faithfully sketched, until in the reasoning of the Court in the Gerhardt case we find again the reasoning of the great Chief Justice in the McCulloch case.

The argument is that the question in McCulloch v. Maryland was federal supremacy, the Court holding that if the right of a State to tax the means employed by the Federal Government to perform its constitutional functions be conceded, then the idea that the Constitution should be the supreme law was empty; that it was not until Collector v. Day that the Court announced the doctrine that tax immunity is reciprocal and that both the State and the Federal Government must be constitutionally independent within their respective spheres; that the Court

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157 U. S. 429 (1895).
11 Wall. 113 (U. S. 1871).
4 Wheat. 316 (U. S. 1819).
304 U. S. 405 (1938).
followed this latter doctrine over a period of years down to and including *Helvering v. Tyler*; but that in *Helvering v. Gerhardt*, in 1938, the Court rejected the reciprocal test of tax immunity and returned to Chief Justice Marshall's principle that the immunity was to protect the supremacy of the Federal Government. The argument further proceeds that the *Pollock case* is the only authority for the proposition that the Federal Government may not tax the net income realized from interest on State obligations and that the weight of that case has been gradually whittled away by decisions in a number of cases permitting excise taxes, franchise taxes, income taxes on Government contractors, on Government lessees, on transfers of Government bonds, on donations of Government bonds, and other similar cases. The conclusion is that a decision that a federal tax on State and municipal bondholders is valid is considerably more probable at this time than a decision reaffirming the result of the *Pollock case*. The discussion in respect to State employees treats many decisions on the point but, boiled down, the argument is that the *Gerhardt decision*, in the language of the dissenting Justices "expressly or *sub silentio* overrules a century of precedent". In the discussion of the tax on State officers, no convincing reasoning is presented to indicate that the Court would go beyond the boundary of the necessary existence of the State and tax those officers who perform essential governmental functions.

The authors stubbornly question the platitude that the power to tax is the power to destroy and would relegate that expression to the place in which it belongs, in the midst of a discussion of a discriminatory tax clearly aimed at the existence of the United States Bank.

The distinction is well made, we think, between the immunities of State bondholders, of State employees and of State officers. An excellent case is made for the abolition of the immunity of the first, a good case as to the second, but not so convincing a case as to the third. In fact, the claim of the authors does not appear to go the full limit of supporting the taxation of the means by which the States perform their sovereign functions, but seems to stop at the boundary of the existence of the State.

Part II, dealing with the 16th Amendment, is largely a restudy—thoroughly done—of well-known data on the meaning of the phrase "from whatever source derived". Some new material is added and all the old is woven in. The principal reliance in regard to the meaning of the Amendment is placed upon Governor now Chief Justice Hughes' message to the Legislature during the ratification of the Amendment,

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293 U. S. 507 (1934).
in which he pointed out the implications of the oft-debated phrase: The argument runs squarely afoul the repeated assertions of the Court that the Amendment merely removes a restriction upon existing federal power and is not itself a grant of power. The difficulty is clearly recognized, however, and the authors make no extreme claim as to the outcome of a direct test on the point.

As we have said, to the lawyer-reader this study must bring the conviction that the blanket immunity of State bonds, employees and officers from federal taxation, and its converse rule, are properly being re-examined and that the preparation of the Department has been lawyer-like, scholarly and without passion. The matter is of current interest, spirited hearings on the proposed legislation being now in progress before Congressional Committees. Attorneys General of many States appear in opposition, and the Department of Justice appears in advocacy through Mr. Morris.

To law students, we readily recommend this book as a model of thorough research and clear presentation.

E. BARRETT PRETTYMAN*


This work is an attempt to give a detailed history of the effort to procure international cooperation in the protection of literary and artistic property. The result of such efforts is The International Copyright Union, the last revision of which was made at Rome in 1928. While the United States has been participating in a great many international unions including the International Convention with respect to patents and trade marks, we have never adhered to the International Copyright Union. Representatives of the United States have attended a great many of the international conventions but it has never been possible to procure the support in the United States for the International Copyright Union. On its face, this may seem a little peculiar, especially, when it is remembered that we have special copyright unions with a number of individual countries and we have adhered to the Pan-American Copyright Union. An effort has been made to consolidate

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the International Copyright Convention and the Pan-American Copyright Convention but this has been unsuccessful and because of the attitude of the American countries there seems little prospect of immediate consolidation.

The author gives the history of the effort to get the countries together for an international treaty, beginning with the Congress at Brussels of 1885 and coming down to the last convention at Rome. He sets out something of the arguments and proceedings and accomplishments of each of the Congresses of the International Convention and endeavors to give a detailed history of their origin and development, indicating in many instances the unsuccessful efforts to change the text of the Convention. This matter is now given for the first time in English and in a way that will be very helpful to anyone who wishes to make a detailed study of the entire Convention or of any portion of it. The author includes a somewhat similar but less elaborate consideration of the various Pan-American Conventions. He also gives a summary of the copyright laws in various foreign countries and a rather lengthy statement of the copyright law in the United States. This is not intended to be a complete and full text book with respect to the United States law, but reference is frequently made to other authors who have already covered the subject in more detail.

The author has consulted and cites a large number of volumes mainly published in Europe. It is surprising to find a volume published at this time under the auspices of Harvard University which pays so little attention to the literature in the technical journals with respect to copyrights. This is unfortunate because much of the important thinking on law at the present time is embalmed with periodical articles. Thus, the author states that prior to our Constitution the only states which had copyright laws were Virginia, New York and New Jersey. An article in the Publishers Weekly, Volume 114 at page 1336 gives a history of copyrights before the Constitution and clearly indicates that all of the thirteen states had passed copyright Acts prior to the Constitution except Delaware.

The author points out some of the reasons why the United States will not adhere to the International Copyright Union. Our country has always insisted that a copyrighted article bear notice of a copyright; that registration of the copyright be effected and that copies of the copyrighted article be deposited. Indeed our enormous Library of Congress has been built up very largely by copyright deposits. These three formalities are eliminated entirely by the International Convention which specifically provides that no country may require any
formalities for copyright protection. It would seem that in order to
go into the Copyright Union we will have to give up our traditional
procedure and there seems to be a very considerable and well organized
objection to this. Our period of copyright protection is for twenty-
eight years with a possibility of renewal for twenty-eight years. The
Copyright Union recommends a period of copyright protection for the
life of the author and fifty years after his death. Indeed, some coun-
tries have a longer period. There seems to be considerable objection
in the United States to giving such a long indefinite period of copyright
protection. Indeed if the public is to obtain anything from the falling
into the public domain of copyrighted material at the expiry of the
copyright it would seem that it would be reasonable to even further
limit the period of copyright protection. A patent runs for seventeen
years only. It seems difficult logically to justify giving a monopoly for
seventeen years to a man who invents a machine for taking or for dis-
playing talking motion pictures while at the same time giving monopoly
for twenty-eight or fifty-six years to a man who writes the silly story
which may be made into a talking motion picture.

The feeling behind those who have endeavored to procure an inter-
national copyright union seems to have been from the beginning that
from such procedure there could be produced some sort of uniform pro-
tection for literary and artistic property. This seems far from accom-
plishment. The advocates of the International Union seem to think
that copyrightable matter must be divided into a number of separate
classes and must be treated separately in the various classes. For in-
stance, an ordinary book is treated in one way; a text book, in another
way; a newspaper, in a third way, and a photograph is treated in still
another manner. In the laws of most of the countries throughout the
world and in the Convention itself these particular classes are separately
treated. They are given different periods of protection and their copy-
ing is subject to different penalties. Indeed no one can read the present
book without getting the general impression that the entire copyright
situation is the result of a long series of compromises. It looks very
much as if all interests except the public interest have reached and
grasped for as much as they could, and have been able to get away
with almost everything that no other interest objected to granting. The
treaty seems to be intended to take care of the interests of the authors;
the interests of the publishers; the interests of the music composers;
the interests of photographers; the interests of newspaper publishers;
the interests of motion picture producers and exhibitors; the interests
of the radio broadcasters, and to some extent the interests of the makers
of phonograph records. Nowhere has very much attention been paid to the interests of the general public. The same may be said with respect to the efforts to amend the copyright law in the United States. A bill is presented in almost every Congress to revise the copyright laws. Fortunately, so far, the various interests have overlapped so that they interfered with the other interests represented. The result has been that every attempt is objected to by some one and so the public interest has not been entirely destroyed.

This may be an advantage. The attitude of some of the stronger interests and the attitude of the Senate up to now has been to insist upon a revision of our own statutory law before we adhere to the International Convention. There are those who insist that the Senate adhere to the International Copyright Union and then, having a treaty obligation, they believe the law will be amended to put us in line with the treaty. Our State Department officially seems to have taken this position but, so far, the public interest has fought it off. Certainly if we cannot agree on a proper copyright statute there is no logical reason why we should adhere to an international convention which will force us to change the law in a way the public does not want.

A study of the present volume will reveal a good many of the interests which are pulling us one way or another with respect to many of the proposals for the amendment of the copyright statute. Many of the author's statements are justified by citation of authority. In many instances, however, the author states what is the policy or what is the law or what should be the policy or what should be the law without citation of any authority and frequently without the use of any reasoning which persuades. This is unfortunate as it would be very helpful to see all sides of each problem and to get an unbiased balancing. As it is, the book must be looked upon as of academic interest only, since the United States seems to be fairly well determined to keep its own method of copyright protection and not to get involved in an international copyright union.

KARL FENNING*

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This source book of almost 1400 pages is of interest not only for the matter it treats but because of the general editor, Professor Grace Abbott of The University of Chicago School of Social Service Administration, was for thirteen years the head of the Children’s Bureau in Washington.

The two volumes contain numerous citations from English and American child welfare laws as well as various decisions dealing with both dependent and delinquent children. The form of legal presentation will appeal to lawyers and legislative groups, in addition to social welfare organizations.


In the review of a “source book”, one must determine whether or not the sources are so chosen as to deliberately mould the reader’s thinking, whether certain items of importance have been omitted or whether the items have been chosen from a historical, chronological or other objective basis. Assistance is found in the present instance by the Editor’s introduction to each section or part in which she gives her own views and summarizes the contents of the part to follow. Both volumes cover the several sub-divisions ably and, with one possible exception, no attempt to bias the reader’s point of view is noted, although he is steadily conditioned to accept an extension of child-welfare legislation. The book represents a tremendous amount of research and is, as far as this reviewer is aware, the first attempt to accomplish, within one work, the citation of most of the important pieces of English and American child welfare legislation. It is recommended as a source book for all legal, legislative, sociological and social service libraries.

In her opening preface, the editor notes that with the exception of

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the Castberg Law of Norway, dealing with maternal care for illegitimate children, this work compares the experience of the two English speaking nations with child welfare legislation.

Professor Abbott states that an English translation of the Norwegian law dealing with the children of unmarried mothers, was made available in 1919 as an official document of the Children's Bureau, because the "Castberg Law of Norway, which promulgated a new theory of the rights of the child of unmarried persons, profoundly influenced American thinking on this subject and has therefore been included". This statement cannot be allowed to pass without a slight challenge. The challenge is that too much should not be expected from a mere law. The problem of illegitimate children, innocent as they are, is much wider than the passing of a law assuring them, in deserving cases, of continuing maternal care. The many angles of this problem cannot be discussed in the short space available here but an analogy may serve for illustration. The Juvenile Court has helped but has failed entirely to solve juvenile problems. Thus, let us say that an American Castberg Law might assure some illegitimate children of the care of their own mothers. On the other hand, such a law probably would create other problems by taking away some of the social sting of illegitimacy.

A sound theory of child care is to assume at all times that a child is the child of its parents and that when it is necessary for the state to pass legislation intended to aid children, that aid should be extended through the family. Parents should be assisted, when necessary, with the care of their children but the State should assume that the parents are properly caring for the child until definite evidence to the contrary is presented. However, the State should never hesitate to step in when the family demonstrates that it is failing to care for the child. The editor of The Child and the State, seems to accept some such theory. The writer of this review has had the counsel of two graduate students who have used this work as a text and they feel that the book does the above theory of child care, no abuse. (Even the Castberg Law wishes to assure the child the continuous care of its own mother.)

About 400 pages in Part IV of Volume I are devoted to the problem of child labor in the United States. It seems to be true, however, that in spite of two rather intense movements in the middle twenties and again in the middle thirties desired to secure adoption of the Child Labor Amendment to the Constitution, it is impossible to reach that goal. Singularly enough, high church dignitaries of several denominations, both favored and opposed the amendment. Actually the opponents do not desire the continuation of child labor but simply fear the state will
be given overwhelming authority over children, at the expense of the rights and duties of parents.

A short analysis of the child labor provisions of the Labor Standards Bill, passed in June, 1938, is included in this work. It fixes the national minimum age of employment of children at 16 but permits the Children's Bureau to fix 18 years as a minimum age in certain occupations of a hazardous nature. It cannot have any effect on intra-state employment, on employment of children in agriculture, or on children in the "street occupations".

Under the section devoted to child offenders, the Juvenile Court is thoroughly treated. This part includes a description of the English "Borstal System" of follow-up of released juveniles. It is quite worth while and worthy of study for adaptation to American parole problems.

In the last section of the second volume, the editor includes a copy of the act creating the United States Children's Bureau and similar acts of the individual states. She ends her introduction to this section with a plea not only for more workers, appointed under civil service laws, but for workers really trained in the field.

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BOOKS RECEIVED

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


