THE subject of this discussion is a most timely topic. Although the Supreme Court has recently declared that private utility companies have no standing in the federal courts to challenge the constitutionality of the TVA, this discussion is almost too timely to the extent that the treatment of it at this time is inhibited by the fact that certain issues which may have a vital effect upon the future directions and policies of the TVA are still under consideration by a special joint investigating committee authorized by Congress. Under such circumstances, certain moderate assumptions about the outcome of such legislative inquiry are perhaps pardonable. Let us assume, therefore, that aside from possible changes in the internal managerial set-up, perhaps in accounting and auditing policies, the course of the TVA will not be greatly altered by Congress in the immediate future.

Now when we consider the broad subject of utility regulation, one

†A paper delivered by Mr. Welch before the Round Table Conference on Public Utilities and Transportation at the Thirty-Sixth Annual Meeting of the Association of American Law Schools in Chicago, December 29, 1938.

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†Tennessee Electric Power Co. v. Tennessee Valley Authority, 59 Sup. Ct. 366 (Jan. 30, 1939). Since the preparation of this paper, the Joint Congressional Committee authorized by the 75th Congress to investigate the TVA submitted its findings to the Congress on April 4, 1939. A majority report upheld the TVA on virtually all major points of controversy. Conversely, a minority report signed by three Republican members sustained, on the whole, the charges made against the TVA by its former chairman, Dr. A. E. Morgan. In addition, a special minority report signed by one Republican member attacks the conduct of the investigation as having been controlled by the Democratic majority. Because of this wholesale split on more or less partisan lines, these reports of the Committee do not throw any very conclusive light upon the various issues of the investigation discussed herein (Author's Note).
preliminary inquiry intrudes itself: Will we need regulation at all very much longer? Will we have anything left to regulate? I refer, of course, to the possibility of complete socialization of all private utility enterprise. And I think you will agree that this is both a fair and pertinent question. I leave aside for later discussion the interesting question of whether, even in event of universal socialization of the utility industry, public interest would still demand some system of independent regulatory supervision of such publicly operated utility properties.

Answering this question, in my opinion, we shall have private ownership of utilities for many years. Public ownership may make substantial gains of a local character, mostly in the field of electric power. But by and large, and barring some unforeseeable economic emergency (such as might result from national participation in a serious and protracted war), I venture the prediction that the bulk of the investment and management of gas, electric, and telephone utilities in the United States will remain in private hands for some years to come.

I reach this conclusion without passing or touching upon the numerous and hackneyed arguments about the relative merits of public ownership of utilities. I reach this conclusion solely upon the basis of elementary economics: We simply do not have enough public money which could conceivably be expended with popular approval for the entire acquisition of even one of these three great utility services.

Let us check over very briefly the relative investment involved to demonstrate just why this is true. The privately owned electric light industry in this country represents an investment of somewhat less than fifteen billion dollars. The telephone industry about five billion dollars. The gas industry another five billion, split about evenly between manufactured gas and natural gas.

Now let us glance at the financial resources of the Federal government. We see that from the time of the Post-Reconstruction Period of the Cleveland Administration until the second Wilson Administration, our entire national debt fluctuated around one billion dollars. When the New Deal came to power in 1933, the national debt had already climbed to 20 billion dollars, largely as a result of World War expenditures. Since 1933 the national debt has just about doubled largely as a result of cumulative and progressive deficit financing to care for the expenses incident to the present administration’s recovery policies.

In other words, consider that if we took this twenty billion debt, the entire amount of the increase in the national debt incurred by the New Deal during the last six years for emergency relief, farm relief, public
construction, rearmament, and what not, and devoted it all to the single purpose of buying out the private utility industry in the United States, it would not be enough to buy all three of the utility industries. It would only be enough to buy out the power industry and one of the other two—gas or telephone.

I put it that way because I know it will readily become apparent to you that with all the outcry for the last six years against extravagant government spending for downright emergency relief, it is inconceivable that the Federal government could gain congressional approval for an expenditure of this entire amount of 20 billion dollars being directed to the single policy of retiring private investment from the field of public service in the United States—a policy for which we do not seem to feel any particularly pressing need.

In passing it might also be pertinent to consider that the entire outlay of federal funds since 1933 for federal projects, which include electric power features, will ultimately cost about one billion and a quarter dollars. Of this total, TVA will, upon the ultimate completion of its full 10-dam system, involve an expenditure of about one-half billion dollars.

And note, also, that of this entire ultimate outlay of a billion and a quarter for federal projects, probably about a half billion could, under any reasonable allocation be chargeable against power operations. Surely this is not a very impressive amount as compared with a private power industry investment of a little less than 15 billion dollars.

Of course, it could be objected at this point that while the Federal Government might not itself be financially able to swing the cost of socializing the electric power industry, the numerous individual municipalities and other public agencies (states, counties, power districts, and so forth) might accomplish the same result under the leadership of a pro-public ownership federal policy. But here again, while the local spirit might be willing, the local pocketbook is even weaker than the federal treasury. Best evidence of this is the relatively modest response which these municipalities have made to the federal policy of financial assistance in force since 1934. True, this assistance was available only for new construction as distinguished from the financing of the acquisition of existing privately owned facilities.

Nevertheless, one would think that if our municipalities generally had a general desire to go into the power business, they would do so in great numbers under the inducement of outright federal subsidies of from 45 to 55 per cent of the cost of such construction and cheap loans for
the balance. Yet the records show that only $124,281,556² in loans and grants was disbursed for non-federal power plants out of $1,646,-
593,607⁸ disbursed by PWA for non-federal projects of all kinds, such as highways, hospitals, schools, jails, and so forth.

Since, therefore, the people of the United States have apparently neither the disposition nor the extra cash to invest in the retirement of private enterprise from the field of public service in the United States, we might as well make up our minds for the indefinite future to live with a system of utility management dominated by private enterprise. This obviously means regulation, whether in the form of territorial monopolies or by competition, or by a combination of both.

Now we come to the Tennessee Valley Authority as a factor in the regulation of the privately owned electric utilities. As a practical approach, as distinguished from a legalistic approach, the TVA is somewhat of an anomaly. Constitutionally, it is supposed to be bottomed upon the authority and the desire of Congress to improve the navigability of and control the flood waters of the Tennessee river. Such a project had been agitated in various forms even as early as 1824, when the then Secretary of War, John C. Calhoun, sought a survey on the feasibility of inland waterway transportation on the Tennessee river. This was soon thereafter obscured by the advance of the railroads.

The Wilson dam, the only major operating government property on the Tennessee in existence at the time when the TVA took over in 1933, was originally a national defense project erected under pressure of our World War, when Congress authorized the construction of a hydro-electric power plant at Muscle Shoals for the manufacture of synthetic nitrates for munitions by a process which is now more or less economically obsolete. The Supreme Court in the Ashwander case⁴ held that the TVA having thus taken over property validly acquired by the government for defense purposes, could constitutionally market surplus electric power from Wilson dam in commercial utility service.

Just the same, as already suggested, realism compels us to admit that the TVA as presently operated is principally a project for selling electricity at low rates under a set-up designed to encourage public ownership of electric distribution. I say this because Congress and the voters have been told the same story.

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Evidence introduced in the Tennessee Electric Power Co. case indicated that if improvement of navigation and flood control alone were all that were really desired on the Tennessee river, they could have been taken care of at much less expense than the ultimate cost of the TVA program as presently planned. This candid acknowledgment that all legalistic excuses to one side, the main job of TVA is to make and market cheap power, provokes another query: Why did the United States government see fit to depart from traditional policy and embark in what is essentially, if not constitutionally, commercial enterprise?

Officially, of course, the government has not so embarked in commercial enterprise. Even politically, although the present administration's record has been consistently, if unofficially, in the direction of public operation of utilities, the New Deal has not openly or avowedly departed from the fundamental policy announced by President Roosevelt in his campaign speech in Portland in 1932, in which he said the choice of public as against private operation of utility service should be left to local communities. Even the activities of the PWA in financing the construction of local publicly owned plants have always been explained as a mere incident of a general public works program to relieve unemployment.

Thus by virtual elimination we are left with the so-called “yardstick” argument as the main practical explanation of TVA power operation. In a word, this “yardstick” is supposed to supplement, if not actually supplant, the conventional system of commission regulation of utilities. TVA power operations are planned as a model or (if you will) as a disciplinary measure to keep private operations on a basis of comparative economy.

Of course, this whole “yardstick” idea necessarily places the entire emphasis of regulation upon utility rates. I, personally, do not agree that low rates should be the sole criterion of effective regulation. However, in this day when most everyone thinks of utility regulation in terms of rates, practical discussion of the problem decrees that we should accept regulation on that basis.

Now there seems to be two schools of thought about these so-called “yardstick” operations. The first, endorsed apparently by the recently deposed chairman of the TVA, Dr. A. E. Morgan, would have the public yardstick, in the interest of fairness, conform in every detail, or at least as nearly as possible, to the measurement of private operation. Only in this way, it is argued, can the “yardstick” be logically defined as a yardstick, since it would be unfair over a long range to expect private
industry to match performance, with respect to rates, of a subsidized government model.

The second school of thought has no apparent qualms about hidden subsidy. It seems to assume that private utility rates are so much higher than they ought to be that vigorous disciplinary competition is necessary to bring about quick results in the public interest, even though that may include hidden subsidy to some extent. I will not attempt to pass upon the merits of these two positions, except to raise the obvious question as to whether a policy of subjecting private operations to a subsidized rivalry which will eventually drive private competition out of business in a given area is a policy of regulatory discipline, or whether it is simply a policy designed to promote public ownership as such at the taxpayer’s expense.

Of more immediate concern is the question of whether TVA rates are really subsidized. Testimony on this point before the joint congressional committee investigating the TVA has been very conflicting. I think I sum up the gist of such testimony fairly, if roughly, as follows:

Dean Moreland, of the Massachusetts Institute of Technology, utility witness, says that TVA operation of its finally completed system at present rates will lose ten million dollars a year on power sales alone. Former TVA Chairman Arthur Morgan thinks such loss will amount to less than three million a year. The TVA witness, J. A. Krug, testified that TVA will eventually operate at an annual profit of approximately three million dollars a year, although he did admit TVA operations were $1,000,000 “in the red” during the last fiscal year. The explanation for the variation in these three estimates is found, of course, in the items included by the respective witnesses as proper TVA operating costs and investment chargeable against power.

Dean Moreland included in his computations expenses which TVA does not actually pay, such as taxes and cost of money. Mr. Krug, on the other hand, estimated TVA expenses and chargeable investment at a minimum. Dr. Arthur Morgan testified that his calculation left out expenses which he thought should be included but which might be challenged.

As stated before, it would not be proper at this time to pass judgment upon the relative accuracy of these conflicting views before the committee itself. Probably the truth lies somewhere between figures of witness Krug and those of witness Moreland.

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5 Hearings before Special Joint Congressional Committee on Sen. Res. No. 277 to Investigate the Tennessee Valley Authority, Nov. 15, 1938 to Dec. 18, 1938.
This much, however, is true, has not been denied, and has in part been admitted by TVA witnesses: (1) TVA has espoused principles of computing the allocation of its investment as between power and non-power operations which a comparable private utility project would not be permitted to follow; (2) TVA does undoubtedly enjoy certain advantages in the form of virtual tax exemption, no interest charged on money, and various preferences accorded to its governmental status (such as reduced freight rates, free publicity of an important promotional nature, freedom from the expense and discipline of local regulation by state public service commissions, and so forth).

And so it would seem that from the standpoint of a regulatory criterion, the TVA yardstick has been just about discredited by the admissions of TVA officials as an accurate and fair measurement of private utility performance. It is, of course, a debatable question whether the TVA yardstick could be made a fair and accurate measurement of private utility performance by the reforms which would require the TVA to pay or at least set aside these various items of taxes, interest charges, and so forth, and by requiring the TVA to submit to comparable standards of regulation now enforced by Federal and state commissions against private utilities.

This whole idea of regulating private utility rates by competitive public operations has long been a favorite objective among critics of commission regulation of public utilities. I think the idea was most dramatically summed up in a speech by President Roosevelt in Portland on December 31, 1932, when he referred to his unsatisfactory experience with commission regulation while he was governor of New York. He did not then advocate the abandonment of the conventional form of regulation. Indeed, he plainly indicated that he was in favor of stronger and stricter regulation of utilities by government agencies. But he suggested the need for supplementing such purely regulatory supervision by the example of actual government operation. He then said in part (I quote):

"Here you have the clear picture of four great government power developments in the United States, the St. Lawrence River in the Northeast, Muscle Shoals in the Southeast, the Boulder Dam project in the Southwest, and finally but by no means the least of the least of them, the Columbia River in the Northwest. Each one of these will be forever a national yardstick to prevent extortion against the public and to encourage the wider use of that servant of the people—electricity."

Of course, we must realize, coming back to the TVA, that by very
reason of the fact that the Federal government is confined to the production phase of electric power operation and must leave local distribution to its retail customers, the exact economies claimed for the Federal government's own part of the process bears surprisingly little relation to the ultimate result as reflected upon the monthly electric bill of the average residential consumer of the TVA.

In other words, if you visualize the so-called yardstick as a measuring rod of 36 inches from the point where the power is made in the turbine to the point where it is consumed on the domestic premises, TVA's own part amounts to possibly a little more than 10 inches, while the management of the local municipal distribution plants would roughly represent a little more than 25 inches.

The average rate of 5.5 mills per kilowatt hour at which the TVA delivers firm power wholesale to its municipal plant customers is not greatly out of line with similar rates for wholesale supply charged by private generating utilities elsewhere in the United States to privately owned distributing utilities. Understand, the difference of a single mill per kilowatt hour may be the difference between a profitable operation and a deficit operation of a large producer, such as TVA. However, it obviously cannot make very much difference to the ultimate domestic consumer whose national average rate is 4.69 cents per kilowatt hour. It is something like comparing the price of pork on the hoof delivered by the farmer on the packer's scales to the price of a pair of pork chops served to a restaurant patron. A mere cent or two per pound may separate the red from the black on the farmer's books, and even the packer's books, whereas it is almost lost in the restaurant patron's check.

Why then are TVA rates, even to ultimate domestic consumers who are served through the medium of a local municipal distribution plant, so much lower than national average rates?

The answer is that TVA, in addition to delivering its wholesale power at low rates, requires these municipalities, as a condition precedent to obtaining the contract for such a wholesale supply, to put into effect a complete retail rate schedule predetermined by TVA. And so, although the physical operations of TVA run only as far as one-third of the yardstick, its contractual influence extends to the very end of it.

So far the only municipal distribution system of consequence served by TVA is the city of Tupelo, Mississippi, although Knoxville, Tennessee, was recently put on the line. So it is not surprising that evidence as to whether these retail operations are profitable is inconclusive. Dr. Morgan, former TVA chairman, has indicated that Tupelo is operating
its plant at a loss. Officials of that city insist that they are operating at a profit. Be that as it may, even in this field of municipal utility operation, the validity of the TVA yardstick rate is undermined, as an accurate economic model, by the reappearance of subsidy contributed by the Federal taxpayer.

The Federal government in this area has made free gifts of 45 per cent of the cost of distribution systems for these municipalities, has offered to lend the balance at the low rate of 3 per cent interest. The TVA itself has spent considerable sums of money to promote the retail sale of electric appliances in these communities and has subsidized not only their commercial expenses but to some extent their engineering, management, and accounting expenses.

Doubtless, from the broad viewpoint of public interest, there is some social advantage in getting and promoting distribution of electric appliances, even through partial federal subsidy. The fact remains that a private distribution system has no such good angel to help it build its residential load.

But let us accept TVA rates as they are without further question in an effort to determine what effect, if any, TVA operations have had upon competitive private utility operations. In other words, how effective has TVA been as a regulatory agency as distinguished from its record as an operating agency? TVA rates for domestic service are somewhat around 60 per cent less than the national average rate per kilowatt hour received from the same class of service by the private power industry. Since they were put into effect, almost four years ago, TVA retail rate schedules have not been changed although private electric company rates have been constantly reduced during that period.

Various claims have been made. Private utility operators dispute that TVA has had even a substantial influence in this lowering of private utility rates. Zealous advocates are inclined on the other hand to claim full credit for TVA. Representative John E. Rankin of Mississippi, co-author of the TVA Act, testifying before the joint congressional committee on December 10th, pointed out that electric rates throughout the country have been reduced "$556,000,000 a year since the creation of the TVA and the promulgation of its yardstick rates."

But let us consider statistical facts. It is true that private utility rates have been reduced sharply since 1933. It is also true that they have been going down consistently ever since 1882. According to the Edison Electric Institute's statistics (which are borne out in somewhat different form by the statistics compiled by the U. S. Bureau of Labor Statistics)
using the year 1913 as an index, the national average price per kilowatt hour in 1882 (at 25 cents) had an index number of 287. This has been decreasing every year with the exception of a minor interruption during the World War until today the national average price per kilowatt hour (at 4.3 cents) has an index number of 49 per cent.

If we were to project this trend upon a plotted chart, the descending curve would show a little sharper decline between 1932 and 1938 than during the preceding six years. But this decline would be less steep than during certain other periods along the way, since 1882.

There is no way of telling to what extent, if any, this sharper margin of decline of private electric rates since 1932 was due to the functioning of TVA. It might be just as well argued as a result of a public demand for lower general living costs during the pressure of the recent economic depression. Doubtless, the critical survey of the private utility industries by the Federal Trade Commission had some effect, and the regulatory efforts of the state commissions and the Federal Power Commission should not be ignored.

Furthermore, consider this point. Other forms of utility rates showed even sharper reductions during this period. Thus, according to the United States Bureau of Labor Statistics, the average rates for domestic gas service (including gas for cooking and water heating) had declined nearly 13 per cent just during the period between 1927 and 1936. Federal Communications Commissioner Paul A. Walker, submitting to his commission (April, 1938) a proposed report on the special telephone investigation of the Bell system, claimed that various reductions in long-distance telephone rates alone directly and indirectly attributed to the FCC investigation (which has been going on during the last three years) approximate $24,000,000 a year. In its reply brief (answering Commissioner Walker's report), the Bell telephone system claimed that similar reductions have been going on constantly during the entire history of that industry and had been made whenever operating economies permitted reductions.

In other words, the point I am making is that all utility rates have been going down during the last decade and even before that. I submit, therefore, that if the relationship of TVA operations to lower telephone rates and lower gas rates seems remote, it might be well not to take too much for granted in interpreting the relationship between TVA operations and the generally lowering trend in electric rates.

In passing, consider also the rate structures of the Commonwealth & Southern Corporation, which operates in two general divisions of the
country: A Southern division in the heart of the TVA area, and a Northern division which operates through this Middle West section. The retail electric rates of both of these divisions are about the same, although the Northern division is obviously far beyond competitive pressure from TVA.

It must be admitted that there have been some examples of competitive utility operations, whether between public and private agencies, which have resulted in lower rates. Thus, in the cities of Seattle, Los Angeles, Cleveland, and Springfield, Illinois, where there has been competition between local municipal plants and private power companies, we find the electric rates today considerably lower than the general average.

But when you examine these examples outside of the TVA area, two interesting factors arrest your attention. The first is that there aren't very many examples of this kind. Those that have happened occur only in fairly large cities, which would seem to indicate that it could only happen there because smaller communities could not furnish enough business to realize any advantage from electric utility competition within their own boundaries.

The second interesting fact is that however beneficial to the general public, by way of lower rates, these competitive operations may be over a short period, they have an unmistakable tendency to eat themselves out of existence. This has already happened in Seattle, which is at this time dickering for even a larger territorial monopoly through the acquisition of the facilities of the Puget Sound Power & Light Company in the adjacent area of Kings County, Washington. This has already happened in Los Angeles, where the City Light Bureau now enjoys an electrical distribution monopoly after years of competition with the Pacific Gas and Electric Company. In Springfield, Illinois, the city power plant was prevented from acquiring the competing privately owned utility properties only by an adverse vote of the electorate. All of these city light plant officials—J. D. Ross of Seattle (late Bonneville Administrator); E. F. Scattergood of Los Angeles; and Willis J. Spaulding of the Springfield, Illinois, plant—would undoubtedly tell you, if asked, that while local yardstick competition has its advantages in the beginning, it is not economical in the long run, because it results in a wasteful duplication of facilities. And when that happens, you come to the end of the yardstick.

Thus, we see that even where they have been relatively successful, yardstick operations have a tendency to swallow up the competition they were set to measure. In the TVA area there is little doubt but
that the TVA would like to have private enterprise clear out entirely, that private enterprise would like to clear out entirely. The only difference of opinion seems to be over a fair price for the acquisition of private utility properties by municipal plants functioning under the influence of the TVA. And, if spending agreements are consummated, TVA will soon emerge with a practical monopoly on power supply in its service area.

Now, it may seem that in the foregoing loose discussion of competition I have confused the *psychological* brand of competition by which the TVA rates were supposed to exercise a sort of moral influence upon private utility rates even outside of its own operating orbit, as distinguished from *local* competition, whereby two rival systems fight it out within the same municipal corporate limits. There is such a distinction, it is true. But I have tried to show that the moral effect of these public plant rates, on utilities which are removed from their sphere of influence is of doubtful validity; whereas actual territorial competition has a tendency to put an end to its own existence through inevitable evolution into a territorial monopoly. In short, as a regulator of utility rates, the so-called yardstick would seem to be both limited in scope and in time.

In conclusion, I think it should be fairly said that TVA operations have done a great deal to make the public generally power conscious. It has taken advantage of the backing of the Federal Treasury to cut rates in anticipation of increased consumption. While it is true private utilities do not have the resources to take such liberty of action, the net result has been in the interest of both the public and the industry by putting into actual practice what the electric rate engineers have long known; namely, that electric rates can become almost unbelievably low if sufficient volume of consumption and favorable load factor can be developed.

TVA took a chance in this direction—indeed, TVA Power Director Lilienthal admitted that his original schedule of rates was based upon a "calculated risk" and had been put into effect before TVA had even completed its allocation of costs, or knew who its customers might be, or how much power they might need. It is doubtful if a private electric utility would be permitted to take such a daring step under conservative regulation.7

My own conclusion about the TVA yardstick is somewhat along the lines apparently espoused by former TVA Chairman Morgan. We take

for granted that TVA is going to go on operating. Whereupon, we should take some steps to remove its inequities as a model operation. Unfortunately, TVA, under its present management, has not shown a disposition to become such a fair working model. Instead, it has shown a regrettable tendency to go in the other direction. It does not want to pay full taxes, for example. It does not want to be subject to the auditing or control of the General Accounting Office. It has already promoted state legislation which has the effect of relieving it from the slightest possible control of the state regulatory commissions.

That brings us to a final brief point on whether we should continue this so-called "double standard" of regulation as between publicly and privately owned utilities. I submit that the business of furnishing utility service is just as much of an inherent monopoly under political as under private ownership, and accordingly requires some form of independent regulation to guard public interest against wasteful competition, discrimination, and other abuses which gave rise to our legal concept of utility regulation more than thirty years ago.

And although it is likely that our utility industries will be generally dominated by private control for some years to come, we have seen that within its own areas of operation, public ownership has a tendency to suppress competition and supplant it with a monopoly. What will happen when the private yardstick—the competitive check upon private utility operations—is thus removed from the local scene and public management has the unquestioned power to use the rate for a vital public service as an instrument of taxation?

In the absence of independent regulatory supervision, it is my considered judgment that there is a real danger that the management of publicly owned systems may, under such circumstances, engage, for political motives, in irregularities which could be just as detrimental to the public interest as the abuses of private management (operating on a profit motive basis) prior to the era of commission regulation. With all its faults, private utility operation has at least one advantage in that it cannot continue operating at a loss. Experience with public operations generally, both in this country and abroad, do not always tell the same story.
THE WORK OF THE NEW YORK LAW SOCIETY*

FLEMING JAMES, JR.† AND ABRAM H. STOCKMAN††

ON MAY 2, 1932, fourteen lawyers in New York City interested in improving and promoting the administration of justice grouped themselves under the leadership of Dr. Herman Oliphant into an organization called The New York Law Society.

There is, of course, nothing startling in a number of lawyers forming themselves into a group for such a purpose; rather, that appears to be a usual characteristic of the profession. Yet somehow this group differed from others. Its charter members were banded together not because they had achieved high attainments at the bar and success in the practice of law, but because they had participated in an interesting experiment calling for cooperation between the bar and an academic institution applying a new technique for studying the processes of litigation.

In 1929 the Institute of Law of Johns Hopkins University struck out along a new path by conducting a quantitative study of litigation in New York City. For this experiment it had the able direction of Dr. Oliphant and the assistance of the fourteen lawyers. From lawyers and from court records, it gathered a mass of material required for formulating and studying the crucial problems concerning civil actions in the courts of New York City. This material consisted of three main bodies of data:

1. Facts as to 69,000 calendar entries in the Supreme Court and 35,500 calendar entries in the Municipal Court.
2. 5,500 detailed reports of cases from lawyers.
3. Basic information gathered from court records as to each of 8,500 cases in the Supreme Court, 5,500 cases in the City Court and 77,700 cases in the Municipal Court.

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*This article is based upon a paper read before the Round Table on Remedies at the meeting of the Association of American Law Schools on December 29, 1938.
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Some conclusions reached from this material were published.\(^1\) The net cost of civil litigation in New York City to the taxpayers during 1930 was investigated by two members of the Institute's staff, Stuart Chase and Ida Klaus. This study covered both expenditures and receipts of public funds in the administration of civil justice and attempted some comparison with the cost to taxpayers of other community tasks somewhat comparable. It was published in 1932.\(^2\) In order to bring to bear on the problems in New York the benefit of foreign thought and experience, a member of the cooperating group of practicing lawyers, Edward S. Greenbaum, Esq., with L. I. Reade, Barrister, wrote The King's Bench Masters and English Interlocutory Practice.\(^3\) Special attention was given in this study to the "summons for directions" and "settlement of issues."

Unfortunately, in 1932, the Johns Hopkins University was forced by lack of funds to discontinue this meritorious, but costly venture. So The New York Law Society was formed to continue the work of the Institute in New York and apply its methods in studying the administration of the law. The Society, as the Institute before it, aimed to help in providing a serviceable system of administering justice cheaply, quickly, and with certainty in the midst of the increasing complexity of American life. The administration of justice had not kept pace with the needs of society. The problem was no longer merely a technical legal one, but a social question of the first importance. The task of improvement was conceived to be a twofold one: first, there was the need for facts, and secondly, the need for a definite program for the adoption of changes which the facts showed to be necessary.

For the achievement of these ends, the form of the organization of The New York Law Society was peculiarly adapted. The founders of the Society were in a position, as lawyers and law professors, to provide or secure some realistic material, not found in records, yet indispensable for fruitful study; to afford a guidance in the choice of the important areas for study, and to subject the results obtained to criticism from

\(^1\) Oliphant, Study of Civil Justice in New York (1931); and Oliphant and Hope, A Study of Day Calendars (1932). The first of these outlined the need for the New York study and its objectives and methods. The second involved an analysis of 69,901 calendar entries on both jury and non-jury docket, which contributed to the complete reorganization of the calendar system in Trial Term of the Supreme Court of New York County.

\(^2\) Chase & Klaus, Expenditures of Public Funds in the Administration of Civil Justice in New York City (1932).

\(^3\) Published in 1932.
the standpoint of current reality. On the other hand, a trained research staff, however small, was necessary to give the work the broad factual basis so much desired, and the accuracy and objectivity of scholarly craftsmanship. Combining as it did these two points of view, The New York Law Society constituted a new conjunction of forces for the study of law and its administration, which, it was believed, would be of growing importance as an agency of social well-being.

The work of the Society may, for convenience, be divided into two periods, 1932 to 1935, and 1935 to the present day. The division is arbitrary, but it roughly corresponds with changes in the way the work was financed, and in the personnel and directorship of the organization. In 1934, moreover, the Judicial Council of the State of New York was created.

During the earlier period the Society, though hampered by lack of funds, was able to continue for a time under Dr. Oliphant's leadership and, later, with a research assistant of the Institute's staff carrying on as director. No collection of additional field data was undertaken, and most of the work was quite naturally concerned with the material made available to the Society by the Survey of Litigation. The first study of this kind was Some Aspects of Appeals. It involved an analysis of every appeal taken from a money judgment in the Supreme Court of New York County during 1930, and an extended compilation on the printing costs of briefs and records which partially supplements the earlier study of public expenditures in the administration of justice. The processing and tabulation of the material of the Survey continued along other lines also during this period. The Work of the Supreme Court was a statistical analysis of every other case in which a "note of issue" was filed in this court (in New York County) during the year 1930, which tabulated the types of cases, their duration, the amount of the judgment rendered, and the court costs in each case. The Work of the City Court was a similar statistical analysis of every alternate judgment entered in the City Court, New York County, during 1930. The Work of the Municipal Court was a like analysis of every fifth action and summary proceeding (i.e., a proceeding to dispossess a tenant from the premises) instituted in the nine Municipal Court districts of Man-

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*Published in 1934.

*This is the highest court of original civil jurisdiction in New York County.

*The intermediate court of original civil jurisdiction in New York County.

*The lowest court of original civil jurisdiction in New York County.
hattan during 1929. Unfortunately, funds were never made available for publishing these very pertinent statistics and they lie today in the Society’s files in manuscript form. From time to time official requests have been made to the Society for data on specific matters, and frequently the Society has drawn on these tabulations and the material bequeathed it by the Institute to prepare special and confidential reports. Some of them are set out in a footnote.9

The first phase of the Society’s history was thus devoted largely to developing the data gathered by the Institute of Law. It was inevitable that the research policies should also reflect those of the Institute. Attention was focused on relatively broad exploratory studies dealing with basic data. There was little disposition to enter into controversial matters or to make studies aimed at the solution of isolated particular problems. In 1935, however, the Society lost the active leadership of Dr. Oliphant who went to Washington eventually to become General Counsel for the Treasury Department. Further, the New York Judicial Council had come into being charged with the functions of gathering, analyzing and publishing judicial statistics and recommending improvements in procedure and the administration of civil and criminal justice.10 This occupied some of the field which the Law Society, as the successor of the Institute, had been engaged in. Consequently, the Society re-examined its policy in the field of law reform to avoid duplicating the work of the Council. To this end it was concluded not to follow the exact footsteps of the Institute and its Survey of Litigation nor to bring that material up to date by later studies, but rather to use a similar technique in attacking

9The Work of the Judges in the City Court in Relation to Pending Legislation to Increase their Number; Some Suggestions as to the Central Jury Part of the Municipal Court; Some Figures and Observations on Accident Litigation in the Supreme Court; A Comparison of the Work of the Trial Term, Supreme Court, New York County, During the First Three Months of 1930, 1931 and 1932; Some Preliminary Figures on the Duration of Litigation in the Supreme Court, New York County, During 1930; Some General Considerations as to the Policy and Organization of the Municipal Court; Some Figures and Observations on Jury Trials Without a Jury in the Municipal Court; Memorandum in Support of the Senate Bill in Respect to Appeals from Motions Denying Summary Judgment; Memorandum on the Assignment of Justices in the Municipal Court; Memorandum on Broadening the Scope of Examination Before Trial in the Municipal Court of New York.

10N. Y. LAWS (1934) c. 128, §§ 40-48; N. Y. LAWS (1936) c. 231, § 1. The State Constitution has, since 1925, required the legislature to provide for the compilation of judicial statistics. Art. VI, § 22. But the command was completely ignored until the creation of the Judicial Council, except that the Supreme Court in the First Department did publish annually general statistics of its work.
specific problems which were not being handled by the Judicial Council, or to cooperate with the Council in pushing specific measures of common interest to both organizations.11

Shortly after the creation of the Judicial Council, the writers became associated with the Society. From about the same time its work has been financed by the generosity of individuals and of two foundations, at first, the New York Foundation, and later, the Carnegie Corporation of New York.11

Today the Society is an organization of twenty-four practicing lawyers and law professors,12 most of them with records of public service, and an advisory group of three members.13 It is in close relationship with the Yale Law School and its director of research is a member of that faculty. The Society has an office in the Bar Building, New York City, next to the Association of the Bar of the City of New York and, at present, employs three research assistants and secretarial aid. All reasonable requests for special reports and findings coming from those

12For obvious reasons the Council is not free to campaign for its proposals while the Society is, both as a group and as individuals.
13Neither of these foundations is to be understood as approving, by virtue of their grants, any of the statements made or views expressed in this article or any other publication of the Society.
14Present active members are: Robert M. Benjamin of Parker & Duryee; Thomas W. Chrystie of Chrystie & Chrystie; Porter R. Chandler of Davis, Polk, Wardwell, Gardiner & Reed; Kenneth Dayton, Budget Director of the City of New York; Eli Whitney Debevoise, of Debevoise, Stevenson, Plimpton & Page; Robert L. Finley of Parker & Duryee; Walter Gellhorn, Professor of Law, Columbia University; Edward S. Greenbaum of Greenbaum, Wolff & Ernst; Francis H. Horan, Special Assistant to the Attorney General of the United States; Nicholas Kelley of Larkin, Rathbone & Perry; André Maximov of Spence, Windels, Walser, Hotchkiss & Angell; Harold R. Medina of Medina & Sherpick, Professor of Law, Columbia University; Charles Poletti, Lieutenant-Governor of the State of New York; Whitney North Seymour of Simpson, Thacher & Bartlett; Kenneth M. Spence of Spence, Windels, Walser, Hotchkiss & Angell; David Teitelbaum of Donovan, Leisure, Newton & Lombard; Bethuel M. Webster of Webster & Garside; Herbert Wechsler, Professor of Law, Columbia University; Roswell Magill, Professor of Law, Columbia University.

Certain members, while retaining their membership, are inactive because of their official positions. They are: Mr. Justice Douglas, of the Supreme Court of the United States, recently Chairman of the Securities Exchange Commission; Herman Oliphant, General Counsel, Treasury Department; Clarence V. Opper, member of the Board of Tax Appeals; Jerome N. Frank, member of the Securities Exchange Commission; Thomas E. Dewey, District Attorney of the County of New York.
15Charles C. Burlingham; Charles E. Clark, Dean of the School of Law, Yale University; Robert P. Patterson, Judge of the District Court of the United States for the Southern District of New York.
actually engaged in official or unofficial efforts to effect particular improvements are considered. They are complied with if they are at all possible with the means available and with the program of research under way. Requests have often come from the bar associations in New York, or particular committees of those organizations, and the Society has at all times cooperated with such groups. Upon any question selected for investigation by the Society, all of the members sit as a committee of the whole. From the give and take of discussion, the efforts of the research staff are directed towards a reasonably attainable goal. The attention of the Society is not diffused through numberless committees and numerous projects, but it concentrates upon a few things at a time.

We shall treat next some of the specific projects undertaken by the Society during the second period.

EXAMINATION BEFORE TRIAL PROCEDURE

The provisions of the New York Civil Practice Act under this head are fearfully and wonderfully complicated.\textsuperscript{14} Yet on the whole, as construed by the courts at any rate, they are quite illiberal and unsatisfactory.\textsuperscript{15} Professor Edson S. Sunderland and Mr. Ragland, who was his pupil, have thoroughly explored the possibilities of examination before trial as a useful procedural device and have canvassed experience in Anglo-American jurisdictions under every type of provision.\textsuperscript{16} Their conclusions may well be accepted as sound. They found that oral examination is more satisfactory than written interrogatories and answers; that full oral examination is in practice a great aid in the search for truth; that it is a very effective way of preserving testimony; that it promotes settlement by showing to each party his own and his opponent's strength and weakness; that it indicates what the real issues are and what facts may as well be admitted, and in this way goes much further than the pleadings do to get a case in shape for trial. The new Federal Rules have reaped the full benefit of these studies,\textsuperscript{17} but the Law Society realized that so complete a reform in the state procedure would be altogether unpalatable to the legislature. The principal shortcomings in the New York scheme are these: in the First Department (New York and Bronx Counties) at least, it was unavailable for the important issues

\textsuperscript{14}\textit{N. Y. C. P. A.} (Gilbert Bliss, 1926) §§ 288-309.

\textsuperscript{15}\textit{Ragland, Discovery Before Trial} (1932) 337.


\textsuperscript{17}Rules of Civil Procedure for the District Courts of the United States, Rules 26 \textit{et seq.}
in negligence cases and was limited in all cases to facts which the movant had the burden of proving; in all departments it was limited to parties, their employees, and witnesses who were aged, infirm, out of state, or the like.\textsuperscript{18} In 1934 the Commission on the Administration of Justice in New York proposed a measure which was calculated to remedy many of these defects.\textsuperscript{19} This measure was introduced in the 1934 legislature as the Buckley Bill, but never reported out of committee. The Judicial Council held a public hearing in December, 1934, largely attended by lawyers, at which considerable opposition to the Buckley Bill was voiced. Judge Pound suggested that views and recommendations be submitted by interested groups. The Society, through a sub-committee, carefully combed the Buckley Bill and proposed a number of changes. Some of these related to objections expressed at the hearing, particularly a device to penalize one invoking the machinery in bad faith (\textit{e.g.}, to blackmail his adversary) while preserving the full legitimate scope of discovery. There were a great many other changes, most of which sought to secure a more practicable operation of the machinery. These suggestions were almost all approved by the Judicial Council, which also felt it necessary to limit the scope of examination procedure to parties and present and past employees of parties in order to head off attacks on the bill as too sweeping.\textsuperscript{20} The final proposal thus resulted from a combined effort.\textsuperscript{21}

\textit{Pre-Trial Procedure}

In the metropolitan area, calendar delay of eighteen months to two years in the supreme court is the rule in jury cases, and this spells real human hardship. A fuller examination before trial might contribute something towards reducing the congestion, but other procedures attack this particular problem more directly. Great strides along this line were made in Cleveland, Detroit, and Boston in the early thirties. In 1936, the Society decided to study these accomplishments at first hand with a view to drawing some conclusions that might have validity for New York. Mr. Stockman, therefore, visited these cities and spent about a week in each, closely observed the procedures at work, questioned at length the judges


\textsuperscript{19}\textit{Report of the Commission on the Administration of Justice in New York State} (1934) 276-284, 332-342.

\textsuperscript{20}The provisions of this Bill are set out in \textit{Second Report, New York Judicial Council} (1936) 161-174.

\textsuperscript{21}This bill has not yet been enacted.
and clerks charged with their administration, interviewed a number of representative lawyers and claim men, and ascertained what statistical sources were available by which to measure the effectiveness of the various devices. What was found, in brief, was this. In Detroit every case must go through a pre-trial hearing before it is tried. There is a separate call for chancery and law cases, each presided over by a single judge. On this call court and counsel consider (1) whether the pleadings must be amended, (2) what facts, if any, can be settled by agreement, and (3) whether the case can be settled without trial. Amendments are rarely allowed after a case has passed from the pre-trial docket. Stipulations commonly cover such issues as agency, control of premises, place of accident, and the like; and often dispense with formalities in the introduction of pictures, maps, and documentary evidence. The judge does not try aggressively to settle the case, but the possibility is explored and the setting made favorable to compromise. "A case which cannot be settled is kept on the pre-trial docket until the court is assured that all of the necessary amendments have been filed, all the requisite depositions taken, and that no continuances are likely to be asked for."22 The case then goes on the trial docket and is reached for trial within a month or two.23 Before the inauguration of pre-trial procedure the lapse of time between closing of issue and trial in Wayne County (Detroit) was about four years. This had been reduced to about 15 months, in 1936. Other factors materially aided in reducing this delay, yet there can be little doubt that the pre-trial procedure had played a most significant part. Trial lawyers in Detroit pretty uniformly felt that it was well designed to benefit both plaintiffs and defendants.

In Cleveland there was found a very informal procedure for settling cases. The key to it is the undivided effort of a single judge who handles the "call list" and "settlement list". As each case appears on the calendar this judge takes the initiative in finding out whether it can possibly be settled. If it can, it appears on the settlement list, but does not lose its place on the regular calendar. The same judge also uses his good offices to bring together counsel, in cases on the settlement list, and to launch settlement negotiations. If these fail the case is returned to the trial calendar. This system has not escaped a good share of criticism by the local bar. Yet it is an important part of a procedural machine which

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22Annual Report, Michigan Judicial Council (1936) 73.
23The authority for this whole procedure is found in three court rules. Rules of the Circuit Court for the Third Judicial Circuit of Michigan, Rule 4 of Div. I, Rules 2 and 6 of Div. II (as revised to Sept. 1, 1933).
has produced an enviable calendar situation in Cleveland. In 1936 Mr. Stockman found that "A case started six months ago can be tried today."

A pre-trial call was inaugurated in Boston in 1935, based largely on the Detroit experience. By 1936 this had already had measurable success. According to one judge who ably administered this procedure, the Superior Court in Suffolk County (Boston) disposed of three times as many cases during the quarter beginning December 1, 1935, as in the same quarter of prior years. Massachusetts has also taken another line of attack on calendar congestion by adopting the auditor system, not only in Suffolk but in other counties where the need existed. A Massachusetts statute permits a reference of cases, involving difficult questions of fact or long accounts, to auditors whose findings of fact may be used as prima facie evidence if either of the parties still insists on a jury trial."24 For a year (1932-3) this statute was applied to motor vehicle tort cases in Essex County, which includes the cities of Lynn and Salem and rural towns. The success of this experiment led to a demand by the bar for a revival of the system, and its extension to other counties. In 1935 the court acceded to these demands. A panel of auditors was selected by the justices in cooperation with the local bar associations. In Boston any pending automobile tort case was referred on motion of either party. In Essex County, all cases pending for a certain length of time were automatically referred and, later, any case might be referred on motion. Hearings before auditors involved the testimony of witnesses and were conducted with dignity. The auditor made findings and an award. Either party was free to reject the award and insist on a trial, to the jury if he wished, though the findings and award of the auditor were admissible in evidence upon such trial. Theoretically, of course, the auditor system might duplicate trials and increase delay and expense. In practice, it was found to do just the opposite. About 90% of the referred cases were settled or withdrawn after the auditor's report without further trial. Calendar delay (in Boston) dropped from 5 years to 3 years and 8 months during the first year and a half the system was in effect.25 There was a slight additional expense to the counties for the period during which the accumulation of cases on the docket was being cut down (when the judicial system was in effect doing double duty). But the saving that will result when the

25In February, 1938, the delay was two years and nine months. Pinanski, The Superior Court—Jury Pooling, Auditors, Pre-Trial (1938) 136 Boston Bar Bulletin, May, p. 3, at p. 17.
courts have caught up with the calendar is apparent from this, that an auditor’s hearing costs about $30 a day as compared to $400 a day for a jury trial.

After these studies were made the Law Society considered and discussed them at length and finally printed and circulated among the members of the bar a report of its studies and its proposals for New York City.\(^{25}\) These were addressed to tort jury cases which account for three quarters of the jury litigation and form the crux of calendar delay. Such cases should go through a pre-trial call. As to the time of this call, however, the Society proposed an innovation, namely, that it should occur shortly after issue joined. Disposition of the case at this time would be even more advantageous to the parties and the public than disposition shortly before trial. That seems obvious, but its accomplishment presented one very serious difficulty. The imminence of trial makes the question of settlement a real and pressing one. The removal of this pressure from the pre-trial call might take away an essential ingredient of a successful procedure. The Society, therefore, proposed that the pre-trial judge be empowered to order a prompt reference of any case that could not be settled. This combination of an early pre-trial call and an auditor system is believed to comprise as effective a formula for reducing calendar congestion in urban centers as can be devised within our constitutional framework.\(^{26}\)

The proposal of the Society caused a great deal of discussion among members of the bar. Committees of both bar associations in the city considered it. It was debated at an open meeting of the Association of the Bar of the City of New York. It brought forth a host of letters from lawyers—some of praise, some of criticism. It was taken up by Mr. Stockman with representatives of the Association of Casualty and Surety Underwriters and the chief claim men of several individual companies. As a result of these conferences it is probable that the inauguration of pre-trial procedure would encounter no serious opposition from insurance companies. Perhaps one of the most immediate and important achievements of the proposal was its influence upon the report of the Advisory Committee on the Federal Rules,\(^{27}\) which led to the incorpora-

\(^{25}\) A Proposal for Minimizing Calendar Delay in Jury Cases (1936).

\(^{26}\) Cf. Ex parte Peterson, 253 U. S. 300 (1920). Incidentally the hearing before the auditor would afford a complete examination before trial with all its attendant advantages.

\(^{27}\) The final Report of the Advisory Committee on Rules for Civil Procedure (1937) contained a draft of rules which had most of the essential features of the Society’s proposal, except that references could be ordered only where the issues were complicated. The
tion of very progressive provisions for pre-trial procedure in the Rules finally adopted by the Supreme Court.28

When this general interest in pre-trial procedure was at its height, the Judicial Council recommended the adoption of a rule of court in the first department (New York and Bronx counties) which would have set up a machinery essentially like that in Detroit—a proposal which finally won the support of one of the metropolitan bar associations.29 None of these schemes has yet been adopted, but the Society has not relaxed its efforts to further the final success of the one among them for which general support can be mustered. Nor has the interest which was aroused died down. The adoption of the Federal Rules and the report of the Committee on Pre-Trial Procedure of the Section of Judicial Administration of the American Bar Association has given it an impetus. The Society through its representatives presented the whole matter of examination before trial and pre-trial procedure before the general meeting of the New York State Bar Association in January, 1939. This will no doubt be the forerunner of further consideration by local bar associations.

STUDY OF THE CUSTOMS PROCESS

On October 5, 1934, Mr. Herman Oliphant, General Counsel of the Treasury Department, wrote the Society:

"There is an accumulation of over 200,000 cases in the Customs Court... with a consequent delay of serious proportions to cases being currently filed. This whole situation needs to be carefully studied by an agency that can bring to the work two things, first, the skill and patience for a really accurate statistical analysis of the various phases of the problem; and second, a thorough practical knowledge of the actual operation of our legal practice and procedural mechanisms."

The Society and a committee of the Yale Law School Faculty,30 therefore, undertook this study. They were fortunate enough to secure the full-time services of Mr. Charles U. Samenow, of New Haven, a lawyer and graduate of the Yale Law School, to conduct the statistical and

supporting note cites the Society's publication. Former drafts of the rules contained no analogous provisions. See proposed rules 16 and 53, and notes.

29Year Book, New York County Lawyers' Association (1938) 181-183. The Committee on Law Reform of the Association of the Bar of the City of New York also recommended adoption of the Council's proposal, but the recommendation was rejected by the association. Year Book, Association of the Bar of the City of New York (1937) 187. The proposal of the Judicial Council appears in its Third Annual Report (1937) at 43.  
30This committee consisted of Dean Charles E. Clark, and Fleming James, Jr.
observational part of the work. Mr. Samenow made a systematic study of the customs process and customs litigation for a period of some two years along both qualitative and quantitative lines. The study was made at the Port of New York where between 80% and 90% of all protests originate. The results of this work were collected by Mr. Samenow in a voluminous report which indicated the need for procedural changes. Committees of the Society and the Yale Law School studied this report intensively. The Society and the Law School committee then made their report, with detailed and specific recommendations for changes of administrative and customs court procedure. Some of the former have been adopted. The rest are still under official consideration.

THE CONSTITUTIONAL CONVENTION

A Constitutional Convention was held in New York in 1938. The year before the Society concluded that it could make a valuable contribution to the work of the Convention if it could prepare for the delegates a summary of the history and background of each section of the existing judiciary article. This work was undertaken. In the course of it unforeseen difficulties were encountered. There is a fine constitutional history of New York written in 1905,\footnote{Lincoln, The Constitutional History of New York (1906).} but nothing of note had appeared since then. There were also printed reports of the Constitutional Conventions, most of them containing transcripts of the debates. But there was no printed report of the Judiciary Convention of 1921 which framed the present article. At this time Mr. Leon Frechtel, who had just graduated from the Yale Law School, was working with the writers as research assistant. Largely through his persistent and resourceful efforts the original transcript of the minutes of the debates at this Convention was found and edited.\footnote{Lincoln, The Constitutional History of New York (1906).} But diligent search failed to unearth any copy of the proposals submitted to the Convention by its Executive Committee. In order to clarify the debates it was necessary to reconstruct laboriously the wording of each proposal from the debates themselves and the final measures adopted.

The results of this research were (1) a history of the Judiciary Article, section by section, which set forth all the antecedents of the existing provisions showing what changes had occurred, together with the reasons advanced for and against them, in committee (where that could be found) and in the Conventions, and which also gave all the proposals that had been unsuccessfully advanced and a summary of the debates
upon them; (2) an edited report of the debates in the Judiciary Convention of 1921. When the New York State Constitutional Convention Committee prepared the officially printed material for the constitutional delegates, it incorporated these works in their entirety in the volume entitled *Problems Relating to Judicial Administration and Organization.* Together they comprise over seven hundred pages of this volume. It is believed that they are useful not only for help they afforded the delegates but also as a distinct addition to the available material on the constitutional history of the state. 

**COLLECTION PROCEDURE**

The Society has long had an interest in studying the effectiveness of procedures for the collection of money judgments. Devices designed for this end have several aspects: (1) they may be viewed as machinery for getting at the assets of recalcitrant debtors—or of salvaging as much as possible from insolvent debtors; (2) they may also be judged in the light of their tendency to discourage or encourage unsound methods of granting credit; (3) finally, they may be evaluated as methods of rehabilitating debtors who find themselves in an embarrassed plight—without regard to the causes of such embarrassment. Of course these various aims are by no means mutually exclusive and a procedure could conceivably be efficient in all three directions. Indeed it is probable that a too single-minded pursuit of the first objective has generally defeated the others.

In 1935 the New York Civil Practice Act was amended so as to make supplementary proceedings more effective as a device for reaching assets. It sought to do this by extending the historic weapons of equity—the *in personam* order and punishment for contempt—into fields from which they had always been withheld, most notably, perhaps, that of future-acruing income. When these amendments had been in force

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{n} New York State Constitutional Convention Committee (1938).

{n} The judiciary article proposed by the Convention of 1938 failed of adoption by the people. There has been considerable agitation for another convention solely to frame a judiciary article. If such a convention is called the historical materials prepared by the Society should again prove of value.


for something more than a year, the Society decided to study the experience under them. This study was made in the City Court of the City of New York where most proceedings supplemental to judgment are pursued. It revealed that the changes had been moderately successful in subjecting to process various kinds of wealth and income which could not have been reached before. The study did not point unequivocally to the necessity of any specific changes in supplementary proceedings—viewed solely as a collection device—and was never published. It succeeded, however, in arousing the Society’s interest in the broader social aspects of collection procedure. This was more or less of a pioneer field, though some notable work had been done in it by men like William O. Douglas, Wesley A. Sturges of Yale, Thomas D. Thacher as Solicitor General, William L. Garrison, and Roger C. Minahan of Wisconsin.

A good deal of this had been directed to the rehabilitation of debtors—particularly wage-earners—through new bankruptcy procedure. One plan, however, is primarily aimed at bringing about sounder credit methods, that of underfiling, which is in effect in one form or another in Colorado, Delaware, Idaho, Indiana, New Jersey, Pennsylvania, British Columbia, and Ontario. Where this is in effect attachment, garnishment or execution by one creditor ensures to the benefit of all who file their claims in the same proceedings—and all existing creditors are given the privilege to file

Mills, 224 Mass. 193, 112 N. E. 879 (1916); Bowman v. Breyfogle, 145 Ky. 443, 140 S. W. 694 (1911). There was one exception to this rule, viz., equity would reach and apply future accruing income from a trust fund (if it was not a spendthrift trust). Bryan v. Knickerbacker, 1 Barb. Ch. 409 (N. Y. 1846); Sillick v. Mason, 2 Barb. Ch. 79 (N. Y. 1847); Wetmore v. Wetmore, 149 N. Y. 520, 44 N. E. 169 (1896).


Sturges & Cooper, Credit Administration and Wage Earner Bankruptcies (1933) 42 Yale L. J. 487; Sturges, A Proposed State Collection Act (1934) 43 Yale L. J. 1055.


Sturges & Cooper, op. cit. supra, note 35, at 520 (Note 123).
and prove claims. The debtor must furnish a list of creditors, who are notified, and anyone may contest any claim. All assets reached by any process are paid into court and distributed. There is no discharge. Of course, there is no compulsion upon other creditors to underfile except that if they do not they lose the opportunity to share in the proceeds of the assets which have been subjected to process in the proceeding. Such a scheme eliminates the opportunity to gain advantage by racing to collection—a race in which the swift have never been predominantly the deserving. This in turn tends to make creditors recognize the common interest they have in their common debtor and to prevent prospective creditors from relying on high pressure collection methods instead of taking care in the extension of credit. The personal receivership is more or less fashioned to the same end. The Society was seriously considering studies of some of these procedures in operation when the Chandler Act was passed in June, 1938, with its provisions for the liquidation of wage earner debts by installments. The practical effect of this upon our plans was discussed at several committee meetings. The wage-earner provisions of the Chandler Act are concerned primarily with the rehabilitation of the embarrassed but honest debtor who invokes them. They may succeed fairly well in doing this and yet leave two problems unsolved: (1) Can rehabilitation be done better in the state or federal courts? (2) Does the Act discourage unsound overextension of credit? The answer to the second question propably depends on how freely debtors will invoke the Act when they are beset with garnishment, wage-assignments, and supplementary proceedings under state statutes. If wage-earners are as loath to resort to the new provisions as they were to go into “straight bankruptcy”, grave abuses will remain. After all, the debtor has always been able to end the race for his assets by voluntary bankruptcy if he was willing to take this step and the stigma that went with it. No doubt one aim of the Chandler Act is to remove this stigma and perhaps it will. At any rate the Society concluded that this year is not the time to embark on the study of further changes. Rather, it is going to do everything it can to help the Chandler Act succeed and study its actual operation in New York to see how well it succeeds, and in how many directions.

40 52 STAT. 840 (1938), 11 U. S. C. A. (Supp. 1938). The wage-earner liquidation provisions are found in Chapter XIII.

41 See Douglas, Wage Earner Bankruptcies—State v. Federal Control, supra, note 34.

42 See Symposium (1933) 42 Yale L. J. 473-642.
STUDY OF REGISTRATION OF TITLE TO LAND

In 1937 there was urged upon the Carnegie Corporation the need for an impartial examination of the facts concerning title registration in New York. This corporation agreed to finance such a study and chose The New York Law Society to supervise it. The survey and report of the subject were made by Professor Richard R. Powell of the Columbia Law School, who consulted from time to time with a committee of the Society. The results of this study were recently published and constitute a valuable addition to the literature on the subject. Not only is the legislation and practice in New York thoroughly analyzed, but there is also a detailed treatment of the situation in other jurisdictions where land titles are registered.

ECONOMICS OF THE LEGAL PROFESSION

In 1937 sub-committees of the committees on legal education of the two bar associations in New York City approached the Society in connection with the problem of numerical limitation of admission to the bar. The staff of the Society canvassed at great length the possible ways in which it could bring its research facilities to bear on the question. The methods of approaching this general subject have been so well described in detail in recent publications that no useful purpose would be served by rehearsing them here. Suffice it to say that the Society’s interest in the matter has during this past year led to its cooperation with the Joint Conference on Legal Education of the State of New York in setting up a tentative plan for a survey of the public and the bar in certain selected communities in the state, including New York City. If the funds for undertaking this study are forthcoming—and it seems likely that they will be—the Society and its staff will play an important part in conducting this study.

STUDY OF ADOLESCENT DELINQUENCY

About six month ago an interesting book on adolescent delinquents entitled Youth in the Toils was written by Leonard V. Harrison and Pryor McNeill Grant under the auspices of the Delinquency Committee of the Boys’ Bureau, which was a department of two outstanding welfare agencies in New York City,—the Association for Improving the Condi-

*Powell, Registration of the Title to Land in the State of New York (1938).

“A reference to and analysis of all of these surveys is contained in The Economics of the Legal Profession (1938), prepared by the American Bar Association’s special committee on the economic condition of the bar.
tion of the Poor and the Charity Organization Society. The authors painted a sordid picture of the effect of the criminal procedure upon delinquent boys, 16 to 21 years of age, who ran foul of the law and whose treatment by the law was in no way differentiated from that of older hardened criminals.

This book reached its mark so far as the Society was concerned, for the interest of one of its members led to the appointment of a committee and their meeting with the research staff, the Commissioner of Correction of New York City, and the Director of the Citizens' Committee on the Control of Crime in New York, Inc., to consider the problem and lay plans for its study.

Of the various aspects of the problem posed by *Youth in the Toils*, the Society chose for its task an investigation of the existing legal procedure between the time of arrest and of commitment as it affected boys of the age in question.

Fortunately, at this time, the Citizens' Committee on the Control of Crime, an organization formed "to study and seek means of dealing with the problems existing in connection with the prosecution, suppression and punishment of crime, and to educate the public with respect to such problems" has completed the gathering of field material and possessed complete case histories on every felony and serious misdemeanor for which an arrest was made from July 1, 1937, to June 30, 1938. This material was thought to be a convenient place to start, and the Society is cooperating with the Citizens' Committee in a specific study of adolescents.

At present the data are being processed and tabulated with a view to finding out the number of the different types of crimes committed by adolescents, according to their ages, the dispositions of cases through the procedural stages (commonly known as a "mortality" analysis), their duration, and, most important of all, an analysis of the frequency and duration of incarceration pending the disposition of their cases. This last, of course, is related to the problem of bail. When it has finished these tabulations the Society's staff will make observational studies of the handling of adolescents in places where this is reputed to be done well and will canvass what has been written on the subject. From all this it is hoped that some real contribution can be made towards a more intelligent and less wasteful treatment of adolescent delinquents in the period between their arrest and final disposition of their cases.

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45 *Twelve Months of Crime in New York City*. A report by the Citizens' Committee on the Control of Crime, Inc. (1938).
TORT ACTIONS BETWEEN HUSBAND AND WIFE†

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In PRIMITIVE law the wife was looked upon as the husband's chattel. She had no political nor legal rights. She remained in practically the same condition during the period of the strict law in our common law up to the 17th century. She had no separate legal existence apart from that of her husband. The two were regarded as one. She could neither enforce nor defend any rights in the courts unless her husband be joined with her as plaintiff or defendant. Being one entity, the common law knew of no actions between them of any nature whatsoever, either property or tort.

During the 17th and 18th centuries our common law entered upon a period of liberalization by the infusion of equity or natural law. A like change took place in the civil law during the same centuries. In the Roman law this infusion of equity, morals, and natural law into the previous strict, rigid and formulary law is represented by the incorporation of the *jus gentium* and *jus naturale* into it during the late Republic and early Empire, 178 B.C. to the time of Diocletian, 284 A.D.† The Roman praetor exercised equity jurisdiction with respect to married women's rights along the same lines that were later developed by the English Chancery court.

The separate entity between husband and wife has always been recognized in equity. But that was a property court only. Hence the doctrine developed that a wife may sue her husband to enforce property rights, and especially rights arising with respect to her separate estate which chancery had created. The married women's acts which were generally

†This article will be concluded in the May issue of the Journal. The reader is referred to an appendix of statutes appearing in this issue at the conclusion of this portion of the article.

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enacted during the reform movement in this country in the last half of the 19th century, undertook to make these equitable estates legal estates. These acts have very generally received the construction that the spouses may sue each other with respect to the enforcement of property rights. Under these acts the law courts commenced to take jurisdiction of property suits between husband and wife but some refused on the ground that such actions were peculiarly within the province of equity jurisdiction and declined to entertain even property suits between the spouses. Hence a conflict in the cases has developed in law and in equity as to which courts should still have jurisdiction in property disputes between husband and wife. Law courts that have thus declined jurisdiction in property suits would consequently hold that tort actions between the spouses were inadmissible. The legislative purpose in the enactment of the married women's acts was undoubtedly to place husband and wife on an equality as to property matters and the same purpose, although often not so clearly expressed, seems to have been in the legislative contemplation with respect to tort actions.

While the primary purpose of this paper is to examine the tort actions between husband and wife, it is deemed desirable to precede that by a brief survey of the property actions between them. Originally all suits between the spouses grew out of property controversies and were confined to equity courts and no torts were recognized that did not affect property or that did not fall within recognized heads of equity jurisdiction. It was only after the married women's property acts became generally enacted that questions arose whether tort actions were permissible between the spouses and whether such must relate to injuries to property alone or might be extended to damages for personal injuries suffered by one spouse at the hands of the other.

I

Accordingly, replevin actions between husband and wife have been denied in some jurisdictions either because the statute did not specifically authorize them or because such suits were not permitted at common law.2 Other jurisdictions have sustained such actions between spouses.3

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2Plotkin v. Plotkin, 32 Del. 455, 125 Atl. 455 (1924) (Court applies strict construction and policy argument. Right not clearly expressed in statute); Hobbs v. Hobbs, 70 Me. 383 (1880) (common law).

3Notes v. Snyder, 55 App. D. C. 233, 4 F. (2d) 426 (1925); Thresher v. McElroy, 90 Fla. 372, 106 So. 79 (1925) (wife sued third party for her property sold to defendant by her husband); Shewalter v. Wood, 183 S. W. 1127 (Mo. App. 1915) (Conversion by wife
Where either spouse has sued the other for conversion of property there has been a similar divergence in decisions. New York has allowed the actions. Thus a suit is maintainable in equity by the wife against her husband for her separate property of which he had deprived her. On the other hand the validity of a contract between husband and wife for payment of money has been denied and a refusal to perform by repayment is not a ground for a suit by one against the other for conversion. Nor is trover maintainable by one against the other for converted property.

The purpose of the married women's acts was not only to make the wife independent of her husband in property matters, but also to simplify the old equity procedure by enabling the wife to sue or be sued alone. Under the chancery practice the wife always had to join her husband if her interest were not antagonistic to his. If antagonistic she had to sue by next friend and make her husband defendant. Suits in equity between husband and wife must involve property or fall under heads of recognized equity jurisdiction. She may maintain a bill in equity against the husband for maintenance and custody of her children, to enforce a

of heirlooms, divorced at time of suit; Bruner v. Hart, 178 Okla. 222, 62 F. (2d) 513 (1936).


*Smith v. Gorman, 41 Me. 405 (1856). In Eddleman v. Eddleman, 183 Ga. 766, 53 Ga. App. 368, 186 S. E. 154 (1936), it was held that a husband could not maintain trover against his wife for a ring although he was living apart from her. This decision by the Georgia Court of Appeals was reversed by the Supreme Court of Georgia, Feb. 10, 1937, Eddleman v. Eddleman, 183 Ga. 766, 189 S. E. 833 (1937). The court there held that a husband might sue his wife in bail-trover, proceeding for the recovery of his personal property converted by her, since the statutes make a wife a femme sole with respect to her property rights. It is observed that trover is founded on violation of property right where the action is maintainable, as distinguished from an injury to the person, where it is not.

*Douglas v. Butler, 6 Fed. 228 (C. C. D. N. J. 1881); Taylor v. Holmes, 14 Fed. 498 (C. C. W. D. N. C. 1882); Smith v. Smith, 18 Fla. 789 (1882); Thresher v. McElroy, 90 Fla. 372, 106 So. 79 (1925); Abramsky v. Abramsky, 261 Mo. 117, 168 S. W. 1178 (1914) (may sue either at law or in equity under statute); In Matter of Badger, 286 Mo. 139, 226 S. W. 936 (1920); Miller v. Miller, 44 Pa. 170 (1863).

*Peters v. Peters, 20 Del. Ch. 28, 169 Atl. 298 (Ch. 1933); Wilson v. Wilson, 96 Fla. 358, 118 So. 215 (1928); Anthony v. Anthony, 135 Me. 54, 188 Atl. 724 (1937); Druker v. Druker, 268 Mass. 334, 167 N. E. 638 (1929) (Jurisdiction extends to separate property, prevention of fraud, relief from coercion, enforcement of trusts, establishment of conflicting rights in property); Whitney v. Whitney, 49 Barb. 319 (N. Y. 1867).

*In Matter of Badger, 286 Mo. 139, 226 S. W. 936 (1920).
promise by him to repay a loan made to him out of her separate estate, to compel the performance of contracts between them and to impress a trust upon money received for her property. He may maintain a bill against her to enforce a reconveyance of land deeded by him to her without consideration. Either may compel an accounting for trust funds arising from his or her property. But neither may have an accounting for money derived from joint earnings nor from sale of joint property. The wife can sue in equity to redeem real estate in which she has an inchoate dower right from a mortgage, and the husband may recover in an equitable action money advanced for the benefit of the wife's separate estate. Under the married women's acts the wife may recover a money judgment against her husband, but she has been denied an action against her husband to recover money received by him from her separate estate in Pennsylvania. Such actions are now authorized by recent statute in that jurisdiction. She may recover from her husband the money due upon a promissory note representing her separate property, and he may sue the wife as executrix for a debt due him from her testator. In some jurisdictions the wife cannot sue her husband to recover money or a debt, either because such actions are expressly excluded by statute, or are not included among those conferred by it. Generally,

12Lawler v. Lawler, 107 Ark. 70, 153 S. W. 1113 (1913).
13Perkins v. Bletheu, 107 Me. 443, 78 Atl. 574 (1911).
14Whiting v. Whiting, 114 Me. 382, 96 Atl. 500 (1916).
22Wilson v. Wilson, 36 Cal. 447 (1868); Mathewson v. Mathewson, 79 Conn. 23, 63 Atl. 285 (1906) (suit maintainable at law; extensive history of the Connecticut property acts); Graves v. Howard, 159 N. C. 594, 75 S. E. 998 (1912). Contra: Heacock v. Heacock, 108 Iowa 540, 79 N. W. 353 (1899) (holding wife cannot recover interest on a note against husband in action at law in which she is payee); Lord v. Parker, 3 Allen 127 (Mass. 1861) (married woman not liable upon partnership note of which she is member with husband as she cannot form a partnership with husband).
however, actions between spouses for money will lie under the married women's acts at law or in equity. Thus a wife may enforce the payment of a debt due from her husband by a writ of attachment levied on the community property.

A wife cannot sue her husband on a foreign judgment at law although valid where entered. Nor may such foreign alimony judgment be enforced by a bill in equity. It is only a suit for payment of money unauthorized by statute prohibiting suits between husband and wife in Massachusetts. Here special grounds for equitable relief must be established to take the case out of the prohibition of the statute. Jurisdiction in equity exists over suits between spouses to secure the wife's separate property, to prevent fraud, to relieve from coercion, to enforce trusts, and to establish other conflicting rights concerning property. A statute enjoining suits between husband and wife is not applicable where she enters judgment against him by virtue of a warrant of attorney contained in a judgment note. The wife may not sue her husband in an action at law on a bond for payment of alimony. It would seem that she is equally without a remedy in equity under the Massachusetts cases. The husband may maintain an action against a public recorder of mortgages to compel his performance of an official duty by erasing an improper record of a foreign alimony judgment.

The common law imposes an obligation upon the husband to support his wife, but she could not enforce that obligation by suit against her husband. If third persons supplied her with necessities where the husband had failed to do so, they could collect there-for against him. Under the married women's acts, where the wife has supplied and paid for such necessaries out of her separate estate, and sued her husband for reimbursement, there is a conflict in the cases whether she may recover.

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23Whitney v. Whitney, 49 Barb. 319 (N. Y. 1867) (suit for money lies in equity); Grubbe v. Grubbe, 26 Ore. 363, 38 Pac. 182 (1894); Seredowicz v. Seredowicz, 3 D. L. R. 47 (1934) (Court of Appeal for Manitoba held that the husband could sue his wife for conversion of money).

24Ryan v. Ryan, 661 Tex. 473 (1884).


29State ex rel. Macheca v. Dunn, 148 La. 460, 87 So. 236 (1921).
The majority of the courts have denied the action. Some courts have allowed it.

In absence of statute, a wife cannot sue her husband at law upon an implied contract. Nor has she a cause of action against him upon a written contract providing for separation, maintenance, and compensation for loss she sustained in breaking up her home by marrying. An action for damages is not maintainable by the wife against her husband for breach of the marriage contract, consisting of cruel treatment, failure to provide support promised prior to marriage, or for humiliation. Here her only remedy is divorce.

The husband can sue his wife to establish property rights; to recover, settle, and protect property, and to establish a resulting trust where the wife has taken property in their joint names purchased with his funds. The corresponding rights exist in the wife. Under the Louisiana code the wife’s property actions are very few and all suits against the husband must have the authorization of the court. They include actions for restitution of her paraphernal property. She cannot sue the husband in assumpsit in absence of statute. Covenant by the wife against the husband for permitting waste and destruction of real estate in which she has a remainder after the expiration of his life estate is not maintainable. Unliquidated damages for breach of covenant are not “property” within meaning of the statute. Nor may she sue him in trespass or ejectment.

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31DeBrauwere v. DeBrauwere, 144 App. Div. 521, 129 N. Y. Supp. 587 (1st Dept’ 1911), aff’d, 203 N. Y. 460, 96 N. E. 722 (1911) (wife can recover reasonable amount expended for necessaries from her separate estate); Sodowsky v. Sodowsky, 51 Okla. 689, 152 Pac. 390 (1915) (Can recover sum expended for necessary support in action at law).

32Pittman v. Pittman, 4 Ore. 298 (1872).


34Gowin v. Gowin, 254 S. W. 529 (Tex. Civ. App. 1924) (Intimated that if damages from husband’s wrongful acts belong to her separate estate the action would lie), aff’d, 292 S. W. 211 (Tex. 1927); Note (1924) 10 CORN. L. Q. 61 (favoring the action).


36Bouligny v. Fortier, 16 La. Ann. 209 (1861); Vigerue v. Vigerue, 133 La. 406, 63 So. 89 (1913); Harvey v. Engler, 184 La. 858, 860, 168 So. 81, 82 (1936) (court said: “... during the existence of the marital status the husband cannot sue his wife except for causes authorized by law.”).

37Hobbs v. Hobbs, 70 Me. 381 (1879).

38Miller v. Miller, 44 Pa. 170 (1863).
even though it be her separate estate.\textsuperscript{39} Relief must be in equity for protection or restoration of that.\textsuperscript{40} The remedy for an injury to the wife’s property is at law, and a bill in equity to restrain the husband from interfering with it will not lie unless it is necessary to prevent irreparable injury.\textsuperscript{41} The wife may bring an action for partition of real estate held jointly with her husband,\textsuperscript{42} and he, for accounting and partition of joint personal property.\textsuperscript{43}

II

Since the married women’s acts permit the wife to sue alone, she may sue third persons either in property matters, or for torts committed against her, and that whether her husband acted jointly with the defendant or not.\textsuperscript{44} At common law she must bring such actions with her husband jointly, where he is also liable for her own torts against third persons.\textsuperscript{45}

\textsuperscript{39}Smith v. Smith, 4 N. J. Misc. 596, 133 Atl. 860 (C. C. N. J. 1926); McKaig v. McKaig, 154 Misc. 257, 276 N. Y. Supp. 829 (Sup. Ct. 1935) (husband had voluntarily withdrawn from home—could not sue wife in ejectment since her possession was not adverse to his, but was in law his possession); see Caplan v. Caplan, 268 N. Y. 445, 449, 198 N. E. 23, 25 (1935) ("... A wife may not sue a husband for a trespass upon her person, whether committed by the husband in person or through his agent."); Note, \textit{Actions of Trespass Between Husband and Wife}, (1935) 79 L. J. 270.

\textsuperscript{40}Smith v. Smith, 4 N. J. Misc. 596, 133 Atl. 860 (C. C. N. J. 1926).

\textsuperscript{41}Larison v. Larison, 9 Ill. App. 27 (1881).

\textsuperscript{42}Shafer v. Shafer, 30 Ohio App. 298, 163 N. E. 507 (1928); Moore v. Moore, 59 Okla. 83, 158 Pac. 578 (1916).


\textsuperscript{44}Thresher v. McElroy, 90 Fla. 372, 106 So. 79 (1925) (replevin for property her husband had wrongfully sold to defendant); McDonald v. Levenson, 238 Mass. 479, 131 N. E. 160 (1921) (personal injury caused by joint negligence of husband and defendant); Ackerson v. Kibler, 138 Misc. 695, 246 N. Y. Supp. 580 (Sup. Ct. 1931) (wife sued defendant alone for his and her husband’s joint negligence causing her personal injury); Ackerson v. Kibler, 232 App. Div. 306, 249 N. Y. Supp. 629 (4th Dep’t 1931) (defendant brought in plaintiff’s husband and sought to recover contribution from his joint tort-feasor. Held: husband cannot be joined as defendant, as plaintiff had no cause of action against him, and defendant is not entitled to contribution); Oppenheim v. Kridel, 236 N. Y. 156, 140 N. E. 227 (1923) (criminal conversation); Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17 (1889) (alienation of husband’s affection); see Stevenson, (1897) 29 \textit{Chicago L. J.} 412 (torts committed against wife by third persons and her right to sue therefor alone or with husband jointly).

\textsuperscript{45}Douglas v. Butler, 6 Fed.-228 (C. C. D. N. J. 1881) (joint action by wife and husband against defendant to compel surrender of title and possession to real estate); Sargeant v. Fedor, 3 N. J. Misc. 832, 130 Atl. 207 (Sup. Ct. 1925) (husband and wife both liable for her slander); Notes (1925) 74 U. of PA. L. Rev. 305 (approved); (1934) 83 U. of PA. L. Rev. 66 (liability of a husband for the torts of his wife).
III

It is in the field of tort actions that the courts have disagreed as to whether the married women's acts have changed the common law rule so as to authorize such suits between husband and wife. The acts in the various jurisdictions are not generally specific on the point. Some acts mention torts directly, while many confer the right upon the wife to sue for injury to her person, character and reputation. Most of them empower the wife to bring the actions against persons generally, and do not distinguish between third persons and husbands. Very few prohibit suits between spouses, and some directly authorize them. Since the married women's acts had the equity practice back of them, courts found no difficulty in interpreting them as conferring the right of action between husband and wife with respect to property. No such background for tort actions between spouses existed at common law, and they were unknown in equity, which dealt only with property. No precedents in favor of tort actions existed at common law, and none opposed seems to have arisen in England until the beginning of the last quarter of the 19th century. While equity had always recognized the duality between husband and wife, the common law had always regarded them as one, so no suit could arise between them because of the impossibility of the same person being both plaintiff and defendant in the same suit. While it is generally stated that no actions were maintainable between husband and wife at common law, either in property or tort, that is not due to precedents opposed, but to the fiction of unity which prevented any such actions being brought at all. The statements universally found in the cases, and referred to by text writers, that no actions in tort were maintainable between spouses at common law are therefore only dicta since no adjudicated precedent, either for or against the action, existed until quite recently, and after the married women's acts had been generally enacted. We can say, then, that tort actions between husband and wife were unknown at common law, and the same is true of property actions.

46Viguerie v. Viguerie, 133 La. 406, 63 So. 89 (1913); Libby v. Berry, 74 Me. 286, 43 Am. Rep. 589 (1883) (no tort action between spouses at common law, nor against husband's co-defendant who acted under his direction); Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382 (1915) (no tort action between spouses at common law); State v. Kirby, 167 Tenn. 307, 69 S. W. (2d) 886 (1934) (no tort action between spouses at common law); Sykes v. Speer, 112 S. W. 422 (Tex. Civ. App. 1908) (no tort action between spouses at common law); Wilson v. Brown, 154 S. W. 322 (Tex. Civ. App. 1912) (no tort action between spouses at common law); Phillips v. Barnet, 1 Q. B. Div. 436 (1876) (no action lies by wife against husband after divorce, for an assault committed during coverture.
The rule with respect to tort actions between husband and wife originated in assault and battery cases. We shall first consider the cases where the wrongful act resulted in the death of the wife and where her administrator has brought the action against the husband or his estate, under the survival statutes, for the benefit of the wife's estate. Here the action has been allowed in a single jurisdiction and denied in five, so far as reported cases are available. In the jurisdictions where the actions have been denied it has been on the ground that only such actions survive as the wife had during her life time and that she had no cause of action against her husband for an assault and battery committed during the coverture. Kentucky, while denying recovery for the wife's estate, has allowed the action for the benefit of her surviving children, to the extent that they are entitled to share in the recovery under the statute.

Among the assault and battery cases between husband and wife in this country, not resulting in death, the majority have denied the action. Many of these cases have been brought after divorce of the parties. The ground for denial has usually been that the action did not exist at common law and that the legislatures in enacting the married women's acts

Blackburn, Lush and Field placed decision on the ground that husband and wife were one person. Lush—"a case of the first impression."); see STEWART, HUSBAND AND WIFE, (1887) § 48 (Matrimonial offenses between husband and wife give no right of action in tort.); COOLEY, TORTS (4th ed. 1932) § 169 (For a personal tort by the husband to her person or reputation the wife can sustain no action, but she must rely upon the criminal laws for her protection or seek relief in separation or in proceedings for a divorce).

"Fitzpatrick, Adm'r. v. Owens, 124 Ark. 167, 186 S. W. 832 (1916) (allowed—intent of married women's act to confer same rights against husband as others); Note (1916) 16 COI. L. REV. 606 (tort actions not more subversive to public morals than other actions); Dishon's Adm'r. v. Dishon's Adm'r., 187 Ky. 497, 219 S. W. 794 (1920) (denied—no cause of action against husband for tort—he would be sole beneficiary in case of recovery—no children left); Robinson's Adm'r. v. Robinson, 188 Ky. 49, 220 S. W. 1074 (1920) (allowed for benefit of children to the extent they are entitled to recovery); In re Dolmage's Estate, 203 Iowa 231, 212 N. W. 553 (1927) (denied—"any person" in statute does not include husband—no intent to confer greater rights upon wife than possessed by husband); Notes (1928) 26 MICH. L. REV. 455, (1928) 7 TENN. L. REV. 63 (prefers minority—seems to be afraid of fraud in insurance cases); Wilson v. Barton, 153 Tenn. 250, 283 S. W. 71 (1925) (denied—wife had no cause of action for the assault in lifetime. Code created no rights of action but merely provided for survivorship of rights she had already); Wilson v. Brown, 154 S. W. 322 (Tex. Civ. App. 1912) (guardian of children denied action against father who killed their mother—she had no cause of action against husband had she survived); Keister's Adm'r. v. Keister's Ex'rs., 123 Va. 157, 96 S. E. 315 (1918) (denied—wife had no cause of action in her lifetime and statute construed to confer remedies only where she already had substantive civil rights).

Robinson's Adm'r. v. Robinson, 188 Ky. 49, 220 S. W. 1074 (1920).
did not intend to confer any new rights upon either spouse that they did not possess at common law. The usual provision found in these acts that the wife may sue and be sued as if unmarried has, in this line of decisions, been construed to refer to suits against or by third persons; and that these acts only empower the wife to maintain and defend such suits alone, without joining her husband as plaintiff or defendant as the common law and chancery practice required. Therefore, there could have been no intent to authorize such suits between husband and wife. The fact that many such suits have been brought after divorce does not make that a cause of action which did not exist during coverture when the injuries were inflicted.

The first tort action between spouses that seems to have been reported in this country was one for assault and battery committed in New York in 1863. The suit by the wife was denied and seems to have initiated the majority rule for such actions. An attempt to change this rule in that state subsequently failed when the court of appeals reversed the supreme court, which had held that a wife could maintain an action for assault and battery against her husband under the statute of 1860, which allowed her to sue "any person" for an injury to her person. The reversal was without opinion, and has remained the law in New York ever since. As this doctrine of tort actions rests on the theory of unity of person, the court cannot, in denying her action, award costs against her.

Several states have followed the lead first established in New York, in denying actions for assault and battery between wife and husband. First among them were Iowa and Maine. The Maine cases were both brought by the wife after divorce, and in both, the assault occurred during coverture and with the assistance of a third person, who acted under the direction of the husband. The actions could not be maintained

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51 Peters v. Peters, 42 Iowa 182 (1875) (statute conferred rights to sue for property only); Abbott v. Abbott, 67 Me. 304 (1877) (wife forcibly incarcerated in insane asylum); Libby v. Berry, 74 Me. 286 (1883) (wife forced to submit to an operation to procure a miscarriage).
against either the husbands or their confederates. In the earlier case, decided under the common law, the confederate could not be sued without the husband joining as party plaintiff; and in the later case, under the statute enabling the wife to sue alone, she sued both jointly. Since the husband was not liable, the court held that his confederate who acted under his direction, was not liable. The statute gave the wife no new cause of action but only enabled her to sue alone, where formerly she had to join her husband, or where the husband could sue alone for torts committed against her. Since no cause of action existed during coverture, there was none after divorce. Decisions in other jurisdictions have been along the same line, in denying the right of either spouse to maintain an action for assault and battery against the other.\textsuperscript{53}

In 1910 came the leading case of Thompson v. Thompson\textsuperscript{54} from the Supreme Court of the United States. The wife sued the husband for assault and battery, under the District of Columbia statute empowering married women to sue separately, "for torts committed against them" as fully and freely as if unmarried. The action was denied. The court placed the construction upon the statute, which we have seen in the earlier Maine cases. The court said: "The statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which, at common law, must be brought in the joint names of herself and husband."\textsuperscript{55,54} The only effect of the statute as construed, was to remove the common law requirement that the husband must be joined with her in suits, and it permitted her to sue alone only where she already had a cause of action.

\textsuperscript{53}Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909) (husband sued wife for battery—right of action denied); Strom v. Strom, 98 Minn. 427, 107 N. W. 1047 (1906) (suit by divorced wife for an assault denied—statute gave her no greater rights than husband had at common law); Note (1906) 6 Col. L. Rev. 533 (incline to liberal view); Sykes v. Speer, 112 S. W. 422 (Tex. Civ. App. 1908) (damages for personal injuries inflicted by husband awarded wife in divorce action—divorce valid but provision awarding damages held void); Phillips v. Barnet, 1 Q. B. Div. 436 (1876), cited supra note 46.

\textsuperscript{54}218 U. S. 611 (1910); Notes (1927) 21 Ill. L. Rev. 515 (approves majority view in Thompson case); (1910) 9 Mich. L. Rev. 440 (quotes liberally from dissenting opinion), (1910) 16 Va. L. Rev. (n.s.) 856 (disapproved—"We are constrained to believe that the law-making power never contemplated the construction of the act now placed upon it by the Supreme Court of the United States."), (1924) 33 Yale L. J. 315 (approves new trend of decisions allowing suits for tort between wife and husband to be maintained. Turn of the tide indicated in the dissenting opinion in Thompson case), (1913) 22 Yale L. J. 250 (well argued comment in support of tort actions by wife against husband, showing how statutes are disregarded by construction by courts that deny the action).

\textsuperscript{55}218 U. S. 611, 617 (1910).
at common law, or where formerly both must be joined, or, where the husband could sue alone for torts against his wife. Her right of action for tort, under the statute, was limited to third persons. Justice Harlan dissented. Justice Holmes and Chief Justice Hughes concurred on the ground that Congress could not have intended to allow the wife to sue the husband in tort for recovery of property, and deny her the right to sue in tort for injury to her person.

Since that case was decided, three jurisdictions have had occasion to affirm the rule in assault and battery cases. That tort actions between husband and wife are not maintainable under the married women’s acts is also supported by Cooley.

Up to the time of the Thompson case, not a single jurisdiction in this country had permitted either spouse to maintain an action for personal tort against the other. The liberal views expressed in the dissenting opinion in that case, has been the occasion for creating a line of division in tort actions between husband and wife ever since. The majority of the courts still follow the rule of that case, and the cases that preceded it. Unfortunately, that case did not appear until after the tort rule with respect to actions between spouses had been settled in many jurisdictions. In jurisdictions where the question was still an open one, the doctrine expressed by Justice Harlan began to receive recognition. The jurisdictions that have adopted the liberal view, by allowing tort actions between husband and wife, constitute a growing minority. Here, as in the states that follow the majority rule, the assault and battery cases preceded the negligence cases.

Connecticut and Oklahoma were the first states to break away from the prevailing rule, by allowing the wife to maintain an action for damages against her husband for assault and battery inflicted by him upon her during coverture, and resulting in personal injury to her.

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55Butterfield v. Butterfield, 195 Mo. App. 37, 187 S. W. 295 (1916) (suit for assault and battery denied—common law rule not changed by statute), rehearing denied 195 Mo. 37, 197 S. W. 374 (1916); Smith v. Smith, 14 Pa. D. & C. 466 (1930) (suit by wife for assault and battery after divorce denied—statute prohibits suits between husband and wife, except for divorce and to protect and recover her separate property); Lilienkamp v. Rippetoe, 133 Tenn. 57, 179 S. W. 628 (1915) (suit by divorced wife for assault denied—wife emancipated by statute as to property—assault by husband made a misdemeanor, but disability to sue him in tort not abrogated).

56COOLEY, TORTS (4th ed. 1932) § 169 (But even under these statutes the wife cannot maintain an action against her husband for a personal injury).

57Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914) (wife’s suit allowed for assault and battery and false imprisonment—public policy argument against action examined and rejected); Fiedler v. Fiedler, 42 Okla. 124, 140 Pac. 1022 (1914) (divorced wife sued for
Then New Hampshire, which has always possessed liberal and progressive courts, fell in line.\textsuperscript{58} The statute there is no broader than in other jurisdictions that have denied the action. It is construed to confer the same rights for injuries against husbands as against any other person. Alabama allowed the wife to sue for an assault and battery, by the husband, under a statute empowering the wife to sue alone "for all injuries to her person".\textsuperscript{59} The remaining jurisdiction, in which this type of action has been sustained, is South Carolina.\textsuperscript{60}

Another type of analogous case coming under this head, and which does not reflect credit upon the marriage relation, is where the wife has been the innocent victim of venereal infection from the husband. Suits by the wife on these grounds have been sustained in one jurisdiction and denied in two. Criminal prosecution has been denied in England.\textsuperscript{61} These cases also have generally been preceded by divorce before the actions were brought.

In all cases where the wife has sued the husband—alone, or jointly with his confederate, for false imprisonment, the action has been denied. They all come from jurisdictions that decline to entertain tort action between spouses.\textsuperscript{62} These actions have arisen after divorce or separation

injury from gunshot wound inflicted by husband—allowed. Public policy argument rejected); Notes (1913) 12 Mich. L. Rev. 700 (first case to allow tort suit), (1914) 28 Harv. L. Rev. 109 (approving tendency).

\textsuperscript{58}Gilman v. Gilman, 78 N. H. 4, 95 Atl. 657 (1915) (assault suit by wife allowed—husband on same plane as third persons).

\textsuperscript{59}Johnson v. Johnson, 201 Ala. 41, 46, 77 So. 335, 338 (1917) (Court said: "We can hardly conceive that the legislature intended to deny her the right to sue him separately, in tort, for damages arising from assaults upon her person"); Harris v. Harris, 211 Ala. 222, 100 So. 333 (1924) (voluntary separation—husband took child from wife and in act committed the assault and battery—suit by wife allowed whether living together or apart); Notes (1917) 27 Yale L. J. 1081 (approval—public policy "more imaginary than real"), (1919) 5 Corn. L. Q. 171 (approved case).

\textsuperscript{60}Fitzpatrick, Adm'r. v. Owens, 124 Ark. 167, 186 S. W. 832 (1916), cited supra note 47; Prosser v. Prosser, 114 S. C. 45, 102 S. E. 787 (1920) (wife sued for battery).

\textsuperscript{61}Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287 (1898) (divorced—action denied—statute will not extend by implication to abrogate common law rule); Crowell v. Crowell. 180 N. C. 516, 105 S. E. 206 (1920), rehearing denied, 181 N. C. 66, 106 S. E. 149 (1921) (action by wife allowed); Schultz v. Cristopher, 65 Wash. 496, 118 Pac. 629 (1911) (divorced—action denied—statute gives wife same access to courts as husband but neither can sue the other in tort); Notes (1920) 34 Harv. L. Rev. 676 (as representing sounder tendency), (1920) 19 Mich. L. Rev. 659 (with approval); Regina v. Clarence, 16 Cox Crim. Cas. 511 (K. B. 1888) (husband cannot be convicted for offense to wife).

\textsuperscript{62}Main v. Main, 46 Ill. App. 106 (1892) (action by divorced wife denied); Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382 (1915) (denied—statute gave wife no greater rights than husband and he could not sue for tort by her against him); Nickerson v. Nickerson,
and the tort is usually unlawful incarceration in an insane asylum. Nor may the husband sue the wife for conspiring to cause him to be falsely incarcerated in such an institution.63

Only two cases have been reported involving actions for malicious prosecution between husband and wife, both from New York, and the right of the wife to sue was, in each case, denied.64 The Allen case, decided without opinion, followed the earlier Schultz case65 denying suit for assault and battery which was also handed down without opinion. In a learned and illuminating argument, which forms a landmark in the law of dissenting opinions, Judge Pound made a determined effort to change the course of New York decisions on the tort rule in actions between husband and wife. He points out that the action should lie under the statute allowing the wife to recover, "for an injury arising out of the marital relation"; that the rights of the wife have been evolved from the archaic period of our race; that the fiction of unity should have no weight under the married women's acts; that public policy should not be invoked against tort actions when it is not regarded in equity and criminal suits between husband and wife; and that an outgrown fiction should not be used as a means of withholding liability for personal injury to the wife by her husband under existing statutes.

An action for trespass on the case by a married woman against her former husband has been sustained for fraud in securing an annulment of their marriage and concealing the fact until after his remarriage, which barred her subsequent suit to vacate the decree.66 The decision was placed on the ground that the fraud was not consummated until entry of the annulment decree and that they were then no longer husband and wife. The concurring opinion was placed on the same premise. The dissent was on the ground that the fraud took place during coverture and is therefore not actionable. This jurisdiction must accordingly be

65 Tex. 281 (1886) (divorced wife sued husband and confederate—maintainable against latter but not against husband). Perhaps the Brown case, cited supra note 57, may be said to form an exception to the rule where the suit was for assault and battery and false imprisonment, and was allowed.


65Allen v. Allen, 246 N. Y. 571, 159 N. E. 656 (1927); Notes (1928) 28 Col. L. Rev. 818 (no discussion), (1927) 37 Yale L. J. 834 (commends dissenting opinion), (1928) 1 Lincoln L. Rev. 8 (commends Pound), (1928) N. Y. L. J. 1800 (comment on case); Lapides v. Lapides, 143 Misc. 549, 256 N. Y. Supp. 798 (N. Y. City Cts. 1932) (wife sought to recover expenses and damages sustained in defending husband's action for annulment of the marriage—her suit for malicious prosecution held not maintainable).


67Cameron v. Cameron, 111 W. Va. 375, 162 S. E. 173 (1931).
classed among those that deny tort actions between husband and wife. The husband may not maintain an action for damages against his wife for conspiracy with another in instituting a proceeding for the dissolution of their marriage, but the suit will be sustained against the wife to set aside the fraudulent order procured by her annulling the marriage.\textsuperscript{67} The latter falls within a recognized head of equity jurisdiction. Nor may a wife, in a suit for malicious prosecution against her husband, recover expenses and damages sustained as the result of successfully defending the husband's action against her for annulment of their marriage.\textsuperscript{68} A husband cannot sue his wife for deceit by which he was induced to marry her but the action will lie against her co-defendant for falsely representing that she was virtuous.\textsuperscript{69} Under a statute permitting any unmarried female to prosecute an action for her own seduction, a minor who has been seduced and legally marries her seducer cannot, after divorce, maintain an action for damages against him.\textsuperscript{70} But if the court subsequently upon her application adjudges that such marriage was void she may after such decree maintain the action for seduction.

Two cases of first impression in this country have been decided in the Minnesota court. In the first, the husband sought to invoke the equity jurisdiction of the court, by injunction, to restrain his wife from committing a series of personal torts charged to consist of continued "nagging." The relief asked was refused on the ground that no contract nor property right of the husband was invaded.\textsuperscript{71} The nearest analogous case that has been found is in an English court where a wife living apart from her husband under a separation order under the married women's act of 1895, was, in a libel suit against the husband, granted an injunction restraining the repetition of the libels.\textsuperscript{72} In the second Minnesota case, it was decided that, notwithstanding the words, "every person," in the larceny statute, it does not include the wife, and that she cannot be convicted of a theft of her husband's property.\textsuperscript{73}

Actions for libel and slander between husband and wife have been

\textsuperscript{67}Boylan \textit{v.} Vogel, 147 Misc. 554, 264 N. Y. Supp. 209 (Sup. Ct. 1933).
\textsuperscript{68}Lapides \textit{v.} Lapides, 143 Misc. 549, 256 N. Y. Supp. 798 (N. Y. City Cts. 1932).
\textsuperscript{69}Kujek \textit{v.} Goldman, 9 Misc. 34, 29 N. Y. Supp. 294 (N. Y. City Cts. 1894) (pregnant by defendant).
\textsuperscript{70}Henneger \textit{v.} Lomas, 145 Ind. 287, 44 N. E. 462 (1896).
\textsuperscript{71}Drake \textit{v.} Drake, 145 Minn. 388, 177 N. W. 624 (1920); \textit{Note} (1920) 4 \textit{MINN. L. REV.} 538 (seems to approve).
\textsuperscript{72}Robinson \textit{v.} Robinson, 13 T. L. R. 564 (Manchester Assizes 1897).
\textsuperscript{73}State \textit{v.} Arnold, 182 Minn. 313, 235 N. W. 373 (1931).
denied in every jurisdiction where they have been brought in this country. These cases, like all suits for willful tort, have nearly always been preceded by divorce or separation. Here, as for assault and battery, the first reported case occurred in New York and at about the same time. The wife was denied the right of action against her husband for slander under the statute of 1862, providing that any married woman could maintain an action alone against "any person" for any injury to her person or character. The court stated that it was not the intent of the legislature to change the common law rule as to the disability of husband and wife to sue each other at law. It has been said that these two cases started the wrong road in New York. Their influence on the rest of the country in establishing the majority rule, with respect to tort actions between husband and wife, has been an important factor.

In Pennsylvania, a married woman cannot sue her husband for slander. The act of 1893 provided that she might not sue her husband except for divorce, and to protect or recover her separate property. This act repealed former acts which permitted suits for this tort against the husband. In a federal court the wife was denied an action for libel against her divorced husband under the Missouri statute of 1909 empowering the wife to sue her husband at law or in equity, except for personal tort. And a suit for libel and slander cannot be maintained against the husband by the wife although they are not living together. The husband and wife are jointly liable for her slander of a third person, but the husband cannot be prosecuted for a defamatory libel on his wife.

In England, as previously noted, we have seen that a wife living apart from her husband, under a separation order obtained by virtue of the summary jurisdiction under the married women's act of 1895, can maintain an action of libel against her husband. The King's Bench, in a suit for libel by a tombstone inscription, decided, however, that the wife, by reason of Section 12 of the Married Women's Property Act

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72Note (1927) 5 N. Y. U. L. Rev. 55 (right of wife in New York to action for damages against husband for personal tort).


76Sargeant v. Fedor, 3 N. J. Misc. 832, 130 Atl. 207 (Sup. Ct. 1925).


78Robinson v. Robinson, 13 T. L. R. 564 (Manchester Assized 1897).
of 1882, could not sue her husband in an action for tort, since that section gives a cause of action for the protection and security of her separate property only. It is not perceivable how the case could have been otherwise decided under that section and act, which specifically enacts that "no husband or wife shall be entitled to sue the other for a tort."

IV

In the tort actions between husband and wife in this country for negligence, every case with a single exception arose out of an automobile accident, caused by the husband's negligent operation of the car and in which the wife, as the injured victim, usually has been the plaintiff. In all of these cases, although it does not always appear in the case, we can be safe in assuming that the husband carried indemnity insurance on the car to protect himself against adverse judgments recovered against him by any party who was injured through his negligence. Otherwise suits of this type would not occur between wife and husband. In all such cases the insurance company is the real defendant, appearing to defend the action against the husband. In only a single case of this type have we found a statement that no indemnity insurance was carried, and that did not involve a suit between husband and wife. In these cases the courts have applied the rule, that was first evolved from assault and battery and other cases for willful tort. Accordingly, in jurisdictions where suits for torts of that character are denied, the courts have also denied actions for negligent tort. We have, therefore, a majority line of decisions where suits for negligent tort between spouses have been denied, and a minority where they have been sustained. We shall later attempt to show that the reasons for denying suits for willful tort between spouses do not exist in suits for negligence, and that the same rule is not applicable to both types of actions. The jurisdictions where suits for negligent tort have been denied will first be considered.

The first reported case involving a suit for negligent tort between husband and wife occurred in Georgia in 1917. Since then these cases have been numerous, and by far most of them have appeared during the

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last decade. In Pennsylvania, where the next suit for negligence was brought, the statute prohibits suits between husband and wife except for divorce, and proceedings by the wife to protect and recover her separate property.\textsuperscript{84} The husband's rights under the statute are reciprocal. The next jurisdiction to report a case for negligent tort between spouses was New York. In this state, as in the case of willful torts, more negligence cases have appeared than in any other jurisdiction. In the first case the wife brought an action against a street railway company and the husband for joint negligence. The husband's attorney moved for dismissal of the action, which the court granted, but humorously observed that a contrary ruling may have been more in accord with the husband's wishes.\textsuperscript{85} The doctrine that no recovery can be had between husband and wife for negligent tort has been affirmed in several later New York cases.\textsuperscript{86}

Minnesota and Rhode Island had occasion to pass upon the question of negligent tort in domestic relation cases the year following the initial case from New York. In the former jurisdiction, the right of action between spouses had already been decided adversely in a case for willful tort, and the rule of that case\textsuperscript{87} is followed in the suit for negligence.\textsuperscript{88} The court states that the purpose of the statute was to place husband

\textsuperscript{84}Smith v. Smith, 29 Pa. Dist. R. 10 (1920); Cardamone v. Cardamone, 9 Pa. D. & C. 723 (1927); Notes (1928) 76 U. of Pa. L. Rev. 613 (—"result attained by a debatable construction of the Pennsylvania statute", that is, chose in action was held not included in term "separate property", since unliquidated damages are not property), (1919) 67 Pitt. Legal J. 599.

\textsuperscript{85}Perlman v. Brooklyn City R. Co., 117 Misc. 353, 191 N. Y. Supp. 891 (Sup. Ct. 1921) ("In this respect I think the husband's attorney is right, although what the husband himself actually thinks about it is not made known to me. If it were not for the repeated admonition of our appellate courts that the subject of casualty insurance should not be referred to in this class of litigation, I should indulge in the presumption that the husband is not only insured against liability for negligently causing injury, but that, if he were not, we would hardly be confronted with this suit against him."); aff'd, 194 N. Y. Supp. 971 (App. Div. 2nd Dep't 1922) (memo decision); see Albrecht v. Potthoff, 192 Minn. 557, 560, 257 N. W. 377, 381 (1934) (In the absence of estrangement between spouses, with or without separation, or a well-insured defendant, an action of this kind never will be resorted to).


\textsuperscript{87}Strom v. Strom, 98 Minn. 427, 107 N. W. 1047 (1906).

\textsuperscript{88}Woltman v. Woltman, 153 Minn. 217, 189 N. W. 1022 (1922), Note (1923) 21 Mich. L. Rev. 473 (disapproved).
and wife on equality and, as neither had a tort action against the other at common law, the wife is denied a right of action here. In a recent Minnesota case, it was held that the administrator of a daughter may recover from her father, whose negligence caused her death, although her mother, the wife of the defendant, was the sole beneficiary. The defendant could not participate in any recovery because of his negligence. The court adheres to its former decisions that the wife cannot maintain an action against her husband for a personal tort against her. There is a dissent on the ground that the wife is the real plaintiff. If the wife can secure the benefit of a judgment against the husband for his negligence indirectly, why not permit her to sue the husband directly for negligent tort? Since these are insurance cases, public policy ought not be invoked against direct action by a wife, when disregarded if she is sole beneficiary. In a Rhode Island case, the wife sought to maintain an action on the case for negligence against her husband, but the court decided that the statute enabling her to sue alone only dispensed with the necessity of joining her husband as was required at common law.

Cases for negligent tort between husband and wife next occurred in Ohio, Iowa, and Mississippi. The Ohio statute was said to have conferred the same rights upon the wife to maintain actions as were theretofore possessed by the husband, which did not include the right to sue each other for tort; that joinder of husband was only required when the cause of action was in favor of or against both, and that no new cause

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89Albrecht v. Potthoff, 192 Minn. 557, 257 N. W. 377 (1934), Notes (1935) Col. L. Rev. 781, (1935) 48 Harv. L. Rev. 849, (1935) 19 Minn. L. Rev. 595, (1935) 83 U. of Pa. L. Rev. 688, (1935) 21 Va. L. Rev. 578 (The Virginia Law Review submits that the Potthoff case is sound. It states that the adult daughter could have sued the father, and her mother can sue him as the daughter's administratrix "because the tort to the daughter is clearly not a tort to the wife."); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936); Notes (1936) 85 U. of Pa. L. Rev. 124, (1936) 50 Har. L. Rev. 131 (approved). Here both husband and wife were killed in an automobile accident caused by the latter's negligent driving. Under Pennsylvania law neither could have sued the other had both survived. Plaintiff, the wife's father, the sole surviving parent, sued the administrator of the husband's estate on the ground that he was deprived of his daughter's constant contributions to his support and was allowed to recover under the death statute. The court proceeds upon the ground that while the husband's unlawful act imposed no liability upon him in favor of his wife, it may support an action by other parties against whom he had no such immunity to recover for an independant wrong done to them. The relation of husband and wife intervening between the tortious act and a third injured party ought not to defeat recovery simply because the wife would have had no cause of action. Notes (1936) 11 Temp. L. Q. 108, (1937) 31 Ill. L. Rev. 796, (1937) 35 Mich. L. Rev. 508.


89Finn v. Finn, 19 Ohio App. 302 (1924).
of action had been created. In answer to the public policy argument advanced by the court against the maintenance of the action, it was suggested that the real defendant was the indemnity company. This the court brushed aside by saying that this did not appear in the record.\textsuperscript{92} No suit for negligent tort can be maintained by the wife against her husband in Iowa.\textsuperscript{93} In the same year a case appeared in Mississippi in which the wife sought to recover damages against her husband for his negligence for her personal injury. This suit had not been preceded by any cases for willful tort between spouses in that jurisdiction. The statute there in force provides that “husband and wife may sue each other.” With previous precedent lacking, and with the express command of the statute before it, the court, nevertheless, denied the action.\textsuperscript{94} As to the statute, the court said that it authorized suits only “where there existed a cause of action.” Was it not the intent of the legislature to create a cause of action by enactment of this statute? Otherwise it would have been useless because husband and wife could sue each other in equity before its enactment in property matters, without the aid of the statute. There is a dissenting opinion of 26 pages which deserves rank with those of Harlan and Pound heretofore noted. The case appears again in an attempt to recover from an insurance company. This failed, as the policy undertook to indemnify the husband “against loss from liability imposed by law”, and it has just been decided that no liability could be imposed on the husband for his negligent wrong against his wife.\textsuperscript{95} This doctrine has been adhered to in subsequent cases.\textsuperscript{96}

Anticipating that an action at law could not be maintained in New Jersey by a wife against her husband for negligent tort, a wife brought a bill in equity against her husband to recover damages for personal injury sustained by her through his negligence. The court stated that, neither at law nor in equity, could an action be maintained by the wife against her husband for personal injuries; that she could resort to a bill in equity against him only for protection or restoration of her separate

\textsuperscript{92}Leonardi v. Leonard, 21 Ohio App. 110, 153 N. E. 93 (1925).
\textsuperscript{93}Maine v. Maine & Sons Co., 198 Iowa 1278, 201 N. W. 20 (1924).
\textsuperscript{94}Austin v. Austin, 136 Miss. 61, 64, 100 So. 591, 592 (1924) (“The husband and wife in these times have enough grievances for the courts and scandal mongers without by a strained construction another being added by the courts.” It is submitted that such language and expression of prejudice have no application in indemnity insurance cases).
\textsuperscript{95}Austin v. Maryland Casualty Co., 105 So. 640 (Miss. 1925).
\textsuperscript{96}Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933).
Tort Actions Between Husband and Wife

estate; that the married woman's act did not give such right; and that an action for unliquidated damages must be pursued in a court of law.97

Maryland, Michigan, and Nebraska followed the majority rule the following year in denying actions brought by the wife against the husband for negligent tort. The Maryland statute empowered the wife to sue for torts committed against her, but was construed not to include torts committed by a husband.98 The court followed the Thompson case99 from which it quoted liberally. Within the year, two cases involving suits for negligence between husband and wife occurred in Michigan. The statute authorized the wife to sue alone when a cause of action "shall accrue" to her. It was construed to apply only where a cause of action existed in her favor at common law.100 Under the customary statute permitting a wife to sue and be sued as if unmarried, she may not sue her husband for negligence in Nebraska.101

The Indiana statute provides that a married woman may sue alone "when the action is between herself and her husband." Still, as in Mississippi, she has been denied the right to sue her husband to recover damages for an injury caused by his negligence.102 The court, in hardly more than a memorandum opinion, cited a list of cases supporting the majority rule that had arisen under dissimilar statutes, without any discussion. The doctrine should be re-examined in that state. In the District of Columbia, following the Thompson case for assault and battery, it has been decided that a wife may not maintain an action against her husband for negligence.103 Tennessee had already denied actions for willful tort between husband and wife. When the actions for negligence appeared there, the rule in the earlier cases was followed.104 Florida has adopted the majority rule in declining to sustain actions for negligence between husband and wife, but one case in tort between husband and

97Von Laszewski v. Von Laszewski, 99 N. J. Eq. 25, 133 Atl. 179 (Ch. 1926).
98Furstenburg v. Furstenburg, 152 Md. 247, 136 Atl. 534 (1927).
102Blickenstaff v. Blickenstaff, 89 Ind. App. 529, 167 N. E. 146 (1929); Note (1929) 5 Ind. L. J. 218 (growing inclination to construe married women's rights liberally—tort actions between husband and wife no more against public policy than divorce suits—after tort committed sanctity has been destroyed).
103Spector v. Weisman, 59 App. D. C. 280, 40 F. (2d) 792 (1930); Note (1930) 9 N. C. L. Rev. 89 (married women's statutes remedial—should be strictly construed).
104Tobin v. Gelrich, 162 Tenn. 96, 54 S. W. (2) 1058 (1931); Raines v. Mercer, 165 Tenn. 415, 55 S. W. (2d) 263 (1932); see assault cases, notes 47 and 55 supra.
wife appearing in that jurisdiction. Maine, which is one of the strong fortresses of the common law, would be expected to follow the majority rule in negligence cases, even if that rule had not previously been adopted in cases for willful tort.

Montana has aligned itself with the majority by declining to recognize any right in the wife to maintain an action against her husband for personal injuries caused by the negligence of his employer under a statute authorizing her to sue alone for injuries to her person and providing that provisions in derogation of the common law must be liberally construed. The court stated that it was not the purpose of the statute to create a right which neither spouse had at common law but only to place her on equality with the husband and that there was no intent to interfere with the "centuries-old policy" which prohibits actions between them for personal tort. The doctrine in this case has been affirmed in a later case holding that a married woman has no action against her husband for injury resulting from his negligence. It was observed that a legislative attempt to overrule the Conley case was not favorably considered. An action was subsequently brought against the insurance company in the earlier case; this also failed on the ground that it could not be sued prior to an adjudication of a liability against the insured. Under the terms of the policy it was required, as a condition to liability, that a final judgment be rendered against the assured and execution thereon be returned unsatisfied before the wife could proceed against the insurance company to recover the amount of such judgment.

Missouri, Vermont and Louisiana are the latest jurisdictions to add their weight to the majority by refusing to permit a wife to sue her husband for negligence. The Missouri court followed the earlier Rogers case, where it had denied an action by the wife against her husband for false imprisonment, and observed that the statute, being in derogation of the common law, cannot grant greater power than its terms express.

105Webster v. Snyder, 103 Fla. 1131, 138 So. 755 (1932).
107Conley v. Conley, 92 Mont. 425, 15 P. (2d) 922 (1932); Notes (1932) 5 Rocky Mt. L. Rev. 294 (no reaction), (1933) 22 Ill. Bar J. 19, (1933) 7 Tulane L. Rev. 601 (fast growing minority).
108Kelly v. Williams, 94 Mont. 19, 21 P. (2d) 58 (1933).
110Willott v. Willott, 333 Mo. 896, 62 S. W. (2d) 1084 (1933); Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382 (1915) cited supra note 62. Accord: Rosenblum v. Rosenblum, 231 Mo. App. 276, 96 S. W. (2d) 1082 (1936) (wife was injured in an automobile collision caused by her husband's negligent driving. It was held that the tort action by the wife against the husband was not maintainable).
The Vermont court placed the same construction upon the provision in the statute authorizing the wife to sue or be sued alone that the Maine court had previously given it.111 Its purpose was to enable her to maintain an action alone in those instances where, under the common law, she had to join her husband, or where he could sue alone for wrongs against her. The intent of the statute was not to create a right of action where none existed before. Her right of action was, therefore, limited to those cases where injuries were committed against her by some third person, and did not include those committed by her husband. In all other respects it was the intent of the statute to maintain the common law unity of husband and wife. The wife was accordingly denied the right to maintain an action against her husband for injuries caused by his negligence. The Louisiana code prohibits suits between husband and wife, except in certain specified instances, all relating to property or separation. No tort actions are mentioned. One of the exceptions relates to suits by the wife against her husband for restitution of her paraphernal property. Under this exception she cannot sue the husband for injuries caused by his negligence based on the contention that a claim for injury constitutes her paraphernal property.112 Even if such claim became paraphernal property, the action for negligence could not be maintained by the wife against the husband. The code allowed suits against the husband only for restitution of her paraphernal property and the husband, if she recovered, could not be said to have received anything to restore.

The English Married Women's Property Act of 1926, in force in Ontario, provides that a married woman shall have against all persons, including her husband, the same remedies for the protection and security of her separate property as if unmarried, but that "no husband or wife shall be entitled to sue the other for a tort." Under this statute a

112 Palmer v. Edwards, 155 So. 483 (La. App. 1934); rehearing denied, 156 So. 781 (1934); Note (1933) 7 Tulane L. Rev. 601; Edwards v. Royal Indemnity Co., 182 La. 171, 161 So. 191 (1935) (The plaintiff brought the action directly against the indemnity company and recovered. Such direct action was authorized by the statute. The court stated that any stipulation in the policy providing that judgment must be recovered against the insured as a condition precedent to liability on the part of the insurer must yield when in direct conflict with the statute. It is also stated that the plea of coverture available to the insured husband in a suit by the wife was a personal defense to him and could not avail the husband's insurer.); cf. Austin v. Maryland Casualty Co., 105 So. 640 (Miss. 1925); Conley v. U. S. Fidelity & Guaranty Co., 98 Mont. 31, 37 P. (2d) 565 (1934) (these cases failed in the absence of enabling statutes).
wife brought a joint action against her husband and another for injuries resulting from the husband's negligence. The action against the husband was dismissed and it is not shown what disposition was made of the case against the other defendant. The case never again appeared in the reports.\textsuperscript{113} The English Act of 1882 contains the same prohibition with respect to tort actions between husband and wife. Another section of the act provides that "property" includes a thing in action. In an action brought by a wife against her husband to recover for personal injuries caused by his negligence, it was sought to sustain the action on the ground that her right of action was a thing in action and, therefore, "property" under the statute. The claim that a right of action for pure tort constituted a thing in action was denied, and it was stated that such right is no part of a wife's separate property. The court made the observation that the law of husband and wife is "fraught with inconsistency and injustice" and favored a general overhauling by Parliament. This is especially true where, as here, and in all actions for negligence between husband and wife, an insurance company is the real defendant. The case has aroused wide comment.\textsuperscript{114} We submit that the case was properly decided on the ground assigned. Miller's views on the obligations imposed upon the husband by the Married Women's Property Act of 1881 are in accord with those expressed by Justice McCardie in the \textit{Edelston case}.\textsuperscript{115}

The foregoing discussion includes mention of the cases we have been able to find involving suits for negligence between husband and wife where the actions have been denied. Some cases that have been cited, and others that have not, involving questions of subsequent marriage of the parties, conflict of law, master and servant, or partnership will be dealt with under those heads.

The jurisdictions that have allowed actions for negligence between

\textsuperscript{113}\textit{Goldman v. Goldman}, 61 Ont. L. R. 657 (1928).


\textsuperscript{115}\textit{Miller}, Lectures on Philosophy of Law (1884) 173, "It makes the funds of the husband and wife two separate estates in which the surviving spouse and children have a community of interest. The husband is deprived of all control of the wife's property; but while he is bound to maintain his wife and children, no corresponding obligation is laid upon her. Without this provision the law is quite unjust, and the symmetry of the rights in the respective estates of the spouses is marred."
husband and wife constitute a growing minority. These will be next considered. In all but two of these jurisdictions the minority rule had previously been adopted in cases for willful tort. And in two states that have allowed actions for willful tort no suits between spouses for negligence have appeared.

North Carolina was the first state to permit a wife to maintain an action for personal injuries caused by the negligence of her husband. Previous to this, a wife’s action for willful tort had been sustained against her husband. This state is, therefore, the first to place willful and negligent tort on the same plane. The statute requires that a married woman must join her husband, except “when the action is between herself and her husband.”

After the wife had recovered judgment against her husband, he brought suit against the insurance company and recovered. It was stated that the questions of public policy and sound morals were for the legislature. This doctrine has been affirmed in later cases. In Shirley v. Ayers a suit was brought by a husband against his wife for personal injuries caused by her negligence and recovery had against her. Accordingly, husband and wife have reciprocal rights of suit under this statute. We would expect this construction under any statute authorizing the wife to sue alone in those jurisdictions that permit a wife to sue her husband.

Connecticut was the first state to allow a wife to sue her husband for willful tort committed by him against her. This doctrine was applied when suits for negligence causing personal injury to the wife were brought against the husband. It was stated in the case last cited that the common interest of husband and wife in an action for negligence, defended by an indemnity insurance company, does not render such action fraudulent or collusive but may be considered on the question of the credibility of the parties to the suit.

The third jurisdiction to recognize the right of the wife to maintain

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117Roberts v. U. S. Fidelity & Guaranty Co., 188 N. C. 795, 125 S. E. 611 (1924); Shirley v. Ayers, 201 N. C. 51, 158 S. E. 840 (1931).


119Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925); Notes (1925) 24 Mich. L. Rev. 618 (approved), (1925) 10 Minn. L. Rev. 439 (no reaction), (1925) 1 Notre Dame Lawy. 195 (disapproved), (1925) 60 Am. L. Reg. 607, (1926) 4 Can. B. R. 399 (“shocked”), (1925) 1 Ala. L. J. 186; Kalamian v. Kalamian, 107 Conn. 86, 139 Atl. 635 (1927) (statement of defendant obtained after accident by “attorneys for his insurer”).
an action against her husband for personal injuries caused by his negligence was Wisconsin. No prior case for willful tort between husband and wife had been decided in that jurisdiction. A wife brought suit against two partners by whom her husband was employed at the time of his negligent act. The defendant partners interpled the husband as co-defendant. The question then before the court was whether the wife could sue her husband for negligence. This was determined in the affirmative. The Wisconsin statute authorized any married woman to bring an action alone "for any injury to her person." The same words are found in many statutes in states that have denied tort actions between husband and wife. The court said: "We must presume that the Legislature meant exactly what it said, and when it said a married woman might bring an action as if she were a femme sole it meant bring an action against any person who did injury to her person or character even though that person were her husband."

This doctrine has been affirmed in subsequent Wisconsin cases in negligence suits between spouses. In the Fontaine case the wife sued her husband and the insurance company jointly. A new trial was granted to the defendants on the ground that the wife assumed the risk of the consequences of her husband's lack of skill and experience, since she was familiar with his driving. The case does not again appear in the reports.

\[120^\text{Wait v. Pierce, 191 Wis. 202, 209 N. W. 475 (1926), rehearing denied, 191 Wis. 202, 210 N. W. 822 (1926); Notes (1926) 26 Col. L. Rev. 895 (approved), (1926) 4 Wis. L. Rev. 37 (court reached a "logical conclusion" on statutory construction—fears influence on family peace—will result in multitude of petty suits and collusion), (1926) 11 Marq. L. Rev. 55 (disapproved as reading new rights into the statute which the legislature did not intend), (1926) 11 Minn. L. Rev. 79 (approves the new tendency), (1926) 12 Iowa L. Rev. 93 (no reaction), (1926) 21 Ill. L. Rev. 515 (approves majority view in Thompson case).}\]

\[121^\text{Moore v. Moore, 191 Wis. 232, 209 N. W. 483 (1926); Fontaine v. Fontaine, 205 Wis. 570, 238 N. W. 410 (1931); Archer v. Chicago, M., St. P. & P. R. R., 215 Wis. 509, 255 N. W. 67 (1934) (The wife sued the railroad company and her husband jointly to recover for personal injuries sustained in a collision between an automobile driven by her husband and a box car caused by her husband's negligence. His negligence was imputed to the wife so no recovery was allowed against the railroad company. But the wife recovered against the husband for his negligence in the operation of the car in which she was riding as a guest. Subsequently, Archer v. General Casualty Co. of Wis., 219 Wis. 100, 261 N. W. 9 (1935), the wife was held entitled to recover from the liability insurer on the judgment against the husband for injuries sustained in the automobile accident, although the policy was issued in the name of both parties, they being joint owners of the automobile. The claim was based on the fact that the wife had a claim against her husband, who was insured against loss by reason of ownership and use of the automobile, and there was no policy limitation excluding the right of recovery by the wife under the circumstances).}\]
Arkansas, which had previously allowed a wife's administrator to sue the husband for willful tort resulting in her death, is the next jurisdiction to permit her to maintain an action against the husband for negligence. The statute purports to remove all common law disabilities of married women. There is a dissent on the ground that the statute as construed in the earlier case is not broad enough to permit the wife to sue her husband for negligence alone.\(^{122}\) In Alabama the minority rule was first adopted in the *Johnson case*\(^ {123}\) which involved an action for

\(^{122}\) *Katzenberg v. Katzenberg*, 183 Ark. 626, 37 S. W. (2d) 696 (1931); Notes (1931) 12 B. U. L. Rev. 134 (disapproved—argues that criminal actions, prosecuted by the state, and divorce, brought only after home is hopelessly disrupted, are not like civil actions. Approves rule as stated by Prof. Cooley). This argument overlooks the fact that all suits for negligence between husband and wife have arisen from automobile accident cases where the husband carried liability insurance. No other actions for negligence have been brought between spouses, (1931) 10 Tex. L. Rev. 242 (modern trend in direction of liberal view in regard to married women's rights—states that Texas rule can only be changed by constitutional amendment), (1932) 35 Law Notes 213 (quotes liberally from dissenting opinion); Fitzpatrick Adm'r. v. Owens, 124 Ark. 167, 186 S. W. 832 (1916). *Contra:* Roberson v. Roberson, 193 Ark. 669, 101 S. W. (2d) 961 (1937) (The wife sued her husband for damages for personal injuries resulting from his negligent operation of an automobile in which she was a guest. Between the time of the injury and the date of the suit the general assembly had enacted a statute providing that no person transported as a guest in an automobile should have a cause of action against the owner or operator of such vehicle for damages on account of any injury unless such automobile was "wilfully and wantonly" operated in disregard of the rights of others. This statute was upheld by the court as valid. Another statute which deprived any person related to the owner or operator of the automobile of any cause of action for personal injuries against such owner or operator while in, entering, or leaving such automobile, the court found unnecessary to pass upon. The court quoted a Michigan case that gratuitous passengers are generally relatives or friends, and that in probably most of the cases the real defendant was an insurance company, therefore, it not being difficult to prove ordinary negligence where the guest and the host cooperate to that end, the result of such cases is mirrored in increased insurance rates, thereby introducing public interest into the case.

The court held that the statute applied to an accident which occurred before its enactment, and accordingly denied recovery. The court disclaimed that it had overruled the *Katzenberg case*, but the case was in fact overruled by the statute.

The statute, in our opinion, is unfortunate, and the conclusion can hardly be avoided that its primary purpose is to protect insurance companies from adverse judgments in actions that would ordinarily not be brought if there were no insurance involved. The law ordinarily holds one liable for negligent conduct. An automobile is a highly dangerous instrumentality in the hands of a careless driver, and to absolve him from all liability except where his acts are willful or wanton seems extreme. Under such a statute personal liability insurance becomes virtually restricted to taxi-cabs and other operators for hire. A gratuitous guest while engaged in one of the most dangerous forms of travel remains absolutely unprotected in case of injury.

\(^{123}\) *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917).
assault and battery by a wife against her husband. The rule is adhered to in two subsequent cases involving suits for negligence brought by a wife against her husband.\textsuperscript{124} The Alabama statute provided that a wife must sue alone “for all injuries to her person.” North Dakota, without any previous precedent from cases for willful tort, has aligned itself with the minority jurisdictions by allowing a wife to sue her husband for negligence.\textsuperscript{125} There the statute conferred upon a wife, with respect to torts, the same capacity and rights, and subjected her to the same liabilities, as if unmarried, and provided that in all actions she must sue and be sued alone. South Carolina has allowed suit between spouses for willful tort. In an action brought by the wife against the husband to recover for personal injuries caused by his negligence the same decision was accordingly rendered.\textsuperscript{126} Oklahoma and New Hampshire have allowed the wife to sue her husband for willful tort. No actions for negligence between spouses have occurred in those jurisdictions.\textsuperscript{128a}

The above includes all of the jurisdictions in this country that have either denied or allowed the right of husband and wife to maintain actions for either willful or negligent tort against each other.

\textbf{APPENDIX OF STATUTES}

\textit{Ala. Code Ann.} (Michie, 1928) § 8268—"The wife must sue alone, at law or in equity, upon all contracts made by or with her, or for the recovery of her separate property, or for injuries to such property, or for its rents, income, or profits, or for all injuries

\textsuperscript{124}Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931); Bennett v. Bennett, 224 Ala. 335, 339, 140 So. 378, 380 (1932) (That an insurance company is defending in this case appears from questions put to the plaintiff by defendant's counsel—"You don't expect John Bennett to pay you anything if you get a verdict do you?").

\textsuperscript{125}Fitzmaurice v. Fitzmaurice, 62 N. D. 191, 242 N. W. 526 (1932).

\textsuperscript{126}Pardue v. Pardue, 167 S. C. 129, 131, 166 S. E. 101, 102 (1932) (Counsel—"We would like to ask if any juror is an agent of an insurance company." Held: no ground for a continuance. The concurring justice stated, "This court will take notice that many owners carry automobile insurance," he proceeded: "In such state of facts every intelligent juror on the panel knew, before any question was asked, that defendant was protected by indemnity insurance.")

\textsuperscript{128a}Howe v. Howe, 87 N. H. 338, 179 Atl. 362 (1935) (A wife sued her husband and the insurance company to enforce a judgment obtained against the husband in a prior suit, and to get recourse upon a policy of insurance protecting the husband. The wife had been injured while riding in a car driven by her husband and due to his negligence. She had obtained judgment against him by default. The purpose of the present action was to get satisfaction of that judgment against the insurance company. The action was allowed in accordance with the Gilman case, supra note 58); see Miltimore v. Milford Motor Co., 197 Atl. 330, 333 (N. H. 1938) (" . . . definitely show that wife may sue her husband for negligence in this state.")
to her person or reputation; and upon all contacts made by her, or engagements into which she enters, and for all torts committed by her, she must be sued as if she were sole."

ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 2174—"Married women of the age of 21 years . . . shall have the same legal rights as men of the age of 21 years . . . , and are subject to the same liabilities as men of the age of 21 years . . . ."

§ 3729—"When a married woman is a party her husband shall be joined with her except, when the action concerns her separate property, or is between herself and her husband, in which case she may sue or be sued alone."

ARK. ACTS 1915, p. 684—"Every married woman . . . shall have all the rights to contract and be contracted with, to sue and be sued, and in law and equity shall enjoy all rights and be subjected to all the laws of this state as though she were a femme sole."

Acts, 1919, No. 66, p. 36 added—"it is expressly declared to be the intention of this act to remove all statutory disabilities of married women as well as common law disabilities."

CAL. CODE CIV. PROC. (Deering, 1931) § 370—"A married woman may be sued without her husband being joined as a party, and may sue without her husband being joined as a party in all actions, including those for injury to her person . . . ."

COLO. COMP. LAWS (1921) § 5577—"Any woman may, while married, sue and be sued, in all matters having relation to her property, person or reputation, in the same manner as if she were sole."

§ 5584—"any woman, while married, may bargain, sell and convey her real and personal property, and enter into any contract in reference to the same, as if she were sole."

CONN. GEN. STAT. (1930) §§ 5170, 5172, 5173, 5493, M. W. Prop. stats. (Only torts mentioned those committed by wife herself. Under M. W. act the wife retains her legal identity with capacity to acquire and own property, the right to make contracts and to sue and be sued.)

GEN. STAT. (1930) § 5154—"The separate earnings of the wife shall be her sole property. She shall have power to make contracts with her husband or with third persons, . . . as if unmarried. She may bring suits in her own name upon contracts or for torts and she may be sued for a breach of contract or for a tort; . . . ."

DEL. REV. CODE (1915) § 3048—"The property of a married woman . . . shall be deemed to be her sole and separate property and she may . . . sue and be sued, and exercise all other rights and powers . . . which a femme sole may do."

D. C. CODE (1901) § 1155—"Married women shall have power . . . to sue separately . . . for torts committed against them, as fully and freely as if they were unmarried."

Ontario Married Women’s Prop. Act (1926) § 8—"Every married woman shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property as if such property belonged to her as a femme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

Married Women’s Prop. Act (1882) 45 & 46 Vic., c. 75, § 12—"Every married woman . . . shall have . . . the same civil remedies . . . for the protection and security of her own separate property, as if such property belonged to her as a femme sole, but . . . no husband or wife shall be entitled to sue the other for a tort."

FLA. REV. STAT. (1920) § 3951—"A married woman shall have the right to bring suits . . . concerning her real estate, without joining her husband or next friend."

§ 3947—"All property real and personal, of a wife, owned by her before marriage or lawfully acquired afterward . . . shall be her separate property . . . ."
§ 3948—"The property of the wife shall remain in care and management of the husband . . . nor shall the wife be entitled to sue her husband for the rent . . . or profits of her said property."

GA. REV. STAT. (1909) § 1735—"A married woman may, in her own name, without joining her husband as a party, sue and be sued . . . with the same force and effect as if she were a femme sole."

IDAHO CODE ANN. (1932) § 5-304—"A woman may while married sue and be sued in the same manner as if she were single; provided, that except in actions between husband and wife the husband shall not be chargeable in any manner with the wife's costs or other expense of suit."

§ 5-305—"If a husband and wife be sued together the wife may defend her own right, and if the husband neglect to defend she may defend for his right also."

ILL. REV. STAT. ANN. (Smith-Hurd, 1929) c. 68, § 1—"A married woman may, in all cases, sue and be sued without joining her husband with her to the same extent as if she were unmarried . . . ."

IND. STAT. ANN. (Burns, 1926) § 262—"A married woman may sue alone . . . 1. when the action concerns her separate property. 2. when the action is between herself and her husband."

§ 8751—"A married woman may bring and maintain an action in her own name against any person or body corporate for damages for any injury to her person or character the same as if she were sole; and the money recovered shall be her separate property, and the husband, in such case, shall not be liable for costs."

§ 8739—"A married woman may take, acquire and hold property . . . by conveyance, gift, devise or descent, or by purchase . . . and the same, to get her with all . . . income . . . shall be and remain her own separate property . . . the same as if she were unmarried."

§ 8738—"All the legal disabilities of married women to make contracts are hereby abolished . . . ."

IOWA CODE (1927) § 10462—"When any woman receives an injury caused by the negligence or wrongful act of any person . . . she may recover for . . . any elements of damages recoverable by common law."

KANS REV. STAT. (1923) § 23-203—"Where through the wrong of another, a married woman shall sustain personal injuries causing the loss or impairment of her ability to perform the right of action to recover damages for such loss or impairment shall rest solely in her . . . ."

KY. STAT. ANN. (Carroll, 1930) § 2128—"A married woman may take, acquire and hold property, . . . She may make contracts and sue and be sued as a single woman, . . . ."

LA. REV. CODE OF PRAC. (Marr's 1927) Art. 105—"A married woman cannot sue her husband as long as the marriage continues, except it be to obtain a separation . . . , or for the separation of property . . . paraphernal property, separate property, or divorce; but in no case can she sue her husband without the authorization of the court before which she brings her action."

ME. REV. STAT. (1930) c. 74, § 5—"She may prosecute and defend suits at law or in equity, either of tort or contract, in her own name, without the joinder of her husband, for the preservation and protection of her property and personal rights, or for the re-dress of her injuries, as if unmarried, or may prosecute such suits jointly with her husband . . . ."

MD. ANN. CODE (Bagby, 1924) Art. 45, § 5—"Married women shall have power . . . to contract . . . and to sue upon their contracts, and also to sue . . . for torts committed against them, as fully as if they were unmarried . . . ."
MASS. GEN. LAWS (1921) c. 209, § 6—"A married woman may sue and be sued in the same manner as if she were sole; but this section shall not authorize suits between husband and wife."

MICH. COMP. LAWS (1915) § 12357—"Whenever a cause of action shall accrue to, or arise against any married woman, she may sue or be sued in the same manner as if she were sole."

MINN. STAT. (Mason, 1927) § 8616—A married woman "shall receive the same protection of all her rights as a woman which her husband does, as a man; and for any injury sustained to her reputation, person, property, character or any natural right, she shall have the same right to appeal, in her own name alone, to the courts of law or equity, for redress and protection that her husband has to appeal in his name alone . . . ."

MISS. CODE ANN. (1930) c. 36, § 1940—"Married women are fully emancipated from all disability on account of coverture; and the common law as to the disabilities of married women and its effects on the rights of property of the wife is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married; . . . (she) shall have the same capacity . . . to sue and be sued, . . . as if she were not married." § 1941—"Husband and wife may sue each other."

MO. REV. STAT. (1929) § 2998—"A married woman shall be deemed a femme sole so far as to enable her to carry on and transact business on her own account, to contract, and be contracted with, to sue and be sued, . . . with or without her husband being joined as a party."

MONT. REV. CODES ANN. (1921) § 5791—"A married woman in her own name may prosecute action for injuries to her reputation, person, property, and character, or for the enforcement of any legal or equitable right, and may in like manner defend any action brought against her." § 5809—"A married woman may sue and be sued in the same manner as if she were sole."

NEB. COMP. STAT. (1929) § 20-305—"A woman may while married sue and be sued, in the same manner as if she were unmarried."

§ 20-306—"If a husband and wife be sued together, the wife may defend for her own right; and if the husband neglect to defend, she may defend for his right also."

§ 42-202—"A married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property."

§ 42-201—Property a woman has at time of marriage and income therefrom, and any property acquired by descent, devise, gift, purchase or otherwise, "shall remain her sole and separate property, notwithstanding her marriage . . . ."

NEV. COMP. LAWS (Hillyer, 1929) § 8546—"when a married woman is a party, her husband must be joined with her, except: 1. when the action concerns her separate property, or her right or claim to the homestead property, she may sue alone. 2. when the action is between herself and her husband, she may sue or be sued alone."

§ 8547—"If a husband and wife are sued together, the wife may defend of her own right, and if either neglect to defend, the other may defend for both."

§ 3355—"All property of the wife, owned by her before marriage, and that acquired by her afterwards by gift, bequest, devise or descent, with . . . profits thereof, is her separate property . . . ."

§ 3373—"Either husband or wife may enter into any contract . . . with the other . . . respecting property, which either might enter into if unmarried . . . ."
N. H. Pub. Laws (1926) c. 288, § 2—"Every married woman . . . may . . . sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done, as if she were unmarried".

N. J. Comp. Stat. (1910) p. 3236, § 12 a—"Any married woman may maintain an action in her own name without joining her husband therein for all torts committed against her, . . . in the same manner as she lawfully might if a femme sole".

N. M. Stat. Ann. (1929) §§ 105-109—"A married woman shall sue and be sued as if she were unmarried".

§ 68-201—"Either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried . . . . "

§ 68-302—"All property of the wife owned by her before marriage and that acquired afterwards by gift, bequest, devise or descent, with the . . . profits thereof is her separate property".

N. Y. Laws (1860) c. 90, § 7—"Any married woman may bring and maintain an action in her own name for damages, against any person or body corporate, for any injury to her person or character, the same as if she were sole".

Laws (1909) c. 19, § 57—"A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried".

N. C. Code (1931) § 454—"When a married woman is a party, her husband must be joined with her, except that . . . 1. when the action concerns her separate property, she may sue alone. 2. when the action is between herself and her husband, she may sue or be sued alone. In no case need she prosecute or defend by a guardian or next friend".

§ 2513—"The earnings of a married woman by virtue of any contract for her personal service and any damages for personal injuries, or other torts sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried".

N. D. Comp. Laws Ann. (1913) § 4411—"Either husband or wife may enter into any agreement or transaction with the other, or with any other person, respecting property, which the other might, if unmarried. The wife after marriage has with respect to property, contracts and torts the same capacity and rights and is subject to the same liabilities as before marriage, and in all actions by or against her she shall sue and be sued in her own name".

Ohio Code Ann. (Throckmorton, 1929) § 7999—"A husband or wife may enter into any engagement or transaction with the other, or with any other person, which either might if unmarried . . . . "

Oklahoma Rev. Laws (1910) § 3363—"Woman shall retain the same legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injuries sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone".

Ore. Code Ann. (1930) § 33-201—"When property is owned by either husband or wife, the other has no interest therein which can be the subject of contract between them, or such interest as will make the same liable for the contracts or liabilities of either the husband or wife who is not the owner of the property."

§ 33-202—"Should either the husband or wife obtain possession or control of property belonging to the other either before or after marriage, the owner of the property may
maintain an action therefore, or for any right growing out of the same, in the same manner and extent as if they were unmarried”.

§ 33-215—“All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband are hereby repealed . . . and for any unjust usurpation of her property or natural rights she shall have the same right to appeal in her own name alone to the courts of law or equity for redress that the husband has”.

PA. STAT. ANN. (Purdon’s, 1930) tit. 48, c. 3, § 111—“A married woman may sue and be sued civilly, in all respects, and in any form of action, and with the same effect and results and consequences, as an unmarried person; but she may not sue her husband, except in a proceeding for divorce, or in a proceeding to protect and recover her separate property; . . .”

R. I. GEN. LAWS (1896) c. 194, § 16—“In all actions, suits and proceedings, whether at law or in equity, by or against a married woman, she shall sue and be sued alone”.

S. C. CODE (1932) § 400—“A married woman may sue and be sued as if she were unmarried. . . . When the action is between herself and her husband, she may likewise sue or be sued alone”.

S. D. COMP. LAWS (1929) § 170—“Neither husband nor wife has any interest in the property of the other . . .”

§ 171—“Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried . . .”

§ 178—“The wife shall have and retain after marriage all the civil and property rights of a single woman. . . . And for any injury to her reputation, person, or property, she may sue in her own name without joining her husband as party plaintiff and in like manner actions founded upon her separate contracts or torts or relating to her individual property may be brought against her without joining the husband as party defendant.”

§ 2309—“When a married woman is a party, her appearance, the prosecution of defense of the action, and the joinder with her of any other person or party, must be governed by the same rules as if she were single”.

§ 2717 (1)—“A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; . . . but this subdivision does not apply to a civil action or proceeding by one against the other . . .”

TENN. CODE ANN. (Will. Shan. S. Harsh, 1932) § 8460—“ Married women are fully emancipated from all disability on account of coverture, and the common law as to the disability of married women and its effects on the rights of property of the wife, is totally abrogated, . . . and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and to do all acts in reference to property which she could lawfully do, if she were not married; but every (married) woman . . . shall have the same capacity to acquire, hold, manage, control, use, enjoy and dispose of, all property . . . and to make any contract in reference to it, and to bind herself personally, and to sue and be sued . . . as if she were not married”.

TEX. STAT. (1928) art. 1983—“The husband may sue either alone or jointly with his wife for the recovery of the separate property of the wife; and, in case he fails or neglects to do so, she may sue alone by authority of the court”. Art. 1299—“The husband and wife shall join in the conveyance of real estate, the separate property of the wife . . .”

Art. 4614—“All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of all lands, . . . shall be the separate property of the wife”.
Art. 4615—"All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property . . . ."

UTAH REV. STAT. ANN. (1933) tit. 40, c. 2, § 1—"Real and personal estate of every female acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance, bequest or devise, shall be and remain the estate and property of such female . . . . and may be conveyed, devised or bequeathed by her as if she were unmarried".

Tit. 40, c. 2, § 2—"Contracts may be made by a wife, and liabilities incurred and enforced by or against her, to the same extent and in the same manner as if she were unmarried".

Tit. 40, c. 2, § 3—(Conveyances between husband and wife are valid.)

Tit. 40, c. 2, § 4—"There shall be no right of recovery by the husband on account of personal injury or wrong to his wife, or for expenses connected therewith, but the wife may recover against a third person for such injury or wrong as if unmarried, and such recovery shall include expenses of medical treatment and other expenses paid or assumed by the husband."

Tit. 40, c. 2, § 6—"Should the husband or wife obtain possession or control of property belonging to the other before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and to the same extent as if they were unmarried".

VT. GEN. LAWS (1917) § 3521—"A married woman may make contracts with any person other than her husband, and bind herself and her separate property, in the same manner as if she were unmarried, and may sue and be sued as to all such contracts made by her, either before or during coverture, without her husband being joined in the action . . . . and execution may issue against her and be levied on her sole and separate goods, chattels and estate".

VA. CODE (1930) § 5134—"A married woman shall have the right to acquire, hold, use, control, and dispose of property, as if she were unmarried . . . . A married woman may contract and be contracted with, sue and be sued, in the same manner and with the same consequences as if she were unmarried . . . . In an action by a married woman to recover for a personal injury inflicted on her she may recover the entire damage sustained . . . ."

WASH. REV. STAT. ANN. (Remington, 1922) § 6901 (5926)—"All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights she shall have the same right to appeal in her own individual name to the courts of law or equity for redress and protection that the husband has."

W. VA. CODE (1932) § 4749—"A married woman may sue or be sued alone in any court of law or chancery in this State that may have jurisdiction of the subject matter, the same in all cases as if she were a single woman, and her husband shall not be joined with her in any case unless, for reasons other than marital relation, it is proper or necessary, because of his interest or liability, to make him a party. In no case need a married woman, because of being such, prosecute or defend by guardian or next friend."

§ 4750—"A married woman shall be liable for her wrongful or tortious acts, whether committed before or after marriage, and whether under the coercion or instigation of her husband or not. Her husband shall not be liable for such acts unless they were done as his agent or by his actual coercion or instigation . . . . (which), "must be proved".

§ 4739—"A contract between a husband and a wife shall not be enforceable at law, unless such contract, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby".
§ 4732—"Any married woman may take by inheritance or by gift, grant, devise or bequest from any person, . . . real and personal property . . . in the same manner and with like effect as if she were a single woman".

§ 5688—"The marriage of a female plaintiff or defendant shall not cause a suit or action to abate, but, . . . the suit or action shall proceed in the new name . . ." (if notice be given of change, otherwise to proceed to judgment under old.)

Wis. Stat. (1933) § 246.07—"Every married woman may sue in her own name and shall have all the remedies of an unmarried woman in regard to her separate property . . . and any married woman may bring and maintain an action in her own name for any injury to her person or character the same as if she were sole".

Wyo. Rev. Stat. Ann. (Courtright, 1931) § 69-103—"Any woman may, while married, sue and be sued in all matters having relation to her property, person or reputation, in the same manner as if she were sole".

§ 89-1702—"In no case shall the husband or wife be a witness against the other, except . . . in a civil action or proceeding by one against the other . . ." 

§ 89-102—"The rule in common law that statutes in derogation thereof must be strictly construed has no application".

[TO BE CONCLUDED IN THE MAY ISSUE]
INevolution in Law
Giorgio Del Vecchio*

The Roman law writings of Flaminio Mancaleoni, that lucid Professor of the University of Sassari, are well known and justly prized by students of Roman Law. Most significant of his essays is that entitled *The Regressive Evolution in the Juridical Institutes.* Meriting wider notoriety and attention, even among those not Roman, it is especially profitable in so far as it represents a meditated and critical reaction from a tendency, predominant then as today, to regard law as a perpetual and uninterrupted evolution, necessarily progressive, and analogous to the evolution discernible, or believed discernible, in natural organisms.

The truth is that, even in the study of the organic world and of all physical reality, evolution is above all an hypothesis and a regulative principle which permits the unification of certain experiences. Yet it is not, nor should it be, a dogma, inasmuch as there are also experiences of a contrary behavior which must be interpreted according to the antithetical concept of involution. That is as clearly evidenced in the realm of social phenomena, which encompasses law in its positive expressions, as it is in the field of biology.  

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1 This work was read by Professor Mancaleoni as a prelude to the course on Institutions of Roman Law at the University of Naples in February, 1920. It was published in (1921) 1 Studi Sassaresi (second series).

2 See, in general, Demoor, Massart, Vandervelde, L'évolution Régressive en Biologie et en Sociologie (Paris, 1897); Lalonde, La Dissolution (Paris, 1899). Regarding law, see also Von Mayr, Entwicklungen und Ruckschlüsse (Prag, 1909). "Die Rechtsgeschichte muss das Recht als einen lebendigen Organismus betrachten, der in stetem Werden..."
We will not attempt an erudite examination of the term *involution*. We note only, for example, that, long before the conception of the theory of evolution in its narrow sense, Nicolo Cusano spoke both of an “evolution” and of an “involution” of organisms.¹ Not infrequently reference has been made to the involution, decadence and regression of social and human phenomena; often the terms have been used more with respect to customs, to the sciences, and to the *arti belle*, than to law. It is beyond doubt, however, that, even in the juridical field, indefinite progression is mere abstraction, and that in reality laws and institutions display as many phenomena of regression or involution as of progression or evolution. It could not be otherwise in view of the complex nature of the human spirit in which law is born and reborn in perpetuity.

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Evolution, in its more general signification, simply indicates the continuation of a process. We could go farther and consider evolution as synonymous with simple futurity. Precisely that is the first of seven meanings which Rickert has assigned to the concept of evolution.² The second is synonymous with change and would exclude the theory that evolution consists solely of repetition *in futuro*. These two meanings in reality seem too vague and indeterminate, and do not belong within the concept of evolution, which signifies something more, for example, of the “eternal future” of Eracleito. Development or formative process is a concept of the diverse parts which are the successive constituents of a whole (third concept of Rickert). But the unity of the process, in relation to the whole, implies a direction toward an end (fourth concept). In relation to the end, they constitute, then, a scale of values, that is to say, an evaluation of different stata (fifth concept which, however, according to Rickert, passes beyond the purely scientific role of history). The ascending series of values, necessarily successive in time, accounts for the idea of progress (sixth concept). Finally, the supreme


²Rickert, Die Grenzen der naturwissenschaftlichen Begriffsbildung (Tubingen, 1902) 472 et seq.
value, realized in the process, may be conceived as the cause of the process itself, so that one is but the product of the other (seventh concept).

The history of thought contains many doctrines, ancient and modern, in which these concepts have been variously delineated and affirmed. According to Schelling, for example, there exists in nature "ein Trieb und Drang nach immer höheren Leben", and the series of all organic beings is formed "durch allmähliche Entwicklung einer und derselben Organisation". It is hardly necessary to record among the advocates of evolution in the spiritual sense the names of Lessing, Herder, Kant, Fichte, or particularly Hegel, for whom evolution has an essentially logical and dialectic meaning; nor that others, particularly Spencer, support evolutionism in the physical sense, the formulae of which are far from univocal, as partially recognized by that author himself.5

The vicissitudes in legal history have been similarly interpreted according to the standards of the evolutorial concept, in its biological or naturalistic sense as much as in its spiritual or dialectic signification, sometimes even with a certain fusion or confusion of these diverse concepts. It is noted that the philosophy of Schelling at first strongly influenced the historical school of law, as did also that of Hegel; while later the same school assumed an aspect avowedly positivistic or entirely materialistic, abandoning the idealistic formulae deemed proper in the beginning. In this second sense, the concept of evolution in law found most vigorous expression in the works of Jhering. Referring particularly to Roman law, he enunciated, in the early chapters of his Geist des römischen Rechts, certain criteria for interpreting juridical institutes. According to him, the formations and modifications of these institutes should be regarded as organic development: whence the possibility, rather the necessity, of an anatomical consideration and a physiology of law. Jhering distinguishes the varying slowness or rapidity of the process of formation and transformation of the juridical institutes which do not all have the same "plasticity and mobility" ("Bildsamkeit, Beweglichkeit").6 He also observes acutely how, in one system, evolution may not proceed with the same stride in all phases. He does not, however, properly treat, at least from a general viewpoint, the phenomenon inverse to

5On this point, cf. Lalande, Vocabulaire Technique et Critique de La Philosophie (Paris, 1926), s. v. Evolution. This work distinguishes five different meanings of evolution.

that of evolution, which is also verified historically, and which must be drawn from the same analogy to organisms.7

Mancaleoni, at the beginning of his cited work, well states the impossibility of separating oneself, “in either a naturalistic or historical study, from this general concept of the evolution and transformation of beings and their relationships”.8 He at once justly points out that, even in biology, “the theory of evolution reposes upon the consideration of two movements: that progressive, which produces the birth or the development of organized essences; and that regressive, which achieves the disappearance of organs and species, some leaving traces in the atrophied organs which continue in existence, others their tracks in the fossiliferous testimony of paleontology.”9 That is verified, and the verification is inescapable, in the field of law: “The path of law is evenly strewn with institutes which bud forth differentiating themselves, ascend integrating, amplifying, reinforcing their functions, and with institutes which shrivel up and die, sometimes violently through a revolutionary crisis, oftenest slowly, like the natural death of an exhausted organism.”10 That provokes another important observation which should not be overlooked, as frequently happens, namely, that “however little in utility the study of

7On this analogy, see especially the work of the three Belgian authors, Demoor, Massart, Vandervelde, op. cit. supra note 2. Like Jhering, Ardigo, who has systematically altered the concept of evolution or “natural formation” in applying it to social and juridical life, does not seem to have given due attention to the inverse phenomenon of involution. He writes: “Then just as a social organism and social life justify themselves by the justice they mete out, so too the theory of natural formation in social life and also at the same time the theory of natural formation of justice. Which therefore is a natural formation like the solar system, like a mineral, an animal, a dewdrop, like any thought of man”. Sociologia, C. II, § IV, IV Opere Filos. (Padova, 1908) 96-97. Noteworthy, however, are his observations: “Even society, like every other natural formation, is a formation which is born, progresses, then dies. . . . When it dies, it is an old organism which no longer contributes to the maintenance of this common force which is organically subordinate to power. Just as (through one form of this death) in the family the subordinating power of the father diminishes, the adult children no longer coordinate themselves under the supervision of the head of the family. With regard to the demises of societies, however, there is equally to be considered the relative Natural law of each other formation by virtue of which the death of one organism is never total, there always remaining the rhythm produced by that organism in its lifetime. Just as the seed of a plant survives the plant. Just as a man’s ideas are carried on by others at his death. Although Grecian and Roman times are gone as are their social formations, nevertheless there remains the ideas of human justice conceived in these periods. They remain like germs or stores of societies which have followed which did not have to start from the beginning (or from the lowest condition of prehistoric man) the work of social organization.” Id. at 96.

8Mancaleoni, op. cit. supra note 1, at 3.

9Id. at 5-6.

10Ibid.
perished essences, they are not without present value." For, "in those perished essences are found the reasons which explain why many things now alive will perish in their turn, fulfilling the progressive role of death, to which Augustus Comte attributes the desirability of renovating the social tissues." Hence the necessity of studying regressive evolution, or involution, even in law.

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Before examining some of Mancaleoni's observations upon this subject, illuminative especially of the history of Roman law, it is not inappropriate to make some reflections of a general character.

The matter regulated by law is all integrated in human life, since there is no activity in any system or in any epoch which is not qualified juridically, as licit or illicit, according to whether it merits respect or oppposition. In its concrete determinations, its term of service depending solely upon the logical pattern of legality or illegality (immutable whatever the content), law reflects in itself all the psychic motives and all the elements of reality which touch upon human activity, since it is precisely the resultant of these factors. Hence the perpetual flow of law in its positive expressions, the possibility of diverse gradations of spiritual development in law and juridicial customs which may correspond, for example, as much to harmonious and elevated civilization as to blind and violent barbaricism, to cite only two extreme cases. In effect, the manner of life and hence also the guise of law are infinite. Ubi homo, ibi societas; ubi societas, ibi jus: law, in its social manifestations, always and necessarily accompanies the ascension of the spirit, as it does its decadence. All aspirations, all concessions, all human passions, in so far as they are endowed with a certain historical consistency, become values in the pattern of law. Since it is true that in some guise the same sentiments and the same passions continue to appear in the human soul, it is always possible (as we in fact see) to formulate laws which correspond to the varied states of the soul, including those pertaining to and characteristic of a past age. In this sense Bodin affirmed: "Humana historia, quod magna cui parte fluit ab hominum voluntate, quae semper cui dissimilis est, nullum exitum habet." "Si quis historiorum, non poetarum ex-cutiat intelligentiam, producto judicabit parem esse in rebus humanis, atque in omnium rerum natura conversionem: nec aliquid sub sole novum esse."
Without affirming the existence of historical laws, of cycles or pre-determined periods, it must certainly be admitted on the basis of experience that, like individual life, the life of whole peoples is subject to manifold alternatives. For example, periods of greater economic prosperity are succeeded by periods of depression, which *postaque in omnium rerum natura conversionem: nec aliquid sub sole norale.* Just as virtuoso actions of the same individual may be followed by others that are discordant, so too in the case of peoples we observe that after historical phases of rigid and austere customs there sometimes follow decadence and corruption: sufficeth to contemplate the slackening of customs, caused perhaps by the oriental influxes, which was one of the causes, probably the principal, of the ruin of the ancient Roman State. And everyone remembers also, for example, the degeneration lamented by Dante in the Florentine customs after the time of Cacciaguida. Thus, in the history of letters and of the *arti belle* periods of classical perfection and of splendid florescence are followed by those of sterility, mediocrity and bad taste. How could anything analogous fail to occur in law if it is linked in its positivity with all the other aspects and phenomena of human life?

That the juridical structure, though more complex, must be subject to decay and destruction is demonstrated by many facts in human history. It usually happens through a slow process of erosion or involution; it, therefore, has that phenomenon of organic decadence which, because of its own slowness, is less perceptible to superficial observation. It may also experience subterranean and violent suppression, as when a State is subdued and destroyed by another. A State, absolutely considered, can never disappear completely because it is but the same positivity of law confined to its proper sphere, that is to say, subjectivity. As we have sought to show elsewhere, Statehood consists of infinite gradations: the rank and file of the State can be very robust and also can be very flabby. The gradations intermediate between these two extremes are innumerable. The disappearance of one State, therefore, cannot be but relative, inasmuch as the elements of a vanished State (unless its destruction is considered complete and without residuum) must necessarily settle anew and recompose themselves with more or less difficulty in another political fabric.

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*orbem redire videatur, ut aequo vitia virtutibus, ignoratio scientiae, turpe honesto consequens sit, atque tenebrae luci.* *Id.* at 480. It may be compared to this passage from Seneca: “*Nubilo serena succedunt; turbantur maria, quam quieverunt; fiant invicem venti; noctem dies sequitur; pars coeli consurgit, pars mergitur; contrariis rerum aeternitas constat.*”

*Seneca, CVII Epistolarum 8.* Regarding the thought of Bodin, see the observations of Delvaille, *Essai sur l'histoire de l'idée de progrès jusqu'à la fin du XVIIIe siècle* (Paris, 1910) 132 et seg.
These cases of cessation or, better, violent transformation, in which, as the poet puts it, "like old stages kingdoms and empires collapse", do not require particularizing here. Rather there is necessary a certain analysis to discover the process of degradation or degeneration whereby a juridical institute gradually ceases to exercise its function. Such phenomenon of gradual atrophy may be indicated by the law's general character. Much more often it is seen in single institutes which, through their more varied purposes, gradually lose the rationale of their existence. It is, therefore, proper to speak of involution or regression.

A juridical system may be realistically compared to an organism because its parts tend to compose themselves in coherent unity, all of which must play their role in the life of that system so that every moment of its history is necessarily concatenated and convergent upon determined ends. Hence that "perpetual labor", especially appropriate in jurisprudence, to coördinate and harmonize existent rules and those continuously arising, and thus to integrate those which appear in social life. This organic character is appropriate, in a certain measure, also to the single parts of one same system. We may in truth observe the natural increment of any law, private or public, just as we may observe the physiological development of the various members of the human body. By the same standard, it is possible that some parts develop more and others less; "arrested development" or atrophy of single organs is possible without necessarily implying an analogous phenomenon with respect to the remaining parts. Furthermore, it is possible (as much in a biological sense as in the social) to have phenomena of the hypertrophy, that is to say, excessive augmentation, of a given organ or of one of its parts: which may constitute a peril and an injury to the entire organism, while, limited to that organ, it must be regarded not as involution but as evolu-
tion.

To leave the metaphor, it must be said that the development of certain juridical institutes may not mean real increment or progress for the entire system of which they are parts; and, inversely, the regression of some may signify the progressive development of others, and even of the entire system. Thus, to cite only evident examples, the gradual transformation, until extinguishment, of the institution of slavery has signified in reality the reinforcement and extension of the law of the personality according to the principle of natural liberty and juridical equality of men. Similarly, the decadence and the gradual suppression of feudalism meant the creation of a new and more solid political fabric (the so-called modern State). The examples could easily be multiplied.
All law is truly a complex system of values which function, sometimes in a positive sense, at other times negatively. More specifically it may be said that every juridical system represents an attempt at conciliation between the values of order and the values of liberty. To secure a greater measure of one of these values it seems that the other must be correspondingly limited. Just such tempering happens in the always renovated life of peoples. There can be no absolute criterion in these matters when we seek to comprehend historical reality, through its causes and their relativity.

The decadence or involution of certain institutes corresponds to the presence of less than the real rationale of their existence; whence the apparent return to a phase already surpassed. We say apparent since in reality, as it has been often demonstrated, a real return to that which pertained to a past age, with all its concrete characteristics, has never been verified nor can it be. The past is in a certain sense irrevocable. There may be analogies or imitations of past phenomena, but never true reproductions. History does not repeat itself even in the field of law; and all that happens in the world occurs, if it is well examined, only once.

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These general considerations, particularly with reference to the history of Roman Law, are clearly affirmed in that essay of Mancaleoni's which we cited at the outset. That essay is an inexhaustible mine of precious learning for the philosopher as well as for the jurist.

The history of Roman Law indeed offers us, in its slow and complex vicissitudes, to quote Mancaleoni—"cases which verify the regressive character of an institute: cases affording opportunity to study a category of connected parallel regressions of different institutes; innumerable.

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14See, for example, DEMOOR, MASSART, VANDERVELDE, op. cit. supra note 2: "Il est toujours possible d'appliquer à des formes sociales nouvelles l'étiquette d'une institution définitivement abolie, mais, ce qui est impossible, c'est de faire revivre l'institution même, dans un milieu radicalement transformé". Id. at 218 et seq.; cf. id. at 314. The principle of the "irreversibility" of social events has been affirmed especially by TARDE, L'OPPOSITION UNIVERSELLE (Paris, 1897) 301 et seq.; cf. LES LOIS DE L'IMITATION (2d ed., Paris, 1895) 410 et seq. Regression is not properly a return to antiquity: "Le dépérissement et la mort des langues, des religions, des constitutions, des arts, ne sont pas l'inverse de leur naissance et de leur croissance". TARDE, L'OPPOSITION UNIVERSELLE (Paris, 1897) 449. Cf., also, WORMS, LA SOCIOLOGIE (Paris, 1921) 87 et seq.; which, however, makes some reservation on this point and records the thesis opposed by Taine. With special regard to law, R. von MAYR has sustained that institutes of a past age may return to life, but through motives diverse from their original motives, hence with certain intrinsic differences. VON MAYR, op. cit. supra note 2, at 28-30, 33, 44. Upon such return, they would have an "ausserer Parallelismus" and an "innere Divergenz". Id. at 48.
instances involving the regression and the complete disappearance of a juridical institution." At times it is possible to obtain "a complex progressive evolution of an institute accompanied by the regressions of some of its characteristics." Naturally the search for these partial involutions is more difficult, as Mancaleoni notes, just as microscopic anatomy is less easy than macroscopic anatomy.

The critic spirit in Mancaleoni fully realizes how difficult is the evaluation of these matters: since the apparently regressive transformation of an institute often corresponds to progression in a vaster order. He cites the characteristic example in the lex Poetelia which, initiating or at least provoking the assignment of the object of an obligation from the physical person of the debtor to his patrimony, has signalled the decadence of the nexus (bond), and with it all executive procedure with respect to the person of the debtor. It has, on the other hand, permitted the affirmation and perfection of the principle of patrimoniality of the obligatorial relationship. There are many cases of just such intertwining of regressions and progressions and it is prudent to refrain from judgments precipitated by the merits of such concomitant intercrossings. Thus, the regressive process of the control and tutelage of women corresponds to a new organization of the family institution in relation to the State: "The functions of the paternal family which as organs had appropriated that control and tutelage are assumed by other institutions: the State performing the political functions, the maternal family those of a domestic nature." In the same sense we may also observe, in general, that the decadence of the ancient jus Quiritium was an index of its own inability to comprehend new social factors which developed in forms more ample and elastic than praetorian law. Legislative organs likewise had to transform themselves, since, as Bonfante wrote, "the substantially non-political role of developing private law renders inept the work of assemblies."

The praetor "in fact usurps the legislative functions in the guise of becoming the classic organ of the evolution of Roman jurisprudence." Very important is the study of carry-overs which represent in each phase of history the fragmentary record of earlier periods: "of the institutes smitten by regressive evolution." Those surviving elements

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10 Mancaleoni, op. cit. supra note 1, at 8.
11 Id. at 9.
12 Id. at 10, 11.
13 Id. at 22.
14 Id. at 259. Cf. id. at 265.
15 Mancaleoni, op. cit. supra note 1, at 14.
may sometimes exercise an attenuated function; also, "the designation of institutes often contains the record of a spent element."\textsuperscript{22}

The decadence of an institute is manifested mainly in its gradually ceasing to exercise its real function. Indication of that is (as Bonfante also notes) the multiplication of exceptions or of single laws, which little by little exhaust the principles and laws originally fundamental, and are finally but meaningless words. In this way they become contradictions to reality.

Not every law, even if formally in effect, is a living part of a juridical organism. In this connection let us recall the efficacious words of Jhering: "Laws can emanate, even in a short time, in great numbers . . . Laws may overlap as clouds in a perturbed sky, but if they pass as rapidly as those clouds, and leave no trace, they are not true products, indeed but the drags and chips which fly off as history takes form. The productivity of legal history has for its object the evolution of the juridical organism, and it is not achieved in what that organism consumes, but in what it digests."\textsuperscript{23}

The loss of an institute's real efficacy may occur, as we have already indicated, as much by atrophy as by hypertrophy. Mancaleoni cites, respectively, these two examples taken from Roman history: "When the Senate acclaims a unique orator who explains the imperial will, and it has no other form of spontaneous deliberation, its legislative power is extinct."\textsuperscript{24} "When Caracalla awarded citizenship to all inhabitants of the empire, he marked the fall of the c\textit{ivis} and the rise of the \textit{subditus}.

Rightly he observes that a law may lose its functions by having them assumed by other existing or new laws, or even by virtue of the institute itself assuming other functions of inferior nature; or, finally, through the absorption and fusion of diverse institutions, with the resultant exhaustion of some or all.\textsuperscript{26} Concrete examples of all these species appear in the history of Roman Law.

The regressive evolution of institutes is evidenced typically in the form of desuetude, and even in the numerous artifices of juridical technicality (for example, in shams, exceptions, amendments by way of restrictive and extensive interpretation). Ingenious is this kind of achievement of jurisprudence in demolishing little by little the rigid scaffolding of the ancient civil law, and in adapting law, freed from its archaic formulae, to the new conditions of life.

\textsuperscript{22}Id. at 15.

\textsuperscript{23}Jhering, \textit{op. cit. supra} note 6, at 69.

\textsuperscript{24}Mancaleoni, \textit{op. cit. supra}, at 19.

\textsuperscript{25}Id. at 20.

\textsuperscript{26}Id. at 21.
As a conclusion of his study, Mancaleoni believes that two laws may be enunciated: first, that according to which "an institute which has reached the full extension of its progressive evolution, obeying the necessity of transforming, must regress"; second, that of the "irreversibility of evolution and hence also of involution, which renders impossible the retracing of its steps, or the reappearance of a vanished institution or the development anew by a surviving element of its lost functions."²⁷

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One who contemplates the foregoing facts in their perenniality and multiplicity, the continuous evolution and involution of juridical institutes and their parts, with an almost infinite series of inter-crossings and complications, progressive and regressive, of birth and of cessation not only of institutes but of entire States, cannot but doubt that all human history does not have a well defined program; that it is, rather, a labor of construction and destruction, destined to renew and to recommence in perpetuity. To dispel this doubt it is not enough to note that many prejudices and errors, traduced into the laws of an earlier age, have been corrected in later history. For those aberrations do not belong only to the origins, but sometimes follow to epochs of greater civilization which have not been immune (thus, for example, the Greco-Roman antiquity did not know the laws and processes against witchcraft which brought on bloodshed in the Middle Ages). There is no conquest in human thought, even in the field of law, that might be considered definitive and irrevocable and not subject to being attacked and abolished by one person or another over a more or less long period of time, for the reason that the more varied human passions, including the less noble, always arising, make an unending drama of law and life.

These considerations, while capable of being discussed and in some way corrected, as we shall see, in any event contain sufficient elements of truth to induce us to abandon many ingenious illusions. The human genus well represents an ideal unity, not, however, a real one, as it has been wrongly believed and is still believed. Its various parts constitute distinct organisms, each of which has its appropriate life, a life always complicated and at times waylaid by other minor organisms which sprout from its breast: just as (if the comparison is permissible) in the human body there live innumerable microbes. Various groups have distinct histories at times intercommunicative among themselves; that is, they develop in an anachronous manner, so that it would be manifestly impossible to attribute to all peoples living in a given period a common type

²⁷Id. at 29; see, also, id. at 12. That corresponds to the observations of Tarde.
of civilization. With each people, and in each of the laws composing the regulative system, movements of development or of evolution alternate with others of regression or of involution. It is that which still complicates and confounds, almost hopelessly, the picture which should represent in a unitary way the life of the human genus. To speak generally of progress under these circumstances, as if it expressed a constant and uniform reality, is so contrary to the data of experience as to merit the sad irony of Leopardi in the famous passage of *Ginestra*.

Do these facts suffice—we may ask ourselves—to remove all value from the idea of progressive evolution, or is it solely a matter of determining more exactly, that is to say, more critically, the meaning of that idea? We observe, in the first instance, that our mind must collate in a certain unity the successive facts of history (this is precisely, as we saw, one of the meanings of evolution). Wherefore, the precise series of successive phenomena often demonstrates undeniably an organic increment, that is, a true and proper development, thanks to which they attain by degrees the end virtually determined from the beginning. The same procedure follows for the rest, also in an inverse sense, that is, with respect to regressive evolution or involution. The theological principle is equally applied in both cases. It is, however, not correct to deduce therefrom that the two antithetical tendencies have equal efficacy so as to neutralize and offset each other and to make real progress impossible. To affirm that would denote simple prepossession or a very superficial view of reality: as if, observing the tossing sea and the alternating winds, it were concluded that no vessel could ever advance toward its destination. The data of experience, rightly interpreted, persuade us differently.

As has already been noted, regressions in law are frequently true only in a relative sense: they denote the death of an institute, which is only to make room for a different institute, one broader and more responsive to the new conditions of life. Also, the case apparently more catastrophic, namely, the collapse and disappearance of an entire State or Empire, may in reality signify the recomposition of its elements in a more advanced form; so that it is not so much a case of death as one of reno-

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vation or renascence. Superfluous would be examples of that, for one of them is gloriously known to all of us.29

If the true return of past phases of history is impossible, nevertheless their germs are never entirely destroyed. For example, the eventide of the Greco-Roman civilization, perhaps the gravest case of decadence in all human history, and which caused to disappear, among other things, the elevated civilization on the northern hills of Africa, did not, however, spell the total loss of that precious patrimony of ideas and culture. The heritage was later embraced and it rendered possible new flowering of civilization. As Mazzini says, "The people are quasi workers in the immense factory of humanity, quasi instruments of labor who can, their work done, fall or expire, but leave their fruits to the entire species."30

That regressions and destructions are not intended in the absolute sense appears more clearly if we attempt to penetrate the dialectics of history, or the secret reasons and the ultimate effects of events, beyond their immediate appearance. It is noted, for example, that the persecutions of the followers of a faith, whether religious or national, even if they seemed to have succeeded in their purpose, often serve miraculously to strengthen those same faiths and in reality to carry them to triumph. The history of Christianity affords a superb example; and political history (particularly that Italian) similarly confirms Mazzini's doctrine that without martyrs nations are not founded.

A consideration really philosophical has shown that, far from an exact correspondence between the motives and the effects of human activity, there is, to the contrary, a very great excess of one over the other. Thus, egoistical motives serve not infrequently as an instrument to achieve much higher ends. Thus is manifested that recondite ontology, or intrinsic finality, of history, which Vico called "Providence", and others defined as "heterogenesis of ends" or "the secret artifice of nature". Kant, moved by the consideration that man has the good tendency toward companionableness, yet also one toward isolation, added that if the anti-social tendency did not exist (not lovable in se, but whence derives the resistance which everyone encounters in reaching his egoistical aspirations), spiritual gifts would never bud forth; and "men, tame like the sheep they herd, would perhaps not expend any more initiative toward their existence than do their beasts."31 Nature should, therefore, accord-

29Translator's note: The modern Italian State.
30Storia della rivoluzione francese di T. Carlyle in 4 Mazzini, Scritti Editi e Inediti (Roma, 1881) 278.
31Kant, Idee zu einer Allgemeinen Geschichte in Weltbürgerlicher Absicht (1784) Vierter Satz.
ing to Kant, "be thankful for the irreconcilability, for the rivalry of ambitions, for the insatiable craving to possess and to dominate. Without that, all superior natural instincts would always remain submerged and lethargic. Man desires peace; but nature knows better than he what is good for the species; it desires discord. He wishes to live comfortably and pleasantly; but nature wants him to avoid laziness and inert complacency, to immerse himself in work and difficulty, and thus to draw himself wisely out of his shells."32 War, the greatest expression of the antagonism among men, has therefore in reality a most important function, even as a means to achieve union or alliance among people: "All wars are likewise attempts (not in the intent of men but truly in that of nature) to create new associations between states and, through reciprocal destruction and mutilation, new political bodies, which in their turn pass through similar revolutions; until finally, by means of the best possible arrangement of the civil constitution internally, and by means of accord and common legislation in external relations, there is achieved a state of things which, like a civil community, can maintain itself autonomously."33

With this standard, many superficial evaluations of progression and retrogression in history should be re-examined. The decline of certain institutes and the disappearance of entire States may assume, then, a significance analogous, for example in physical life and particularly in the vegetarian world, to the alternation of seasons, with all its essential decay, as a phase intermediate to an ulterior reflorescence. The decay of social and political institutions is truly accompanied, nearly always, with suffering and with the perishing of individuals and of peoples. This lends a more tragic touch to human vicissitudes, notwithstanding their expected resurrection.

Does all this signify perhaps that men, or better, peoples, are but blind instruments to achieve certain designs of nature? And that all the events of history are not only causally determined but equally justified, like means adapted to a high end? Such absolute fatalism or finalism, which would abolish every distinction of value in the acts of men, does not respond, we believe, to the thought of Kant and, at any rate, would not be acceptable. From the fact that human history has generally a meaning and an end, and that profound tendencies in that sense also operate beyond the superficial motives, it does not follow that by nature they lack resistance and adverse tendencies, nor that they must give way in

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32 Ibid.
33 Kant, op. cit. supra note 31, Siebenter Satz.
each case so that every event should necessarily constitute advance toward the goal. Deviations and aberrations are possible in history, as in individual life, which doubtless also has determined ends. Even in biological organisms, which by definition imply an ontology, monsters and freaks are found like teratological formations, representing unsuccessful attempts of nature to achieve its appropriate ends.

With respect to human history, therefore, another observation may be made: the knowledge of appropriate ends, acquired from individuals and from peoples in the course of evolution, becomes a factor in the evolution itself, that is, it helps in general to send it more directly toward those ends. The partial deviations and regressions, which are especially appropriate in primitive times, and which always manifest the secret intention of nature, tend to become less frequent in our observation rather than in fact; formerly unknown, there develops knowledge of their goal in history. A certain application is here found of the maxim: "Ducunt volentem fata, nolentem trahunt".34

It is appropriate to note that a philosophical consideration of history may neither supplant nor exclude the empirical consideration of human events, regardless of what may be achieved thereby or however exact in ascertainment.35 Philosophical construction, in these matters, must depend largely upon independent initiative, and it must deal with the ultimate confirmation of events. It renders possible a more profound view of historical data, which in their relationships are more distant and inaccessible to the common glance. Yet philosophical construction does not dispense with minute research, just as in the physical world the use of the telescope in astronomy does not exclude chemical and microscopic analysis. In no case can the reality of experience be altered to fit a preconceived design. To do so would be to fall again into the errors which have discredited the ancient philosophy of history.

For these same reasons, there must rigorously be avoided every confusion between the explanatory inquiry, intent upon comprehending the course of human vicissitudes (whether in the strictly historical sense or in the "Meta-historical" or philosophical sense), and that valutative or deontological, which responds to an exigency distinct from our spirit.

It is most important in the clarification of this matter to find if possible the criterion for a scale of values; that is, a measurement of values in the light of which progression and retrogression can be determined. Too

34Seneca, CVII Epistolae 11.
35In this connection, compare the explicit warning of Kant, op. cit. supra note 31, Neunter Satz.
often such valuations are intrusted merely to individual sentiment, so
that the same fact can appear qualified in diverse and even contradictory
ways. Sufficeth to think of the various evaluations which, according to
his political predilections, each individual can make as to the gradations
of liberty and order: values which, as we noted, often appear in contrast
to each other and which the law tends to temper. However difficult the
solution may be, the problem, essentially philosophical, consists precisely
of the determination of an idealistic principle, universally valid, with
which to judge the gradations of justice, of juridical and political forma-
tions which the flow of history presents in ever-changing forms.

A diffuse treatment of this difficult problem would be out of place here;
but we can briefly note that the supreme criterion of juridical values,
like those moral, must be sought and found in the same human nature,
universally considered. Rooted therein are those fundamental and in-
eradicable exigencies which the law must harmonize. Profound analysis
demonstrates that, in their intimate essence, liberty and order are not ex-
clusive of each other; rather, they identify each other. Thus, the funda-
mental value of the human personality implies, rightly conceived, the
coördination of the liberty of each individual with that of others, and,
therefore, the idealistic subordination of all to one common law. Other
indications of values can as well be inferred from human nature with
regard to the ends implicit therein. Those ends appear as necessary
tendencies or vocations of our spirit, and that as much in the form of
law as in that of morals. Both of these ethical categories have, in truth,
a characteristic of absoluteness, which supervises the relativity of their
concrete expressions in the world of experience. A similar characteristic
of absoluteness, or of universal validity, is appropriate even to the
categories of logic which inform our spirit and render learning possible.
Only a defective philosophy can disregard and deny these elements a
priori with arguments which denote in their authors an imperfect under-
standing of the true scope of the problem.

Philosophical analysis still presents a large field for reflection, and we
do not dare to assert that it has surmounted all difficulties, even those
concerning law, and has sufficiently illuminated all aspects of the subject.
Nor is it to be considered sufficient to have established a principle, how-
ever just, to clear up immediately the manner of its application to par-
ticular matters. Thus, for example, a civil or penal code, however per-
fect it may be, does not make superfluous the work of judges who must
interpret and apply it.

If the philosophical elaboration of supreme principles is the subject
of laborious arguments in the schools, those same principles are, moreover, alive and active in the common conscience. This is a great comfort to those who labor in this study, as well as a precious reference guide to the correct solution of the problem. Thus, if we have regard to law, there is no doubt that in the common conscience there appears, not as simple mutation but as real progress, the path of extermination of the vanquished foes of their conservation, be it even in state of slavery (servus quia servatur); hence the mitigation and abolition of the slavery itself. This and other examples which could be adduced do not yet prove that the common conscience suffices, in itself, to establish the entire scale of values, and to resolve the grave questions which the complex reality continuously presents for the meditation of philosophers and jurists. But they prove that such meditation has a real basis, to paraphrase Vico, in the human mind itself.

The error most to be avoided in this subject is the confusion of the scale or order of values, obtainable through deductions, with the series of gradations in empirical reality; as if it were certain a priori that history develops with mechanical rigidity, ascending from low to high in each period and in each place, whereas inductive observation often shows the contrary. Each dogmatism or apriorism should be exclusive, when it involves the collection of the data of experience.

That collection is still far from completed, nor perhaps will it ever be, because many peoples have vanished leaving few or a minimum of traces, while others are not yet born. The human world is perhaps still young, even if we consider audacious the paradox that we actually live in prehistoric times and that true history has not begun. However that may be, it is appropriate to be cautious in affirming or denying the existence of historic laws which might be definitively ascertained solely on the basis of experience greater than that we now possess.

Yet, also with caution and reservation, it seems permissible to emphasize that the attitudes innate in the mind and in human nature have had a certain development, even in their juridical manifestations, through varied and not always progressive vicissitudes. In other terms (we still cling substantially to an idea of Vico that has luminously forerun the results of more recent research): just as the understanding of truth, that is, the theoretical science, pure and applied, has certainly advanced, even in the alternation of periods of splendor and those of obscurity, so too the principles of law, implicit in human nature like ideal vocations, have been and still are fulfilled historically, athwart innumerable strains, often bloody and not always victorious. Even here, light alternates with shade, progression with pause and retrogression.
A less summary indication of that can be found in those parts of
treatises in legal philosophy which are devoted to the characteristics
of juridical evolution.

An ultimate aspect of the problem must still be briefly adverted to
here. Belief in the possibility and in the necessity of progress (in the
sense of a dover essere) has in itself an ethical value. The unity of our
spiritual nature makes it impossible to work toward a certain end with-
out thinking that the end itself may and must be achieved, even if only
in the distant future and through the work of generations which follow.
The determination of the supreme value, even of that which concerns
law, implies for our conscience the duty to coöperate in its fulfillment;
hence also the confidence that it is not unachievable. That does not
mean that any pious wish or any utopia may be legitimately exchanged
for an expectation counted upon. Nor that there must be ignored the
obstacles which oppose the realization of an ideal. But, when the ideal
be strongly and rationally demonstrated, the vision of the distance
separating us from its effectuation does not free us from the obligation to
draw as near to it as possible. Pondering the difficulties, however grave,
which stand in the way can only induce us to place well beyond the
limits of our mortal existence the hope that the goal be finally achieved.
In this sense, the sadness, and we say also the pessimism, in regard to
the individual life can well be accompanied with that trustful serenity
which is properly of the just and wise man.

It has already been observed with regard to ancient history that the
prophets of the future were often the makers of that future. In the
same way and for the same reason, the announcement of a progressive
advent of justice, or of a greater future perfection of institutes and of
the entire system of law, has in itself a practical value, contributing in
effect, when seriously meditated, to that perfection itself.

Therefore, the objective examination of the vicissitudes, in part evolu-
tional and in part also involutional, in the history of law, must not ex-
tinguish in us our trust in justice as a supreme human ideal. It is proper,
most of all, for philosophy to elevate us above contingent particularities;
to regard principles and ultimate ends. Nor must the ready derision of
the populace, who are interested only in the tangible things of the hour
(which to them is the only science), deter the philosopher from the
fulfillment of his office. Thus, if also sub-noble passions infuriate men
and lead them to offend and overcome each other, to the extent of
jeopardizing the highest achievement of civilized humanity and to threaten
the obscurcation of truth most enlighteningly demonstrated in the ele-
mentary principles of justice, there must be philosophically affirmed the ideal value of order, of liberty, and of peace (like elements of justice) in the range of each State, as in the relationships among the various States. This idealistic value can be contradicted by empirical reality, but it will not thereby lose its ethical truth, and it will necessarily constitute a goal for future development.

The retrogression or involution will, therefore, never be the ultimate word so long as there exists the human soul, in its nature capable of the infinite.
THE SUPREME COURT OF THE UNITED STATES*

ORIGINAL JURISDICTION—SUIT BETWEEN STATES†

WHEN the October, 1938, Term of the United States Supreme Court is finally concluded, few of its decisions will be found to surpass in provocativeness, and none in the novelty of the situation presented, the Court's decision on March 13, 1939, in the case of State of Texas v. State of Florida, et al.¹

Upon the death in 1936 of Colonel Edward H. R. Green, four states, Texas, New York, Massachusetts and Florida, prepared to move forward with claims that each was the domicil of the decedent at the time of his death, on the basis of which contention each proposed to levy death taxes on the property left by the decedent. The gross estate, aggregating in excess of forty-four millions, consisted chiefly of securities and other intangibles held on deposit in New York. An original bill filed in the United States Supreme Court by the State of Texas asked that Court to take jurisdiction of the case to resolve the allegedly conflicting claims of domicil among the four states involved. The bill was amended² to bring to the Court's attention the fact that the total of the death taxes sought by the four states, when added to the federal death tax, would exceed the assets of the net estate by a large amount (the excess was afterwards found to equal $1,589,877) thus rendering altogether possible a scramble among the claimant states each seeking to secure satisfaction of its particular tax claim before exhaustion of the estate—a scramble in which Texas especially feared that she would suffer the greatest loss since the property left by the decedent in Texas consisted solely of minor real estate holdings assessed at approximately $6,000, and the taxes claimed by Texas amounted to $4,685,057. The amended bill of complaint averred that by it there was presented "a case or controversy of a civil nature between two or more States of the United States of America ... and, therefore, is within the original jurisdiction of this

*Written April 1, 1939.
†Written by Francis C. Nash, Professor of Law, Georgetown University School of Law; Former Editor of this JOURNAL.
¹59 Sup. Ct. 563 (March 13, 1939).
²"From colloquies between Court and counsel at the preliminary argument in the Supreme Court, which resulted in the filing of an amended bill of complaint by the State of Texas, it appeared that one factor—or possibly the only factor—which induced the Supreme Court to take jurisdiction was the fact that the death tax claims of the four states exceeded the total estate, so that as to the excess there was a real conflict between the states." Third Report of Committee of Nat. Tax Ass'n, Double Domicile in Inheritance Taxation, PROCEEDINGS OF THE NAT. TAX ASS'N (1937) 5-6.
The relief prayed for was the issuance of a writ of subpoena to the State of Florida, the Commonwealth of Massachusetts, and the State of New York, (the widow and sister of the decedent were also joined; later, by stipulation of the parties, the suit as brought against the widow was dismissed), "commanding them on a day certain to appear before this Honorable Court to answer all and singular matters and things hereinbefore set forth and complained of." And, as ultimate relief, Texas prayed:

"that this Court may determine, declare and adjudge whether, for purposes of taxation as aforesaid, the said Edward H. R. Green was domiciled at death in the State of Texas, or in the State of Florida, or in the Commonwealth of Massachusetts or in the State of New York, and more particularly, may determine, declare and adjudge that the said Edward H. R. Green, for purposes of taxation as aforesaid, was domiciled at death within the State of Texas, and not within either the State of Florida, or the Commonwealth of Massachusetts, or the State of New York, and further may determine, declare and adjudge that the complainant, and the complainant alone, has exclusive right and jurisdiction to impose and collect succession, transfer or inheritance taxes upon the intangible personal property as aforesaid owned by the said Edward H. R. Green at death.

"And the complainant further prays for all other, further, different, and additional relief, by injunction or otherwise, as this Honorable Court may deem expedient, and offers to do all such equity as this Honorable Court shall require." The relief sought was clarified by a supplemental memorandum brief filed in support of the bill of complaint in which it was stated that,

"The State of Texas asks no injunction against any proceeding by any State. It asks only that this Court shall, in advance of litigation in the State courts, determine which one of the States is the one which under the Constitution may impose a tax. It justifies its request to this Court to make this determination, first, because under the Constitution this is the only Court in which the four claimant States may with perfect equality present their claims in a suit to which all of them are parties, and, second, because a constitutional question being involved, this is the Court to which resort must ultimately be had to determine which of the four States has the right to impose the tax.

"The judgment sought by the State of Texas will be a self-enforcing judgment . . . It will be self-enforcing in just the same way that the judgments of this Court in the various boundary dispute cases decided by it have been self-enforcing. If any difficulty in the enforcement of the judgment is to be foreseen, it is to be foreseen, we assume, upon the ground that the parties are sovereign States. But the same difficulty would always be foreseeable in any suit in this

*Motion for Leave to File Bill of Complaint, and Bill of Complaint brought by the State of Texas against the State of Florida, et al., p. 4.

†Id. at 28.

‡Id. at 28-29.
Court between States, and if the foreseeing of it be a proper basis for refusing jurisdiction in this case it would be a reason for refusing jurisdiction in all cases between States."8

Along with this disavowal of intent to seek injunctive relief, it was further stated that "Texas does not base its request for judgment upon the Declaratory Judgments Act or in any way rely upon that statute."7 But directly it was indicated that declaratory relief was essentially what was being sought:

"The judgment prayed for is a determination of the domicile of the decedent, for that will automatically settle the question of the jurisdiction to tax the intangible property of the decedent. The determination of the question of fact of the domicile of the decedent in our case is the equivalent of the adjudication of the location of the boundary line in the boundary cases. . . . The judgment prayed for by the State of Texas is no more objectionable on the ground that it is merely declaratory than were the judgments entered in many of the boundary dispute cases. . . . Accordingly, it seems unnecessary and inappropriate to burden the Court with an extended appraisal of the sufficiency of the proposed bill as against the tests so carefully laid down in Aetna Life Insurance Co. v. Haworth, decided at this term. It may be worth while, however, to demonstrate that the proposed bill squarely meets the general and ultimate test required by that case, namely, whether the issue is one 'that is appropriate for judicial determination.' The only possible suggestion to the contrary is that at this time there is something hypothetical, abstract, academic or moot about the controversy. But there is not. Nothing in the nature of an advisory opinion is sought. All of the facts which go to make a controversy between adversary parties now exist. The decedent has lived his life and the way in which he lived it has raised the issue as to the State of his domicile. The decedent has died. Each of four States in good faith claims that the decedent was domiciled within its borders, and that therefore it is entitled to impose an inheritance tax upon the intangible property of the decedent. One of these States asks leave to bring the others into this Court in order that the question which of them is entitled to the tax may be adjudicated. This question certainly is 'appropriate for judicial determination.'"8

On March 15, 1937, Texas' motion for leave to file its bill was granted by the Court,9 and New York, Florida, and Massachusetts (as well as the two private defendants) were ordered to make answer. In its answer New York10 acquiesced in the averment by Texas that the latter's complaint presented a case or controversy between the several

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9Id. at 12.
10Id. at 12, 13, 15-16.
States within the original jurisdiction of the Court, but the validity of the contention was challenged by Massachusetts. However, the challenge was not pressed beyond the mere noting of an exception, and Massachusetts joined with New York and Florida in submitting to the jurisdiction of the Court, each praying that the Court determine in which of the four disputant States the decedent died domiciled.

Upon the return of the defendants' answers the Court appointed a Special Master to take evidence in the case, to make findings of fact, to state conclusions of law, and to submit them to the Court with his recommendations for a decree. Discharging these duties the Special Master submitted to the Court an elaborate record and summary of evidence on which he based his conclusion that the decedent's domicile at the time of death was in Massachusetts, recommending, therefore, that the Court find exclusively in favor of that Commonwealth's claim.

Before entering upon discussion of the Court's decision, confirming the report of the Special Master, and adopting his recommendation for a decree in favor of Massachusetts alone, two points should be noted with emphasis: (1) Neither the bill of complaint filed by Texas, nor the cross bills filed by Massachusetts, New York, and Florida, specified or defined the nature of the relief sought, although the request in each was the same, namely, that the Court "determine, declare and adjudge" the domicile of the decedent at the time of his death. In other words, although not expressly so denominated by any of the four states, all were seeking what in essence amounted to declaratory relief. (2) All defendants (the two private litigants, as well as the three sovereign defendants) acquiesced in the proposal by Texas that the Court should assume jurisdiction in the case. At no point was the propriety of the suit resisted, as a result of which the whole matter savored strongly of a submission by

11"This respondent denies the allegations contained in the second paragraph of the bill, that the case purported to be set forth in said bill is of a civil nature between two or more sister States and between a State and citizens of another State, and that it is within the original jurisdiction of this Court." Answer of the Commonwealth of Massachusetts, p. 2. Compare Answer of the State of Florida: "Answering Paragraph numbered 2 of the bill of complaint, this respondent admits all and singular the allegations therein contained, except that it denies that this suit involves a controversy between a State and citizens of another State." (At p. 1).


13Bill of Complaint of the State of Texas, p. 28. The Answer of the State of Florida used the terms "determine, declare, adjudge, and decree." (At p. 12). The Answer of the State of New York used only the terms "determine and adjudge." (At p. 8). The Answer of the Commonwealth of Massachusetts used precisely the same terms as those used by the State of Texas. (At p. 14).
all interested parties to something closely akin to an arbitration proceeding. The underlying assumption, namely, that there should be a determination of exclusive domicile, carrying with it the determination of exclusive power in one of the four states to levy death taxes on the intangibles left by the decedent, was nowhere challenged either by New York, Massachusetts or Florida in their answers, or by the Special Master in his report and recommendation.

Mr. Justice Stone, delivering the opinion of the majority (Mr. Justice Frankfurter dissenting, and Mr. Justice Black concurring in the dissent), treated the case as presenting two questions, one going to the jurisdiction of the Court, and the second turning on the issue of domicile. Approaching the question of jurisdiction, he said:

"While the exceptions do not challenge the jurisdiction of the Court, the novel character of the questions presented and the duty which rests upon this Court to see to it that the exercise of its powers be confined within the limits prescribed by the Constitution make it incumbent upon us to inquire of our own motion whether the case is one within its jurisdiction . . . our constitutional authority to hear the case and grant relief turns on the question whether the issue framed by the pleadings constitutes a justiciable 'case' or 'controversy' within the meaning of the Constitutional provision, and whether the facts alleged and found afford an adequate basis for relief according to accepted doctrines of the common law or equity systems of jurisprudence, which are guides to decision of cases within the original jurisdiction of this Court."14

By thus sua sponte raising a challenge to its jurisdiction the Court obviously sought to rid the case of the flavor of arbitration undeniably given to it by the ready submission of all defendant parties to the proposal of the complainant State, Texas. It might have been supposed that the Court would meet its own challenge by fitting the case into the mold of a suit for declaratory relief, testing its justiciability by considerations similar to those followed in *Aetna Life Insurance Co. v. Haworth*,15 *Nashville, C. & St. L. Ry. v. Wallace*,16 and the boundary dispute cases17 so strongly urged as precedents by the complainant. While the Court did turn to the boundary dispute cases for support of the proposition that the justiciability of the suit was in no way weakened by the fact that injunctive relief was neither sought by the parties, nor recommended by the Special Master,18 the jurisdiction of the Court was not based upon

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15300 U. S. 227 (1937).
16288 U. S. 249 (1933).
17Iowa v. Illinois, 147 U. S. 1 (1893); Georgia v. South Carolina, 257 U. S. 516 (1922); see Memorandum Re Bill of Complaint, pp. 8-15.
18The fact that no relief by way of injunction is sought or is recommended by the
an assimilation to the declaratory relief characteristic of those cases. Rather, and most surprisingly, does the alternative theory come, the complaint of Texas was taken to present a case by way of interpleader. Thus viewed the justiciability of the case was established to the satisfaction of the Court.

“When, by appropriate procedure, a court possessing equity powers is in such circumstances asked to prevent the loss which might otherwise result from the independent prosecution of rival but mutually exclusive claims, a justiciable issue is presented for adjudication which, because it is a recognized subject of the equity procedure which we have inherited from England, is a ‘case’ or ‘controversy’, within the meaning of the Constitutional provision; and when the case is one prosecuted between states, which are the rival claimants, the risk of loss is shown to be real and substantial, the case is within the original jurisdiction of this Court conferred by the Judiciary Article. See Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249. . . .”

The surprise comes when note is taken of (1) the fact that none of the pleadings, nor the report of the Special Master, in any may indicated that relief was being sought by way of interpleader, and (2) the awkwardness with which the case stands in the garb of traditional interpleader. As described by Lord Cottenham, interpleader “is where the plaintiff says ‘I have a fund in my possession, in which I claim no personal interest, and to which you, the defendants, set up conflicting claims; pay me my costs, and I will bring the fund into court, and you shall contest it between yourselves.’” Obviously the complaint of Texas pre-

Special Master does not militate against this conclusion. While in most causes in equity the principal relief sought is that afforded by the injunction, there are others in which the irreparable injury which is the indispensable basis for the exercise of equity powers is prevented by a mere adjudication of rights which is binding on the parties. This has long been the settled practice of this Court in cases of boundary disputes between states. Louisiana v. Mississippi, 202 U. S. 1; Arkansas v. Tennessee, 246 U. S. 158; Georgia v. South Carolina, 257 U. S. 516; Oklahoma v. Texas, 272 U. S. 21; Michigan v. Wisconsin, 272 U. S. 398; New Jersey v. Delaware, 291 U. S. 361.” Stone, J., in Texas v. Florida, et al., 59 Sup. Ct. 563, 570 (March 13, 1939).

19Id. at 568.

20To extend the neat procedural device of interpleader to such a situation is another illustration of transferring a remedy from one legal environment to circumstances qualitatively different. To settle the interest of different claimants to a single res where these interests turn on narrow and relatively few facts and where conflicting claims cannot have equal validity in experience, is one thing; it is a wholly different thing to bring into court in a single suit all states which even remotely might assert domiciliary claims against a decedent and where one state court might with as much reason as another find domicile within its state.” Frankfurter, J., dissenting, in Texas v. Florida, et al., 59 Sup. Ct. 563, 579 (March 13, 1939).

21Hoggart v. Cutts, Craig & P. 197, 204 (Ch. 1841).
sented no such situation as that described by Lord Cottenham; far from having any fund to surrender to the court, the essence of Texas' grievance was the lack of such a fund out of which its claim for taxes might be satisfied.\textsuperscript{22} Accordingly, it was suggested that the case might meet the requirements of the "bill in the nature of a bill of interpleader."\textsuperscript{23}

This bill is defined by Pomeroy as one

"... in which the complainant seeks some relief of an equitable nature concerning the fund or other subject-matter in dispute, in addition to the interpleader of conflicting claimants; as, for example, the redemption of a mortgage or other encumbrance on property where there are conflicting claimants to the debt secured. The complainant is not required, as in strict interpleader, to be an indifferent stakeholder, without interest in the subject-matter. It is essential, however, that the facts on which he relies entitle him to equitable, as distinguished from legal, relief; he is not permitted, under the guise of a bill in equity, to litigate a purely legal claim or interest in the subject-matter ..."\textsuperscript{24}

The bill in the nature of a bill of interpleader did not dispense with the requirement of a stake-holder. Here the situation is much like that presented in \textit{Killian v. Ebbinghaus},\textsuperscript{25} where Mr. Justice Woods said in behalf of the Court:

"The bill is either a bill of interpleader or a bill in the nature of a bill of interpleader. It is clear that it cannot be sustained as a bill of interpleader. In such a bill it is necessary to aver that the complainant has no interest in the subject-matter of the suit; he must admit title in the claimants and aver that he is indifferent between them, and he cannot seek relief in the premises against either of them. ... In this case the bill fails to comply with any of these requirements.

\textsuperscript{22}No attempt was made to invoke statutory interpleader. Indeed, for all its liberalization of traditional interpleader, it is difficult to see how statutory interpleader would any more gracefully have fitted the measurements of the case. See Chafee, \textit{The Federal Interpleader Act of 1936} (1936) 45 \textit{Yale L. J.} 963, 1161.

\textsuperscript{23}The peculiarity of the strict bill of interpleader was that the plaintiff asserted no interest in the debt or fund, the amount of which he placed at the disposal of the court and asked that the rival claimants be required to settle in the equity suit the ownership of the claim among themselves. But as the sole ground for equitable relief is the danger of injury because of the risk of multiple suits when the liability is single ... and as plaintiffs who are not mere stakeholders may be exposed to that risk, equity extended its jurisdiction to such cases by the bill in the nature of the bill of interpleader. The essential of the bill in the nature of interpleader is that it calls upon the court to exercise its jurisdiction to guard against the risks of loss from the prosecution in independent suits of rival claims where the plaintiff himself claims an interest in the property or fund which is subject to the risk." Stone, J., in \textit{Texas v. Florida, et al.}, 59 Sup. Ct. 563, 568 (March 13, 1939).

\textsuperscript{24}Pomeroy, \textit{Equity Jurisprudence} (1907) \textsection 1328n. Compare 2 Story, \textit{Commentaries on Equity Jurisprudence} (1st ed. 1836) \textsection 824.

\textsuperscript{25}110 U. S. 568 (1884).
"If the complainant were in possession of the property in question, holding it for the party beneficially interested, and had custody of rents and profits derived therefrom, and the two sets of defendants asserted conflicting claims to the property and to the rents, the facts might sustain a bill of interpleader. But the complainant is out of possession; he has no rents in his custody. He is, therefore, in no jeopardy from the conflicting claims of the defendants, and cannot call on them to interplead. Instead of admitting title in the two sets of claimants, and asking the court to decide between them, he sets up title in himself for the benefit of one set and seeks relief against the other.

"To avoid these obstacles to the maintenance of the suit, the appellee insists that it can be maintained as a bill in the nature of a bill of interpleader. In support of this view, his counsel cites section 824 of Story's Equity Jurisprudence (11th ed.), where it is said that 'there are many cases where a bill in the nature of a bill of interpleader will lie by a party in interest to ascertain and establish his own rights, when there are other conflicting rights between third persons.'

"But in all such cases the relief sought is equitable relief. . . . The authority cited by the appellee does not, therefore, aid the bill in this case, which is that of a party out of possession, claiming the legal title to real estate, seeking to oust the parties in possession, who also claim the legal title, and compel them to pay over the rents and profits.

"The fatal objection to the suit is that it is in fact an attempt by the party claiming the legal title to use a bill in equity in the nature of a bill of interpleader as an action of ejectment."26

That the situation in the principal case suggested something of the atmosphere of an interpleader suit must be conceded. The atmosphere suggested, however, was that of an interpleader suit in what is known as the second stage—where the applicant for interpleader has secured allowance of his request that the various parties who are pressing him with conflicting claims for what he is holding be compelled to come into court and thresh out their dispute between themselves, the applicant meanwhile ridding himself of the subject-matter of the dispute by turning it over to the court, thereupon being relieved by the court of any further concern in the matter.27 Such might have been the situation in

26Id. at 571. 572. (Italics Supplied.)
27"A suit in interpleader consists of two major phases. It should first be determined whether the bill will lie. . . . That phase of the matter may be determined by any of the several methods appropriate to chancery practise for testing the sufficiency of a bill, if the objectionable matter appears on the face of the bill. If any facts exist which are not shown by the bill of interpleader, but which constitute a valid reason why the bill should not lie, they are matters of defense and may be set up by answer, which of course must be supported by proof. If it is found that the bill will not lie, it is useless to go further, and the bill will be dismissed. If it is found that the bill will lie, then the court so decrees, and upon bringing into court the property in dispute the complainant is discharged from further liability, with his costs. The second phase of the matter is then taken up. If the case is ripe for decision between the defendants, as well as between them and the complainant, the court may forthwith settle the conflicting claims of the parties
the principal case had the representatives of Colonel Green's estate, besieged by the tax claims of the four states, been the applicants seeking relief by way of interpleader. Then, had the application been granted, an amount equal to the greatest of the several tax claims would have been paid into court, and Texas, Florida, New York and Massachusetts would have been called in to litigate their merits of the various claims to the fund. Not only was this not the situation in Texas v. Florida et al., but had the representatives of the estate undertaken to secure such relief their application would have been denied by reason of the decision of the Court in the case of Worcester County Trust Co. v. Riley.\textsuperscript{28} There the representatives of the estate of the decedent, Robert H. Hunt, faced with claims for death taxes by Massachusetts and California, each of which claimed to have been the domicile of the decedent at the time of his death, sought to interplead the taxing authorities of the two states under the authority of the Federal Interpleader Act of 1936.\textsuperscript{29} The Controller of California resisted the attempt, and in his resistance was ultimately sustained by the United States Supreme Court. Holding the attempt to interplead the taxing authorities of California to constitute a suit against the state, it was held that the case fell within the prohibition of the Eleventh Amendment. And in so holding the Court, again through Mr. Justice Stone, declared that should the estate of the decedent be obliged to meet and satisfy tax liabilities in both California and Massachusetts, growing out of decisions of the courts of both states, those of Massachusetts finding that the decedent died domiciled in that state, and those of California finding in favor of a California domicile, there was nothing in the Fourteenth Amendment that would militate against such a result. And in the principal case the conclusion of the Worcester County Trust Co. case is expressly reaffirmed:

"That two or more states may each constitutionally assess death taxes on a decedent's intangibles upon a judicial determination that the decedent was and make a final decree as to all parties at one hearing. If, however, the cause is not then ready for decision as between the conflicting claimants, the court orders that such claimants, who originally are defendants, interplead and litigate the matter in dispute between themselves. Appropriate issues are then made and proof taken, if necessary, between the claimants, and the contest proceeds between them to determine who is entitled to the subject matter. The latter phase of the matter becomes in effect, a new and independent proceeding between the claimants alone as adversaries," \textit{Per Curiam}, in Florida East Coast Ry. v. Eno, 99 Fla. 887, 890-891, 128 So. 622, 625 (1930), Chafee, \textit{Cases on Equitable Remedies} (1938) 10-11.

\textsuperscript{28}302 U. S. 292 (1937).

domiciled within it in proceedings binding upon the representatives of the estate, but to which the other states are not parties, is an established principle of our federal jurisprudence.\footnote{Stone, J., in Texas v. Florida \textit{et al.}, 59 Sup. Ct. 563, 569 (March 13, 1939).}

Thus the very remedy which might so completely have solved the dilemma of double domicile for the taxpayer is denied him while, on the other hand, it is tortured out of its familiar shape to meet the predicament of the taxing states when, faced with the same dilemma, they, or some of them, stand in danger of the fate of Oliver Twist—or, more appropriately, perhaps, that of old Mother Hubbard.

Nor does the discrimination end here. It is not every case where the states themselves seek the aid of the Supreme Court in the problem of double domicile that will meet with the success of the principal case. In the well known \textit{Dorrance case}\footnote{Citations to and discussion of the lengthy and involved litigation in this case may be found in Nash, \textit{And Again Multiple Taxation?} (1938) 26 \textit{Georgetown Law Journal} 288.} New Jersey sought to draw Pennsylvania into the United States Supreme Court to litigate their conflicting claims as to which of them was the domicile of Dr. Dorrance at the time of his death. The failure of New Jersey in this attempt\footnote{New Jersey's motion for leave to file the bill was denied in \textit{New Jersey v. Pennsylvania}, 287 U. S. 580 (1933).} may be explained on various grounds, such, for example, as the fact that when New Jersey filed its petition with the United States Supreme Court, the highest court of Pennsylvania had already sustained\footnote{\textit{In re Dorrance's Estate}, 309 Pa. 151, 163 Atl. 303 (1932).} the validity of the Pennsylvania tax (though the tax had not yet been paid), and review of its decision by certiorari had been denied by the United States Supreme Court.\footnote{\textit{Dorrance v. Pennsylvania}, 287 U. S. 660 (1932).} The real explanation, however, is more likely that offered by counsel for the State of Texas in distinguishing \textit{New Jersey v. Pennsylvania}\footnote{287 U. S. 580 (1933).} from the situation presented in \textit{Texas v. Florida, et al.} The essence of the distinction was that since the estate of Dr. Dorrance was large enough to satisfy the tax claims of both New Jersey and Pennsylvania (as well as those of the Federal Government), and still have in excess of seventy millions left after the satisfaction of all such claims, New Jersey was, in its attempted suit against Pennsylvania, unable to show the possibility that it might suffer any loss from the assessment and collection of taxes in Pennsylvania.\footnote{There it did not appear that the State of New Jersey would be in any way injured by the collection of the tax which Pennsylvania was about to collect. It was not and...}
paramount importance in the principal case is clear from the repeated stress laid upon the circumstance that the Green estate lacked assets sufficient to meet the tax claims of all four states. "Taken as a whole," said Mr. Justice Stone, "the case is exceptional in its circumstances and in the principles of law applicable to them, all uniting to impose a risk of loss upon the state lawfully entitled to collect the tax." Looking at the two cases from the point of view of the taxpayer, it seems grossly unfair that the estate of Dr. Dorrance should bear a tax burden in the way of state death taxes equal to between a third and a quarter of his total estate, where the only reason for the discrimination is the fact that the one left enough to meet the larger demand, where the mere forty odd millions (gross estate) left by the other were insufficient.

The crux of the matter is caught by Mr. Justice Frankfurter (in his dissenting opinion) when he points out the weakness in the basic assumption upon which the four States (and the Special Master) proceeded in submitting the case to the Court, namely, that it was necessary to find that Colonel Green, at the time of his death, died possessed of but one domicile exclusively to be found in some one of the four claimant states. He said:

could not be alleged either that the property in New Jersey, out of which New Jersey could collect the tax which it claimed, was insufficient, or that the entire assets of the estate wherever situated were insufficient to permit the full collection of both the Pennsylvania tax and the New Jersey tax. As we understand it, this Court refused to permit New Jersey to file its bill because of the absence of these averments and because their absence compelled the inference that leave to file the bill was sought not in the interest of the State of New Jersey but in the interest of the state and its beneficiaries. In our case these averments are made and the fact is that leave to file the bill was and is sought by the State of Texas solely on its own initiative and in its own interest." Memorandum Re Bill of Complaint of the States of Texas, p. 2.


38 The Dorrance estate totalled $115,000,000; the tax paid Pennsylvania totalled (in round figures) 17.2 millions, and that paid New Jersey, 15.6 millions, or a total of state death taxes of 32.8 millions. See Nash, And Again Multiple Taxation? (1938) 26 GEORGETOWN LAW JOURNAL 288, 342. As found by the Special Master, the net estate left by Colonel Green totalled $36,137,335, and the Massachusetts tax amounted to $4,947,008. See Texas v. Florida, et al., 59 Sup. Ct. 563, 569 (March 13, 1939).

39 By allowing this assumption to stand the Court had to determine the question of fact—the domicile of the decedent at the time of his death. The opinion of the Court with respect to this question is important as a statement of the effect, as a matter of law, of the existence of particular facts and should serve as a guide to the determination of domicile by the federal courts. The Court accepted the common law doctrine that "Residence in fact, coupled with the purpose to make the place of residence one's home are
"The presupposition of jurisdiction in this case is the common law doctrine of a single domiciliary status. That for purposes of legal rights and liabilities a person must have one domicile, and can have only one, is an historic rule of the common law and justified by much good sense. Nevertheless, it often represents a fiction. . . . The facts in this case doubtless present a bizarre story. But in Green's peregrinations from state to state, in the multiplicity of his residences, and in the conflicting appeals which various states made upon his interests from time to time, the case is hardly unique nor are analogies to it unlikely to appear in the future. As a result, this Court is asked to determine the conflicting claims of different states of the Union to a share of the estate of individuals who, as a matter of hard fact, at different periods and contemporaneously invoked and enjoyed such benefits as the existence of state governments confer. It is asked to do so by applying an old doctrine of limited validity to modern circumstances whereby, through the elusive search for an often non-existent fact called domicile, only one state to the exclusion of all others would be allowed to levy a tax. The inherent difficulties of this problem have been widely recognized. The old formulas are simply inadequate to the new situation. On the other hand, it is not for this Court in these cases of multiple residences to evolve new taxing policies based on more equitable consideration than the all-or-nothing consequence of the old domiciliary rule."40

The majority, it should be observed, were not oblivious to the possibility of a finding for double, or even multiple, domicile. Indeed, the possibility was recognized and found consistent with due process of law in both the Dorrance41 and Hunt cases.42 And it can hardly be doubted that the estate of Colonel Green would have been left to a fate like that of the Dorrance and Hunt estates had there been assets enough to render the fate consummate.43 The only criticism that can be made of the majority decision on this point is that it failed to spread the assets as far as they would have gone among such of the states as appeared to have legitimate claims to them. That the record established facts capable of supporting a reasonable finding of domicile in more than the one state of Massachusetts can hardly be denied. The difficulty lies not so much in determining what other state or states besides Massachusetts should be cut in on the pie, but which one to exclude, since the pie was not big enough to go around.

the essential elements of domicile." 59 Sup. Ct. 563, 576 (March 13, 1939). As between two residences that which appears from the person's entire course of conduct to be his "preeminent headquarters" and most intimately connected with his major interests in life must be considered the domicile. A review of the evidence, impossible here, is necessary for a determination of the facts which will attach to one or another of several residences the tests of domicile laid down by the Court.


41 See note 31, supra.


That the Court was desirious of framing a decision which would lack as much as possible the generating potentialities of precedent seems indicated by the stress laid over and over again on the novel feature of the case—the danger of serious conflict among the four states which would result from the realization of the not too improbable eventuality of all four seeking to collect tax claims from an estate of insufficient assets. This objective might seem to have been more readily attainable had the case been treated as one of voluntary submission by the four states to the adjudication and declaration of rights among them. Warping into play the plan of interpleader makes possible the contention in some future dispute that while Texas v. Florida, et al. was submitted to the Court pretty much as a matter for arbitration, it was treated by the Court in a way to support the conclusion that had Massachusetts pressed her initial doubts of the jurisdiction of the Court, she would nevertheless have been forced to submit. On the other hand, this may have been the very objective the Court most desired—to negative as decisively as possible any willingness on the Court's part to serve as an arbitrator between the states in such matters. This conclusion is reinforced rather than weakened by the trouble taken by the Court to elaborate a non-conventional theory of interpleader as a frame for its decision. Recourse to the jurisdiction of equity to render declaratory relief might more easily have been made to determine the justiciability of the case, but under this aspect the decision would have retained the flavor of arbitration still.\(^{44}\) Therefore, while the case cannot at some future time be denied the force of precedent where, under similar circumstances, one state seeks to compel another, unwilling, state to yield to the Court's determination of double domicile, it can, quite effectively, be denied such force where several states seek voluntarily the assistance of the Court in a case where the facts do not so clearly establish the possibility of the establishment of tax claims exceeding the available assets of the subject sought to be taxed. Texas v. Florida, et al. stands as an established precedent for a situation narrow enough to render improbable the burdening of the Court with questions of domicile, questions which, the Court has repeatedly held, are, in normal situations, non-federal in nature.\(^{45}\) The answer to the worrying of the dissenting Justices\(^{46}\) that

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\(^{44}\)The fact remains that the relief afforded was essentially that of a declaratory judgment. \(\ldots\) to retain the bill and dispose of it on its merits, amounts, in effect, to a declaration of rights on behalf of the estate which could not be adjudicated otherwise than through the screen of controversy between states." Frankfurter, J., dissenting, Texas v. Florida. et al., 59 Sup. Ct. 563, 580 (March 13, 1939.) (Italics Supplied.)

\(^{45}\)Thompson v. Whitman, 18 Wall. 457 (U. S. 1873); Thormann v. Frame, 176 U. S.
the decision of the majority might gradually be expanded into some doctrine out of all proportion to its original beginnings is to be found in another dissenting opinion of recent date, that of Mr. Justice Butler in the Reciprocal Immunities case,\textsuperscript{47} where he said:

"Appraisal of lurking or apparent implications of the Court's opinion can serve no useful end for, should occasion arise, they may be ignored or given direction differing from that at first seemingly intended."

**FEDERAL CORPORATIONS—SUABILITY**

The status of federal corporations (i.e., corporate agencies wholly owned by the United States) was further clarified when the Supreme Court, in *Keifer & Keifer v. Reconstruction Finance Corporation et al.,*\textsuperscript{1} held that a Regional Agricultural Credit Corporation, a corporation wholly owned and controlled by the United States,\textsuperscript{2} is subject to suit in tort. The suit was based on the alleged negligence of the Regional Agricultural Credit Corporation as bailee for hire.

The Act which created the Reconstruction Finance Corporation\textsuperscript{3} con-

\textsuperscript{47}"Jurisdictional doubts inevitably lose force once leave has been given to file a bill, a master has been appointed, long hearings have been held, and a weighty report has been submitted. And so, were this the last as well as the first assumption of jurisdiction by this Court of a controversy like the present, even serious doubts about it might well go unexpressed. But if experience is any guide, the present decision will give momentum to kindred litigation and reliance upon it beyond the scope of the special facts of this case. To be sure, the Court's opinion endeavors to circumscribe carefully the bounds of jurisdiction now exercised. But legal doctrines have, in an odd kind of way, the faculty of self-generating extension. Therefore, in pricking out the lines of future development of what is new doctrine, the importance of these issues may make it not inappropriate to indicate difficulties which I have not been able to overcome and potential abuses to which the doctrine is not unlikely to give rise," Frankfurter, J., dissenting (Black, J., concurring in the dissent) in *Texas v. Florida, et al.,* 59 Sup. Ct. 563, 580 (March 13, 1939).

\textsuperscript{1}Graves v. People of State of New York, ex rel. O'Keefe, 59 Sup. Ct. 595 (March 27, 1939).

\textsuperscript{2}Prepared by Philip Treibitch.

\textsuperscript{3}Congress originally authorized the Reconstruction Finance Corporation to create and finance the regional agricultural credit corporations, 47 Stat. 713 (1932), 12 U. S. C. § 1148 (1934). They are now under the supervision of the Farm Credit Administration, Exec. Order 6084, March 27, 1933; 50 Stat. 704, 12 U. S. C. § 1148 (Supp. 1937).

tained one section\textsuperscript{4} authorizing it to create the regional agricultural credit corporations and providing for their powers in broad terms. Although the section pertaining to the regional agricultural credit corporations did not specifically make them subject to suit, the Court refused to presume from that fact alone that Congress meant to grant to the Corporation immunity from suit. On the contrary, the Court held the fact that Congress has provided for suability in the case of almost all other corporations it has created,\textsuperscript{5} many of them with functions similar to those of the regional agricultural credit corporations,\textsuperscript{6} indicates the policy of Congress to make such corporate agencies subject to suit. That the omission of the usual express provision for suability from the section of the Act providing for the regional agricultural credit corporations did not show an intention to depart from that general policy, was declared by the Court to be indicated by the fact that the parent Reconstruction Finance Corporation was expressly made subject to suit.\textsuperscript{7}

The approach of the Court to the question whether Congress by its silence meant to cloak a federal corporation with immunity was similar to that used in the leading case of \textit{Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation and the United States};\textsuperscript{8} where the Court inferred an intention to make the Fleet Corporation subject to suit from the fact that Congress authorized its incorporation under the laws of the District of Columbia. The principal case, more applicable to present-day federal corporations, leads strongly to the view that in the light of the modern concept in regard to corporate facilities, and the uniform policy followed by Congress in creating them, the Court will infer from the mere creation by Congress of a federal corporation an intent to make that corporation amenable to suit. It does not follow, of course, that Congress, by incorporating an agency of the


\textsuperscript{5}The Court, in a footnote to its decision, lists some forty corporations created by Congress which have been given express authority to sue and be sued. 59 Sup. Ct. 516, 518 (Feb. 27, 1939).

\textsuperscript{6}All of the other corporations in the farm credit system have been expressly made subject to suit, 39 \textit{Stat.} 363 (1916), 12 U. S. C. § 676 (1934). (The Federal Land Banks); 48 \textit{Stat.} 266 (1933), 12 U. S. C. § 1138 (1934). (Central Bank for Cooperatives, Banks for Cooperatives, Production Credit Corporations and Production Credit Associations. The Production Credit Corporations and Production Credit Associations have been organized as permanent facilities for short-term agricultural credit, replacing the regional agricultural credit corporations which were of an emergency character.)


\textsuperscript{8}258 U. S. 549 (1922).
Government, divests it of all the rights and immunities of the United States. For some purposes federal corporations have been held separate entities, but for other purposes they have been regarded as administrative branches of the Government. The Court has apparently been guided by its view of public policy and the intent of Congress, in stressing the one or the other of these two aspects of federal corporations in any particular case.

More important than the holding that the Regional Agricultural Credit Corporation was amenable to suit, since Congress usually provides for suability expressly, is the holding that the unqualified authority to sue and be sued makes a federal corporation amenable to suit in tort as well as in contract. Without conceding that the suit in the instant case was one in tort, the Court nevertheless held the Regional Agricultural Credit Corporation subject to suit in tort. The Court declared there was no reason for inferring an intention to have tort suits treated differently from contract suits. If, said the Court, Congress meant to limit a corporation's amenability to suit to one in contract only, it well knew how to do so, since it has done so with respect to suits against the United States. In so holding, the Court clarified a question concerning which there have been a number of conflicting opinions.

*Federal corporations, e.g., have been granted immunity from state taxation as instrumentalties of the Federal Government, McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819); Clallam County, Washington v. United States and United States Spruce Production Corporation, 263 U. S. 341 (1923); City of New Brunswick v. United States, 276 U. S. 547 (1928).


*This dual character of Federal corporations was discussed recently in Stoke, Some Aspects of the Legal Status of Federal Corporations (1938) 27 Georgetown Law Journal 1.


FEDERAL LEGISLATION
TAXABILITY OF GOVERNMENT-BOND INTEREST

Seldom in our recent history has any question of policy before Congress brought forth such extensive discussion of constitutional questions as has the demand for elimination of intergovernmental immunities under the income-tax laws of the Federal Government and the various states.¹

These immunities have accrued to the benefit of two classes: First, those receiving salaried income as officers or employees of the federal or local governments; second, those receiving interest on bonds issued by the federal or local governments.

In the case of Graves v. People of State of New York ex rel. O'Keefe,² decided March 27, 1939, the Supreme Court, in a far-reaching opinion, settled the constitutional question as to whether the federal and state governments might properly levy an income tax on salaries of the officers and employees of one another. But the constitutionality of an income tax on the interest received from government bonds (and like securities) remains an open question under that decision. Is interest on state and municipal securities constitutionally immune from the federal income tax? Is interest on securities of the Federal Government constitutionally immune from a state income tax? The present paper will endeavor to review these constitutional problems in the light of recent judicial decisions.

As a matter of policy the elimination of intergovernmental immunities has met with official approval³ and favorable public comment,⁴ but much controversy has arisen as to the constitutional basis of any proposed method of effectuating such a policy. President Roosevelt⁵ sent a strong message on the subject to Congress on April 25, 1938 and again on

¹Taxation of Government Bondholders and Employees—The Immunity Rule and the Sixteenth Amendment, United States Dep't of Justice (1938); Power of Congress to Tax the Interest from State and Local Securities and the Compensation of State and Local Employees, report to the Joint Committee on Internal Revenue Taxation by its staff (1938); The Constitutional Immunity of State and Municipal Securities: A Legal Defense of The Continued Integrity of the Fiscal Powers of the States, by the attorneys general of the states and counsel for certain of their municipal sub-divisions (1938).
²59 Sup. Ct. 595 (March 27, 1939).
³Testimony of Under Secretary of the Treasury Hanes, Hearings before the Special Committee on Taxation of Government Securities and Salaries pursuant to S. Res. 303 (75th Cong.), 76th Cong., 1st Sess. (1939) 4.
⁴On February 9, 1939 Representative McCormack, in discussing H.R. 3790, known as the “Public Salary Tax Act of 1939”, remarked that the Gallup poll showed 87% of the responses to be in favor of removing tax immunities; 84 Cong. Rec., Feb. 9, 1939, at 1823.
⁵Hearings before the Special Committee on Taxation of Government Securities and Salaries pursuant to S. Res. 303 (75th Cong.), 76th Cong., 1st Sess. (1939) 4.
January 19, 1939. In the first message the President said:

"The desirability of this recommendation has been apparent for some time, but heretofore it has been assumed that the Congress was obliged to wait upon that cumbersome and uncertain remedy—a constitutional amendment—before taking any action. Today, however, expressions in recent judicial opinions lead us to hope that the assumptions underlying these doctrines are being questioned by the Court itself and that these tax immunities are not inexorable requirements under the Constitution itself but are the result of judicial decisions. Therefore, it is not unreasonable to hope that judicial decision may find it possible to correct it."

The decision of the Supreme Court in the case of Helvering v. Gerhardt on May 16, 1938 gave impetus to the movement for legislation to remove tax exemptions. Subsequently, in June 1938, the United States Senate appointed a special committee to study the entire question, both as to federal and state salaries as well as to income from federal and state securities. The committee was directed to report not later than March 1, 1939 but obtained an extension of that date to June 1, 1939 insofar as the securities question was concerned. Meanwhile, on February 9, 1939, H. R. 3790, known as the "Public Salary Tax Act of 1939", passed the House of Representatives and was pending before the Senate with a favorable report from the Senate Committee on Finance at the time the decision in the Graves case was handed down. The Public Salary Tax Act was subsequently enacted into law (Pub. L. No. 32, 76th Cong., 1st Sess. (April 12, 1939)). It also seems certain that this Congress will undertake legislation designed to tax income from government securities and will attempt to complete the broad task of eliminating all exemptions based on the relationship of income to a governmental source. Because the situation from a legislative standpoint is so fluid at this time, with the picture changing rapidly from day to day, and because the final form of such legislation cannot at present be predicted, this discussion must necessarily be limited to the constitutional problem and not projected too far into an attempted analysis of possible legislation.

HISTORICAL DEVELOPMENT

It is perhaps appropriate to consider briefly the doctrine of intergovernmental immunities from the historical viewpoint.

304 U. S. 405 (1938).
Immunity of the national and state governments from taxation by one another is not founded on any express limitation in the Constitution. It stems from the famous case of *M'Culloch v. Maryland* in which Chief Justice Marshall delivered the opinion, which has become so well known in the law as to be almost axiomatic, and hence, of course, will not require detailed discussion here. In that case a state tax laid specifically upon the privilege of issuing bank notes, and in fact applicable to only national bank notes, was held to be invalid because it interfered with the national Government in the exercise of its power to establish and maintain a bank, implied from specific grants of power in the Constitution. Maintenance of the supremacy of the Federal Government within the sphere of its delegated powers was to Chief Justice Marshall a great principle, and he could not reconcile state taxation of a federal instrumentality with that principle.

From *M'Culloch v. Maryland*, decided in 1819, to *Helvering v. Gerhardt*, decided last year, there may be roughly outlined three stages of development, or perhaps more exactly expressed, of judicial application of the doctrine. First, from *M'Culloch v. Maryland* to *Collector v. Day*, decided in 1871, extended a period characterized by supremacy of the Federal Government. Second, from *Collector v. Day* to *South Carolina v. United States*, decided in 1905, came a period of reciprocity or parity of the states and the national Government as regards the immunities allowed each. Third, from *South Carolina v. United States*, which excluded from immunity those functions of the states not essentially governmental, to *Helvering v. Gerhardt* there occurred a gradual encroachment upon the application of immunities granted to individuals because of their relationships with the federal or state governments. *Helvering v. Gerhardt* marked the end of an era in the law insofar as taxation of salaries of government employees was concerned. *Graves v. New York ex rel. O'Keefe* declared the end of immunities for both federal and state

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124 Wheat. 316 (U. S. 1819).

13The question of supremacy of the Federal Government had arisen in two cases prior to *M'Culloch v. Maryland*: *viz.*, United States v. Peters, 5 Cranch 115 (U. S. 1809), and Martin v. Hunter's Lessee, 1 Wheat. 304 (U. S. 1816). In the former the legislature of Pennsylvania tried to annul a judgment of a court of the United States. The Supreme Court declared itself the supreme judicial tribunal of the nation and voided the action of the state legislature. In the second case a Virginia court of appeals attacked § 25 of the Judiciary Act of 1789, which gave a right of appeal from state courts to the United States Supreme Court. The supremacy of the federal law was declared applicable and the action of the Virginia court of no force.

1411 Wall. 113 (U. S. 1871).

15199 U. S. 437 (1905).
salaries and raised questions yet to be answered with regard to other fields of inter-governmental immunities. It is widely felt that now must begin a period of new demarcations insofar as immunity for either type of government is concerned.

The case of Collector v. Day introduced two new elements into the law of immunities; first, it made available to state officers and employees the same immunity afforded federal officers and employees in the earlier case of Dobbins v. Erie County,\textsuperscript{16} which had followed M'Culloch v. Maryland in applying the doctrine of federal supremacy as a basis of immunity for a federal employee; second, it extended both federal and state exemptions to include income. Graves v. New York ex rel. O'Keefe specifically overruled Collector v. Day as applied to salary income.

Applying the principle that the income from a governmental source enjoyed the same immunity as its source, the case of Pollock v. Farmers Loan & Trust Company,\textsuperscript{17} decided in 1895, extended the reciprocal doctrine to include the income received by private persons from municipal bonds. Exemption from the federal income tax was granted on the supporting reasoning that the income tax amounted to a direct tax on the bonds without the Constitutional requirement of apportionment, and on the reasoning that it was a tax on the power of the states and instrumentalities to borrow money. The decision in this case made the Sixteenth Amendment necessary so that any income tax might be levied by the Federal Government without apportionment. This case stands today as the landmark in supporting the immunity of interest on government securities from income taxation. Will the Supreme Court follow the course set in overruling Collector v. Day, by overruling this decision as one founded upon reasoning that is no longer tenable? This question, of course, cannot be answered categorically. It can only be considered in the light of reasoning applied by the Court in its recent decisions affecting directly the question of immunities.

ARGUMENT FOR TAXABILITY

In Fox Film Corporation v. Doyal,\textsuperscript{18} the Supreme Court stated in a concise manner the doctrine of immunity as it seems to exist today, thus:

"The principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from federal taxation—essential to the maintenance of our dual system

\textsuperscript{16}16 Pet. 435 (U. S. 1842).

\textsuperscript{17}157 U. S. 429 (1895) and 158 U. S. 601 (1895).

\textsuperscript{18}286 U. S. 123 (1932). This case expressly overruled Long v. Rockwood, 277 U. S. 142
—has its inherent limitations. It is aimed at the protection of the operations of government (McCulloch v. Maryland, 4 Wheat. 316, 436), and the immunity does not extend "to anything lying outside or beyond governmental functions and their exertions" (Indian Motorcycle Co. v. United States, 283 U. S. 570, 576, 579). Where the immunity exists, it is absolute, resting upon an "entire absence of power" (Johnson v. Maryland, 254 U. S. 51, 55, 56), but it does not exist "where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government" (Willcutts v. Bunn, 282 U. S. 216, 225).

The determination of immunity from any particular tax must ultimately rest on whether or not it is a burden on the governmental function involved. The cases of Helvering v. Gerhardt and Graves v. New York ex rel. O'Keefe both merit analysis in connection with the application of this test because they establish it firmly and directly.

In Helvering v. Gerhardt employees of the New York Port Authority sought exemption from the federal income tax upon their salaries, contending that they were engaged in an essentially governmental function and therefore entitled to the immunity accruing to the Authority itself. The Court outlined two principles in determining entitlement to immunity:

"... The one, dependent upon the nature of the function being performed by the state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. ... The other principle exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax on the state itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons."

The function of the New York Port Authority was not considered of such a character and so intimately associated with the performance of an indispensable function of state government as to vitiate an income tax on its employees. The rationale of the case insofar as it concerns the "burden" limitation on the doctrine of immunity merits careful consideration because of its analogy to the taxation of interest from securities. The effect of the tax on the governmental instrumentality was declared to be speculative and unsubstantial. It was not thought necessary in order to attain protection for the continued existence of the state to

(1928), in establishing that one who derived income from a copyright could not be given the same immunity from state taxation as was afforded a federal instrumentality.
confer on it a competitive advantage over private persons in carrying on its functions. Although the cost of government might be increased to some unascertainable extent, such a burden was considered only a normal incident of the "organization within the same territory of two governments, each possessed of the taxing power". It is difficult to carry the case of the government bondholder past this reasoning. The idea of conferring on the state a competitive advantage over private persons would seem to apply in the "money market", although it may be shown that the burden involved is more directly passed on to the government itself.

The *Graves case* presents the converse of the situation in *Helvering v. Gerhardt*. An employee of the Federal Government, an attorney for the Home Owners' Loan Corporation, sought to invoke immunity from a New York State income tax upon his salary. The Court had before it the questions of whether he was engaged in an essential governmental function and whether the tax amounted to an unconstitutional burden on the Federal Government. The first was disposed of on the assumption that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the Federal Government. The old doctrine of federal supremacy as established in *M'Culloch v. Maryland* was applied. In its opinion the Court stated that the Federal Government derives its authority wholly from powers delegated to it by the Constitution, that every action within its constitutional power is governmental action, and that since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. And when, the Court continued, the national Government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the Government itself through its departments.

The question presented by the case, as phrased by the Supreme Court, was simply whether or not the tax laid upon the income of an employee of a corporate instrumentality of the Federal Government imposed an unconstitutional burden on that Government. The Court pointed out

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that the tax was a non-discriminatory one on income, in no way a tax on the Home Owners’ Loan Corporation itself,21 and said that “the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national Government tantamount to an interference by one government with the other in the performance of its functions”. It was considered that the burden would be the same whether the government was that of the state or of the United States. All the reasons applied in the Gerhardt case for denying the immunity sought here were considered applicable. The conclusion of Mr. Justice Stone’s opinion may well be quoted:

“So much of the burden of a nondiscriminatory general tax upon the income of employees of a government, state or national, as may be passed on economically to that government through the effect of the tax on the price level of labor or materials is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because, if allowed, it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments.”

Mr. Justice Frankfurter gave a concurring opinion in the case, emphasizing that the old, oft-quoted theory, “the power to tax involves the power to destroy,” can no longer be credited.22

In the light of this decision the immunity heretofore granted to income on government securities obviously does not stand on the solid basis attributed to it following the decision in the Pollock case. The argument that a tax on such income is a tax on the source is gone;23 the argument that the power to tax is the power to destroy can no longer support a


22He said, “All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called ‘pernicious abstractions’. The web of unreality spun from Marshall’s famous dictum was brushed away by one stroke of Mr. Justice Holmes’ pen: ‘The power to tax is not the power to destroy while this court sits’. (Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 223 (1928) (dissent)).”

23See cases cited in note 21, supra.
The rule seems to be narrowed to a simple test of whether or not the tax in question places an immediate and direct burden upon the functions of the other government. If it does, then immunity will be recognized. But if the effect of the tax is remote and unsubstantial, then immunity will be denied. It has been said of the test as now established that "the Court will apply ... a pragmatic test when the tax imposed by one government falls only indirectly upon the other government. The burden limitation ... emphasizes a practical perspective where the tax is indirect as distinguished from a doctrinal dogmatism where the tax is direct. ... The more recently announced burden limitation requires the application of a practical criterion to the economic consequences of an indirect levy. The pith of recent decisions is that immunity from a nondiscriminatory indirect tax is not grounded upon theoretical conceptions of impairment of the functions of government but upon substantial interference of such functions". Can the practical economic burden of a tax levied against the individual's income from interest on government securities be said to fall directly and substantially upon the government issuing the securities? Certainly the immunity heretofore recognized has been at least shaken.

Much attention is being given to the argument that the Sixteenth Amendment gives the right to tax interest from securities as "income from whatever source derived". Directly contrary to this argument are those cases holding that the Sixteenth Amendment did not grant to the Federal Government any new taxing power, but only relieved the income tax of the necessity of apportionment. The Department of Justice, in its study of the question of eliminating tax immunities, has prepared a comprehensive study of the legislative and judicial history of the Amendment. It is urged that effect should be given to the express meaning of the words "from whatever source derived". In view of the tendency of the Court at this time to consider the Constitution itself as

26Wenchel (Chief Counsel, Bureau of Internal Revenue), Legal Aspects of Tax-Exempt Privileges (1939) 25 A.B.A.J. 205, 207.
27Taxation of Government Bondholders and Employees—The Immunity Rule and the Sixteenth Amendment, United States Dept of Justice (1938); Power of Congress to Tax the Interest from State and Local Securities and the Compensation of State and Local Employees, report to the Joint Committee on Internal Revenue Taxation by its staff (1938).
the source of constitutionality, rather than to consider *stare decisis* as an unbending rule, there is ample ground for believing that the Sixteenth Amendment might be considered as giving to the Federal Government the right literally to tax incomes "from whatever source derived". Such an interpretation of the Amendment would eliminate the question of any immunity from the federal income tax. However, under the present tendency of the decisions it would seem unnecessary to disturb those cases holding that the Amendment made no new grant of power, because, for the purpose of eliminating immunities enjoyed by individuals who obtain income from the Government's obligations, reliance may well be made on the "direct and substantial burden" test.

Immunity in a number of analogous fields has been denied the individual who deals with either the national or a state government. It has been denied where the tax was held to be upon franchise privileges even though income was a measure of the tax; where the income was earned as a contractor with the government; where the income resulted from a transfer of government securities at a profit; where the tax was a transfer tax on legacies to the government; where an inheritance tax was applied to a legacy of government securities; where income resulted, in part, from transactions in interstate commerce; where one state undertook to tax the bonds of another state held by its own citizens; and finally where the employees of the one government were taxed by the other government on the income received as such employees.

Immunity has consistently been allowed by the Supreme Court wher-

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29Note particularly Mr. Justice Frankfurter's concurring opinion in the Graves case, 59 Sup. Ct. 595 (March 27, 1939).
ever the tax in question could be established as a property tax on the bonds themselves. But immunity on this basis does not afford a corresponding immunity for interest on the bonds, in the light of those decisions denying that a tax on the income is a tax on the source.

ARGUMENT FOR IMMUNITY

The case in support of immunity for income from securities is not altogether devoid of argument. It rests upon the ground that a direct and substantial burden would fall upon the issuing government as a result of the tax. The case for interest on securities is made stronger than the case for salaries by the fact that such a tax may be held to be a clog upon the borrowing power of the government.

The Court has been careful not to overrule Pollock v. Farmers Loan & Trust Co. In Willcutts v. Bunn it upheld the right of the Federal Government to subject gains from the sale of county and municipal bonds to federal income tax, but made a distinction with regard to income on securities, saying:

"In the case of the obligations of a state or of its political subdivisions, the subject held to be exempt from federal taxation is the principal and interest of the obligations. Those obligations constitute the contract made by the state, or by its political agency pursuant to its authority, and a tax upon the amounts payable by the terms of the contract has therefore been regarded as bearing directly upon the exercise of the borrowing power of the government."

In James v. Dravo Contracting Co., which denied immunity from a

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**282 U. S. 216 (1931).

***302 U. S. 134 (1937).
West Virginia gross-receipts tax imposed upon an independent contractor in connection with work performed for the Federal Government in that state, Chief Justice Hughes referred to the Pollock case as follows:

“There is no ineluctable logic which makes the doctrine of immunity with respect to government bonds applicable to the earnings of an independent contractor rendering services to the government. That doctrine recognizes the direct effect of a tax which ‘would operate on the power to borrow before it is exercised’ (Pollock v. Farmers Loan and Trust Company, supra) and which would directly affect the government’s obligation as a continuing security. Vital considerations are there involved respecting the permanent relations of the government to investors in its securities and its ability to maintain credit—considerations which are not found in connection with contracts made from time to time for the services of independent contractors.”

Without referring particularly to the other cases cited, it may be stated, if even somewhat dogmatically, that the law as it now stands supports immunity of income on government securities, and any holding to the contrary would necessarily involve an overthrow of the Pollock decision. It is difficult to deny that the income tax levied against interest from government securities would operate on the borrowing power and would increase the cost to the government. In a comprehensive treatise entitled The Fiscal and Economic Aspects of the Taxation of Public Securities, prepared by Harley L. Lutz, Professor of Public Finance at Princeton University, and referred to in the hearings before the Senate Special Committee on Taxation of Government Securities and Salaries, estimates are made as to the added cost to both the state governments and the Federal Government if the legislation anticipated should become effective. It is not within the scope of a discussion of the constitutional aspects of the problem to consider in detail the economic effects of taxing securities, but the economic result of such a tax could not be ignored in applying the “burden” limitation on immunity.

The argument that any income tax on an individual amounts to a direct and substantial burden on the government with whom he deals is gone except in this one field. The trend points toward its overthrow. In this respect the decision in Hale v. State Board contains an interesting view of the income tax. Justice Cardozo, in ruling that state income

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\(^{46}\) 76th Cong., 1st Sess. (1939) 91-186.


\(^{47}\) 302 U. S. 95 (1937).
taxation on interest received from state bonds issued before the income tax law was passed was valid although the bonds had been exempted at the time of issuance from other forms of taxation, commented in that case upon the nature of the income tax as follows:48

"We do not overlook the argument that the promise to pay interest may be part of the obligation of a contract as much as the promise to pay principal. To concede this counts for little if the distinction between an excise and a property tax, or between the different meanings of a property tax, is not permitted to escape us. . . . The tax complained of by appellants is not laid upon the obligation to pay the principal or interest created by the bonds, at all events within the meaning of the contract of exemption. The tax is laid upon the net results of a bundle or aggregate of occupations and investments. Under a statute so conceived and framed a man may own a quantity of state and county bonds and pay no tax whatever. The returns from his occupation and investments are thrown into a pot, and after deducting payments for debts and expenses as well as other items, the amount of the net yield is the base on which his tax will be assessed."

It would be difficult to find a closer parallel to the question now at hand. The case against immunity was summarized by Justice Stone in Gerhardt v. Helvering in a manner difficult to defeat:

"The taxpayers enjoy the benefits and protection of the laws of the United States. They are under a duty to support its government, and are not beyond the reach of its taking power. A non-discriminatory tax laid on their net income, in common with that of all other members of the community could by no reasonable probability be considered to preclude the performance of the function which New York and New Jersey have undertaken, or to obstruct it more than like private enterprises are obstructed by our taxing system. . . . At most it may be said to increase somewhat the cost of the state governments because, in an interdependent economic society, the taxation of income tends to raise (to some extent which economists are not able to measure, see Indian Motorcycle Co. v. United States . . . ) the price of labor and materials. The effect of the immunity if allowed would be to relieve respondents of their duty of financial support to the national Government in order to secure to the state a theoretical advantage so speculative in its character and measurement as to be unsubstantial. A tax immunity devised for protection of the states as governmental entities cannot be pressed so far."

The present trend in the decisions is undeniably toward placing every possible limitation upon the doctrine of immunity. The present tendency of the Supreme Court seems to be to consider the background from which a questionable judicial doctrine arose and to overthrow that doctrine if it is out of harmony with a practical application of constitutional principles.49 The field of immunity has been narrowed so that almost

48Id. at 107-108.
49Note Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938), overruling Swift v. Tyson,
every analogous situation has been denied a place therein,\textsuperscript{50} and the principal reasoning of the \textit{Pollock case} has since been overthrown by the Court.\textsuperscript{51} It is extremely doubtful that immunity for income from securities could now gain recognition if the legislation contemplated by Congress brings the issue squarely before the Court.

\textbf{LEGISLATIVE EXEMPTION}

If it may be assumed that the constitutional basis of immunity no longer exists, the question arises: To what extent can exemptions be conferred by legislation? It cannot be successfully denied that the entire doctrine of immunities was shaken and left on questionable grounds by the \textit{Graves case}. Witness, e.g., the statement by Mr. Justice Stone, in the majority opinion, that—

“every agency which Congress can constitutionally create is a governmental agency, and since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation. Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have implied, is a question which need not now be determined.” (Italics added.)

Also worthy of attention in this connection is the following statement by Mr. Justice Frankfurter in his concurring opinion:

“Whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the state governments under which they live is a matter for another day.”

These statements, considered in the light of the case as a whole, raise questions concerning the entire field of intergovernmental immunities.

One such question presents itself directly in the problem now before Congress of affording relief from the retroactive effect of the decisions

\textsuperscript{50} See note 21, \textit{supra}, for the cases cited by the Court in \textit{Graves v. New York ex rel. O'Keefe} as denying that an income tax is a tax on the source.
in *Helvering *v. *Gerhardt* and *Graves *v. *New York *ex rel. *O’Keefe*. The Public Salary Tax Act of 1939, recently enacted into law (as stated above), is designed to afford such relief. Unquestionably Congress can relieve those who would be subjected to a retroactive application of the federal income tax. But can it extend such relief to those of its own employees subjected to state income-tax laws, which will also be effective retroactively? Congress is proceeding to formulate legislation toward this end. In some of the states that have income-tax laws such legislation, however, would not be necessary because exemptions are already allowed.

In fourteen of the thirty-four income-taxing states, for example, statutory provision is made for exempting federal employees' salaries; three states do not apply their income-tax laws to compensation received as salaries; three states afford exemptions in their tax regulations; five states exempt salaries of federal employees to the extent required by federal law; five states phrase the exemption in terms of constitutional requirements. Two states, however, have recently repealed provisions in their laws affording exemption to federal employees; New York repealed its provision on March 15, 1937; Arkansas, on March 15, 1939. Undoubtedly a movement toward repealing exemption statutes will result from the decision in *Graves *v. *New York *ex rel. *O’Keefe*. Many state legislatures are now in session, and since states are generally pressed for sources of revenue, they can be expected to hasten to take advantage of the new opportunity.

As regards state income taxation of interest on securities of the Federal Government twenty of the thirty-four income-taxing states specifically exempt such interest; eleven states grant exemptions on the basis

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52A somewhat similar situation arose in 1926. Under the Revenue Act of 1918, the first which did not specifically exempt salaries of state officers and employees, the United States Treasury regulations allowed exemptions. These were continued in effect until 1925, when the Treasury changed its position and attempted to assess income taxes retroactively against all state officers and employees not engaged in an essential governmental function. Congress thereupon passed a special provision (Revenue Act of 1926, § 1211) that afforded relief from the retroactive effect of the Treasury Department ruling.


54N. H., Ohio, Tenn. The Kentucky law is silent regarding salaries.

55Ariz., Calif., Mont.

56Iowa, Minn., Miss., Ore., S. D.


of requirements of federal law or constitutional immunity; and three states grant exemptions only through their regulations.

CONCLUSIONS

The federal-supremacy rule, which has always played an important part in the doctrine of immunity, will no doubt support legislation affording relief to federal employees. On the basis of that doctrine it would seem evident that no state legislation could create an exemption, under any circumstances, from the federal income tax. In the absence of a constitutional immunity, as is now the case with employees, the federal law would be supreme and no basis of enforcement of such a state law would exist. This would no doubt be true of any legislative exemption. It is intimated in the Graves case that Congress might have clothed the Home Owners' Loan Corporation with complete immunity, and perhaps its employees, had it chosen to do so, but the questions left open by both Justices Stone and Frankfurter make even the doctrine of "federal supremacy" somewhat uncertain.

Although in view of the decision in Graves v. New York ex rel. O'Keefe legislation is not necessary to make the federal income tax applicable to salaries of state employees, specific legislation is necessary to tax income from state and federal securities. It is apparent, however, that such legislation will be enacted. No doubt it will be applied only to future security issues, and the states will be allowed to levy a non-discriminatory income tax on the interest from federal securities issued in the future.

But until the immunity claimed for such securities is overthrown by the Court, legislation within itself can not settle this constitutional question. There is strong likelihood that the Court as now constituted, applying the test of direct and substantial interference evolved in the recent decisions, will follow the course already opened and declare an end to the constitutional immunity of income from government securities.

Certainly, however, there still remains strong argument for the doctrine of immunity of such income. For the effect of this tax on the borrowing power—a power perhaps as essential to the functions of government as the taxing power itself—would undeniably be substantial, and in addition such a tax would materially increase the burden of government in marketing its securities.

LLOYD CROSLIN

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60 Ariz., Wis., Mont.
61 Exemptions are now allowed under § 22 (a) (4) of the Int. Rev. Code (1939).
NOTES

ADMINISTRATIVE REHEARINGS AND JUDICIAL REVIEW IN RADIO STATION LICENSING

THE Federal Communications Act of 1934 makes provision for both administrative hearings (by the Federal Communications Commission) and judicial review (by the United States Court of Appeals for the District of Columbia). Unfortunately, the Act fails to indicate the relationship of the one remedy to the other. Whether appeal is a remedy of a supplementary nature, so that the filing of a petition for rehearing and the administrative disposition thereof are conditions precedent to the vesting of appellate jurisdiction, or whether the remedies are alternative, subject to election on the part of the person adversely affected, were questions left to conjecture.

48 Stat. 1095 (1934), 47 U. S. C. § 405 (Supp. 1937) provides: "After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, on any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a hearing if sufficient reason therefore be made to appear: Provided, however, That in the case of a decision, order, or requirement made under Title III of this chapter, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. . . . No application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings therefore shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order." (Title III of the Act pertains to radio broadcasting.)

Section 402 (b) provides: "An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases: (1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission. (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

Time for filing the appeal is limited in § 402 (c) as follows: "Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of reasons therefore. . . ."
Judicial decision has implemented the statute by the establishment of several rules to the following effect:

(a) An appeal will be dismissed if brought by a person who failed to avail himself of the administrative remedy of rehearing in order to protect his interests. *Red River Broadcasting Co. v. Federal Communications Commission.*

(b) The pendency of a petition for rehearing properly before the Commission when notice of appeal was filed precludes the assumption of appellate jurisdiction. *Southland Industries, Inc. v. Federal Communications Commission.*

(c) The legal vigor of a petition for rehearing, pending when notice of appeal was filed, is not vitiated by the mere combination of passage of time and administrative inaction. *Woodman of the World Life Ass'n. v. Federal Communications Commission.*

(d) Time for appeal does not start running until the disposition of a petition for rehearing properly before the Commission. *Saginaw Broadcasting Co. v. Federal Communications Commission.*

In the *Red River Broadcasting case*, the appellant was the licensee of an existing radio broadcasting station who claimed to be aggrieved and adversely affected by the granting of a permit to a certain Baxter to construct a new station which the appellant alleged would have a deleterious economic effect upon its existing station. No formal notice of

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*98 F. (2d) 282 (App. D. C. 1938).*

*99 F. (2d) 117 (App. D. C. 1938).*

*99 F. (2d) 122 (App. D. C. 1938).*

*96 F. (2d) 554 (App. D. C. 1938).*

*There is no constitutional right to use the limited broadcasting channels of the air. Trinity Methodist Church, South v. Federal Radio Comm., 62 F. (2d) 850 (App. D. C. 1932), cert. denied, 288 U. S. 599 (1933). Congress may, under the interstate commerce clause, regulate radio broadcasting even to the extent of authorizing the deletion of existing stations. See Federal Radio Comm. v. Nelson Bros. Co., 289 U. S. 266 (1933). When licenses are granted, the equities of existing stations should be considered. *Id.* at 285; Unity School of Christianity v. Federal Radio Comm., 64 F. (2d) 550 (App. D. C. 1933). In the absence of a showing of economic or other damage, however, the fact that an area is sufficiently served by existing stations is not a ground for reversal of the Commission’s order granting a permit for the construction of a new station. Great Western Broadcasting Ass’n v. Federal Communications Comm., 94 F. (2d) 244 (App. D. C. 1937). See Pittsburgh Radio Supply House v. Federal Communications Comm., 98 F. (2d) 303 (App. D. C. 1938). On the other hand, the granting of a new license should be denied if it would result in the inability of the holder of an existing license to carry on in the public interest. Great Western Broadcasting Ass’n v. Federal Communications Comm., 94 F. (2d) 244 (App. D. C. 1937); Pulitzer Pub. Co. v. Federal Communications Comm., 94 F. (2d) 249 (App. D. C. 1937).*
the proceedings had been given to the appellant and it had not inter-
vened therein. The court, in granting a motion to dismiss the appeal, held that the same actual notice which prompted the appeal would have enabled the appellant to petition for an administrative rehearing. Failure to petition for a rehearing was considered tantamount to a failure to exhaust an available administrative remedy.

Through Mr. Justice Miller the court said,

“The reason for the rule requiring exhaustion of administrative remedies is well exemplified in this case for, assuming that the Commission erroneously failed to give notice of hearing on the Baxter application, still, if appellant had used one of the other available methods—particularly the petition for rehearing—to

Footnotes:
8 Failure to notify a station of proceedings before the Federal Radio Commission where the very existence of a station is involved amounts to a denial of due process. Unity School of Christianity v. Federal Radio Commn., 64 F. (2d) 550 (App. D. C. 1933).

Objections will not be considered judicially which were not stated before the appropriate administrative body if there was opportunity to do so. Chicago, M., St. P. & Pac. R. R. v. Risty, 276 U. S. 567 (1928). Board of Director of St. Francis Levee Dist. v. St. Louis-San Francisco Ry., 74 F. (2d) 183 (C. C. A. 8th, 1934); Campbell v. Milwaukee Electric Ry. & Light Co., 169 Wis. 171, 170 N. W. 937 (1919). Accord: Eastland Co. v. Federal Communications Commn., 92 F. (2d) 467 (App. D. C. 1937); Waite v. Macy, 246 U. S. 606 (1918); Smith v. Illinois Bell Telephone Co., 270 U. S. 587 (1926); Carpenter Steel Co. v. Metropolitan-Edison Co., 268 Fed. 980 (E. D. Pa. 1920); Williams v. Harvey, 91 Mont. 168, 6 P. (2d) 418 (1931).


Failure to petition for a rehearing of a workmen's compensation case was held to pre-

If confiscation will result from delay, failure to apply for administrative rehearings may be excused. United States v. Abilene & Southern Ry., 265 U. S. 274 (1923); see Banton v. Belt Line Ry., 268 U. S. 413 (1925).
call attention to the error, it was within the power of the Commission to correct the error and fully protect appellant.10

The theory that the favorable exercise of discretion is not conduced by willful or neglectful disregard of ordinary and adequate remedies also operated against the appellant because of the equitable character of appeals from the Commission.12 Furthermore, the court was being asked to exercise its power of review without a proper record to review.13

In the Southland Industries case, the licensee of an existing station had sought to make use of his administrative remedies by intervening in proceedings before the Commission on another party’s application for a permit to construct a new station, and had filed a petition for rehearing within the statutory period. Before the Commission had acted upon the petition, notice of appeal was filed. Sixteen days thereafter the Commission dismissed the rehearing petition so that at the time the

11Under the Radio Act of 1927, 44 STAT. 1169 (1927), the court was directed to hear, review and determine the appeal upon the record made before the Federal Radio Commission and upon such additional evidence as the court might receive and to alter or revise the decision appealed from, entering such judgment as it may seem just. Since the court was thus made a superior revising agency in the administrative field of radio regulation, its decisions under the act were not judicial and could not be reviewed by the Supreme Court of the United States. Federal Radio Comm. v. General Electric Co., 281 U. S. 464 (1930).

By the Amendment of 1930, 46 STAT. 845, incorporated in the present Act, and 48 STAT. 1095 (1934), 47 U. S. C., § 402 (Supp. 1938), the function of the court is limited to a review of questions of law by making conclusive upon the court findings of fact supported by substantial evidence. This is a judicial function. Federal Radio Comm. v. Nelson Bros. Co., 289 U. S. 266 (1933).


12Under § 154j of the 1934 Act, the Commission permits interested persons to appear before the Commission to be heard in person or by attorney. See United States v. Radice, 40 F. (2d) 445 (C. C. A. 2d, 1930) for effect of denial of intervention essential to protection of petitioner’s rights.
record on appeal was filed the petition was not considered by the appellant to be pending.

On the ground that jurisdiction was still in the Commission at the time the appeal was filed so as to prevent the court from acquiring appellate jurisdiction,15 the appeal was dismissed sua sponte.16 The court said in an opinion again written by Mr. Justice Miller:

"Upon the filing of its appeal in this court—its petition for rehearing being then undisposed of—appellant occupied the anomalous position of asking the Commission for administrative relief and at the same time asking the court for judicial relief from the anticipated decision of the Commission."17

Although the foregoing language may prove unassailable, the follow-


Conversely, a lower court loses jurisdiction to grant a rehearing after an appeal from its decision is perfected. Lasier v. Lasier, 47 App. D. C. 80 (1917).


In order to be appealable, an order or decree must be a final adjudication or determination of a substantial right against a party in such a manner as leave him no adequate relief except by appeal. See Collins v. Miller, 252 U. S. 364 (1920); Hohorst v. Hamburg-American Packet Co., 148 U. S. 262 (1893); Odell v. H. Batterman Co., 223 Fed.-292 (C. C. A. 2d, 1915).

Quaere: If the Federal Communications Commission "waived" resort to the rehearing remedy in order to have the issues decided quickly on appeal, would the court decline to assume jurisdiction? See Dayton-Goose Creek Ry. Co. v. United States, 263 U. S. 456 (1924), with which compare Federal Trade Comm. v. Claire Furnace Co., 274 U. S. 160 (1927).

ing statement of the court in remanding the appeal is perplexing in view of the discretionary nature of the Commission's decisions on petitions for rehearings.  

"Moreover, as we have already indicated, the action of the Commission in dismissing the petition was improper, as leave to file it was not necessary under the Act and the Commission was not divested of jurisdiction by the filing of the appeal in this court. Consequently, the Commission's order was improvidently made . . . the petition must be regarded as pending at the time of filing the record; and, in fact, as pending at all times thereafter, until properly acted upon by the Commission. . . .

"Whether a petition for rehearing should be filed in a particular case must be decided on the merits as each case arises. However, in our view, its use as an administrative remedy should not be discouraged, but instead should be encouraged—not to supplant, but to supplement' appellate review. For that reason, in our opinion, the purpose of the law is defeated if the Commission declines to act upon such petitions when they are filed, or dismisses them without consideration, as was done in the present case. Its action, therefore, was arbitrary and capricious and constituted an improvident exercise of power."

The court seems here to make a deduction which is open to criticism, namely, that the right to file a petition without leave of the Commission begets a right not to have that petition summarily dismissed. No conditions for refusal to grant a rehearing seem to be imposed by the statute. Nor does due process require that rehearings be granted. Nor is there a finding by the court that the petition in question stated a sufficient (or even a proper) reason for granting a rehearing. Furthermore, it seems possible that too much encouragement to the use of administrative rehearings may have the effect of needlessly increasing both the work of the Commission and the burden of the parties appearing before it. For example, it might obligate a party to repeat objec-

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18See note 1, supra.
20The language of § 405 of the Act merely makes it lawful for the Commission to exercise its discretion to grant a rehearing if sufficient reason be made to appear therefore. See note 1, supra.

21A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. . . .
22"If a single hearing is not due process, doubling it will not make it so. . . ." Pittsburgh C. C. & St. L. Ry. v. Backus, 154 U. S. 421, 426 (1894).
23Facts which have been fully retried need not ordinarily be retried by means of a re-
tions which the Commission, at the original hearings had already considered and over-ruled. An appeal sometimes may be the obvious and efficacious remedy, especially in a situation where a rehearing seems predestined to be fruitless and expensive for both the Commission and the aggrieved party. Functionally, the petition for rehearing seems to be indicated for the purpose of presenting new evidence, of correcting evidence already received, of modifying a decision which overlooked or misinterpreted facts, of correcting errors in law to which objection could not have been made at the original hearing, or regarding which higher authority has spoken during the statutory period.

From the Woodman of the World case, the inference can be drawn that, since a petition for rehearing may long continue to be pending before the Commission in the absence of administrative action thereon, the legal effectiveness of the petition as a source of embarrassment to the petitioner by making it impossible for him to appeal, may survive the practical effectiveness of the petition to secure administrative justice. As in the Southland case, the appellant here was a licensee of an existing station who had intervened before the Commission to oppose the granting of a permit to an adverse applicant. Thirteen days after the effective date of the order of the Commission, by which the appellant claimed to be adversely affected, petition for rehearing was filed. The Commission at that time was apparently taking the position that the right to petition for a rehearing and the right to appeal were alternative remedies. On the twentieth day after the effective date of the Commission's order,


*Rule 106.31 of the Federal Communications Comm. (1938) provides that a petition for rehearing shall show that new or additional material evidence has been discovered which petitioner after due diligence could not have known at the time of the original hearing or that the commission in its decision order or requirement, overlooked or did not consider a material question of law or matter of fact which might have caused it to have rendered a different decision. If under this rule it is attempted to restrict the functions of the rehearing to the reception of new evidence or to take account of something overlooked or not considered which might have changed the decision, insufficient scope will have been given to § 405 of the Act. That section provides that if in its judgment, after the rehearing and the consideration of all the facts of the case, including new facts, it shall appear that its original decision is in any respect unjust or unwarranted, the Commission may change its decision accordingly.
notice of appeal was filed. The Commission had not, at the time of the decision on the appeal—nearly one year after the petition for rehearing was filed, taken any action either to dismiss or grant the petition.

In the light of these facts the appeal was dismissed sua sponte, on the ground that the pendency of the petition for rehearing was still an impediment to the court's jurisdiction. The court had this to say regarding the practical aspect of the case:

"Jurisdiction cannot be given to a court by consent, acquiescence or inadvertence. It can acquire jurisdiction only by authority of law. It is immaterial, therefore, what the situation may be 'as a practical matter'.

"The only theory upon which abandonment of the motion for rehearing by the appellant could be urged in support of this court's jurisdiction, would be that as a result of such abandonment the motion ceased to be 'pending' before the Commission, before the appeal was taken. But there is nothing to show an abandonment."25

If appeal, the exclusive remedy provided by statute, does not afford relief, a victim of administrative procrastination may be in a helpless position.26 It should be noted, however, as mitigating against the harshness of the decision, that it was not the appellant who objected to the dismissal of the appeal but rather the intervener upon appeal, who was the successful applicant below, motivated by a desire to have the appeal dismissed on its merits. Furthermore, the Woodman of the World and the Southland Industries cases were remanded to the Commission. The fact that the Red River case was not remanded suggests that the court favors an appellant, who sought to take advantage of the rehearing remedy but whose appeal must be disallowed because it is not legally ripe, over one who failed to accord the Commission an opportunity to decide his case in the first instance, by neglecting to petition for a rehearing.

If it be true that it is sometimes a prerequisite to an appeal that a petition for rehearing should first have been filed, and that the pendency of such a petition precludes appellate jurisdiction, then an insistence on the strict construction of Section 402 (c) of the Act27 would in some

27Quoted, in part, in note 2, supra.
cases operate to deprive the aggrieved party of any judicial review. For frequently, the Commission does not (and perhaps cannot) dispose of a petition before it "within twenty days after the decision complained of is effective". Such an unfortunate consequence and the ensuing discouragement of applications for rehearings are obviated by the decision in the Saginaw Broadcasting case, where the court rejected the contention that the twenty-day period started to run from the date of the Commission's order. Instead it was held sufficient that the appeal was taken within twenty days after the denial of the petition for rehearing.28 There is ample justification for the court's refusal to apply the statutory provision in a strict literal sense for it is hardly conceivable that Congress intended to limit the time for taking an appeal so as to make the administrative remedy of rehearing uncertain and oppressive in operation.

An expected concomitant of rule making by the piecemeal process of judicial interpretation of constructive legislative intention is the inconsistency of application of slowly crystallizing principles. That the principles enunciated in the Red River and the Southland cases have not attained the rigidity requisite for uniform application is indicated by the decision in Pottsville Broadcasting Co. v. Federal Communication Commission.29 Relying on the testimony given by the president of a company applying for a license, the Commission reached the erroneous conclusion that the payment of subscriptions to stock of the company was contingent upon authorization by a state securities commission. The application for the license, therefore, was denied on the ground inter alia that the financial ability of the company was defeated by this contingency. In allowing the appeal, the court had to maintain, sub silentio, the strange position that a mistake of the Commission which was induced by the appellant was reversible error even in the absence of a showing that the appellant had taken advantage of a petition for rehearing to afford the Commission an opportunity to correct its error. No mention is here to be found that the same facts relied on for appeal might have been presented with better grace to the Commission through the agency of a petition for rehearing; nor is mention made of the court's duty to scrutinize its own jurisdiction despite the oversight or complacency of

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counsel in not raising the objection. It is to be hoped that the decision does not mean that the Commission is expected to make its decisions upon a record factually less complete than that which is made available to the court on appeal.

In the absence of an expression of legislative intent, considerations of principle and of expediency prompt the conclusion that the rehearing remedy should be made available to interested persons when it might have the effect of furthering administrative justice and that it should be encouraged by withholding judicial relief unless the administrative remedy has been pursued. The remedy should not, however, be transformed into a ritual embarrassing speedy and inexpensive adjudication by the requirement that parties resort to, and the Commission grant, rehearings to rehash old arguments or to engage in a dress rehearsal of the appeal.

MAX MALIN.
STATUTORY PROVISION FOR THE SPECIFIC PERFORMANCE OF CONTRACTS FOR THE SALE OF CHATTELS

The fundamental rule with respect to the granting of specific performance of contracts for the sale of chattels is that equity will not interfere to decree specific performance where the remedy at law is plain, adequate and complete. In the case of contracts involving personal property which can be easily purchased in the open market or where pecuniary compensation for breach of the contract would constitute full and complete satisfaction, equity courts, in general, have maintained a "hands off" policy, leaving the parties to their remedy at law. Some states, including California, have enacted statutes providing that there is a presumption that the breach of an agreement to transfer personal property can be adequately relieved by pecuniary compensation, and where adequate pecuniary compensation can be made specific performance will be denied. This provision has been held to create a disputable presumption which may be defeated by a proper showing of facts.

There are cases in which equity has decreed specific performance of contracts for the sale of unique chattels, those not purchaseable in the open market, heirlooms and sentimentally valued property, slaves, works of art, vessels, documents, patents and copyrights. This is consistent with the general rule, however, since there is no adequacy of remedy at law, such goods being irreplaceable by money. The customary attitude of equity against granting relief to parties to a contract for the sale of chattels where there has been a breach has been subject to criticism by so eminent a jurist as Mr. Justice Story:

"The truth is that upon the principles of natural justice Courts of Equity might proceed much farther and insist upon decreeing a specific performance of all bona fide contracts since that is a remedy to which Courts of Law are inadequate . . . for it is against conscience that a party should have the right of election whether he would perform his covenant or only pay damages for the breach of it. But on the other hand there is no reasonable objection to allowing the other party who is injured by the breach to have an election either to take damages at law or to have a specific performance in equity, the remedies being concurrent, but not coextensive with each other."

3Southern Iron and Equipment Co. v. Vaughan, 201 Ala. 356, 78 So. 212 (1918); Corbin v. Tracy, 34 Conn. 325 (1867); 2 Story, Equity Jurisprudence (13th ed. 1886) §§ 717, 718.
5Gilfallen v. Gilfallen, 168 Cal. 23, 141 Pac. 623 (1914).
Legislatures have passed statutes, some of which, on a cursory perusal, seem to have recognized this deficiency in equity’s jurisdiction and which attempt to cure the fault. Whether, as interpreted and applied by the courts, these statutes and provisions have met the need of equity, as pointed out by Story, is the purpose of this discussion.

Many states have a code provision like that of Montana\(^6\) which provides that specific performance will be compelled when it would be extremely difficult to ascertain the actual damage caused by the non-performance of the act to be done. Effect was given to this provision and performance decreed in Alley v. Peeso,\(^7\) a case for the enforcement of a contract for the sale of stock. It should be observed that this provision is merely declaratory of the law as equity has always applied it and makes it mandatory for equity to decree relief only in those cases in which there are present the circumstances which equity, without a statutory mandate, requires before it will exercise its discretion.

Maryland has a statute,\(^8\) originally enacted in 1888, which provides that specific performance shall not be denied merely because the party seeking to enforce the contract has an adequate remedy in damages, unless the party resisting its specific performance shall show that he is sufficiently solvent to satisfy a judgment against him or post a bond to pay any damages and costs which may be awarded against him. Of this provision, the Maryland Court of Appeals said, “The manifest purpose of this legislation was to compel parties either to specifically perform contracts which theretofore a court of equity could not compel them by decree to perform because of the existence of an adequate remedy in damages, or else to give a bond with satisfactory security which would be answerable for the failure to perform in the event of damages being recovered for non-performance."\(^9\) The court granted specific performance of a contract for the sale of lumber which was readily purchaseable on the market and subsequently\(^10\) affirmed this holding as to the effect of the provision. It would appear that equity’s jurisdiction has been enlarged beyond a mere adequate legal remedy to a practical legal remedy; practical in the sense that equity will not have to force a party

\(^{6}\) Story, Equity Jurisprudence (14th ed. 1918) § 994.


\(^{8}\) Mont. 1, 290 Pac. 238 (1930).


\(^{10}\) Neal v. Parker, 98 Md. 254, 271, 57 Atl. 213, 215 (1904).

into law where he may obtain a judgment on which he will be unable to get satisfaction.

The Uniform Sales Act, which has been enacted almost verbatim in thirty-three states and two territories, contains in Section 68 an authorization to grant decrees of specific performance of contracts for the sale of personal property. Concerning this section, Williston, the author of the act, states in his treatise on Sales:

"Courts of equity have very closely restricted their jurisdiction in regard to contracts for the sale of personal property. It would some time promote justice if the courts were somewhat more ready to allow specific performance of contracts to sell goods in cases where for any reason damages did not seem adequate. This section of the act will perhaps dispose courts to enlarge somewhat the number of cases where specific performance is allowed."

However, Mr. Williston's proposition, as expressed in the last sentence of the quoted paragraph, has, for the most part, been treated by the courts as the mere fond hope of a learned writer. Only ten years ago it was stated that but two cases were to be found which even considered Section 68, and in one of these the opinion simply discussed the section without resting the holding thereon. It was further pointed out that in Outten Grain Company v. Grace and Uppendahl the Illinois court said, "The section of the Act relied on makes no change in the application of the remedy by specific performance from what it was before."

In Hughbanks v. Browning the court, after citing the pertinent statute, said, "The language of this section of the law, as we now find it, clearly gives to the trial court the power to decree an enforcement of the sale where the purchaser demands that sort of relief and the court

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11§ 68—Specific Performance—where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just."

12Williston, Sales (2d ed. 1924) § 601.
16Ohio App. 114 (1917).
17Ohio General Code (Page, 1938) § 8448 (Uniform Sales Act § 68).
finds it to be equitable and proper." 18 The decree of specific performance of the contract for the sale of a tobacco crop was then affirmed. The statement of the court thus directly relies on Section 68 as the basis of the equity court's jurisdiction to grant relief in this type of contract. But in the later case of Welker v. The City Brewing Company 19 the same court affirmed the granting of specific performance of a contract for the sale of beer without mention of the statutory provision, relying on the ordinary principles of equity as applied to the contract and "the peculiar circumstances existing" to form an exception to the general rule. Thus, though in 1917 a start was made by the Ohio courts toward Mr. Williston's goal, in 1918 the court failed to lend support to its earlier holding.

Michigan is the one jurisdiction which, though at first only sending out a feeler on the problem of pegging on Section 68 equity's jurisdiction to decree specific performance of contracts for the sale of personal property, has subsequently definitely placed the grounds for this jurisdiction squarely on the authority of that section.

In Toles v. Duplex Power Car Company 20 the Michigan court pointed out that, although by statute the court may decree specific performance; "yet, the recognized field for equity interference to enforce specific performance of contracts is limited to matters relating to real estate." The court, however, reduced the value of this support to any interpretation of the section as extending equity's jurisdiction by discussing the general rule that equity will not ordinarily decree specific performance in matters relating to personal property, except "in cases where the measure of damages in a court of law will not afford adequate compensation for the breach of contract because the personal property contracted for has to the purchaser a special sentimental value, is something rare or impossible to obtain elsewhere, has no market value, or possesses some peculiar characteristic distinguishing its purchase from an ordinary contract of sale and purchase of personal property." 21

In 1927, however, when specific performance of a contract by a testator's children to convey securities of the estate to the testator's grandchildren in consideration of their release of interest in the estate had been decreed and an appeal from the decree was taken, the court stated unequivocally, "There can be no question as to the power of the trial court, sitting as a court of chancery, or of this court on appeal, to require

18 Ohio App. 114, 115 (1917).
19 Ohio App. 117 (1919).
20 224, 230, 168 N. W. 495, 497 (1918).
21 Ibid.
the defendants to specifically perform their contract. 3 Comp. Laws 1915, § 11899".22 By this holding Michigan definitely placed itself on record as basing equity's jurisdiction in this type of case on Section 68 of the Uniform Sales Act.

Michigan's position is further emphasized in Michigan Sugar Company v. Falkenhagen,23 in which a contract for a beet crop was under consideration for enforcement. Subsequent to the filing of the bill, the defendants had sold the crop to a third party and defendants' counsel then objected that the court originally had no jurisdiction to decree specific performance and, therefore, after the sale, had no jurisdiction to retain the case and award damages. The court quoted the statutory provision24 and went on "When the bill was filed the court of equity had jurisdiction to decree specific performance, or in the exercise of a discretion guided by circumstances to award damages in lieu thereof."

25 It will be seen that the award of damages was affirmed on the grounds of equity's original jurisdiction in the case based on what is Michigan's Section 68 of the Uniform Sales Act.

No courts other than those of Michigan, Illinois and Ohio have either relied on or discussed the Uniform Sales Act as the foundation of equity's jurisdiction to decree specific performance of contracts for the sale of chattels.

There is another field in which action has been taken by the legislatures of the various states to provide for specific performance of the contracts under consideration here, namely, where authority is given for the establishment and organization of cooperative or marketing associations. Every state, with the exception of Delaware, has enacted a statute along these lines in recent year, and usually it contains a provision that an association shall be entitled, in the event of breach or threatened breach of a marketing contract by a member, "to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof."26

26 Many cases have been before the courts of various states involving the right of cooperative associations to the remedies of specific performance on account of the statutory provision in question. In Kansas, it was held that the statutory provision was virtually mandatory on the court, at

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least under normal conditions. The California court observed, in Colma Vegetable Association v. Bonetti, that the provision "deliberately abrogated all contradictory legislation and judicial determinations." And the Texas court held that, since, even without the cooperative marketing act cooperative marketing associations are entitled to equitable relief against members who breach their contracts of sale, the statute practically prevents the exercise of discretion by the courts. Many other states have reached substantially similar conclusions with respect to their marketing association statutes.

In construing these statutes, in cases where holders of mortgages on crops which were taken with notice that the mortgagors were under contract to deliver the crops to a marketing association, the courts, over the protest of mortgagees, have required the members to deliver their products. However, Alabama and North Carolina have refused to go that far and in Bishop v. Ala. Farm Bureau Cotton Association, the court declared that the statutory provisions were to "be construed as contemplating the use of such remedies only in case they shall be found to consist with commonly accepted principles of right and justice", and denied the remedy because of a mortgage held by a third person on the crop contracted for.

It will be seen that, although two-thirds of the states have adopted the Uniform Sales Act containing the provision which presumably provides for specific performance of contracts for the sale of personal property, yet only Michigan has gone on record as relying on the Act as providing equity's jurisdiction, as compared with the respect accorded statutes dealing with the co-operative associations. Whether this is an active disregard of the provision, or a policy of equity not to enlarge its jurisdiction without an express mandate from the legislature, or a failure

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27 Kansas Wheat Growers' Ass'n v. Schulte, 113 Kan. 672, 216 Pac. 311 (1923).
28 91 Cal. App. 103, 267 Pac. 172, 177 (1928).
29 Texas Farm Bureau Cotton Ass'n v. Stovall, 113 Tex. 273, 253 S. W. 1101 (1923).
30 Warren v. Alabama Farm Bureau Cotton Ass'n, 213 Ala. 61, 104 So. 264 (1925); McCauley v. Arkansas Rice Growers Co-op. Ass'n, 171 Ark. 1155, 287 S. W. 419 (1926); Rifle Potato Growers' Co-op. Ass'n v. Smith, 78 Colo. 171, 240 Pac. 937 (1925); Lee v. Clearwater Growers' Ass'n, 93 Fla. 214, 111 So. 722 (1927); Brown v. Staple Cotton Co-op. Ass'n, 132 Miss. 859, 96 So. 849 (1923); Nebraska Wheat Growers' Ass'n v. Smith, 115 Neb. 177, 212 N. W. 39 (1927).
31 Redford v. Burley Tobacco Growers' Co-op. Ass'n, 205 Ky. 515, 266 S. W. 24 (1924); Dark Tobacco Growers' Co-op. Ass'n v. Dunn, 150 Tenn. 614, 266 S. W. 308 (1924).
32 Bishop v. Alabama Farm Bureau Cotton Ass'n, 215 Ala. 388, 110 So. 711 (1926).
33 Tobacco Growers' Co-op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631 (1924).
34 215 Ala. 388, 110 So. 711, 712 (1926).
of counsel to urge the provision on the court, is merely conjectural. Probably it is the legislatures which are to be blamed for using the words "court of equity may, if it thinks fit, . . . by its decree direct that the contract shall be specifically performed",\textsuperscript{35} rather than "the association shall be entitled to . . . a decree of specific performance"\textsuperscript{36} as is provided for by the marketing association statutes.

SIDNEY M. GOLDSTEIN.

\textsuperscript{35}Uniform Sales Act § 68.
RECENT DECISIONS

BUSINESS TRUSTS—Taxability as an “Association”

A trust agreement stated that the purpose of the trust was to carry on the business of owning, managing, leasing and selling real property and sharing the gains therefrom. The trustee (petitioner) was given title to a piece of real property (store and office building) to hold in trust for the beneficiaries, with virtually exclusive power to manage, lease, operate, sell or convey it. The trust was made continuous during the lives of several named persons, and the beneficiaries were empowered to select a successor if the trustee should resign. The agreement provided for the issuance of transferable trust certificates, which during 1933, the taxable year in question, were held by 222 persons. It stated that the trust should not be terminated on the death of the certificate holders, that “no assessment shall ever be made upon the holder of any certificate”, and that neither the trustee nor any certificate holder could be held personally liable upon obligations of the trust. As previously arranged by the settlor, the trustees immediately leased the property to a real estate firm for 98½ years. During 1933 the trustee’s activities were confined to the collection and distribution of rents, payment of taxes, bookkeeping and other duties incidental to the operation of any real estate trust. Held, that it could not be successfully contended that the trust had, in fact, a different or narrower purpose than that expressed in the trust agreement, and that the trust was taxable as an association. Title Insurance & Trust Co. v. Commissioner, 100 F. (2d) 482 (C. C. A. 9th, 1938).

In the leading case of Morrissey v. Commissioner, 296 U. S. 344 (1935), the Supreme Court enumerated criteria for the determination of the question here presented. Mr. Chief Justice Hughes, speaking for the Court, said that to be designated an association for purposes of taxation, a trust (1) must have “associates” (beneficiaries) and (2) must be organized for a business purpose. He then listed five “salient features” which, if present in a trust, serve to distinguish it from a partnership and also (since the same attributes are found in a corporation) “make the trust sufficiently analogous to corporate organization to justify the conclusion that Congress intended that the income of the enterprise should be taxed in the same manner as that of corporations”. These features are: (1) title to property held by trustees as a continuing body with provision for succession, (2) centralized management by trustees who represent the beneficiaries and who act “in much the same manner as directors”, (3) security from termination or interruption by the death of owners of beneficial interests, (4) transferability of beneficial interests, and provision for the admission of new beneficiaries, and (5) limitation of personal liability.

Three companion cases, Swanson v. Commissioner, 296 U. S. 362 (1935); Helvering v. Combs, 296 U. S. 365 (1935); and Helvering v. Coleman-Gilbert Associates, 296 U. S. 369 (1935); were decided the same day. They indicate that the Supreme Court does not consider it essential that all the “salient features” enumerated in the Morrissey case, be present in order to constitute a trust an association, but that the two indispensable requisites are (1) that it have “associates” (more than one beneficiary) and (2) that it be organized for a business purpose.

Mr. Justice Sutherland, in the more recent case of A. A. Lewis & Co. v. Commissioner, 301 U. S. 385 (1937), injected some doubt into the matter, however, when he said: “We are not able to find in the situation an ‘association’ . . . because there are

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no associates and no feature ‘making [the trust] analogous to a corporate organization’.” *Id.* at 389. Had he stopped at the word “associates”, there would be no confusion, but the remainder of his sentence raises a question whether it was meant that these “features” must be present in order to constitute a trust an association. The opinion is ambiguous, but later circuit court decisions, *Bert v. Helvering*, 92 F. (2d) 491 (App. D. C. 1937), and *Kilgallon v. Commissioner*, 96 F. (2d) 337 (C. C. A. 7th, 1938), indicate that the authority of the case will be limited to the proposition that where there is but one holder of a beneficial interest in a business trust, the trust will not be taxable as an association.

The trust involved in the principal case was held to satisfy the tests prescribed in the *Morrisey case*. In reaching this conclusion, however, the court ruled that the purpose of the trust is to be found in the trust instrument, and rejected the petitioner's main contention that in actual practice the trust operated, during the taxable year, in the same manner as an ordinary trust, and that it should therefore be taxable as an ordinary trust. *Quaere*: Is the actual method of operation a substantial determinant, or must the court be guided solely by the potential method of operation as provided for in the trust instrument?

As authority for its ruling on this point, the court in the principal case cited its own earlier decision in *Commissioner v. Vandergrift Realty & Inv. Co.*, 82 F. (2d) 387 (C. C. A. 9th, 1936), and *Helvering v. Coleman-Gilbert Associates*, supra, at 374, wherein the Supreme Court said: “The parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted”. Thereby the circuit court rejected the interpretation placed upon the *Vandergrift case* by the district court in *Jackson v. United States*, 25 F. Supp. 613, 616 (S. D. Cal. 1938), where District Judge Jenney said the *Vandergrift case* indicated that “the three principal elements which must be carefully examined are, (a) purpose, (b) actual operation, (c) form of organization”.

In the *Lewis case*, supra, the Supreme Court laid emphasis on the actual method of operation of the trust, for although the trust instrument provided that transferable certificates might be issued, the Court stressed the fact that none had ever been issued, and the decision was based mainly on the fact that there was actually only one beneficiary. The test of actual operation seems better founded than that of potential operation. Except in a spendthrift trust a sole cestui que trust may assign all or any portion of his interest. Therefore, if the provisions of the trust instrument were made the exclusive guide, it would be possible to provide in the agreement for one beneficiary only (thus securing classification as an ordinary trust for purposes of taxation), which beneficiary could immediately subdivide and assign his interest to numerous other people, securing the advantages of corporate organization without its attendant tax burden. At least in determining whether there is more than one beneficiary, it would appear necessary to look to the actual method of operation, as was done in the *Lewis case*, supra. There is, however, a usefulness to be attached to the test found in recourse to the provisions of the trust instrument—a usefulness to be employed in subordination to the test of actual operation, coming into operation whenever the test of actual operation leaves the result still ambiguous.

E. EDWARD STEPHENS.
CONTRACTS—Liquidated Damages—Effect of Stipulation on Message Blank

In an action against a telegraph company, sounding in tort, for the company's negligent failure to deliver a money order, held, that provision in the money order limiting the company's liability to $500, "at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued"; was a valid provision for liquidated damages, and authorized recovery of $500, despite plaintiffs' failure to prove actual damages. *Nester v. Western Union Telegraph Co.*, 25 F. Supp. 478 (S. D. Cal. 1938).

The trial court found that the plaintiffs had established that failure to transmit a money order between them was due to the negligence of the telegraph company, but plaintiffs were unable to prove any part of the damages claimed to amount to $7600. However, the court held that under the new Federal Rules of Civil Procedure "the plaintiff should be denied relief only when, under the facts proved, he is entitled to none". Defendants had brought into issue the provisions of the contract under which the money order was transmitted, which read:

"In any event, the company shall not be liable for damages for delay, non-payment, or underpayment of this money order, . . . beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, unless a greater value is stated in writing . . . ."

The court found this to be a contract for liquidated damages in the sum of $500 and awarded this amount to the plaintiffs.

A stipulation in a contract calling for payment of a certain sum of money, or a sum to be computed in a certain way, in the event of default in performance, may be regarded either as a contract for a penalty or as one for liquidated damages. Under the first view the intent is construed to have been to secure performance through fear of the punitive conditions of the contract; under the latter, to fix a sum intended to compensate the contracting party in the event of failure of performance.

At common law, prior to the Statute of 8 and 9 William III (1697), in actions upon a bond or penalty for nonperformance of a contract, judgment went as a matter of course for the amount of the bond. However, relief might be had in equity against such punitive obligations. Under the statute, recovery on such instruments was limited to damages actually sustained. Courts of equity would not grant relief against the terms of the contract in cases "when the parties have agreed that in case one party shall do a stipulated act or omit to do it, the other party shall receive a certain sum as the just, appropriate, and conventional amount of the damages sustained by such act or omission." *Story, Equity Jurisprudence* (13th ed. 1886) § 1318. Courts of law in such cases give effect to the intention of the parties by giving judgment for the stipulated sum.

In every such case the real question is the intent of the parties, which will be determined as measured against certain general considerations. Generally, if the amount stated as liquidated damages is clearly excessive, in view of the situation when the contract was entered into, or if at that time it should have been clear to the parties that damages for a breach could readily be assessed, the courts will disregard the clause. On the other hand, when the parties have in good faith set a sum which seemed reasonable compensation for nonperformance, particularly where it appeared actual damages would be difficult to ascertain, the agreement will be enforced although after the event it becomes clear that actual damages may readily be measured

It appears that only one case other than the principal one has interpreted a damage clause like the one here involved. *Wernick v. Western Union Telegraph Co.*, 290 Ill. App. 569, 9 N. E. (2d) 72 (1937), held that it was not a valid contract for liquidated damages. This result was reached by consideration of the fact that in 1921 the Interstate Commerce Commission had required the telegraph companies to increase their limitation of liability on unrepeated messages to $500, and that the contract in question was apparently based upon this requirement.

The Illinois court found a conflict between the several provisions that 1) liability was limited to $500, and 2) the right of transmission was valued at $500. These provisions do not actually conflict. In the *Sun Publishing Assn. case*, a contract for charter of a yacht provided that “our liability shall in no case exceed $75,000” and also that “the value of the yacht shall be taken at $75,000”. The vessel being lost, $75,000 was awarded as liquidated damages.

The *Wernick* decision admittedly rewrote the contract in accordance with the conclusion of the court that the parties had intended merely to stipulate a limitation of damages. The court regarded the valuation clause neither as one for liquidated damages nor one for a penalty, but simply as an inadvertence.

Such a decision, particularly with regard to a standard contract made only after (presumably) careful consideration by competent counsel before adoption, seems altogether unsound.

In the principal case the court very properly took the contract as meaning what it said, relying upon the *Sun Printing Assn. case* rather than the *Wernick case*.

Neither in the principal case nor the *Wernick case* is there any intimation that the defendant contended the sum of $500 was a penalty. It seems probable that such a defense would ordinarily be unsuccessful in view of the fact that distress and damage caused by garbling or delaying a telegram are often difficult of legal appraisal, so that a contract for delivery of a message is a very appropriate one for liquidated damages. It would ordinarily be difficult to infer that the parties had regarded a stipulation of the sort in question as a penalty to ensure accurate transmission rather than a liquidation of uncertain damages from delay or mistake. The stipulation rebounds to the benefit of both contracting parties, and if there be any superior advantage, it is, over a period, more likely to be found with the company rather than with plaintiffs like the one in the principal case.

PAUL FITZPATRICK.

CONSTITUTIONAL LAW—Freedom of the Press—Distribution of Handbills—*Lovell v. Griffin* Distinguished

Defendant was convicted of violating an ordinance of the city of Worcester which provides that: “No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description.” At the beginning of the trial, before the introduction of any evidence, defendant had moved to “quash and dismiss” the complaint against her on the ground that it did not charge the commission of any crime and that the ordinance was unconstitutional and void. Denial of the motion was the only exception brought. *Held*, the city ordinance was
not a denial or impairment of the freedom of the press, it was a reasonable and valid regulation of the use of public ways for the preservation of public order, the protection of travelers from annoyance, and the prevention of misuse or littering of the streets. Commonwealth v. Nichols, 18 N. E. (2d) 166 (Mass. 1938).

Liberty of circulation is as essential to freedom of the press as liberty of publishing. Ex parte Jackson, 96 U. S. 727 (1877). That the distribution of printed matter on the streets may be regulated, however, is not a new proposition. A police regulation intended to keep streets clean and reduce fire hazard, and not operating unreasonably beyond the occasions of its enactment, was sustained in Anderson v. State, 69 Neb. 686, 96 N. W. 149 (1903). The enactment of a reasonable ordinance regulating or prohibiting the distribution of advertising matter in such manner as will ordinarily result in the littering of streets or other public places is a valid exercise of the police power. Coughlin v. Sullivan, 100 N. J. L. 42, 126 Atl. 177 (1924).

The difficulty here, as elsewhere, has been in defining "reasonable." The courts have sought to assign a construction which would permit sustaining such ordinances. An ordinance, the purpose of which is to prevent littering of streets, is designed to forbid the general circulation of handbills and similar printed matter resulting in public inconvenience, rather than an isolated handing of a card or handbill. Milwaukee v. Kassen, 203 Wis. 383, 234 N. W. 352 (1931); Anderson v. State, supra. Distribution in stores is not a violation of an ordinance applicable to public places. Coughlin v. Sullivan, supra. But an ordinance prohibiting the casting away of advertisements and similar matter in vestibules of buildings is a reasonable exercise of the police power since the wind may blow them upon the streets. Philadelphia v. Brabender, 201 Pa. 574, 51 Atl. 374 (1902).

The exercise of some control being necessary, a requirement that circular notices are not to be distributed without a license is a reasonable police regulation. Almassi v. Newark, 8 N. J. Misc. 420, 150 Atl. 217 (1930). In another case, an ordinance which prohibited distribution of literature generally within a city and included a license requirement was denounced by the Supreme Court which stated that the struggle for freedom of the press was primarily directed against the power of the licensor. "It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager. . . . Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form." Lovell v. Griffin, 303 U. S. 444, 451 (1938).

In the principal case, defendant relied upon Lovell v. Griffin, supra, as authority for the contention that the Worcester ordinance was invalid. In distinguishing between the two, the Supreme Judicial Court of Massachusetts referred to the broad sweep of the Griffin ordinance, stating that it went far beyond reasonable regulation and infringed upon fundamental right.

Inasmuch as the ordinance in the principal case contained no license provision, defendant's reliance upon Lovell v. Griffin would perhaps seem somewhat surprising. However, in People v. Young, 85 P. (2d) 231 (Cal. 1938) the court attached little significance to that feature. In sustaining the Los Angeles code—on the grounds that, prohibiting distribution in a very limited number of places, it was thus connected with the public welfare, and that the Supreme Court had not extended its disapproval of an ordinance guarding against littering of the streets—it was stated, "The distinc-
tion to which we refer is not, that under the Griffin city ordinance distribution of pamphlets would be possible were a permit obtained, while no permit is provided for in our ordinance. In effect the two ordinances are identical in this regard for the Supreme Court looked upon the permit feature as a nullity; the ordinance with it was measured as though it were without it. . . . The absence, in our ordinance, of any provision for a permit, neither strengthens it nor does it invalidate it.” Id. at 234.

The courts have given consideration to the nature of the printed matter involved in passing upon alleged violation of ordinances of the type under discussion, apparently feeling that would have a bearing upon whether or not littering of streets would ensue. As to pamphlets containing matters of public interest (the views of a number of citizens as to the management or alleged mismanagement of municipal affairs, a matter in which they, as well as all other citizens, are vitally concerned) an ordinance was held to operate unreasonably in this respect beyond the occasion of its enactment, and to be unduly oppressive. Coughlin v. Sullivan, supra. Interpreting a city ordinance so as to sanction prohibition of the free distribution by a body of citizens of a pamphlet setting forth their views of what they believed to be a movement subversive of their rights as citizens, would be a dangerous and un-American thing. People v. Johnson, 117 Misc. 133, 191 N. Y. Supp. 750 (1921). The American tradition being to overcome sales resistance forcibly, there is a distinction between non-commercial and commercial advertising matter where the purpose is to prevent “throwing it to the wind.” C. I. O. v. Hague, 25 F. Supp. 127, 144 (D. N. J. 1938). And in People v. Young, supra, the court indicated that, were a choice necessary, it would find it easier to uphold an ordinance forbidding the distribution of commercial handbills than one prohibiting the distribution of handbills intended to express one’s views on questions of public concern.

The nature of the matter distributed by the defendant in the principal case is not shown. However, the result very likely would not have been affected by that consideration for in Commonwealth v. Kimball, 13 N. E. (2d) 18, 20 (Mass. 1938), the same court said: “The word advertising is not limited to notices for commercial purposes.”

J. H. FREIFIELD.

DAMAGES—No Recovery for “Loss of Enjoyment” by Musician

Plaintiff was an accomplished violinist and was injured in an accident caused by the negligent driving of one of the defendant’s truck drivers. A bone in her left hand was injured which resulted in a permanent stiffening of the little finger so that she was rendered unable to play the violin. Verdict was for the plaintiff and she recovered, inter alia, damages of $4,000 for the loss of enjoyment resulting from her being unable to play the violin. The defendant appealed to the Supreme Court assigning this award of damages as error. Held, “Loss of enjoyment” resulting to a musician by reason of a personal injury which incapacitated her to play the violin is not a proper element of damages, such damages being too conjectural and speculative in their nature and impossible or too difficult of measurement to form a substantial basis for recovery. Hogan v. Sante Fe Trail Transp. Co., 85 P. (2d) 28 (Kan. 1938).

In awarding damages to an injured party only those damages which are actual
and real will be considered and not those which are conjectural and speculative. *Couch v. Kansas City Southern Ry.*, 252 Mo. 34, 158 S. W. 347 (1913); *Labette Petroleum Co. v. Cities Service Gas Co.*, 137 Kan. 75, 19 P. (2d) 470 (1933). Where possible of proof, the amount of damages must be established with reasonable certainty. In many cases, although substantial damages are established, their amount is, in a pecuniary sense, entirely or extremely difficult of ascertainment. However, it is not necessary that they should be computable with mathematical accuracy. *Johnson & Higgins v. Harper Transp. Co.*, 228 Fed. 730 (D. C. Mass. 1915). The fact that the courts have been unable to measure accurately personal damage or loss has not deterred them from compensating therefor in some amount which seemed reasonable to them. They have repeatedly allowed recovery for physical pain, mental suffering, mental anguish, fright, and embarrassment and humiliation suffered as a result of disfigurement. *City of Salina v. Trosper*, 27 Kan. 544 (1882); *Shelton v. Born*, 77 Kan. 1, 93 Pac. 341 (1908); *Ramey v. Telegraph Co.*, 94 Kan. 196, 146 Pac. 421 (1915); *Clemm v. Atchison, T. & S. F. Ry.*, 126 Kan. 181, 268 Pac. 103 (1928); *Sponable v. Thomas*, 139 Kan. 710, 33 P. (2d) 721 (1934). Perfection or infallibility in measuring the particular damage with exact accuracy has never been required by the courts. As was said in *Hetzel v. Boston & Ohio Ry.*, 169 U. S. 26 (1898), all that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which the suit is brought. In *Columbus v. Strassner*, 124 Ind. 482, 489, 25 N. E. 65, 67 (1890) it was said: "The question of damages . . . should rest upon some substantial basis. The following inquiries, therefore, suggest themselves: What is 'personal enjoyment'? How are we to ascertain to what extent it is possessed by a human being? How can its absence and the cause thereof be demonstrated? If a person for any cause has been deprived of 'personal enjoyment' how are we to go about adjusting his loss on a money basis? These questions seem to be pertinent, but unanswerable, and suggest an insuperable difficulty to the measurement of damages because of loss of personal enjoyment." In the instant case the court was of the opinion that the loss of enjoyment resulting from the incapacity to play the violin, caused by the defendant's negligence, was too conjectural and speculative and too difficult of measurement to form a substantial basis for the assessment of damages. Several cases involving this point have reached the same conclusion. In *Locke v. International & G. N. R. R.*, 25 Tex. Civ. App. 145, 60 S. W. 314 (1901) it was held that loss of the capacity for the enjoyment of the pleasures of life is too vague an element to admit of evidence to sustain it. In an action to recover for loss of the use of an automobile used by the owner only for pleasure, plaintiff was not allowed to recover, the court ruling so on the theory that there was no basis for ascertaining the damages. *Hunter v. Quaintance*, 69 Colo. 28, 168 Pac. 918 (1917). *Pittsburg, C., C. & St. L. Ry. v. O'Conner*, 171 Ind. 686, 85 N. E. 969 (1908).

A California case allowed a child of twelve to recover damages for an injury which destroyed his ability to pursue musical studies on the violin for which he displayed a talent. *Scully v. Garratt*, 11 Cal. App. 138, 104 Pac. 325 (1909). The plaintiff in this case was a young boy and had a life of promise before him. The injury caused by the defendant's negligence interrupted a promising career and absolutely destroyed and thwarted a laudable ambition to acquire proficiency in the particular musical line to which his genius in that respect directed the plaintiff. In the instant case, although the plaintiff also displays a musical talent, she is elderly and has her life behind her. Her career hasn't been interrupted, a promising future
hasn't been curtailed, she merely played the violin for her own enjoyment. To hold that she should recover for the resultant incapacity to play the violin on the same basis that the plaintiff was allowed to recover in *Scully v. Garratt*, supra, would be to broaden the basis on which damages are awarded to the inclusion of elements of conjecture and speculation.

In *Galveston Electric Co. v. Biggs*, 14 S. W. (2d) 307 (Tex. 1929), the court considered as proper elements of damage the resulting inability of the injured party to dance and play tennis, things which she previously had been accustomed to doing. The plaintiff received a severe leg injury which not only incapacitated her but also disfigured her personal appearance. She was about twenty years old, which affected to a great extent the loss involved since the injury rendered her less attractive to other people which definitely lessened her desirability as a spouse and curtailed her activities, thereby reducing her possibilities of friendships, which interfered with the right and desire of most young women, marriage. In this case the elements of damage were clearly and directly connected to the injury and were substantial and real and not conjectural and speculative.

There is a small minority of jurisdictions which have allowed recovery for damages predicated on loss of enjoyment. *Haeussler v. Consolidated Stone & Sand Co.*, 3 N. J. Misc. 159, 127 Atl. 602 (Sup. Ct. 1925); *Nees v. Julian Goldman Stores*, 109 W. Va. 329, 154 S. E. 769 (1930); *Reed v. Jamieson Inv. Co.*, 168 Wash. 111, 10 P. (2d) 977 (1932); *Budek v. Chicago*, 279 Ill. App. 410 (1934); *Kramer v. Chicago M., St. P. & P RR.*, 226 Wis. 118, 276 N. W. 113 (1937). These decisions are based on the theory that the plaintiff has been rendered, by the negligence of the defendant, less able to enjoy life than before the injury was received, and that since this resulted through no fault of the plaintiff the defendant should bear the burden. Although they admit that such damages are extremely difficult of measurement, yet they hold that the amount to be awarded is left to the discretion of the jury, and the verdict in such case will not be disturbed unless the amount is so large or small as to evince passion, prejudice, or some ulterior motive on the part of the jury. *Nees v. Julian Goldman Stores*, supra. These decisions attempt to overcome the difficulty in distinguishing damages with a real and substantial basis from those whose basis is merely speculative and conjectural, but it seems that in their attempt to overcome the difficulty they have also wiped out the distinction.

JOSEPH D. DI SESA.

DIVORCE—Jurisdiction—Estoppel

The parties to the present suit were married in Maryland and have since resided continuously in the District of Columbia. As a consequence of frequent marital difficulties, they entered into a separation agreement which, together with provisions for maintenance and support of the wife and child, provided: "That it shall be lawful for each of the said parties to live separate and apart from the other and to reside from time to time at such place or places and with such person or persons as either party may see fit, without any restraint or interference from the other, in all respects as if such party were unmarried." Subsequent to this agreement they joined in obtaining a "Mexican" divorce by "mail order", which decree pronounced their divorce because of "incompatibility of characters". There was evidence in the case

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tending to prove that the defendant wife was aware of the invalidity of this decree; and threatened the complainant, as her husband, with an action for a greater maintenance allowance.

The husband, later, obtaining evidence of the defendant's adultery, brought this suit for a divorce, in the District of Columbia, on that ground. The defendant answered filing a cross-bill and charging cruelty. The trial court made no finding other than: "I find that the Mexican divorce was obtained with the co-operation and consent of both parties and on the authority of Curry v. Curry, 65 App. D. C. 47, both the original and cross-bills should be dismissed." Held, on appeal, reversed on the ground that the lower court had misinterpreted Curry v. Curry, supra, and erroneously applied the doctrine of estoppel. Garman v. Garman, 102 F. (2d) 272 (App. D. C. 1939).

The Restatement, Conflict of Laws (1934) § 112 provides: "The validity of a divorce decree cannot be questioned in a proceeding concerning any right or other interest arising out of the marital relation, either by a spouse who has obtained such decree of divorce from a court which had no jurisdiction, or by a spouse who takes advantage of such decree by remarrying." The decision in the instant case would appear to be in direct conflict with, and a repudiation of, this doctrine. A careful examination of the case, however, reveals such not to be the case. Although the courts of the District of Columbia do not appear to have adopted the doctrine of this paragraph of the Restatement in haec verba, they did apply it in spirit and substance in Curry v. Curry, 65 App. D. C. 47, 79 F. (2d) 172 (1935).

In the instant case the court explained its decision in the Curry case, as follows:

"[T]he theory of the decision in Curry v. Curry was that the party plaintiff there, having invoked the jurisdiction of a foreign court upon the basis of jurisdictional facts asserted in that court to be true, could not in a second suit be heard to say that they were untrue, to the unsettlement of domestic relations created under color of the first decree, and that on the facts asserted in the Nevada court its decree was valid and therefore could not be repudiated nor collaterally attacked." The Garman case is thus seen to be immediately distinguishable on, at least, the following grounds:

(1) There was no misrepresentation of jurisdictional facts to the Mexican court, as appears to be the basis of the estoppel in Curry v. Curry; (2) There is no basis in the instant case for a claim by the defendant (wife) that it is inequitable for the plaintiff (husband) to assert, as against her, the invalidity of the Mexican decree for the reason that she was not misled into believing that she was divorced by such decree; (3) It may be that the court viewed § 112 of the Restatement as applying to cases of divorces obtained in another state of the United States or in a foreign country having a point of contact with the marital relation (which, though void, might reasonably have been considered as valid by the parties) but not as applying to divorces obtained in the court of a nation to which neither the husband nor wife was subject and in which neither was domiciled. Cf. Kegley v. Kegley, 16 Cal. App. (2d) 216, 60 P. (2d) 482 (1936); Golden v. Golden, 41 N. M. 356, 68 P. (2d) 928 (1937).

The defendant's second contention, that the language of the separation agreement was a consent to her subsequent adultery, hardly merits consideration. The law is well settled that separation agreements do not operate per se as a consent to adultery, and consequently a bar to divorce. Franklin v. Franklin, 154 Mass. 515, 28 N. E. 681 (1891). See also Ross v. Ross, L. R. 1 P & D 734 (1869); Barker v. Barker,
EQUITY—Contempt—Nature of Proceedings

Appellant had been found guilty of contempt in the District Court, and, as called for by the rules governing criminal appeals, had merely filed a notice of appeal. The proceedings had been initiated by a Special Agent of the Bureau of Internal Revenue for the failure of the appellant to produce records as ordered by the court to aid in investigation, and he had been committed to jail until he should produce the records. Appellant contends that the appeal should be governed by the rules applicable to criminal appeals, the provisions of which he had fulfilled. Held, that the proceedings, since they had been initiated by a party to a cause, should be governed by the rules applicable to civil appeals, and, therefore, required a petition for and allowance of appeal. McCrone v. United States, 100 F. (2d) 322 (C. C. A. 9th, 1938).

Contempts are divided into two general classes: criminal contempt—conduct directed against the dignity of the court amounting to an obstruction of justice, and civil contempt—a failure to do something under order of the court for the benefit of a party litigant. The distinction between the two classes becomes hazy when the contempt consists in a violation of an injunction of the court. For then the contumacious conduct is both a flouting of the court's authority and an offense against the rights of private parties. The question then arises as to whether the contempt proceedings should be governed by the rules applicable to criminal or civil actions. For, although proceedings for contempt are sui generis, Myers v. United States, 264 U. S. 95 (1924); In re Gompers, 40 App. D. C. 293, (1913), they conform as closely as possible to the procedure in criminal or civil actions according to whether the proceedings are criminal or civil in character. In criminal contempt proceedings, brought to preserve the dignity of the court and to punish for the disobedience of its orders, the court, the state, or the people is the party complainant. But in civil contempt proceedings, instituted to preserve and enforce the rights of private parties to litigation and to compel obedience to the orders and decrees made for the benefit of such parties, the process is remedial and coercive, and the offended litigant is the party complainant. Hence proceedings for civil contempt are between the original parties and are instituted and tried as part of the main cause, while proceedings for criminal contempt are between the state and the defendant and are not a part of the main cause. Therefore, as a test in determining the character of the proceedings, it has been held that the party who has initiated the proceedings is an important factor, i.e., they are criminal in character if prosecuted by the court, and civil, if prosecuted by a party litigant. Gompers v. Buck's Stove & Range Co., 221 U. S. 418 (1911). The title of the proceeding would thus ordinarily determine its character. A more basic test is to be found in the prayer for relief, as indicating the purpose of the proceedings, whether punitive or remedial.

Having determined the character of the proceedings, one may then determine the type of relief that the court can afford. If the proceeding be criminal, the court may impose a fine or a definite term of imprisonment to punish and deter the commission of further contempts. If the proceeding be civil, there are two possibilities. If the
contumacious conduct consists in doing what one was ordered not to do, the court may order a money payment for the benefit of the litigant, but no prison term, a prison term not being remedial. If the contempt consists in not doing what one was ordered to do, the court may impose a prison sentence until the defendant is ready to perform as ordered, the effect being to coerce the defendant to perform for the benefit of the plaintiff. *Gompers v. Buck's Stove & Range Co.*, *supra*. A money payment for the benefit of a litigant must be commensurate with the injury suffered as a result of the obstruction and delay. *Fox v. Capital Co.*, 299 U. S. 105 (1936). See, Note (1938) 26 *Georgetown Law Journal* 719.

For purposes of review by an appellate court the form of the order determines the character of the proceeding. If the order is for punishment of the defendant by a fixed period of imprisonment, one not determined by the defendant's compliance with the order of the court, or is for a fine, i.e., a money payment, payable to the state, the proceeding is regarded as criminal. If the imprisonment ordered is for the purpose of compelling obedience to the order of the court and is made on application by and for the benefit of a complaining party, the proceeding is regarded as civil. *Matter of Christensen Engineering Co.*, 194 U. S. 458 (1904); *Gompers v. Buck's Stove & Range Co.*, *supra*; *In re Merchant's Stock & Grain Co.*, 223 U. S. 639 (1912); *Lamb v. Cramer*, 285 U. S. 217 (1932).

Because of the different character of proceedings for criminal and civil contempt, the rights of the parties differ as the proceedings differ. Where proceedings arising out of violations of orders in civil cases are regarded as criminal in character, guilt of the defendant must be proved beyond a reasonable doubt as in any other criminal case. *Gompers v. Buck's Stove & Range Co.*, *supra*; *Michaelson v. United States*, 266 U. S. 42 (1924); *People v. Spain*, 307 Ill. 283, 138 N. E. 614 (1923); *State v. Bittner*, 102 W. Va. 677, 136 S. E. 202 (1926). Where the proceedings are regarded as only quasi-criminal, only clear and convincing proof is required, but still there must be more than a mere preponderance of evidence. The degree of proof necessary lies in the twilight zone between a mere preponderance and beyond a reasonable doubt. *Sawyer v. Hutchinson*, 149 Iowa 93, 127 N. W. 1089 (1910). But where the proceedings are regarded as civil in nature, the contempt must be established by a preponderance of the evidence, but no more. *McBride v. People*, 225 Ill. 315, 80 N. E. 306 (1907).


In civil contempt proceedings the power to punish for contempt is lost when the suit in which the contempt arose is abated or finally disposed of, but in criminal contempt proceedings an abatement of the main cause does not destroy the right to punish. *In re Fanning*, 40 Minn. 4, 41 N. W. 1076 (1889).

In the matter of costs, the general rule in civil proceedings is that costs are awarded to the prevailing party. *Merrimack River Savings Bank v. City of Clay Center*, 219 U. S. 527 (1911); *O'Rourke v. Cleveland*, 49 N. J. Eq. 577, 25 Atl. 367 (1892). A few states hold that costs are not taxable in criminal contempt proceedings, *Magennis v. Parkhurst*, 4 N. J. Eq. 433 (1844); *People v. Gilmore*, 88 N. Y.
626 (1882); but generally courts assume the right to impose costs in addition to or in lieu of fine or imprisonment. Brown v. Brown, 4 Ind. 627 (1853); In re Chartz, 29 Nev. 110, 85 Pac. 352 (1906).

As affecting the right of and the procedure in review, differences resulting from the different character of the contempt proceedings are regulated by statute in the various jurisdictions. For a lengthy discussion of these variances see annotation in 28 A. L. R. 40. It is sufficient here to point out that in the Federal Courts when an order from which an appeal is attempted is civil in nature, the rules of civil procedure apply, Alaska Packers' Ass'n v. Pillsbury, 301 U. S. 174 (1937); and when an order from which an appeal is made is criminal in nature, an appeal under rules for criminal appeals is proper, Wilson v. Byron Jackson Co., 93 F. (2d) 577 (C. C. A. 9th, 1937). In the instant case, since the order was considered civil in nature, it was held that a petition for and allowance of appeal was necessary under the rules for civil procedure in effect when the appeal was entered. It may be noted that Rule 73 (a) of the new Federal Rules of Civil Procedure provides that a party may appeal from a judgment by filing with the district court a notice of appeal, thus abolishing in part the last distinction made.

JOHN C. HARRINGTON.

EQUITY—Federal Procedure—Jurisdiction of Federal Courts to Enjoin Collection of State Tax

Suit was brought by the United States in the United States District Court for the District of Massachusetts to enjoin the city of Springfield, Massachusetts, and its tax collector, R. L. Munn, from selling certain property of the United States located in Springfield for the non-payment of taxes amounting to $18,001.14 for the year 1937, the complaint alleging (1) that the property was not subject to taxation by the state; (2) that the threatened sale would cause irreparable injury to the United States; and (3) that the United States had no adequate remedy at law. The defendants contended that the federal district court lacked jurisdiction to enjoin the enforcement of the tax in view of the amendment to § 24 (1) of the Judicial Code, by § 1, of the Act of August 21, 1937, 50 Stat. 738, 28 U. S. C. § 41 (1), (Supp. 1938), providing, "No district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state." Held, the federal district court had jurisdiction to enjoin collection of the tax, since (1) no plain, equitable remedy existed in the state courts, and (2) no action at law in the state courts was available to the United States as it could not constitutionally appropriate money from the federal treasury in order to pay the tax before suing for refund as required in an action at law in the state court. Springfield v. United States, 99 F. (2d) 860 (C. C. A. 1st, 1938). (Certiorari applied for Feb. 10, 1939).

Federal district courts are courts of limited jurisdiction conferred by the Constitution and Statutes of the United States. Concord Casualty & Surety Co. v. United States, 69 F. (2d) 78 (C. C. A. 2d, 1934). A plaintiff, therefore, suing in federal court must state in his complaint the facts upon which the jurisdiction depends, since the limitation of jurisdiction raises a presumption that jurisdiction does not exist unless affirmatively shown upon the record. Bingham v. Cabot, 3 Dall. 382 (U.
S. 1798); Robertson v. Cease, 97 U. S. 646 (1878). Not only must the essential jurisdictional facts be pleaded, but they must be supported by competent proof if they are challenged in proper manner by the defendant; and even where they are not so challenged, the court may insist that the jurisdictional facts be established by the preponderance of the evidence. McNutt v. General Motors Acceptance Corp., 298 U. S. 178 (1936). A general denial in the answer is a proper manner by which to challenge jurisdiction where state practice permits of that course, Roberts v. Lewis, 144 U. S. 653 (1892); as is a motion to dismiss, Matthews v. Rodgers, 284 U. S. 521 (1932); Wall v. Chesapeake & O. Ry., 95 Fed. 398 (C. C. A. 7th, 1899). In the principal case, the federal district court decided the case on the merits, no question of jurisdiction being raised. United States v. Springfield, 22 F. Supp. 672 (D. Mass. 1938). However, on appeal the defendants questioned the jurisdiction of the district court, this procedure being permissible where “general” jurisdiction of the district court is alleged to be lacking. McNutt v. General Motors Acceptance Corp., supra; Petroleum Exploration, Inc. v. Public Service Comm., 304 U. S. 209 (1938).

Prior to the amendment to § 24 (1) of the Judicial Code, by the Act of August 21, 1937, supra, the federal courts entertained suits to enjoin the collection of taxes by a state where it appeared that the enforcement of the tax would cause irreparable injury, or where some special circumstance existed bringing the case under some recognized head of equity jurisdiction. Henrietta Mills v. Rutherford County, 281 U. S. 121 (1930). Moreover, the federal courts did not feel themselves bound to dismiss a suit for lack of equity jurisdiction in cases where plaintiff could show that no adequate remedy at law in the federal courts existed, although there may have been an adequate remedy at law in the state courts. Di Giovanni v. Camden Fire Insurance Ass'n., 296 U. S. 64 (1935); American Life Ins. Co. v. Stewart, 300 U. S. 203 (1937); Atlas Life Ins. Co. v. Southern, Inc., 23 F. Supp. 334 (N. D. Okla. 1938). The report of the Senate Committee on the Judiciary, Sen. Rep. No. 1035, 75th Cong., 1st Sess. (1937) 1-2, clearly shows the situation existing prior to the passage of the amendment: “If those to whom the federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the state being required to pay first and then litigate, while those privileged to sue in the federal courts need only pay what they choose and withhold the balance during the period of litigation. The pressing need of these states for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the states without judicial examination into the real merits of the controversy.”

The resulting Act of August 21, 1937, supra, has been under consideration in several cases other than the principal case. In Sears, Roebuck & Co. v. Roddewig, 24 F. Supp. 321, 324 (S. D. Iowa 1938), the court dismissed the bill saying, “The amendment . . . is entitled to a liberal interpretation to carry out its obvious purpose, and it would seem that any suit which reasonably falls within the letter or spirit of the provision should be dismissed for lack of jurisdiction.” However, it should be noted in this case that under the laws of Iowa a taxpayer has an equitable remedy by injunction as well as a remedy at law, and that the Iowa courts will enjoin the collection of an illegal tax even though the remedy at law is adequate. Smith v. Peterson, 123 Iowa 672, 99 N. W. 552 (1904). In Printers & Publishers Corp. v. Corbett, 25 F. Supp. 369 (S. D. Cal. 1938), it was held that the federal district court had jurisdiction to restrain the collection of a California sales tax inasmuch as an equitable remedy by injunction was prohibited by statute in the state courts, and the tax being
payable quarterly, the remedy at law in the state courts was inadequate, since it would result in a multiplicity of suits.

From the foregoing it would appear that the federal courts will retain jurisdiction to enjoin the collection of taxes by a state in spite of the amendment of August 21, 1937 where the plaintiff can show (1) that equitable remedy of injunction is not plainly available in the state courts, and (2) that the remedy at law in the state and federal courts is inadequate, a slight showing of inadequacy apparently being sufficient. Applying this reasoning to the principal case, the result reached by the Circuit Court of Appeals appears correct, for (1) there is no plain remedy in equity in the state courts, the Massachusetts rule being that an injunction cannot be obtained by a taxpayer to restrain the collection of a tax, *Loud v. Charlestown*, 99 Mass. 208 (1868), and (2) the remedy at law in the state courts is inadequate in that it would require an appropriation as a condition precedent to relief, which in *United States v. Rickert*, 188 U. S. 432 (1903), was held to be an inadequate remedy where the United States is involved. Whether or not the United States had an adequate remedy at law in the federal courts was apparently not questioned by the defendants in the District Court, nor assigned as error to the Circuit Court of Appeals, and being merely a question of special equity jurisdiction was thereby waived. *Brown v. Lake Superior Iron Co.*, 134 U. S. 530 (1890); *Southern Pacific R. R. v. United States*, 200 U. S. 341 (1906).

J. RICHARD BRINDEL.

**LABOR LAW—Judicial Review of N. L. R. B. Certification**

The National Labor Relations Board, upon proper petition being made, declared the entire Pacific Coast region to be the appropriate unit for collective bargaining among Longshoremen. An election was held in accordance with 49 STAT. 453 (1935), 29 U. S. C. § 159c (Supp. 1938) resulting in the certification of the Committee for Industrial Organization as the exclusive bargaining agent for the region. The employers accepted the certification and made contracts with the Committee for Industrial Organization. The American Federation of Labor, claiming a clear majority in several shipping centers of the Northwest, petitioned the Board for a rehearing upon the determination of the appropriate unit found by the Board. When this petition was denied the present action was instituted in the Court of Appeals for the District of Columbia for a review of the certification made by the Board. *Held*, that a certification of exclusive bargaining agent by the Board is not a final order and consequently the circuit courts are without jurisdiction under the Act to review such proceedings; plaintiff's recourse to judicial review is limited to a bill in equity brought in the district court. *American Federation of Labor, et al. v. National Labor Relations Board*, 6 U. S. L. Week 934 (App. D. C. 1939).

In short, though the action of the Board was in the words of the court, "... definitive, adversary, binding, final and in this case struck at the very roots of petitioners union and destroyed its effectiveness in a large geographical area of the nation..." it was not an order and therefore is not reviewable by the circuit courts or the Court of Appeals for the District of Columbia.

For purposes of illustration, take the following problem: Suppose there were 5,000 C. I. O. Longshoremen in Los Angeles, 5,001 C. I. O. Longshoremen in San Francisco, 5,000 A. F. of L. Longshoremen in Oregon, and 5,000 A. F. of L. Longshoremen in
Washington. If the Board should declare the entire region to be the appropriate unit for collective bargaining, C. I. O. would be certified. If Washington, Oregon and Northern California were certified as one unit and Southern California as a separate unit, A. F. of L. would represent 15,001 of the Longshoremen on the coast while C. I. O. would represent but 5,000. In the third alternative, if Washington and Oregon were declared a unit and California a separate unit, the unions would be evenly divided in their right to represent the Pacific Coast Longshoremen. It is thus evident that in stated circumstances the power of the Board to determine the "appropriate" unit for collective bargaining would largely determine which union should predominate regardless of local or regional strength. Further, if the employer in each instance chose to abide the certification of the Board, the defeated union would have no recourse to the circuit courts to appeal the decision of the Board.

The only remedy available to the minority union, the bill in equity brought in the district court, is decidedly limited in scope. In such a proceeding the issues are limited to three: (1) the constitutionality of the Act, (2) the regularity and conformity of the proceedings under the Act, (3) the constitutionality of the method in which the act is administered, or the procedural due process under the act. The constitutionality of the National Labor Relations Act has been repeatedly upheld. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). In the instant case, no issue was made of the question of regularity of the proceedings in determining the bargaining unit. The defeated union is thus left to the single issue of whether or not the procedure of the Board violates due process.

At the very outset, in order to gain standing in court to inquire into the Board's action, the union must show that it has been deprived of some thing or property in which it had legal right. *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79 (1891). It has been held that the right of the employer to bargain or to contract with his minority employees is not infringed by a certification of the majority union because he can still hear the grievances of the minority union, and is not obligated to submit to the dictation of the majority union. *Precision Castings Co. v. Boland*, 13 F. Supp. 877 (W. D. N. Y. 1936). If the employer's right to contract with the union is infringed it is difficult to see how the defeated union's right to contract with the employer is infringed. The Act nowhere provides for the suppression of the defeated union in such election contests. Moreover a certification does not direct anyone to do anything, and no one has standing in court to obtain judicial review of the action of the Board. Similar state labor board certifications have been held to be mere declarations of fact. *Wallach's Inc. v. Boland*, 253 App. Div. 371, 2 N. Y. Supp. (2d) 179 (1938), aff'd, 277 N. Y. 345, 14 N. E. (2d) 381, (1938). At all events the defeated union still may bargain collectively with the other employees, but must do so through the union victorious in the election.

If, however, this initial difficulty is overcome, and the certification of the one union is established as an infringement of the right of contract of the other, the latter has merely gained standing in court. The right of the Federal Government to infringe the freedom of contract in the regulation of interstate commerce, is, of course, subject to the requirement of due process. *Great Northern Utilities Co. v. Public Service Comm. of Montana*, 52 F. (2d) 802 (D. C. Mont. 1931), aff'd, 285 U. S. 524 (1931). The union is now put upon proof of one of two contentions, either that the action of the Board has without reason consistently resulted in an arbitrary preference of the one union over the other, or in this instance the determination of the appropriate unit was made with no reason or evidence to
support it. In the case of *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), the discrimination against Chinese was proved to be the direct and intended result of the exercise of the administrative powers of the board in question. In the instant case wherever the finding of the appropriate unit is supported by substantial evidence, the discrimination no matter how consistent against one union is incidental and coincidental merely.

In the final analysis, then, though there is quite conceivably substantial evidence of the fact that each city on the west coast should be declared the appropriate unit for collective bargaining, the existence of other substantial evidence of the unity of the entire region precludes interference by the courts with the discretionary power of the Board, and this, though the exercise of that power has resulted in the reduction of a large union to practical impotency. Whether the reservation of the right of the employer to hear and negotiate with the minority union negatives any infringement of the contractual rights of the defeated union or not, the union is as effectively killed as though the Board had ordered it dissolved.

This does not say that the N. L. R. B. has successfully avoided any of the requirements of administrative proceedings. It does say that the Board has the power in effect to exterminate one union and foster another through the routine determination of the appropriate unit for collective bargaining. This misfortune, if such it be, can be rectified only by the legislature.

WOODRUFF J. DEEM.

**TRUSTS—Spendthrift Trusts—Rights of Creditors**

In a proceeding by a trustee involving the construction of a will which had been proved and allowed in 1886, it appeared that testatrix' residuary estate had been devised and bequeathed to trustees, with power to sell and to invest at their discretion, in trust to pay or "to apply and appropriate" the net income thereof to the maintenance of testatrix' surviving grandchildren. The will expressly denied to the beneficiaries the power to assign or to anticipate either the fund or its income, and declared it to be the intent of the testatrix "that the said trust fund and the income thereof, shall not be liable for or chargeable with any debts contracted by them . . ." It was further provided that, upon the death of each *cestui que trust*, the trustees pay over the corresponding portion of the principal sum to the appointees designated by the will of the deceased beneficiary, "but in no event shall any part of said trust funds be liable for, . . . any debts or liabilities of such grandchildren". There followed certain provisions in default of appointment. One Bradford, a beneficiary of the trust, nearly fifty years thereafter died testate, leaving no widow or issue; his will was proved and allowed in 1935. In terms it expressed the exercise of the power of appointment and, out of his dispositive share of the principal sum, bequeathed specific legacies to two, the residue to a third, of the various creditors of his own insolvent estate. From a decree of the Probate Court instructing the trustees-petitioners as to their duties, the respondent below appealed to the Supreme Judicial Court of Massachusetts on the ground that Bradford's attempted exercise of the power of appointment was not within its scope and that, therefore, the limitations over in default of appointment had vested. The successful outcome of this contention would have continued the principal fund in trust for the benefit of the respondent. *Held*, (1) a specific "spendthrift trust" provision, embracing both
fund and income, is valid; (2) an attempt to limit a general power of appointment, so as to defeat the equitable doctrine that property appointed shall be dealt with as assets of the donee's estate, is void; (3) donee's preferential exercise of the power for the benefit of certain creditors is void. *State Street Trust Co. v. Kissel, 19 N. E. (2d) 25 (Mass. 1939).

In English jurisprudence the "spendthrift trust" has been repudiated. At common law any property, real or personal, that a man owned might be alienated by him or be taken for the payment of his debts. Thus it followed that no grant nor devise could enable the grantee or devisee to hold the estate without its being subject to alienation, attachment and execution. A condition which attempted to qualify the otherwise absolute grant was void as repugnant to the nature of the estate granted. *Blackstone Bank v. Davis, 21 Pick. 42 (Mass. 1838), citing Co. Litt.* 223 a. The same rule has prevailed in the English Court of Chancery to the extent that, when the income of a trust estate is given to any person (other than a married woman) for life, the equitable life estate is alienable by, and liable in equity for the debts of, the *cestui que trust*. This quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts. The rule was laid down by Lord Eldon in *Brandon v. Robinson*, 18 Ves. 429, 433 (Ch. 1811): "... if property is given to a man for his life, the donor cannot take away the incidents to a life-estate". There, the trust, being limited over in the event of the beneficiary's bankruptcy, was held invalid; but, "... it could not be preserved from the creditors, unless given to some one else." *Id.* at 434. In *Green v. Spicer*, 1 Russ. & M. 395 (Ch. 1830), wherein trustees under a will had a discretion as to the manner of application of the income of the trust fund, although without power to apply it otherwise than for the benefit of the *cestui que trust*, the Master of the Rolls held that, upon the insolvency of the beneficiary, his interest passed to his assignees, notwithstanding that by the will the beneficiary had no power to sell, mortgage or anticipate the income of the fund.

The latest English case to appy the rule of *Brandon v. Robinson* and *Green v. Spicer*, supra, is *In re Fitzgerald; Surman v. Fitzgerald*, [1903] 1 Ch. 933. By the terms of a marriage contract entered upon in Scotland, a trust was created whereby the trustees were to pay the income to the husband for life, conditioned upon the wife pre-deceasing him, the payments to be strictly alimentary and "not assignable or liable to arrestment" at the instance of his creditors. The husband having survived the wife, and having mortgaged his life interest to English creditors, a summons was obtained by the English trustees to determine the rights of the mortgagees. Joyce, J., speaking for the Chancery Division, after deciding on domiciliary grounds that the validity and operation of the trust must be determined by the law of England, held that the mortgagees were entitled to receive payment of the income from the trustees, for, "according to the law of England an inalienable trust cannot be created in favour of a man even for his maintenance". *In re Fitzgerald; Surman v. Fitzgerald* [1903] 1 Ch. 933, 940. "The declaration in the settlement ... is void and ineoporative according to English law, being repugnant and contrary to public policy". *Ibid.* The reversal of the cause in the Court of Appeal, [1904] 1 Ch. 573, in no manner repudiated the established English doctrine; the decision, rather, turned on the facts and circumstances surrounding the contract, whereby its validity was construed according to the foreign (that is, the Scottish) law. Vaughan Williams, L. J., placed an interpretation on the rule which appears to hold it to be grounded on the attributes of property rather than on public policy. He said, "The English
law, in so far as it refuses to give effect to provisions which affect to control the
rights of disposition which are attached to an absolute transfer of property, does not
seem to me to be a matter regarding ‘public order or good morals’. It is, I think,
merely a logical development from legal definitions adopted by the English law”.

Id. at 597.

Whatever may be the rationale of the English holdings, the American courts have,
in the main, refused to follow the principle laid down by Lord Eldon. In Nichols,
Assignee v. Eaton, 91 U. S. 716 (1875), the Supreme Court of the United States
declined to hold that the power of alienation was a necessary incident to a life-estate
in real property, or that the interest and dividends of personality might not be enjoyed
by an individual without liability for his debts being attached as a necessary incident.
Mr. Justice Miller there said: “This doctrine is one which the English Chancery
Court has ingrafted upon the common law for the benefit of creditors, and is com-
paratively of modern origin. . . . If the doctrine is to be sustained at all, it must rest
exclusively on the rights of creditors”. Id. at 725.

Massachusetts, in common with the majority of the states, has preferred the
reasoning of Mr. Justice Miller to that of Lord Eldon. The leading case in that
jurisdiction is Broadway National Bank v. Adams, 133 Mass. 170 (1882), wherein it
was held that one having the entire right to dispose of property may settle it in
trust in favor of another, with the provision that the income shall not be alienated
by the beneficiary by anticipation, or be subject to be taken by his creditors in
advance of its payment to him.

The cleavage between the English and the American rules is in the relative weight
given to the rights of the beneficiary’s creditors and to the rights of the settlor of
the “spendthrift trust”. It is not difficult to justify the American doctrine as to the
corpus of the trust. The beneficiary does not hold the legal title to the fund;
that, the trust being active, is vested in the trustees. The beneficiary may have
little more than an expectancy that the income when derived, will be paid to him at
the discretion of the trustees. What right has the creditor to look to the trust fund
in satisfaction of his claim? Wills or other instruments creating such trust-estates
are of public record; notice of their existence, and of their terms, is imputed to those
persons who may thereafter be concerned with their subject-matter. The creditor
cannot successfully contend that he has been misled or defrauded.

On the other hand, giving effect to the donor’s intent to preserve the benefits of
the fund solely to the cestui que trust is unsatisfactory when applied to the income
derived. In this connection it is necessary to distinguish income in the hands of the
beneficiary from that in the hands of the trustee. In the former case it is obvious
that the income, the legal title to which was now vested in the beneficiary, is not
shielded from the creditor; if he is able to ascertain the time of payment he may
issue execution before the cestui que trust has been able to dispose of the proceeds.
A different situation arises when the accumulated income has not yet been applied
by the trustees to the uses declared by the settlor. The cases are at variance as to
whether the beneficiary’s interest, at that period, is an equity or an equitable estate.
To illustrate, it is said that the beneficiary has an “equitable interest” in the income
yet only “a qualified right to support”, Rose v. Southern Michigan National Bank,
255 Mich. 275, 238 N. W. 284 (1931). Several of the states, while upholding the
general doctrine of the validity of the “spendthrift trust” have enacted legislation
designed to remove, in part, the accumulated income’s exemption from creditors’
claims. California, for example, has provided that rents and profits “beyond the sum necessary for the beneficiary’s support” shall be liable to such claims. Canfield v. Security First National Bank, 8 Cal. App. (2d) 277, 48 P. (2d) 133 (1935). Of like import is Keith v. First National Bank, 256 Ky. 88, 75 S. W. (2d) 747 (1934). Similar results have elsewhere been attained by judicial decisions. Moorehead’s Estate, 289 Pa. 542, 137 Atl. 802 (1927) (for support of beneficiary’s wife); England v. England, 223 Ill. App. 549 (1922) (to satisfy a judgment for alimony). Griswold, Reaching the Interest of the Beneficiary of a Spendthrift Trust (1929) 43 Harv. L. Rev. 63, classifies the persons in whose behalf and the situations in which recovery is allowed.

These latter trends, it is submitted, are in the proper direction, representing as they do a sound compromise between the harsh rule of the English Chancery and the undue leniency of the earlier American cases. To arrive at a balance of interests among settlor, cestui que trust, and the latter’s creditors, is the desirable goal.

J. W. HUYSSOON.

STATUTES—Legality of Income Tax on Federal Judges’ Salaries

Plaintiff, a judge of the Customs Court, paid the income tax on his compensation received as judge for 1934 and 1935. He now seeks a refund of the tax, claiming that he was a judge of one of the “courts of the United States” within the meaning of the term as used in the Revenue Act for 1934, Sec. 22 (a); 48 Stat. 680, 686; 26 U. S. C. § 22 (a) (1934), “in the case of . . . judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income. . . .”, that he had taken office November 19, 1913, and so was exempt from the tax. Held, the Customs Court is a court of the United States within the meaning of the Act, and since plaintiff had taken office before June 6, 1932, his salary was not taxable for the years 1934 and 1935. Brown v. Magruder, 25 F. Supp. 161 (D. Md. 1938).

In the initial case on this subject, Evans v. Gore, 253 U. S. 245 (1920), the Supreme Court held that the application of the Sixteenth Amendment to the compensation which a federal district judge received, qua judge, was unconstitutional as contrary to Art. III, § 1, of the United States Constitution prohibiting the diminution of his compensation during his continuance in office, saying, “Thus the genesis and words of the [Sixteenth] Amendment unite in showing that it does not extend the taxing power to new or exceptional subjects, but merely removes all occasion otherwise existing for an apportionment among the States of taxes laid on income, whether derived from one source or another.” Id at 261-2. Following this decision, to which Holmes, J., and Brandeis, J., dissented, the Court held in Miles v. Graham, 268 U. S. 501 (1925), that the salary of federal judges (in this case a judge of the Court of Claims) could not be taxed even if they took office after the passage of a revenue act designed to include them, the Court holding, “. . . the purpose [of Art. III, § 1, U. S. Const.] was to impose on Congress the duty definitely to declare what sum shall be received by each judge out of the public funds and the time of payment. When this duty has been complied with, the amount specified becomes the compensation which is protected against diminution during his continuance in office . . . there is no power to tax a judge of a court of the United States on account of the salary
prescribed for him by law." Id. at 508-9. But neither counsel nor the Court raised
the point of a difference between judges of "legislative" and "constitutional" courts
in this case.

However, in a case deciding the validity of the Economy Act of 1932, 47 Stat.
382, 402 (1932), repealed, 48 Stat. 14 (1933), as applied to judges' salaries, Williams
v. United States, 289 U. S. 553 (1933), it was held that the Act did operate to reduce
the compensation of judges of the Court of Claims, since they are not judges of a
"constitutional" court (one in which the judicial power is vested by Art. III, § 1, of
the United States Constitution, and whose judges are protected against diminution of
their compensation while in office by that Article). Rather they are judges of a
"legislative" court, (whose status is defined in Ex parte Bakelite, 279 U. S. 439, 452
(1929), "as a special tribunal to examine and determine claims for money against
the United States . . . a function which belongs to Congress, as an incident of its
power to pay the debts of the United States . . . which [function] Congress has a
discretion either to exercise directly or to delegate to other agencies"), and as such
receive no protection under the judicial article (Art. III) of the Constitution.

The Board of Tax Appeals has decided that the salary of a judge of the United
States Court of Patent Appeals appointed before 1932 is not exempt under the
Revenue Act of 1934, since it would come within the definition of gross income in
any case, and that the reference in § 22 (a) of the Revenue Act of 1934, supra, to
drivers taking office after June 6, 1932, is not a provision of exemption or exclusion,
but one of extension or inclusion. Charles S. Hatfield, 38 B. T. A. 245 (1938). This
decision is being appealed to the Circuit Court of Appeals for the Sixth Circuit.

The principal case rejects this forthright solution of the problem, and prefers to
hold that the Customs Court is by analogy with the Court of Claims a "court of the
United States," citing certain dicta appearing in the Bakelite case, supra, at 455,
"without doubt that Court [Court of Claims] is a Court of the United States within
the meaning of § 375 of Title 28, U. S. C. (the section fixing the retirement of federal
judges) "to bolster its holding that since plaintiff is a judge of a court of the United
States already holding office before June 6, 1932, the Revenue Act of 1934 does not
apply to his compensation as judge. Reliance was placed upon the ruling of the
Bureau of Internal Revenue in 1923 that judges of the Customs Court were exempt
from the income tax on their salaries as such, a ruling which was not rescinded until
1937.

The court further bolstered its construction of the statute by suggesting that a
contrary construction might involve doubts as to the constitutionality of the statute
in view of the decision in Miles v. Graham, supra. It is difficult to understand the
court's position in this respect in view of the holding of the Supreme Court in
Williams v. United States, supra. The construction placed upon the statute by the
Board of Tax Appeals in the Hatfield case, supra, seems definitely to be preferred to
that reached by the court in the instant case, especially since the Circuit Court of
Appeals for the Seventh Circuit in a case involving one of Judge Brown's colleagues,
also appointed before June 6, 1932, has agreed with the decision of the Board in the

JOHN MICHAEL MCKENNA.
BOOK REVIEWS


The place of Criminal Procedure in the law school curriculum appears to be in a state of change. For many years this subject has been neglected, or at the best, treated rather summarily as a part of the course on the substantive law of Crimes. Recent studies in the field of sociology have brought the pathetic condition of criminal administration into the limelight. Bench and bar responded. Committees were organized to study problems of law enforcement. The American Law Institute, after an extensive study, produced its Model Code of Criminal Procedure. Outstanding teachers in the field of Criminal Law played an important role in this attempt to revitalize Criminal Procedure. Recent casebooks, new and revised, in the field of Criminal Law, have almost uniformly devoted more space than heretofore to Criminal Procedure.

In spite of this consciousness that "something must be done" about Criminal Procedure, the overwhelming majority of law schools still offers this course as an appendage to Criminal Law. Their reason is always the same—relatively less important. And in many law schools whose students plan to migrate to, or remain in, large metropolitan centers, the reason is valid. But, in the majority of law schools, the reason is questionable, as a large percentage of their graduates will spend most of their time during their first few years of practice, in the criminal courts. As to these students, is Criminal Procedure relatively less important? Also, as a social problem, are the law schools serving the best interests of the community, badly in need of skilled technicians in criminal administration, as well as they might?

Professor Keigwin’s Cases in Criminal Procedure offers a collection of material well adapted to meet the problem of the law schools. It is short enough to be offered in a two hour course, if such be necessary. Yet it is complete enough to give the student an excellent idea of the fundamentals of Criminal Procedure. The work is divided into fifteen chapters, each chapter covering, in chronological order, one or more phases of the subject. Thus Professor Keigwin first considers the problem of arrest, followed by jurisdiction and venue, extradition, preliminary examination and bail, modes of accusation, The Grand Jury, the indictment (subdivided into four chapters, to wit: formal parts, essentials of the crime, incidental allegations, and upon statutes), duplicity and plural counts, objections to

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the indictment, peremptory pleas and former jeopardy, the evidence, and finally the trial.

There are 729 pages in the book, but not all of this space is devoted to cases. Professor Keigwin has once again made use of his interesting and invaluable system of introducing each new chapter with a clear and concise summary of the general rules, fundamentals and exceptions to be considered therein. This is followed by a group of selected cases which serve as practical illustrations of the problems under consideration. With this text material in mind, student appreciation of the questions raised by the cases leads to a broader, more intelligent, and much freer class discussion. Valuable classroom time need not be spent on the simple, but heretofore unknown, rules of procedure. The instructor, consequently, has time to develop the more intricate problems, point out in greater detail the advantages or disadvantages of a rule, the soundness or weakness of a reason, the need of reform and the manner of accomplishing it.

Some 208 pages of the work are devoted to text material in the nature of these summaries. The remaining 521 pages are devoted to case material, carefully selected by the author as a result of many years of teaching, writing and practice in the field. There are 267 cases. Approximately thirty percent of these were decided since 1920, and of this group, approximately sixteen percent were decided since 1930.

At this point, attention should be called to another example of Professor Keigwin's thoughtful planning of his casebook. Realizing that teaching methods differ and that some instructors prefer to cover fewer cases in a given period of time than do others, Professor Keigwin has suggested 59 cases as possible omissions, by the simple device of printing these cases in smaller type.

In his preface, the author frankly admits that "the system of procedure presented in these pages is that which was until quite recent years, universally accepted in this country. . . ." Criticism will no doubt be made of the work because of the author's failure to include in it the results of the findings of the bodies above referred to, such as the Model Criminal Code of the American Law Institute. The author forsees this possibility and answers it by stating, "... one can hardly understand or at all appreciate a reform unless he knows pretty well what has been or is to be reformed." This is a truism which many educated people often overlook. The good instructor, acquainted as he is with the whole field, could use this work very successfully as the foundation on which to build his students' appreciation and understanding of Criminal Procedure, past, present and future.

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The double nature of this book is disclosed in the title. From a Latin MSS. in the British Museum have been selected about thirty extracts, almost all of them hitherto unpublished and many hitherto unknown. Preceding these Opuscula is an Introduction of triple their length discussing in the greatest detail the entire MSS. and the extracts from every aspect. The opportunity is not lost of dealing with the other known writings, and in some cases the lives, of the Glossators represented in the text. To all this are appended three Latin indices which with the voluminous bibliography supply a previously lacking reference book to the enormous recent literature upon this period of the law. The fact of which popularity is sufficient to indicate the value of the book. The writings of the Glossators are of the utmost interest for the laborers in many fields, not only civil and canonical law, but theology, philosophy, and medievalism in general. When the best of them seriously devoted themselves to a topic, the results have in most cases not since been surpassed.

The Latin text has been edited with the most extraordinary care and a degree of erudition at the command of few now living. Besides the ordinary textual criticism, comparison of MSS., emendation, etc., it was thought necessary to trace and note more than 700 undeclared references to the Corpus Juris. This latter task, mainly undertaken by the collaborator, is one which the reviewer is by professor more capable of appreciating, and it is masterly indeed.

As the author remarks,¹ the text is an apparatus for future studies: it is the Introduction which is of present significance. Here is collected most of what is known of the men, their methods, and their writings. Because of the meagre nature of the data at the moment generally available the investigation is attended with the most acute difficulty. Such fantasy has thus been caused or permitted that, as the author trenchantly observes,² the main danger continues to be diletantism. So conscientious an attempt is made to avoid this pitfall that one is at times almost in-

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¹P. 3.
²P. 146.
clined to make the accusation of excess of caution, as where the identification is rejected of the owner and annotator of the MSS. with "Gerald of Wales". To this reviewer the evidence quoted in favor seems stronger than the connection with Montpellier. Admitting the connection, not very clearly portrayed, no reason is still perceived why "Master G." could not have had the MSS. copied upon "one of his many journeys . . . through Southern France". The only approach to the imaginative realm is the suggestion of a connection between an allegorical description of Justice, Reason, Equity, and the six Virtues to "some national or local school of painting or sculpture". As most works of art may be transported anywhere and endure indefinitely, attributions therefrom of time or place seem insecure. If the position is fixed, as in the case of a fresco, it is still possible for "Mahomet to go to the mountain".

The arguments and conclusions with which the Introduction is crammed are presented with such judgment and acumen as to carry conviction. Two of the suggestions, however, by their novelty challenge and deserve examination. The authorship of one of the extracts being attributed to Placentinus, it is necessary to prove, contrary to the previous assumption, that it was not composed at Rome. The fact that the protagonist describes himself as being there is dismissed with the observation that Dante was not in Hell when he wrote the "Inferno". Though the deduction against which this polemic is directed is perhaps not conclusive, the polemic itself seems scarcely justified. A legal treatise is not an epic poem nor is Rome comparable to such a locality as Hell. Our surprise is more vividly evoked when, two pages later, we find employed just such an argument, of a much weaker kind. The ancient treatise bitterly inveighs against the Germain emperors and their law. Whence it is concluded that it was not composed at Rome, where the foreign law had been

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3P. 25 ff. 4P. 28. 5P. 186.

Two points concerning the original sources are here noted. The nullity for fraud in Dig. 4.3.7.pr., to which exception is taken on p. 76, is explained by Vangerow, Pandekten, 2.277. A contract purporting to have been made by a fraudulent intermediary may be in fact non-existent, though the transfer of title is valid when made in the belief that the terms of the agreement were correctly reported. To the definition of liberty as the power to do what one likes except as one is prohibited by duress or law, it is objected on p. 137 that hereby even a slave is free. The premise is that an owner cannot be guilty of duress against his slave, who differs from a freeman in being legally subject to the arbitrary and unreasonable commands of a private person. This was not true of a filius-familias, in classical law identified with his father from the standpoint of property but master of his own actions, cf. Dig. 43.29.35.

6Quaestiones de juris subtilitatibus.
7P. 192.
prohibited. It might be replied that it was from such a safe shelter that
invectives were most to be expected. Further on in the discussion an
argument is based upon the fact that the treatise was unpublished.9
Again the reader is surprised and puzzled until two pages later he finds
that because it was unfinished it was "probably never published," a de-
duction of somewhat doubtful validity.

With regard to Rogerius, the author's favorite, indulgence is due him,
since such an affection for and intimate acquaintance with the whole
school breathes from every page. It is so satisfactory to picture him as
preceding Placentinus in the chair of law at Montpellier that the fragili-
dy of the hypothesis is merely noted.10 What cannot be so lightly dis-
missed is the attribution to Rogerius of the famous Summa Trecensis, of
which Fitting had said that he "quite definitely" could not be the author.
On this point the zeal of Dr. Kantorowicz to refute Fitting at times be-
comes excessive.11 In one of the summae for a "casual" condition the
example is chosen "if Fraga shall be captured in one year or two". From
this Fitting had deduced that the book was written before the little town
had fallen in the siege. This is likened by our author to the modern
threat to naughty English children of the advent of "Boney". Never-
thelss, to the reviewer it seems improbable that an event the outcome
of which has been long decided should be used as a type of uncertainty.
One would now hardly thus write in a law book of Vicksburg, Verdun,
or even Teruel. Legal treatises are not written for naughty children.
Against the attribution to Rogerius are differences both of substance
and style between the summa in question and the one which later ap-
peared under his name. The former are discounted because of the possi-
bility of change of opinion. The latter, more serious for the author, who
constantly uses the criterion elsewhere, have to be accounted for by the
assumption that Rogerius became dissatisfied with his style.12 Another
maxim of Dr. Kantorowicz is that nothing can be argued from similarity

9P. 202.
10To the two possibilities mentioned on p. 126, could not a third be added; i.e. that the
summa of Rogerius had been used as a textbook by some other umbratilis doctor of a
branch of knowledge new to Montpellier. It was the most recent and complete work.
11It is true that Fitting exaggerated in asserting that the principle of Dig. 35.1.102 had
"disappeared" from modern law, cf. p. 171n. 98. In principle, however, he was right. The
learning of the Glossators and Bartolists upon the innumerable problems involved was
collected in a work of almost 900 folio pages by De Rusticus. With this should be compared
the paucity of doctrine in Windscheid's Pandekten (§ 635n.8) or in any modern commen-
tary to art. 2107 of the B.G.B. Few if any of the nice issues presented are now remembered.
12P. 171.
of order and substance. The perfect truth of this is evident to anyone even cursorily acquainted with the works of the Bartolists, who carried on the tradition. Yet in the matter of the two *summae* much is and has to be made of such resemblances. The difficulty and uncertainty of the whole subject cannot be better illustrated than by these two presuppositions; similarities do not necessarily imply, and differences do not exclude, identical origin.

J. B. THAYER*


Among the many good things missed during the year 1938 was a 1937-38 edition of Montgomery's Tax Handbooks. The omission is explained by the author in the preface to the second of the two books listed above as attributable to the fact (or the author's opinion that such was the fact) that the Revenue Act of 1937 was too unimportant to warrant a new edition of the Handbooks.1 So, in spite of the concession that, "During the years 1937 and 1938 court and Tax Board decisions were handed down in steadily increasing numbers",2 Mr. Montgomery determined to postpone his next edition until after the passage of the Revenue Act of 1938. After a year had been allowed to elapse, it is, perhaps, to be wondered why the author did not delay the latest edition a month or two longer so that he might have been able to cite in his text the pertinent articles of Regulations 101, recently issued under the 1938 Act. The 1939 Income Tax Handbook's references to Regulations 94 (under the '36 Act) are not as unhandy as they might have been had there been less coordination of articles and article numbers in the old and the new Regulations.

The same point of difference immediately noted between Regulations 101 and its predecessor, Regulations 94—that of bulk (an increase by 236 pages makes Reg. 101 loom to the impressively discouraging size of

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1Federal Taxes on Estates, Trusts, and Gifts, iii.

2Ibid.
802 pages)—is to be seen in comparing the new Income Tax Handbook with its most recent antecedent, that issued in 1936. In plan of presentation the new sticks to the familiar groove of the old. So also in purpose and spirit every line of the new is pregnant with the passion of the old, to fortify the taxpayer as best can be done against his unequal tax battle with the ogreish Treasury. When Mr. Montgomery asserts that "the prefaces are the only personal part of my books," he fails to do justice to the pervasiveness of his personality. Far from chafing in the confines of the preface, it stands out on every page, true to the form of every writer whose pen is the pen of a crusader. The author is as consistent in his devotion to the maxim (if it deserves to be called such) that ambiguities in tax matters are to be resolved in the taxpayer's favor as the courts are in their inconsistency in the application of it. Yet the devotion is not a blind one, and therein lies the value of the author's admonitory observations. The point may be illustrated by noting Mr. Montgomery's treatment of the problem of applying the 15 per cent limitation on deductions for charitable contributions, where the question is whether capital losses should be reflected in the total net income against which the limitation must be applied. Pointing out a difference of opinion among several of the lower courts, the author observes: "Until the point is settled by further litigation, taxpayers should not reduce net income by a net long-term capital loss for the purpose of applying the limitation. . . ." This position coincides with that recently taken by the United States Supreme Court in the case of United States v. Pleasants. So in the matter of improvements made by a lessee as constituting income to the lessor, the author is again moved by a split in the lower courts to charge "accountants . . . with notice that in all cases when authorities differ regarding the interpretation of tax laws, clients should be protected until the doubtful points are decided by the U. S. Supreme Court." Here, too, the Supreme Court has but recently shed some (though not as much as had been hoped for) light on the question in the case of M. E. Blatt Co. v. United States.

On the other hand, where the probabilities seemed to indicate an eventual choice by the Supreme Court between irreconcilable rulings in lower courts that would be unfavorable to the taxpayer, the author's tone

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9Id., at 581.
59 S. Ct. 281 (January 3, 1939).
759 S. Ct. 186 (December 5, 1938).
changes, becoming less belligerent and more in the way of dejected wishful thinking. So, in the *Handbook on Estates and Trusts*, Mr. Montgomery indicates what was the generally held expectation that the Supreme Court ultimately would reject any distinction based upon differences between the incidents of joint tenancies and tenancies by the entirety, and would declare valid the application of the federal estate tax to the entire value of property held in joint tenancy (where the decedent had contributed the whole consideration for the property so held), as it had already ruled in the matter of property held by the entirety. Likewise, on the question of the amount properly allowable as a deduction for loss from casualty where the property destroyed is not of the type permitting depreciation allowances, the author first notes the holding of the Second Circuit Court of Appeals declaring the difference between the cost of a pleasure car damaged in a collision and its value after the collision to be the amount deductible as a loss. For the opposed decision in the Fourth Circuit, holding the loss through storm of a pleasure boat to be deductible only to the extent of the depreciated cost at the time of loss (even though the depreciation had not been deductible), only the mild (for Mr. Montgomery) criticism is offered to the effect that "the court (i.e., Fourth Circuit Court of Appeals) preferred to seek what it thought to be the intention of the law rather than accept its liberal wording." The mildness of the criticism may have been motivated by the author's hunch that a preference like that of the Fourth Circuit Court would ultimately be vouchsafed by the Supreme Court.

"The Supreme Court has not yet passed upon the question although in Foster v. Com'r (303 U. S. 618) it held that the full value of property in a joint tenancy created in 1931 must be included in the estate of the decedent in the absence of evidence that the survivor had contributed to the joint estate. This decision was based upon Tyler v. U. S. . . . which dealt with an estate by entirety, thus indicating that the court is not impressed by distinctions between such tenancies and joint tenancies." *Federal Taxes on Estates, Trusts, and Gifts*, 213. On February 27, 1939, in the case of United States v. Jacobs, 59 S. Ct. 147, the Supreme Court confirmed this impression, holding the property held in joint tenancy properly includible in the gross estate of the decedent who had contributed the entire consideration for its acquisition.

*Tyler v. United States, 281 U. S. 497 (1930); Helvering v. Bowers, 303 U. S. 618 (1938).*


*Helvering v. Owens, 95 F. (2d) 318 (C. C. A. 2d, 1938).*

*Helvering v. Obici, 97 F. (2d) 431 (C. C. A. 4th, 1938).*


*On January 3, 1939, the Supreme Court reversed the holding of the Second Circuit Court of Appeals in the Owens case (Helvering v. Owens, 59 S. Ct. 260), and affirmed that of the Fourth Circuit in the Obici case (Obici v. Helvering, 59 S. Ct. 260). Another*
The mildness that must frequently characterize the criticisms of the text because written by Mr. Montgomery in the capacity of a counsellor who knows clients must be advised on the law that is, not the law that ought to be, is not to be found in the prefaces of his handbooks. The prefaces are written by Mr. Montgomery, citizen and taxpayer. This is what the author means when he tells us that the prefaces are the only personal part of his books. To him the softened punch is no part of his personality. No more is it a part of his prefaces. Concerning the tenor of the criticism in the prefaces, it seems pertinent to observe that the distinction between the well-directed solid punch and the wild-swinging haymaker is one of substance. Mr. Montgomery is wasting his excellent energies in the blind fury of his assaults. His latest prefaces are short of the standard to which we have become accustomed. They fall short because they are entirely too dour. The very fact that there is so much room for criticism in our federal tax system renders imperative the need of quick recognition and generous approval whenever improvement, however slight, makes itself evident. Presumably Mr. Montgomery is desirous of arousing administrative and congressional officials to a recognition of the great need of improvement and (since the recognition seems well under way) a determination to achieve it. "What this country really needs", he tells us, "is a nonpartisan commission to sit down, for several years, if necessary, and revamp the entire tax structure so that the business man will stand some chance of making some sense out of it." But Mr. Montgomery ignores the gustatory preferences of his flies when he offers them such vinegary observations as these:

"The 1938 law was an improvement over the 1936 law. But the 1936 law was very bad... When I say that the 1938 law is better than the 1936 law I merely mean that it is not quite as bad."16

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16 Id. at iii.

recent decision, that in the case of Lyeth v. Hoey, 59 S. Ct. 155 (December 5, 1938), is of interest here. The Second Circuit Court of Appeals had held that amounts paid the taxpayer to drop his contest of a will constituted income, Lyeth v. Hoey, 96 F. (2d) 141 (C. C. A. 2d, 1938). This decision the author refers to as "questionable inasmuch as the amounts received did not arise from services nor was there any basis upon which gains could be computed". Federal Income Tax Handbook, 44. The decision of the Supreme Court, in its reversal of the court below, avoided the question raised by the author, whether such amounts could properly be regarded as "income"; and held that on the facts of the case, where the taxpayer contesting the will was the heir at law of the decedent, the amounts received by him in compromise of the contest over the will were received by inheritance, and so fell within the exemption of the statute excluding from gross income amounts received by bequest, devise or inheritance.
"The changes (made by the 1938 law in the taxation of gifts and trusts) are not important except to indicate the petty policy of the present administration. A few badly advised taxpayers resort to devious and illogical tax dodging. The penalties are imposed on thousands of innocent taxpayers."17

Nor will he be appeased when some one suggests to him that the new law permits the time for payment of the estate tax to be extended for a period of ten years instead of eight, as under the former provisions, and reduces the rate of interest over such periods of extension from six per cent to four per cent. To this suggestion he retorts: "... I understand that, if you pay as soon as you can and discharge the debt ahead of time, the Treasury collects interest for the entire period; so if the rate is 4 per cent for a 10-year extension and you pay in 2 years, the rate is 20 per cent per annum. A bit high, what!" Not at all too high, one might reply, for any one so stupid as to ask for a ten years' extension to accomplish a two years' job. Such rancor is as purposeless as it is ungracious.

Obviously taxpayers should be advised to secure the most advantageous closing agreement or compromise of a tax controversy, but the advice need not be given in such a way as to make the taxpayer shy away from the mere approach of a compromise-tempered Treasury official as though he were a Greek burdened with gifts of loaded cigars.18 Surely this is no way to avoid litigation wherein, as with wars of all kinds, nobody wins. Nor is litigation discouraged by offering a "striking reminder to taxpayers and tax practitioners that the Treasury regulations are not the law".19 Faulty, indeed, is the practitioner who fails to distinguish between the administrative regulation that fits into the framework of the statute, and the regulation that seems out of joint. Granting that the last work rests with the courts to pass upon the propriety of the adjustment, it would be a sorry state of affairs if it should become necessary to regard every regulation with suspicion. Indeed the courts tell us that the contrary must be the presumption, and that the administrative ruling is law save in the exceptional case where it is wholly inconsistent with its statutory base.

Though it is difficult to see how tax laws can be made less complicated by rendering tax issues more hotly political than inherently they will always be, and though one might suppose Mr. Lewis and Mr. Green have for the present quite enough on their hands to resolve their inter-

17Federal Taxes on Estates, Trusts, and Gifts, iii.
18"Closing agreements and compromises should be encouraged, but any attempt to make them one-sided is a poor sort of joke." Federal Income Tax Handbook, iii.
19Federal Taxes on Estates, Trusts, and Gifts, iii.
necine struggle, Mr. Montgomery issues the clarion to labor to take up the cudgel of its lobbying power in behalf of its old enemy, Big Business:

"It looks as if labor unions are to have their day. Where they exist I suggest an effort be made to reason with them about taxes. Tell them that the present intolerable burden of taxation is forcing business men to raise prices and there is a limit to such a course. There won't be anything left for high wages if governmental expenditures are kept at present levels." 20

When nothing is attainable, one might as well wish for the moon as for a slipper. But a fairer and more equitable distribution of the tax burden, and a greater clarification of the tax laws, seem both to be reasonably attainable. Why, then, let them slip away in wishing for the millennium of fewer and lower taxes? And in arguing for more fairness and less complication in tax laws it would be well not to lose sight of the fact that the price of fairness is a certain amount of complication. "Current criticisms of the complexity of the federal revenue laws often fail to take account of the fact that many of the most complex provisions were adopted with the desire to treat the taxpayer more generously than the courts had treated him under the original shorter and simpler laws." 21 Professor Magill is here writing of the exchange and corporate reorganization sections of the law and, for all their complexity, he regards them as "masterpieces of technical draftsmanship". 22 At another place he points out that the simplest income tax laws were the first ones to be adopted in the Civil War period, wherein little or no allowance was made in the way of deductions and exemptions. 23 No taxpayer will put so high a price of simplicity as to wish a return to that era. But there is a complexity that is unavoidable in the soundest tax law, and then again there is needless complexity, such as that requiring income taxes to be computed on a dual rate schedule, calling for a normal tax net income, and a surtax net income, and that compelling one estate tax to be computed on the basis of a thirteen year old law, and another on the basis of one six years younger.

In this sphere of needless complexity, and in a field almost as wide—the inequities of the present tax system—there is so much to be done that it seems a pity to see the obvious usefulness that is Mr. Mont-

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21 Magill, Taxable Income (1936), 123.
22 Id. at 124.
23 If a law which was evidently hastily drawn and passed can be said to have adopted a concept of income, the design of the 1861 Act was apparently to tax gross income and possibly gross receipts." Id at 294.

Democracy in the Making is a narrative of the decline and fall of the Second Bank of the United States and of the unsuccessful Whig efforts to establish a successor. The story begins in 1834, after Jackson has removed the deposits and when in retaliation, Nicholas Biddle is bringing about a money and credit shortage. Fraser recounts the failure of the “panic of 1834” to force the hands of the administration. He describes the emergence of the idea of an independent treasury and its development until that institution has been established in Van Buren’s term. The second half of the volume sets forth the vain struggle in the Harrison-Tyler administration to establish a bank on the model of Biddle’s ill-fated institution.

The book has two heroes and two villains. The chief hero, though he does not get the major space, is Andrew Jackson. Mr. Fraser belongs to the Parton school of admirers of Old Hickory. His book is, in effect,
a reply to Abernethy's careful study of the role of the general in the politics of Tennessee. Fraser sees Jackson always as the champion of the people against the money power. The author's account of the battle between Jackson and Biddle is sound and well documented. It would be more effective and more useful, however, if the hero were not romanticized.

Nicholas Biddle, is of course, the deep-died villain. Fraser does not mince words; he calls a bribe a bribe. And he authenticates his charges by references to court proceedings and to correspondence. The climax of the book is reached when Biddle, under indictment, is released under a most extraordinary *habeas corpus* proceeding by a federal judge who has recently borrowed five hundred dollars for the financier. After this miscarriage of justice, Biddle spends his declining years, in affluent and elegant retirement, at his estate.

The second villain is Henry Clay, that wily politician who was always hand in glove with money power. Clay emerges as the would be dictator of Whig policies after the inauguration of William Henry Harrison. Before the Whig program can be launched, however, "Tippecanoe" dies and John Tyler of Virginia becomes the first vice-president to advance to the office of chief executive. Then follows scene after scene in which Tyler, standing on principle, balks the Kentucky tool of the moneyed interests. Tyler holds the bridge against the enemy and prevents the reestablishment of the bank, but the furious Clay brands him with infamy before the people. The concluding sentences of the book are quoted from Tyler who is still president: "I appeal from the vituperation of the present day to the pen of impartial history, in the full confidence that neither my motives nor my acts will bear the interpretation which, for sinister purposes, has been placed upon them."

In re-doing the portrait of Tyler, Fraser has scored a triumph. Though it suggests the romanticization which mars his Jackson, the essentials of his picture are true. The bank politics of the Tyler administration have long been neglected. Fraser has demonstrated that the subject had more possibilities than was commonly thought.

Fraser's story is over-simplified. It is a surface account of political maneuvers on the national stage. But it throws much new light on a period which has been too little known. The style is readable but not distinguished. The book is illustrated with many excellent and sometimes rare pictures.

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The author subtilted his book A National Experiment in Regionalism and this subject is emphasized in the foreword, written by Dr. Ernest S. Griffith. In his first paragraph, Dr. Griffith says, "So much has public attention been directed toward the power program of the Tennessee Valley Authority that one tends to overlook its significance as a new unit in the field of government. It is true that by many political scientists the present county and state boundaries have for years been regarded as illogical; and myriad paper plans have been produced in academic circles dividing the United States into a mythical number of neatly defined 'regions'. But governmental forms have a stubborn life, and the vested interests of office-holders and party organizations join with the mores of state and local patriotism to block changes so drastic. Furthermore, the case is far from proved that these existing forms—at least, the states—have in fact outlived their usefulness. Values may rest in diversity and decentralization that uniformity and concentration never knew."

The first chapter of the book is devoted to the regional idea which is studied with thoroughness and ability. The author concludes that "Regionalism, in one form or another, is possibly the coming polity".1 It is to be regretted, however, that little or no space is devoted to the dilemma involved in realization that regional divisions for one industry or economic purpose would differ in boundaries from regional divisions for any other broad purpose. Thus, regional division of the United States focused upon development of natural resources for power purposes would differ from regional division for extraction of minerals, regional division for industries, agricultural products, manufacturing, etc. It would appear, therefore, that substitution of regional boundaries for existing state boundaries for all purposes of government, would be simply to exchange a new set of arbitrary jurisdictional lines for those of the present states.

After a study of regionalism in the abstract, the author analyzes the Tennessee Valley Authority Act of May 18, 1933, describing in full the objectives and scope of the corporation and the provisions for regional planning and development. In commenting upon the statutory recital of purposes to be attained under the act,2 the author is concerned with

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1P. 27.
2P. 48.
the expressed objective of the statute to improve "the economic and social well being of the people living in said river basin." He indicates some thought that this provision, because it comes close to setting forth the purpose for which the act was designed, may undo the whole experiment. In his words, "It is, according to our theory of government, bad form and even worse law to consider the social and economic well being of several million people living in seven different states!" In this presentation of the problem, the author does not elucidate as to the character of our federal government as being one of limited delegated powers and he does not indicate that the power assumed, which he questions, could readily be added to the constitution by amendment, if frankly proposed by its sponsors and adopted through proper procedure. In other words, what he now calls "bad form and even worse law" takes that character only on the assumption that there has been a deliberate assertion of powers by the federal government in excess of its authority.

With adequate attention to detail, the region involved, its resources, potentialities, and problems, are studied; the author concludes that the area is one of scarcity despite abundant possibilities in human and physical resources.

The next division of the book is a description of the administrative units dealing with regional planning and development. These are divided into the departments of water control in the river channels, water power utilization, water control on the land and regional survey and demonstration service. After reading this chapter, one cannot fail to be impressed with the magnitude of the TVA and the thoroughness with which details of possible developments, present and future, have been studied.

As indicated earlier in this review, a regional experiment necessarily involves certain over-lappings of boundaries. Seven states are concerned in the TVA area, and under our constitutional theory each of these seven sovereign subdivisions retains all governmental powers not expressly delegated to or inherent in the federal government. Obviously, progress in the TVA experiment has been dependent upon cooperation with the states involved. This was expressly authorized by the act, and the states have been found to be, in general, willing to participate in the program. Cooperation with the states has been entered into in respect to water control, agricultural development, forestry, house and land planning, electric power, and a social and economic program. The author states that some 160 governmental agencies and institutions are contributing to the regional work of the TVA, and that lay or voluntary contributing organizations bring the total to 239. This figure he suggests is probably
incomplete. The sheer numbers of cooperating agencies alone would indicate why the organization and planning have seemed to miss no detail, no matter how minute. Lay organizations have been encouraged and are said to be responsible for innumerable valuable suggestions and much useful cooperation.

The author has given us a frank discussion of techniques and methods used to secure cooperation. On carefully studying the chapter devoted to this subject, one is impressed with the fact that the seven states involved have found cooperation, if not profitable, at least not costly to them, since expenses have been, in the main, borne by the TVA.

The closing chapter of the study is entitled, An Evaluation of the Tennessee Valley Authority. Here the author states,3 "From the evidence accrued so far, it appears that the Tennessee Valley Authority through its regional power program is on its way to the accomplishment of several objectives, the realization of which will be of national significance." He recognizes4 that "It is almost inevitable that such an ambitious and far reaching regional undertaking, touching as it does the life of the entire Valley, would result in the antagonism and hostility of a number of human groupings." He is inclined, however, to discount the opposition as being prejudiced or selfish and to conclude "that the mass of people living throughout the Valley are in sympathy with the regional objectives and activities of the Tennessee Valley Authority."

The author is to be commended for clearness and thoroughness. He has organized in a relatively brief treatment the substance of a great mass of materials.

The handbook is principally of the informational rather than of the philosophical type, though it is not entirely lacking in the characteristics of the latter. In the opinion of the undersigned, many people will use the volume as a means of making a brief study of the TVA. The bibliography which is appended in it should give the book a very real value to all desiring to make a detailed study of any phase of the work of the TVA. The author has made a sound contribution to the short shelf of useful books which appeared in 1938.

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3P. 204. 4P. 218.
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Professor Roberts approached his task with the commendable purpose expressed in his perface, of dealing with "facts and situations that come within the experience of most law students" and presenting cases which "the student will have to use and meet in his practice after he has completed his law course." That he has succeeded in doing this is evidenced by the fact that over half of the nearly two hundred cases (only four of which are English cases) which he includes were decided within the last twenty years, and over half of them involve primarily the law of liens (both common law and statutory) and pledges. There is much to be said for this approach. Most students, with at least one eye on the practice of law, are more interested in the right of a garage owner to keep an automobile until storage charges are paid than they are in the rights of an agister who pastured seven head of kine for his neighbor or the legal problems that attend the flight of a bee. If one can make concessions to this caprice without sacrificing the basic fabric for shoddy, it seems well to do so. Unfortunately, the brisk, fairly concise, precedent-controlled modern decision does not always compare too well with the leisurely, philosophic approach of an earlier day, at least for teaching purposes. Professor Roberts, however, seems to have done a good job of selection.

Granting that the emphasis placed upon liens, pledge transactions and, to a slightly lesser extent, bailments, accurately reflects modern conditions, it is possible that in taking this approach, one may sacrifice certain broad and fundamental concepts that underlie the whole structure of property law. Conceding that the law of wild animals, or of lost and abandoned property, may be of minor importance in the practice of law, cases involving these questions are admirable devices for raising problems of what constitutes possession and of the relative and comparative rights of different individuals in a certain object—problems which go to the very fundamentals of our concepts of property and property rights. The same may be said of the delivery aspect in the law of gifts and the problems arising out of the law of accession and confusion. On the other hand, even though cases involving liens and pledges arise more frequently than any others (except bailments), does it necessarily follow that the same proportionate emphasis should be given these subjects in teaching? The teaching of law is concerned primarily with fundamentals, not with ramifications.

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As to the inclusion, or lack of inclusion, of other matter in addition to reported cases, one may or may not agree with Professor Roberts. His footnote material, what there is of it, is accurate and well selected and classified. The only question is whether there is enough of it and whether it is sufficiently revealing and informative. Certainly the author has behind him a great mass of precedent for this sort of sketchiness. From the standpoint of teaching technique, it is arguable that the teacher can better develop the student's power of reasoning and legal analysis if the latter goes to the class discussion without having been told too much beforehand. On the other hand, entirely aside from the question of which sort of book will be more useful to the student after he enters practice, it is possible that a student should learn in law school what he will have to learn later as a lawyer or judge, namely, to take a considerable mass of material, complete with fundamentals, qualifications, variations, permutations and combinations, and learn to digest, analyse, criticise and evaluate it, and eventually work his way through the maze to the right destination. A growing minority of casebook writers seems to be adopting the latter philosophy. In the last analysis, it may be said that Professor Roberts has done a good, competent, workman-like job and has produced a book which compares favorably with the personal property casebooks now extant. The only question is whether he might not have done still better.

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BOOKS RECEIVED

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


