THE BUSINESS WORLD and the rarer atmosphere of economic theory alike have experienced less difficulty in appraising accurately the importance of the part played by the corporate promoter in our industrial system than has the law in assigning to him a definite and satisfactory legal status. Dependent as the present economic society is on individual initiative to set in motion the forces of production and to effect the adjustments of those forces to demand, it is patent that the agencies which conceive and instigate productive enterprises discharge a function of vital significance. Plan and preparation invariably precede successful achievement. The groundwork determines the superstructure. As the moving spirit in the fashioning of the former, promotional activity bears a considerable relation to, and exerts a major influence upon, the final arrangements to which society must look for the satisfaction of its needs. The efficacy with which those arrangements will meet that demand rests largely upon the soundness of the creative vision which the promoter brings to his task, his grasp of the varied psychological and technical factors involved, his resourcefulness in working out intricate problems of detail, and a concept of personal integrity commensurate with the far-reaching effect of the economic service performed.2


1 In commenting upon Professor Joseph Schumpeter's thesis that the dynamic quality of a capitalistic organization of industry is simultaneously its most distinctive trait and its most imperative need, one writer has said that "promotion has both exhibited this quality and ministered to this need." Myron Watkins, Promotion, 12 ENCYC. SOC. SCIENCES (1934) at 518.

2 Ibid., et seq. See DEWING, THE FINANCIAL POLICY OF CORPORATIONS (3rd rev. ed. 1934) 245-257; 1 MEADE, CORPORATION FINANCE (6th ed. 1930) c. i, ii. Promotion is not, of course, confined solely to the institution of new corporate enterprises. Indeed, of recent years promoters have found their amplest opportunities in effecting reorganization and consolidation of existing units. DEWING, CORPORATE PROMOTIONS AND REORGANIZATIONS (1914).
The striking and unimpeded increase in the use of the corporate form of organization in the industrial and commercial fields³ has thrown into even sharper focus the instrumentalities which initiate and mould those forms. The growing dominance of the corporation in the economic sphere has accentuated the necessity of ensuring that such power as the modern Frankenstein has, to make his creature a benevolent instrument of social welfare, shall be exercised. That it is a proper office of the law to pursue such an objective is manifest; and, in so doing, it lends what aid it can to the intelligent direction of production to consumers' demand upon which material prosperity depends. The need of legal intervention has arisen in great part as a result of the trends and developments in the corporate situation to which Berle and Means have so pointedly called attention.⁴ In earlier times it was the general practice for the entrepreneur to put his own money into the venture and to stay on to manage. In such case there was a responsibility resting upon the promoter which engendered a balance, caution, and thoroughness of the pre-examination of the business opportunity which contributed materially to the proper allocation of production to consumption. However, as it became more the fashion to use other people's money in the financing of business undertakings and to separate promotion from subsequent management, the restraints founded upon self-interest tended to diminish. The way was left open for abusive practices ultimately inimical to the general economic order.⁵

Some measure of legal control over corporate promoters is, then, a desirable thing. That has been recognized in the past. It has been less easy to arrive at a common ground as to the extent of that control and the form in which it should be exerted. Certainly, there has existed an abiding inertia which has resulted in an absence of any thorough-going frontal attack upon the problem until quite recently when the Federal Government, in drafting and administering its securities legislation, has apparently given some thought to the promoter. Neither the legislative


⁴ Berle and Means, op. cit. supra note 3.

nor the judicial forms of control have presumed upon the province of economics by attempting to dictate the promoter's choice among business opportunities. Instead, both have approached the problem from the point of view of protecting the investing, rather than the general, public. Although it perhaps could be argued that this response is less direct and adequate than a proper estimate of the promoter's significance might reasonably insist upon, still it cannot be questioned that the imposition of responsibility upon the promoter with respect to those immediately affected by his activities tends to exclude from the promotional field all who are completely heedless of social ends.

Discussion of judicial and administrative control over corporate promoters' profits is invited at this time because of two recent developments. One is the aforementioned federal legislation touching the issuance and sale of securities, and the administration of those laws to date insofar as promoters have been affected. The other is the United States Supreme Court's decision in the case of McCandless v. Furlaud. The consequences of both would seem to be considerable, the latter as evincing a marked advance in, and perhaps a complete overturn of, the federal courts' doctrine of corporate rights of action against promoters, and the former as demonstrating the possibilities of a preventative treatment of the problem before the stage of litigation is reached. Each may best be examined in its particular field.

I

JUDICIAL CONTROL
PROMOTERS AND LEGAL PIGEONHOLES

The difficulties in which the courts have so often found themselves in dealing with promoters' profits have not been born of any faulty estimate of the promoter's practical importance.

6 This paper does not deal with the general subject of contracts entered into by the promoter on behalf of the corporation in process of formation. Discussions of that matter are to be found in Ehrich and Bunzl, Promoter's Contracts (1929) 38 YALE L. J. 1011, and Richards, The Liability of Corporations on Contracts made by Promoters (1906) 19 HARV. L. REV. 97. See also Isaacs, The Promoter: A Legislative Problem (1925) 38 HARV. L. REV. 887.

7 Note (1936) 49 HARV. L. REV. 785.


9 "But that the promoter has his place in society and his usefulness in the world of business is beyond question. He is usually a man of vision, and
Rather, they have had their source in a wavering uncertainty as to just which peg he should be appended in the common law scheme of things. The problem has been further complicated by the essentially fictional character of the entity with which he is associated. The corporation appeared as a legislative product with written laws governing most of its internal and external relations. The corporate promoter appeared at the same time and as an adjunct thereof, but without benefit of statutory definition of his nature or the proper scope of his activities. The upshot was that the courts were forced to the traditional expedient of turning to unrelated branches of juristic theory in a search for colors to make up the legal portrait of the promoter.

The quest has not been a particularly happy one. The decided cases disclosed no other figure on an exact parallel.10 Agency presupposes a principal, but the promoter usually has finished the bulk of his work before the corporation comes into being. Partnerships are off the mark by a discouraging distance. Somewhat lamely, then, the courts took shelter under the cover of trusteeship, and, in speaking of promoters, bandied about the word "fiduciary" with a disarming vagueness which bespoke more a sense of convenience than of conviction. Inevitably, the result of finding refuge within such generous confines has been confusion and contradiction.11

The obvious value of the services performed by the corporate promoter, and the justice of his right to compensation therefor, have been conceded by the courts. At the same time they have

his visions are not always dispelled by the sunlight of experience. Without him much of the material success and industrial progress of this country would not have been attained and scientific advancement would perhaps have been retarded." Allenhurst Park Estates v. Smith, 101 N. J. Eq. 581, 597, 138 Atl. 709, 716 (1927).

10 No one has sketched the problem more vividly than has Isaacs in his plea for a statutory solution: "It seems, then, that every attempt to fit the promoter into a common-law scheme has not only failed but has led to embarrassment and abuses. He tries to act as agent. The courts discover that he cannot. Call him an outsider, and you have not only a bald fiction but you make him free to deal at arms length with the corporation and make secret profits. Call a halt by declaring him a fiduciary—a fiduciary with the burdens but none of the advantages of an ordinary fiduciary. You must modify the statement and retract it at every turn, and finally you find it leading to a recovery of secret profits that were assented to by every one in interest, and that now can be recovered to enrich those who were never damaged." Isaacs, op. cit. supra note 6 at 898.

11 "The result, in effect, is that there is no theory of promoters as such. There is merely a mass of decisions which are not reducible to any legal common denominator." Note (1933) 81 U. of Pa. L. Rev. 746, 747.
insisted, and rightly, that he should not be the sole judge of the amount and manner of payment. The plenary character of the promoter's power over the thing which he ushers into being argues the necessity of imposing some check upon that power inasmuch as undue exuberance in the matter of his own compensation too often involves the financial wreck of the corporation with consequent damage to a variety of innocent interests. The extent to which the use of the fiduciary concept has brought about a sobering effect would seem to be a pertinent subject of inquiry.

Recourse to the law of trusts for ammunition with which to battle promotional greed was initiated long ago. One of the first writers on corporate promoters said in 1898:

"It is now accepted beyond all question that promoters stand in a fiduciary relation towards the company they promote, although it was as late as 1878 before Lord Cairns laid it down as the law in so many words; but long before that date the decisions on dealings between companies and promoters had practically all proceeded on that supposition." 12

The occasion which afforded Lord Cairns the opportunity of delivering himself of the pronouncement was the case of Erlanger v. The New Sombrero Phosphate Company. 13 The defendants had acquired a lease of a mineral island for £55,000. They organized a corporation and staffed it with a dummy board of directors whose first official act was to accept the defendants' offer to sell the lease to the new company for £110,000—£80,000 in cash and £30,000 in paid-up shares of stock. Thereupon the remaining authorized shares were sold by the corporation to the public, the proceeds going mostly, of course, to the defendants in payment for the lease. At the suit of the company itself as plaintiff, the English court ordered a complete rescission of the transaction. 14

In arriving at the result of allowing the corporation relief, the court in the Erlanger case did not concern itself with a nice inquiry into just who owned the company at the time of the transac-

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13 3 App. Cas. 1218 (1878).
14 The Lord Chancellor's oft-quoted language is: "... it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. ..." Id. at 1236.
tion complained of. It did stress the point that, being a fiduciary, the promoter must disclose the exact extent and character of his interest in the transaction. This factor, seized upon by later judges and coupled with the corporate fiction, gave rise to a series of holdings which are nothing short of astounding and which invariably give the lay mind considerable pause. The other English case which has had such important consequences in the law of corporate promoters is *In re Ambrose Lake Tin and Copper Mining Company.*\(^{15}\) The defendant promoters took a worthless mine, organized a corporation to which the mine was transferred, and issued to themselves the entire capital stock in return. Most of this stock, the par value of which was in excess of the value of the mining property several times over, was sold by the promoters to the public. The official liquidator of the corporation sued to recover for it the profits realized by the defendants. It was held, however, that there was no fraud on the corporation since it, through all its shareholders at the time of the transaction, knew of, and assented to, everything that was done by the defendants. There were profits, but not secret profits; and the duty which rests upon a fiduciary is not to refrain absolutely from making profits, but only to reveal all the facts to the *cestui.* With a resolute regard for the sanctity of the corporate fiction, the court brushed aside the coincidence that the defendants and the corporation were the same at the time of the sale of the mine.\(^{16}\)

It is to be noted that these two leading cases both involved an action by the corporation itself. Before going further it might be said that the whole problem of judicial control of promoters' profits (of effective control, at any rate) centers around this right of the corporation to recover. It has never been denied that the individual purchaser of securities has his fraud action against the promoter who has inflicted damage upon him. It is unnecessary at this late date in the history of the common law action for fraud and deceit to explore into and to recount in detail the difficulties which harry the plaintiff in such a suit. The burdens placed upon him with respect to allegation and proof too often prove insuperable.\(^{17}\) The small shareholder, moreover, is deterred

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\(^{15}\) 14 Ch. D. 390 (1880).

\(^{16}\) For a like holding where the promoters issued to themselves the company's debentures as well as its shares, see Salomon *v.* Salomon Co., [1897] A. C. 22.

\(^{17}\) A consideration peculiar to this field is that in prosperous times, when the public is clamoring for opportunities to invest and promotional activity is at its apogee, the vendor of securities seldom needs to commit himself to positive misrepresentations in order to attract buyers.
by the expense of maintaining an individual action. From a practical procedural standpoint, therefore, it may be assumed that judicial control worthy of the name can be secured only through the medium of the corporate right of action.\textsuperscript{18}

"Common Sense or Mere Mystification?" \textsuperscript{19}

Reduced to its simplest terms, the existence of a right of action in the corporation to recover profits realized by its promoter depends upon whether or not the latter has made adequate disclosure of his gains to the corporation. The central responsibility inherent in the fiduciary relationship is frankness. The promoter is at liberty to profit from his dealings with the corporation—and the profits may be either modest or unreasonably large—so long as the corporation is informed of the true situation. As between

\textsuperscript{18} See Berle, \textit{Compensation of Bankers and Promoters Through Stock Profits} (1929) 42 \textit{Harv. L. Rev.} 748, 759, n. 25. The striking rarity of cases in which individual purchasers of stock have recovered damages from promoters confirms this assumption. One such case is Brewster \textit{v.} Hatch, 122 N. Y. 349, 25 N. E. 505 (1890), in which the plaintiff, a subscriber to the stock of a mining corporation promoted by the defendants, was allowed to recover his personal damages from the defendants who had kept for themselves a controlling interest in the corporation at no cost. Mason \textit{v.} Carrothers, 105 Me. 392, 74 Atl. 1030 (1909), ostensibly an individual suit, in reality involved a corporate right of action inasmuch as the relief asked and granted ran to the corporation. The court, it seems fair to say, chose to disregard the actual representative character of the suit in order to evade the disagreeable responsibility of electing between the so-called Massachusetts and federal rules.

A case which has been taken to indicate an appreciable advance in the matter of individual shareholders' suits is that of Downey \textit{v.} Byrd, 171 Ga. 532, 156 S. E. 259 (1930). The defendant promoters, while in complete control of the new corporation, manipulated the stock issue unconscionably to their own advantage. In addition, they caused the corporation to issue a prospectus containing false statements to facilitate the public sale of shares. Three purchasers on the strength of the prospectus were permitted to bring a bill in equity to compel the return of the sums paid by them for the shares. It has been thought that this case points the way to a direct method of handling the problem by allowing all the defrauded parties to join together in an equitable action without the necessity of a resort to a multitude of individual fraud actions. See (1931) 31 \textit{Col. L. Rev.} 890, and (1931) 26 \textit{Ill. L. Rev.} 340. But the court, in its opinion ruling that it was error to dismiss the bill, was careful to note that even if the suit be regarded as improperly brought in equity, the allegations made out a good legal action in deceit. The case is, therefore, hardly a square holding that a class suit may always be maintained in equity by the injured shareholders. For an additional comment on the case, see (1931) 19 \textit{Georgetown Law Journal} 495.

\textsuperscript{19} The phrase is Berle's. \textit{Op. cit. supra} note 18, at 758.
the fiduciary and an individual *cestui,* this principle of trusteeship is a valid one. Transplanted bodily and without modification into the corporate situation, it loses much of its vigor and becomes too often a technical breach through which sinister forces of fraud find their way. Theoretically, a corporation is as free as an individual to consider its own interest when the facts are made known to it, and to decide for or against the promoter’s proposition as that interest dictates. Actually, the peculiar character of the corporate entity may permit this decision to be made by no less a person than the promoter himself who, surprising as it may seem, is invariably impressed with the eminent fairness and desirability of the transaction in process of consummation. All that is required is a little ingenuity in order to achieve this happy unity of supplicant and judge.

The discussion of the *Ambrose case* 20 has already shown that the ingenuity was forthcoming. The stratagem employed in that venture (the promoters took all the shares that were ever issued, and, in their capacity as sole owners of the corporation, informed themselves of, and assented to, everything done by themselves as promoters), has been followed in this country with equal success in the sense that it has been acquiesced in as supinely by the American courts as by the English. There is universal agreement among our legal tribunals that if the promoter holds all the shares that are ever issued at the time when he effects the profitable transaction with the corporation, then there has been complete disclosure and the corporation is bound by its assent.21 It makes no difference that the promoter immediately, and in pursuance of a preconceived plan, resells the shares to persons who buy in ignorance of the prior dealings between the promoter and the corporation. These hapless takers individually may sue the promoter and recover such damages as each can prove; 22 but the right of the corporation to sue, which is more likely to be productive of relief, is effectively foreclosed.

Prior to *Furlaud v. McCandless,* 23 both the latest state and federal court pronouncements on the corporate right of recovery

20 14 Ch. D. 390 (1880) cited *supra* note 15.

21 BERLE, CASES AND MATERIALS ON THE LAW OF CORPORATION FINANCE (1930) 625.

22 As has been seen, in practical effect this is scant consolation. Also, it is likely to be true that financial irresponsibility frequently characterizes the promoters who engage in the more flagrant manipulations. The difficulties attendant upon obtaining legal satisfaction from those whose constant aim it is to keep themselves and their property beyond the reach of the law are well known.

in this situation had agreed in denying it. Massachusetts also, although following a broader rule in another connection, in the case of *Hays v. The Georgian Inc.* reaffirmed the questionable proposition that the form of the transaction governs the equities arising out of it. The facts of that case point a moral for the knowing promoter. As such, they are worth relating in some detail. The defendants consisted of three groups: certain individuals who controlled an existing company which was in a precarious financial condition, a banking combine, and an appraisal company which coöperated obligingly. It was agreed that a new corporation should be formed to which the assets of the old should be transferred at an appraised valuation of $500,000 in excess of the real value. With the proceeds of the sale of stock in the new unit, old debts were to be paid off and a substantial profit left for the promoters. The new corporation was organized with an authorized capital stock of 75,000 shares of Class A, par 20, and 2,000 shares of common, par 5. The original subscribers were three of the defendant individuals, each taking one share of common. These three voted to take over the old company's assets, paying therefor 38,750 shares of Class A and 1,797 shares of common. It was then decided to convert the 2,000 shares of common into 100,000 shares of no-par stock. Thus, the old cor-

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24 Where the promoter takes and resells only a part of the issued stock, leaving the corporation itself to sell the remainder to future subscribers. This will be discussed infra.


26 Promotional frauds have been greatly facilitated by the comparatively modern innovation of no-par shares. The advantage of such shares from the promoter's point of view is that he is relieved of the liability of being assessed on the shares up to par value. See Berle, *op. cit. supra* note 18, 751-753. Generally on no-par shares, see Berle, *Studies in the Law of Corporation Finance* (1928) c. IV; Bonbright, *The Dangers of Shares without Par Value* (1924) 24 Col. L. Rev. 449; Ballantine, *Non par Stock—Its Use and Abuse* (1923) 57 Am. Law Rev. 283.

In Piggly Wiggly, Inc. v. Bartlett, 97 N. J. Eq. 469, 129 Atl. 413 (1925), the defendant promoters, at a time when they owned all the shares in the corporation, issued to themselves 15,000 shares of preferred and 15,000 shares of no-par common in payment for a license right for which they had paid $1,000. The defendants resold the shares to the public and pocketed the proceeds. The corporation sued to compel the proceeds of the common stock to be restored to it. The court denied any right of action in the corporation, saying: "There was a full bona fide consideration for the sale by the company to Bartlett and his associates of the 15,000 shares of the capital stock of no par value. Had this stock had a part value, and had stock of par or face value exceeding the value of the rights purchased been issued, a different question would arise." 129 Atl. 413, 418. The case is disapproved in Note (1926) 26 Col. L. Rev. 447, 452-3.
poration, and through it the defendant individuals, received 38,750 shares of Class A and 90,000 shares of common. The defendant bankers, in return for the Class A and 25,000 shares of the common, paid the defendant individuals $800,000 which the latter kept for themselves. Also, the bankers bought 16,250 shares of Class A from the new company, paying to it $325,000. Subscriptions by the public to the remaining 10,000 shares of common were solicited by the bankers at 14, but before delivery was made, the bankers were careful to take this block of common from the new corporation at 4. The result of these dealings was that the new corporation had 20,000 shares of Class A remaining with it, but the cash return from all its other stock was only $365,000, and its assets were taken at an over-valuation of $500,000.

In this state of affairs a minority shareholder brought a bill on the corporation's behalf to recover the profits realized by the promoters. A demurrer to the bill was sustained because there was no allegation that any stock had been sold by the corporation directly to an innocent subscriber. At the time of the transactions complained of, said the court, all the shareholders in the corporation had been fully informed by the promoters of what was taking place, and had assented. Therefore, there has been no injury of which the corporation has a standing to complain, whatever the individual rights of the purchasers of the shares from the defendants may be.

A statement of the facts and the holding in the foregoing case without more is sufficient to demonstrate the absurdity of the result. To the practical mind, untrammelled by the fiction of

27 Comments on the case have been uniformly critical. See Note (1934) 47 Harv. L. Rev. 1031. In Note (1933) 19 Va. Law Rev. 274, it is said (at 278):

"Its necessary result is to cripple the effectiveness of the rule established in the earlier case (Old Dominion Copper Company v. Bigelow, 188 Mass. 315, 74 N. E. 653 (1903)), for, by a mere change of form, a clever and unscrupulous promoter can avoid all judicial safeguards. It is a decision such as this that forces upon us the conclusion that only by statutory regulation can the problem of the promoter at this late date be adequately dealt with."

Some years before the decision in this case Berle had argued that in order to check such high-handed promotional manipulations by banking groups, the corporation should be allowed to derive its right to sue from innocent purchasers from the promoters, at least where the latter had taken the shares from the corporation with the intent of immediate resale to the public. Op. cit. supra note 18 at 753 et seq. He pointed out that under the modern organization of security marketing, the individual buyer rarely knows whether he is buying from the corporation or from a promoter.
the corporate entity, it seems indefensible to stress the factor of consent without delving into the reality of that consent. Indian giving has never been thought to establish conclusively the philanthropic bent of the donor. The courts, however, look with stern mien upon such cynicism when they are talking the language of corporations, and the rule of the Georgian case has always represented the law in this country.\textsuperscript{28}

Variation from the approved formula may, nevertheless, prove fatal to the promoter by subjecting him to a corporate recovery. The disclosure of profits is not deemed sufficient to satisfy the fiduciary requirement if there is neither an independent board of directors nor a complete revelation to all existing shareholders. The presence of an uninformed interest at the time of the transaction precludes the corporate consent which later bars the corporation from suing. This, likewise, is an unanimously accepted rule.\textsuperscript{29} The classic application of it was in the case of Hughes v. Cadena de Cobre Mining Company.\textsuperscript{30} There, the corporation was granted relief against the promoters although at the time of the exaction of the exorbitant stock profits, the defendants were the sole stockholders with one exception; and this latter person had


In Lomita Land Co. v. Robinson, 154 Cal. 36, 97 Pac. 10 (1908), the landowner and broker who knew what the promoter was doing were held equally liable with him to the corporation although they were not technically promoters and took none of the secret profits.

\textsuperscript{30}13 Ariz. 52, 108 Pac. 231 (1910).
resold his shares to the corporation and vanished from the scene in the interim between the transaction complained of and the institution of suit. The rights of the corporation were regarded as fixed as of the time when the fraud was perpetrated.\textsuperscript{31}

It is the next variant of the plan of organization of the new corporation which has provoked fundamental judicial disagreement. Thus far have been considered two situations: one, where the promoter takes all the stock that is ever issued,\textsuperscript{32} and, two, where the promoter takes only a part of the issued stock and the remainder is taken at the same time by innocent interests to whom no disclosure is made. The third involves the taking by the promoter of all the presently issued shares, but the corporation retains authorized but unissued shares which are intended to be sold by the corporation directly to the public after the promoter has ceased his maneuvers. The courts have parted ways over the question of whether or not the promoter’s fiduciary duty extends to these future subscribers so as to make the failure to disclose the profits to them a basis for a recovery by the corporation.

The divergence in judicial approach was presented most dramatically in the famous Old Dominion Copper Company litigation.\textsuperscript{33} Two individuals, Bigelow and Lewisohn, acting for themselves and for a syndicate of which they were members, acquired certain mining properties with a view to transferring them to a corporation to be presently formed. The new corporation started life with an authorized capital stock of $3,750,000 par value, of

\textsuperscript{31} That this proposition will not be carried to its logical extreme is demonstrated by the two cases of Advance Realty Co. \textit{v.} Nichols, 126 Minn. 267, 148 N. W. 65 (1914), and Richard Hanlon Millinery Co. \textit{v.} Mississippi Valley Trust Co., 251 Mo. 553, 158 S. W. 359 (1913). In both, although there were innocent shareholders at the time of the fraud, the shares had later been transferred in such fashion that, at the time of suit, all the outstanding stock was in the hands of persons who knew of the fraud at the time of perpetration. On such facts the courts refused to permit a corporate recovery which could benefit only the guilty parties.

\textsuperscript{32} For cases allowing the corporation to recover in the situation where all the stock is originally issued to the promoter but a part is turned back by him to the corporation to be sold by it, see: California-Calaveras Mining Co. \textit{v.} Walls, 170 Cal. 285, 149 Pac. 595 (1915); Datillo \textit{v.} Roaten Creek Oil Co., 222 Ky. 378, 300 S. W. 854 (1927); and American Forging and Socket Co. \textit{v.} Wiley, 206 Mich. 664, 173 N. W. 515 (1919). \textit{Contra:} Henderson \textit{v.} Plymouth Oil Co., 15 Del. Ch. 40, 131 Atl. 165 (1925). Compare Hayden \textit{v.} Green, 66 Kans, 204, 71 Pac. 236 (1903); and Fred Macey Co. \textit{v.} Macey, 148 Mich. 138, 106 N. W. 722 (1906).

\textsuperscript{33} A complete history, together with all the citations of the many connections in which the case was considered by the courts, is set out in EHRICH, \textit{THE LAW OF PROMOTERS} (1916) 255-265.
which only $1,000 was initially issued—and that to Bigelow and Lewisohn. Operating through dummy directors, the promoters caused the corporation to increase the stock to the maximum, and to take the mining properties, worth approximately $1,000,000, on payment to the promoters of $3,250,000 of the stock. The balance of the authorized issue, $500,000, was left with the corporation to be sold directly to the public, and was so sold without any disclosure of the true state of affairs. The corporation brought a bill to rescind the transfer of the properties, or, in the alternative, to recover damages. Because of difficulties of obtaining service on Bigelow and Lewisohn in the same jurisdiction, it happened that two separate suits were filed, one in Massachusetts against Bigelow and the other in the New York federal court against Lewisohn.

Nowhere are the vagaries of the judicial process shown in broader outline. The allegations and proof adduced in each case were identical. Yet the Supreme Judicial Court of Massachusetts held Bigelow responsible for the difference between the real value of the properties and the par value of the stock taken by the promoters in payment, whereas the Supreme Court of the United States ruled that the corporation had no right of action against Lewisohn. The Massachusetts court regarded the promoter's fiduciary duty as owing to the corporation both as presently constituted and as it would be after shares earmarked for future sale had been disposed of. Justice Holmes, on the other hand, writing the opinion in the Lewisohn case, was unable to see how the corporation could complain of a transaction to which all of its shareholders had assented with full knowledge of the facts. The advent of additional shareholders thereafter did not negative the corporate consent once given. In his own vivid phrase: "Of course, legally speaking, a corporation does not change its identity by adding a cubit to its stature." Turning to more practical con-

34 188 Mass. 315, 74 N. E. 653 (1905).
35 210 U. S. 206 (1908).
37 210 U. S. at 213. In summary he further said: "... the plaintiff cannot recover without departing from the fundamental conception embodied in the law that created it; the conception that a corporation remains unchanged and unaffected in its identity by changes in its members." Id. at 216. Justice Holmes' predilection for observing the corporate fiction at all costs was amusingly confessed to by himself in a letter to Maurice Wormser (Dec. 19th, 1923): "Twice lately I have had to guard against the corporate entity becoming a non-conductor in the wrong place. (Citations omitted.) But as I said when young, on the Massachusetts bench, the very meaning of the fiction is that you are to act as if it were true." Quoted in CANFIELD AND WORMSER, CASES ON PRIVATE CORPORATIONS (3rd ed. 1932) 3, n. 1.
siderations, Justice Holmes bulwarked his holding by pointing out that the allowance of recovery to the corporation would enure to the benefit of the guilty as well as the innocent.

The relative merits of the Massachusetts and federal rules have been the subject of considerable debate.\(^3\) Whatever may be the correct resolution of that question, a plurality of state courts have accepted the former as the better.\(^3\) That the Federal Supreme


The most substantial criticism of the Massachusetts rule is that it does not benefit the original innocent subscriber who has sold his shares at a loss before the corporation successfully prosecutes its suit. This stricture is all the more justified if a corporate recovery is held to bar an individual right against the promoter. See Barrett v. Shambeau, 187 Minn. 430, 245 N. W. 830 (1932). But this criticism does not establish the desirability of the Federal rule. And if the corporate action is instituted with reasonable promptitude, before there has been time for any considerable turn-over of securities, the Massachusetts rule affords substantial redress.

A suggested compromise between the two rules is to allow the corporation to sue as trustee for those persons who actually have been injured. The way to this procedure is thought to have been pointed by the case of Hyde Park Terrace Co. v. Jackson Bros. Realty Co., 161 App. Div. 699, 146 N. Y. Supp. 1037 (2d Dept. 1914), in which the court ordered the promoters to pay to the corporation, as trustee for the innocent shareholders, the amount of these shareholders’ damages, upon pain of the cancellation of a bond and mortgage which represented the secret profits. For analogies in cases involving directors’ profits, see Matthews v. Headley Chocolate Co., 130 Md. 528, 100 Atl. 645 (1917) and Spaulding v. North Milwaukee Town Site Co., 106 Wis. 481, 81 N. W. 1064 (1900). However, the difficulties involved in securing a proper distribution of the trust fund militate seriously against this plan. See Note (1934) 47 HARV. L. REV. 1031, 1034, and (1922) 35 HARV. L. REV. 765.

Court had its doubts of the wisdom of the *Lewisohn decision* is indicated by its opinion in *Davis v. Las Ovas Company*,\(^40\) decided four years later. In that case the Court permitted the corporation to recover secret profits from the promoters because of a finding that at the time of the fraud there were innocent members of the promotional syndicate who had taken, or had agreed to take, shares in the new corporation. It is not altogether clear whether this case involved an application of the doctrine of "equitable shareholders" which has been used by some courts when the facts could be made to fit it.\(^41\) In any event, one ground of decision in the *Lewisohn case* was abandoned, namely, that the corporate recovery would redound to the benefit of some of the guilty parties.\(^42\) Whether the other ground upon which Justice Holmes relied—the corporate consent as manifested by the holders of all the outstanding shares—has similarly been cast off by the Supreme Court in *Furlaud v. McCandless*\(^43\) offers an interesting speculation.

The promotion involved in the *Furlaud case* was undertaken by a New York investment banking house which conceived the plan of taking options on purposely over-valued gas properties in Pennsylvania, and unloading them on a corporation to be formed. So stated, the central objective of the scheme is simple; its execution involved threading a maze of intricate finance, all the turnings of which cannot be set out in detail here. It is enough for our purposes to consider the results achieved together with a preliminary description of the major maneuvers which preceded those results.

The options which the promoter obtained on the gas properties named a price of $2,572,989 which roughly represented the true value. Engineers were employed who fictitiously appraised the

\(^40\) 227 U. S. 80 (1913).

\(^41\) The essence of this principle is that if agreements to subscribe to stock have been secured at the time of the promoter's secret profit-taking, these potential shareholders will be regarded as existing—"equitable" shareholders. And non-disclosure to these persons founds a corporate cause of action. *Tilden v. Barber*, 268 Fed. 587 (D. N. J. 1920); American Barley Co. *v. McCourtie*, 150 Minn. 460, 185 N. W. 506 (1921); Arnold *v. Searing*, 78 N. J. Eq. 146, 78 Atl. 762 (1910); *Pittsburg Mining Co. v. Spooner*, 74 Wis. 307, 42 N. W. 259 (1889). But compare *Ball v. Breed*, 294 Fed. 227, 232-33 (C. C. A. 2d, 1923), *cert. denied*, 264 U. S. 584 (1924), cited *supra* note 28.

\(^42\) "Neither is the corporate right of action defeated by the fact that the recovery will inure to the guilty as well as to the innocent. . . ." 227 U. S. 80, 87.

\(^43\) 296 U. S. 140 (1935), cited *supra* note 8.
property at approximately $7,000,000. The Duquesne Gas Corporation was organized with an authorized capital stock of 1,000 shares of no-par common. The promoter took all of this stock at fifty cents a share, and thus assumed complete ownership and control of the new unit. The dummy board of directors then voted to increase the authorized capital stock to 1,250,000 shares of no-par stock. Coincidental with these acts, the promoter had formed a banking syndicate to market securities to be issued by the new corporation—$4,000,000 of 6 percent mortgage bonds and $1,000,000 of 6 percent mortgage notes. To aid the syndicate in obtaining subscriptions from the public, the promoter issued a prospectus for the bonds which stated that they were issued by the corporation "in connection with the acquisition of properties, and to provide cash for developments, extensions and other corporate purposes." Prospective investors were, of course, notified of the appraisal made by the engineers hired by the promoter.

Thereafter, events moved in rapid succession. The promoter subscribed for 139,000 shares of the new stock issue at fifty cents per share. Next, the promoter-owned and controlled Duquesne Gas Corporation agreed to take over the gas properties as soon as the promoter could get title under the options. The consideration running from Duquesne for the property was fixed at $3,015,000 in cash, bonds of the par value of $1,300,000, and 535,000 shares of the no-par stock. There was a further agreement that the promoter would take the remainder of the bonds—$2,700,000—at 90, and the entire note issue at 88.

By means of an ingenious credit arrangement with a New York bank, these contracts were carried out and the various transfers made. The promoter disposed of all of the bonds; the note issue was sold en masse to another banking firm; of the no-par shares taken as part of the payment for the properties, the promoter sold 85,000 shares to the public through a stockbroker at a profit of $850,000. The record does not show what became of the other shares which went to the promoter. It does not appear that any additional shares were ever sold by the Duquesne Corporation directly to the public.

Detail aside, the effect of the transactions is clear. Duquesne emerged with gas properties actually worth $2,500,000, and $865,000 of working capital. But its liabilities at the start of its

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44 The device used was a one-day credit for the amount of cash needed to pay the owners of the gas properties in order to get the title deeds out of escrow. On telegraphic notice that title had been obtained, bond subscriptions were collected and the bank repaid immediately.
business life were $5,000,000 of liens held by the public in the form of the mortgage bonds and notes, and 675,000 shares of stock outstanding. So encumbered, the new corporation had scant chance of success, and, in less than two years, found itself insolvent.

The receiver of the Duquesne Gas Corporation brought a bill in the federal court for the Southern District of New York to recover for the corporation the secret profits realized by the defendant promoter. The District Court ordered the defendant to account, but only for the profits derived from the bond sale. The theory underlying this judgment was that in view of the representations made in the bond prospectus as to the uses to be made of the proceeds, the bondholders intended the defendant to be a trustee of the funds for the new corporation. It was further ruled that the corporation had no claim on the money raised by the stock sale since it had known of, and consented to, the transaction through all its shareholders at the time. The Circuit Court of Appeals acquiesced in the lower court's reasoning as to the shares of stock, and extended it to the bonds, reversing the judgment below. The Supreme Court, considering the case on certiorari, reinstated the judgment of the District Court with regard to the bonds, and went on to compel the defendant to account for the $850,000 received from the resale of the stock to the public. It is this latter feature of the opinion which makes the case assume such important proportions in the law of promoters' profits.

At the outset it should be noted that the facts of the case make it fall within the pattern of Hays v. The Georgian and Ball v. Breed rather than of the Old Dominion cases. Expressed in

45 (1933) 33 Col. L. Rev. 1065. On the first appeal in the case, the circuit court reversed and dismissed upon the ground that there was no jurisdiction to appoint the ancillary receiver who had instituted the suit. 68 F. (2d) 925 (C. C. A. 2d, 1934). The Supreme Court ruled against the circuit court and sent the case back for a determination on the merits. 293 U. S. 67 (1934).


47 296 U. S. 140 (1935). A dissenting opinion was written by Roberts, J., in which he was joined by Justices Van Devanter, Sutherland, and McReynolds. A slight loss was suffered by the defendant on the resale of the mortgage notes which, of course, drop out of the picture on that account.


a somewhat less shorthand fashion, the situation was that of the
promoter issuing to himself all the shares and securities that
were ever issued, and reselling to the public, instead of that where
the promoter takes only a part of the stock issue and the corpora-
tion subsequently sells the remainder itself. The former was
always considered the a fortiori case of corporate consent, and
there has never been any division among the courts on the proposi-
tion that the corporation has no cause of action against the
promoter. The curious thing about the Furlaud case is that the
entering wedge is driven into this doctrine by the Court that, in
the weaker situation, was unable to surmount the hurdle of cor-
porate consent. Any discussion of the possible effect of Furlaud
v. McCandless on the so-called federal rule as enunciated in the
Lewisohn case, cannot fail to take account of this factor. A dis-
position to examine into the genuineness of the corporate consent
in the more forbidding situation justifies a prophecy that a
similar course will be followed when the basis for such action is
even more substantial.

A prediction on this score can, however, make no pretention
to the status of certainty because of the peculiar character of
the majority opinion. Justice Cardozo talked of a number of
things in arriving at the result, and was at special pains to dis-
tinguish the Lewisohn case.50 He preferred to characterize the
holding in the case before him as an exception to the general
rule, resting upon two foundations: (1) the fact that innocent
prospective creditors were involved who were certain to lose be-
cause the defendant's acts rendered the corporation virtually
insolvent from the beginning, and (2) consent by the corporation
could not be validly given in the face of a Pennsylvania constitu-
tional provision to the effect that "no corporation shall issue
stocks or bonds except for money, labor done, or property actually

50 "There was no evidence that the effect of the transaction (in the
Lewisohn case) was to make the company insolvent or to work a fraud
upon its creditors or to divert the assets to forbidden uses or to violate a

In the dissent, Justice Roberts characterized the holding of the majority
as "in the teeth of Old Dominion Copper Co. v. Lewisohn." Id. at 171. The
dissenting members of the Court were unable to overcome the circumstance
that every security issued by the Duquesne Gas Corporation went to the
defendant, and that, therefore, there were no profits to which the Corpora-
tion had not assented. In support of the minority's view that the fact that
some of the securities represented a bonded indebtedness made no difference,
see Tompkins v. Sperry, 96 Md. 560, 54 Atl. 254 (1903), and Hamilton v.
received; and all fictitious increase of stock or indebtedness shall be void." 51

Conceivably, the allowance of recovery of the proceeds of the sale of the bonds could be explained either on a theory of a conveyance in fraud of the corporation's creditors, or on an assimilation of bonds to par value shares with a consequent assessment of the original subscriber's liability up to the par level. Neither of these, however, were relied upon by the majority opinion. Rather, the entire discussion was geared to the subject of when the corporation could manifest an assent to the promoter's dealings so as to bind it for all purposes in the future. The tacit assumption from which the majority opinion seems to derive is that the corporate consent, given at a time when it is no more than a mockery, ought not to possess any power to stay the corporation from later asserting its rights against a promoter who has dealt with it unconscionably. 52 The reason given for the inclusion in the plaintiff's judgment of the proceeds of the sale of the shares is in the same vein, namely, the court regarded the whole transaction as "infected with a common vice" and ruled that "everything of profit arising out of the abused relation must now be yielded up." 53

The temptation is strong to regard this case as evincing a resolute purpose on the part of the Supreme Court to introduce a thorough-going sense of reality into the promoter-controlled corporation situation—to make it impossible for the crafty promoter, by observation of the proper forms, to bilk the corporation and its prospective members without there being any right in the corporation to secure redress. Caution in the interpretation of the case is, however, to be observed in view of the fact that creditors and a state constitutional provision were involved and were so heavily leaned upon. But the promise for the future, contained in the following words from Justice Cardozo's opinion, is

51 In Meier v. Eaton, 46 S. Dak. 286, 192 N. W. 721 (1923), the Supreme Court of South Dakota regarded a similar provision in the state constitution as compelling it to follow the Massachusetts rule.

52 Justice Cardozo recurs again and again to the theme that corporate consent, in order to merit any consideration, must be reasonable in the light of the circumstances when given. He says, for example: "To what extent the approval of all the shareholders will relieve (the promoters of the burden of being chargeable as trustees) is a question not susceptible of answer without considering the nature of the wrong and the interests affected. . . . The interests affected by approval will shape the power to approve." 296 U. S. 140, 157.

53 Id. at 164.
unmistakable: "Consent in such conditions (when shareholders and promoters are in substance the same), so far as it gives approval to conduct in fraud of the rights of others, is a word and nothing more. It is not in concord with realities." 54 One cannot but feel that a considerable start has been made toward the exorcism of the bogey of corporate consent which has heretofore prevented any really effective control of promoters' profits by the judiciary.

II

Administrative Control

The uncertainty and inefficiency which have characterized judicial control of promoters' profits (a control subject to the inherent practical limitation that it can be exercised only after the fact), suggest the desirability of a more direct method of keeping the promoter within bounds before he can present the world with *une fact accompli*. Administrative control, unhampered by the complexities of corporate legal theory and scrutinizing the promoter's acts in advance of the sale of securities to the public, offers an answer to a difficult problem. A definitive appraisal of the worth of that answer is precluded by the relatively short life to date of the Securities Act of 1933 55 and its administration, initially by the Federal Trade Commission and now by the Securities and Exchange Commission. 56 Enough has been done, however, to invite a comparison of the results achieved by commission and court control respectively. 57

In no particular does the Securities Act attempt a statutory definition of the relations of the promoter to the corporation, nor to prescribe what rights of action the latter shall have against the former. The civil liabilities to which the promoter may find himself subjected under the Act run only to individual investors. 58

54 *Id.*, at 160.


57 No attempt is here made to inquire into the extent of the control of promoters' profits under state Blue Sky laws. It is enough to point out that those laws were easily evaded by carrying on security sales across state lines, and presented no formidable obstacle to the promoter possessed of a zeal for exorbitant gains. That federal action was a prerequisite of any really satisfactory control of promoters' profits was recognized long ago. See *Annals (March, 1920)*.

58 Sections 11 and 12 of the *Securities Act of 1933*, 48 STAT. 82, 84 (1933), 15 U. S. C. § § 77k, 77l (1934). Even these liabilities are not im-
Thus, the practical difficulties of a multiplicity of suits by small stock- or bondholders to recover ill-gotten gains from the promoter, to which allusion has been made heretofore, remain. But the necessity for such actions may never arise if the Commission undertakes to exert to the fullest extent the powers which it is given over security issues before the latter reach the hands of individual buyers. A demonstration of the truth of this statement requires an examination of the pertinent provisions of the Act, and a description of the procedure which the Commission follows in circumventing unsound promotional practices.

Broadly stated, the Securities Act of 1933 prohibits the interstate sale of securities, and the use of the mails and instrumentalities of interstate commerce in the sale, without there being on file with the Commission certain data. This last is contained in a registration statement which, as a glance at the requirements set out in the Act for its formulation will show, is an exhaustive statement of the facts surrounding the proposed issue. For our purposes, two of those requirements are important. One is that there must be indicated "any amount paid within two years preceding the filing of the registration statement or intended to be paid to any promoter and the consideration for any such payment." The other is "a balance sheet as of a date not more than ninety days prior to the date of the filing of the registration statement showing all of the assets of the issuer, the nature and cost thereof, whenever determinable, in such detail and in such form as the Commission shall prescribe . . . ." To be considered in connection with this second requirement is the power given to the Com-

posed upon the promoter qua promoter. To be held liable under the Act, the promoter must come under one of the descriptions specified therein. See sections 2, 11, 12 and 15. 48 Stat. 74 (1933), 15 U. S. C. § 77b, 77k, 77l, 77o (1934). In this regard the Act is to be contrasted with the British Companies Act, 19 and 20 Geo. V, c. 23. In the latter, the promoter, defined as one who aids in preparing the prospectus, is designated as liable to subscribers if the prospectus contains fraudulent statements. See Douglas and Bates, Some Effects of the Securities Act upon Investment Banking (1933) 1 U. of Chi. L. Rev. 283, 285, n. 9, and Berle, New Protection for Buyers of Securities, N. Y. Times, June 4, 1933, § 8, p. 1.

59 The substantive handicaps which formerly loomed large in the vision of individuals contemplating suit have, of course, largely been removed insuch as the misleading statements or omissions on which liability is predicated appear on the documents filed with the Securities and Exchange Commission.


62 Id., Item 20.

63 Id., Item 25.
mission "to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet . . . and the methods to be followed in the preparation of accounts (and), in the appraisal or valuation of assets and liabilities." 64 Superimposed on all the foregoing are the investigatory powers of the Commission, 65 and its ability at any time to suspend the effectiveness of the registration statement whenever it appears to include "any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading. . . ." 66

These sections of the Act place a substantial administrative check upon the promoter's liberty of dealing with the corporation. It is apparent that any time the Commission finds that promoters' fees and the consideration therefor are not fully disclosed, or that property sold or services rendered by the promoter to the corporation are over-valued on the balance sheet, it may prohibit inter-state sale of the corporation's securities. So restrained, it seems difficult indeed for corporate promoters of the future to effect the fraudulent manipulations of which there have been so many examples in the past.

A survey of the Securities and Exchange Commission's operations thus far reveals that the power of investigating and rejecting balance sheet valuations has been of salutary consequence in curbing promotional rapacity. In the exercise of this power the Commission can achieve results which no court has ever been able to attain. This is illustrated by the Commission's action in the Matter of Big Wedge Gold Mining Company. 67 The situation was one where the promoters took all the stock of the new corporation in payment for over-valued property, and attempted to resell the shares to the public. Had judicial control alone been involved, the attempt would have been successful, and the promoters would have been under no liability to the corporation. Under administrative control, the resale itself was prohibited. The facts, and the manner in which they were handled by the Commission, are illuminating.

The promoters organized the registrant corporation with an authorized capital stock of 3,000,000 shares of common with a one dollar par. Completely controlled by the promoters, the cor-

64 48 Stat. 85 (1933) § 19 (a); 15 U. S. C. § 77s (1934).
65 48 Stat. 80, 85 (1933) §§ 8 (e) and 19; 15 U. S. C. §§ 77l, 77s (1934).
66 48 Stat. 79 (1933) § 8 (d); 15 U. S. C. 77h (1934).
67 1 S. E. C. 98 (1935).
poration issued to them the entire authorized stock in exchange for a lease on mining properties and a reputedly valuable agreement by one of the promoters to furnish some operating capital. The registration statement in question covered an offering by the promoters of $1,600,000 of their shares to the public, none of the proceeds of which was to go to the corporation. On the balance sheet contained in the registration statement there was an asset item of $3,000,000 representing the lease and the agreement; total liabilities were listed as $3,000,000 given in payment for the asset item. At a hearing held by the Commission, it appeared that the engineer's report on which the asset item purported to be based was thoroughly unreliable. Moreover, consulting engineers retained by the Commission testified that there was in fact no commercial ore on the land covered by the lease, and that the lease was of no value for the corporation's purposes. Possessed of such evidence, the Commission blasted the promoters' hopes of turning over a worthless corporation to the investing public at a profit. A stop order was issued suspending the effectiveness of the registration statement, and, thereby, depriving the promoters of any really important market for their shares.

In Re Brandy-Wine Brewing Company 68 involved a combination of factors which would have necessitated a judicial choice between the Massachusetts and federal rules if events had been allowed to proceed to their destined conclusion. Prompt administrative action, however, eliminated the possibility of such an election having to be made. The promoter organized the registrant corporation with 500,000 authorized shares of the par value of one dollar each. The initial issue of stock was 91,000 shares, all of which, plus a $9,000 assumption of obligations, went to the promoter in payment for a piece of real estate. The cost of the property to the promoter, as later ascertained by the Commission, was $29,000. The promoter caused the corporation to file a registration statement covering an additional issue of 259,000 shares to be offered by the corporation to the public. The first balance sheet submitted by the corporation listed the property at a valuation of $100,000. Preliminary storm signals from the Commission elicited a new balance sheet which carried the property at $29,000, but which also disclosed a new item of $71,000 for "Promotion Expense." After an inquiry, the Commission issued a stop order based on certain findings, one of which was that "the valuation of $71,000 set on (the) promotional services rendered the registrant . . . is so grossly and indefensibly ex-

68 1 S. E. C. 128 (1935).
cessive as to be outside the range of reasonable difference of opinion; that a large portion of the stock issued to (the promoter) was in fact a gift; and that the entry of $71,000 for promotional expenses as an asset on registrant's balance sheet . . . is an untrue statement of a material fact."

These are only two of the instances in which the Commission has acted to halt promotional frauds at their inception. The contrast between the administrative method of attack as described by these cases, and the judicial, is so pronounced as to require little comment. The fiction of the corporate consent, dictated by the wrong-doer himself, does not block the path of the Commission. It spins no theories about the nature of the corporate entity. Instead, it concerns itself with intensely practical problems of valuation and the true effect of what it is the promoter is trying to do. Its judgment, formed on the basis of these considerations, is an effective prevention of fraud rather than an attempted reparation. It has all the virtues implicit in the former, together with a facility for acquiring facts and a disregard of formal conventions, traditionally characteristic of administrative procedure.


70 In drafting the Securities Act of 1933, it was never supposed that independent investigation by the Commission would be an important element of control. See H. R. Rep. No. 85, 73rd Cong., 1st Sess. (Committee on Interstate and Foreign Commerce, 1933) 4. Registration statements were to take effect wholly apart from any inquiry into their truth. The magnitude of the task of examining each statement filed was thought to circumscribe greatly the grant of independent investigatory powers. As has been seen, however, the Commission has made use of these powers a surprising number of times. Whether the constant increase in the number of statements filed will necessitate a diminution of the Commission's activities along these lines is problematical. It is to be hoped that suitable provision will be made for their continuance.
PENAL ORDINANCES AND THE GUARANTEE AGAINST DOUBLE JEOPARDY

J. A. C. Grant *

I

In 1820 the Supreme Court ruled that the contention that "where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which Congress has acted, provided the two laws are not in terms, or in their operation, contradictory and repugnant to each other" is a "novel and unconstitutional doctrine", and held that when Congress enacts a valid criminal law it supersedes all state laws punishing the same acts. By the middle of the century, however, this view had been abandoned for the present doctrine of coördinate laws. This new situation presented additional problems, foremost among which was the question, Can a prosecution under the laws of one government be pleaded in bar to a prosecution by the other for the same offense? The 1847-1852 opinions had intimated (dicta) that this could not be done, and after much strained logic and many conflicting rulings their view has finally prevailed.

* A. B., Stanford University (1924), M. A., Id. (1925), Ph. D. Id. (1927); Department of Political Science, University of Wisconsin (1927-1930); Assistant Professor of Political Science in the University of California at Los Angeles; author of Commerce, Production and the Fiscal Power of Congress (1936) 45 Yale L. J. 751, 991, The Scope and Nature of Concurrent Power (1934) 34 Col. L. Rev. 995, The Lanza Rule of Successive Prosecutions (1932) 32 Col. L. Rev. 1309, The Natural Law Background of Due Process (1931) 31 Col. L. Rev. 56 and other articles in various legal periodicals.

1 Houston v. Moore, 5 Wheat. 1, 24 (U. S. 1820).
2 I have traced the history of these two rival doctrines in The Scope and Nature of Concurrent Power (1934) 34 Col. L. Rev. 995.
4 See Grant, The Lanza Rule of Successive Prosecutions (1932) 32 Col. L. Rev. 1309. The rule is predicated upon the theory that the commission of an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and hence constitutes two legally distinct, although physically identical, offenses. United States v. Lanza, 260 U. S. 377, 382 (1922). Compare the English rule that "Even an acquittal (or conviction) by a court of competent jurisdiction abroad is a bar to an indictment for the same offense before any tribunal in this country." Harris, Criminal Law (9th ed. 1901) 377. The English cases are collected in the article cited above. And see Barbey, De l'Application Internationale de la Regle non bis in idem en Matiere Repressive (1930).
we now find ourselves in the unenviable position of being the only civilized country in the world in which successive prosecutions for a single wrongful act are perfectly legal. To this extent, at least, our vaunted constitutional guarantees against a second prosecution for the same offense have dropped out of our living constitutions and have been relegated to the realm of constitutional mythology. In this demise they have carried other constitutional guarantees with them.\(^5\)

It was inevitable that efforts should be made to extend this "dual offense" doctrine to cases other than those involving state and federal relationships. Even before it was well established in that field it had been applied to sustain successive prosecutions by the military and civil authorities,\(^6\) and by the federal government and that of one of the territories.\(^7\) Both were ruled out in 1907 by the decision in *Grafton v. United States.*\(^8\) Its greatest influence, however, has been in the field of overlapping laws and municipal ordinances, where it gives promise of completely revolutionizing the traditional rôle of the city in criminal affairs.

Just one year after the *dictum* of the *Fox case*\(^9\) the supreme court of Alabama, sustaining successive state and municipal prose-

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5 This is particularly true of the immunities from illegal search and seizure and from being compelled to be a witness against one's self. Thus in *McCarty v. Commonwealth*, 200 Ky. 287, 254 S. W. 887 (1923) the evidence illegally secured by the state officers, and thus inadmissible in a state prosecution, was used by the federal government to force the defendant to plead guilty to a violation of the National Prohibition Act. This plea was then used in the state court as a confession of violation of the state prohibitory liquor act. I have discussed other abuses in *Immunity from Compulsory Self-Incrimination in a Federal System of Government* (1934-35) 9 Temp. L. Q. 57, 194, and in the other articles cited therein.


8 206 U. S. 333 (1907).

cutions for battery, reasoned: "The offenses against the corporation and the State, . . . are distinguishable, and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis—the one contemplates the observance of the peace and good order of the city—the other has a more enlarged object in view, the maintenance of the peace and dignity of the State." The Minnesota court felt that since the "jurisdictions offended against" are different, it follows that "The same act, prohibited by both the city and the State, may thus constitute two offenses, which are intrinsically and legally distinguishable"; while the Kentucky judges reasoned, "The offense committed by the appellant against the city and the State, although consisting of the same act, are quite distinguishable, and the prosecution for each offense proceeds upon different grounds; that of the city proceeds upon the sole ground of punishing for violating the city ordinance. . . . The prosecution by the State proceeds upon the sole ground of punishing for violating its criminal laws." "In such case there are two political powers offended by one and the same fact, and the penalty prescribed by each may be enforced without reference to the other." Even judges who were unconvinced of the logic of such arguments felt constrained to acquiesce in the result. Thus, we find Mr. Justice Stone, speaking for the Colorado court, stating: "While I cannot help regarding these distinctions as refined, and more fictitious than real, and while the reasons given in the decisions in justification of what, after all, is practically double punishment for the same act, fail to satisfy me of the logical soundness of the doctrine, yet the great weight of authority appears to uphold this view: that in a case like this before us, the single act, being made punishable both by the general law of the state and by the ordinances of the town wherein it was committed, constitutes two distinct and several offenses . . . and we must therefore yield

10 Mayor of Mobile v. Allaire, 14 Ala. 400, 403 (1848).
12 Kemper v. Commonwealth, 85 Ky. 219, 222, 3 S. W. 159, 160 (1887).
13 Fortner v. Duncan, 91 Ky. 171, 175, 15 S. W. 55, 56 (1891). State v. Sanders, 68 S. C. 192, 195, 47 S. E. 55, 56 (1904) furnished a delightful variation of this rule when it held that the offense is double because there are two offenders: "One is an offense committed by a corporator and the other is as a citizen of the State." The ruling was obviously patterned after Moore v. Illinois, 14 How. 13, 20 (U. S. 1852) in which a dictum favoring successive state and federal prosecutions was built upon the premise that "every citizen of the United States is also a citizen of a State or Territory." Neither opinion intimated what is to be done where the defendant is alien to one or both governments.
assent to the doctrine.” 14 Text writers and commentators added their approval,15 so that by the turn of the century it could be said that “it is now settled beyond a doubt that the same act may constitute an offense against both the state and a municipality, and may be punished by either or by both.” 16

The municipal corporation offered an extremely fertile field for the development of this new concept. Since at common law only a small money penalty could be imposed for the violation of a municipal ordinance,17 “the ancient by-laws used to direct that for a breach of a provision, the offender forfeit a sum named. . . . The method usually employed for recovering the penalty was by an action of debt, or sometimes of assumpsit.” 18 Consequently such actions came to be looked upon as civil rather than criminal, and this view has tended to persist even though a defendant may be imprisoned for default or a jail sentence may be imposed in the first instance.19 Thus the doctrine that the same set of facts may sustain both a civil and a criminal action tended to lend support to successive municipal and state prosecutions 20 until the “dual offense” theory was sufficiently well established to stand on its own feet.

14 Hughes v. People, 8 Colo. 536, 537-538, 9 Pac. 50, 51 (1885). And see Wong v. Astoria, 13 Ore. 538, 543-544, 11 Pac. 295, 296 (1886).
15 For typical statements see Cooley, CONSTITUTIONAL LIMITATIONS (1868) 199; 2 Kent, Commentaries (14th ed. 1896) 12; 2 McClain, Criminal Law (1897) 457; Bishop, Statutory Crimes (3d ed. 1901) 24. Judge Cooley's work, the appearance of which seems to have marked the turning point in the law, presents a startling abuse of "precedents".
16 Note, 92 Am. St. Rep. 89, 100 (1902), which gives an excellent collection of cases.
17 DILLON, MUNICIPAL CORPORATIONS (2d ed. 1873) § 270; Bishop, Statutory Crimes (3d ed. 1901) § 408.
19 The cases are legion. See those cited infra notes 20-22; City of Chicago v. Knobel, 232 Ill. 112, 83 N. E. 459 (1908); City of Chicago v. Williams, 254 Ill. 360, 363, 98 N. E. 666, 667 (1912); State v. Gustin, 152 Mo. 108, 53 S. W. 421 (1899).
20 See the Note cited supra note 16. State v. Muir, 164 Mo. 610, 65 S. W. 286 (1901) and Ogden v. City of Madison, 111 Wis. 413, 87 N. W. 566 (1901) furnish excellent examples of the technique employed. In the latter case the court stated, id. at 428, 87 N. W. at 573, that “what may be felony or misdemeanor under the statute, when dealt with by a city ordinance . . . loses its criminal aspect because of its local character and the greater necessity for more stringent police regulation in cities.” (Italics added). One would normally think of the italicized statement as adding to the criminal character of the act.
Although the premise that a municipal prosecution in a civil action is no longer necessary to accomplish this result it will no doubt continue to exert an important influence upon the use of such successive prosecutions. It offers a convenient subterfuge by which to evade the constitutional provision that "the trial of all crimes shall be by jury" 21 without resorting to the other possible avenue of escape (which defeats its own purpose) of so reducing the penalty as to place the act in the petty offense category. Equally enticing are the possibilities of using illegally secured evidence, securing a conviction without proving guilt beyond a reasonable doubt, and appealing from a verdict of acquittal, 22 all of which would seem to follow logically from this illogical premise. But this doctrine is by no means necessary to the accomplishment of such results, since experience has shown that the "dual offense" doctrine in its purer form opens a gate for the evasion of these and similar guarantees.

The municipal corporation presents the added advantage that, unlike the military jurisdiction, the possibility for expansion of its criminal authority has no logical limits other than those of the state itself. As the Florida court has written, "The overwhelming weight of the authorities, with which our views accord, supports the . . . rule,—that there is no impropriety, from a constitutional standpoint, in clothing our municipal governments with legislative power to prohibit and punish by ordinance any act made penal by the state laws", 23 and many Alabama communities have

21 City of Greeley v. Hamman, 12 Colo. 94, 20 Pac. 1 (1888); McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516 (1892); Hunt v. City of Jacksonville, 34 Fla. 504, 16 So. 398 (1894); Hood v. Von Glahn, 88 Ga. 495, 14 S. E. 564 (1891); Littlejohn v. Stells, 123 Ga. 427, 51 S. E. 390 (1905); City of Mankato v. Arnold, 36 Minn. 62, 30 N. W. 305 (1886) with which compare State ex rel Erickson v. West, 42 Minn. 147, 43 N. W. 845 (1889); Ogden v. City of Madison, 111 Wis. 413, 87 N. W. 568 (1901). Other cases are collected in DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 427; 3 MCLERNEDY, MUNICIPAL CORPORATIONS (2d ed. 1928) § 1163.

22 City of Greeley v. Hammon, 12 Colo. 94, 20 Pac. 1 (1888); State v. Lee, 29 Minn. 445, 457, 13 N. W. 913, 917 (1882); State v. Nelson, 157 Minn. 506, 196 N. W. 279 (1923); City of Kansas v. Clark, 68 Mo. 588 (1878); City of Cape Girardeau v. Smith, 61 S. W. (2d) 231, 232 (Mo. 1933). And see Village of Northville v. Westfall, 75 Mich. 603, 42 N. W. 1068 (1889); City of Milwaukee v. Ruplinger, 155 Wis. 391, 395, 145 N. W. 42, 43 (1914); City of Milwaukee v. Johnson, 192 Wis. 585, 213 N. W. 335 (1927). In McInerney v. City of Denver, cited in the preceding note, the court based its ruling upon the premise that "in prosecutions for the violation of a municipal ordinance . . . the constitutional provisions relating to indictments . . . in criminal cases do not apply." Id. at 308, 29 Pac. at 518.

already approximated this logical extreme by adopting what is known as the "short ordinance": "Be it ordained by the City Council of the City of Roanoke, that any person or persons committing an offense in the City of Roanoke, or within the Police Jurisdiction of the City of Roanoke, which is declared by any law or laws of the State of Alabama, heretofore or hereafter enacted, to be a misdemeanor shall upon conviction be punished by a fine not exceeding One Hundred Dollars ($100) and may be sentenced to imprisonment in the municipal jail or to hard labor for the City of Roanoke not exceeding six (6) months." 24 Under such a by-law, specific ordinances are only necessary where the city wishes to punish acts which are not prohibited by the state law or where it desires to add its sanctions to those of the state where the latter has classed an act as a felony. 25 Nor, now that the common law rule that "a by-law cannot imprison" has been abandoned, would there seem to be any particular limits to the possible scope of penalties. Jail sentences of six months to one year are now quite generally accepted as nothing out of the ordinary, and more severe sentences are not unknown. 26 It would seem that as yet no municipality has been authorized to punish an act as a felony, but sentences of two years at hard labor would seem to indicate that we are well on our way toward that goal.

From what has been said it is evident that under present doctrines the gradual but constant extension of municipal jurisdiction threatens to undermine many of the guarantees in our bills that § 18 of the Baltimore Charter authorizing the city to "exercise . . . all the power commonly known as the Police Power, to the same extent as the State has or could exercise said power" validates a city ordinance providing a penalty of a five dollar fine and twelve months imprisonment for offenses punishable only by a small fine under the state law.

24 See Nelson v. City of Roanoke, 24 Ala. App. 277, 135 So. 312 (1931), which sustained this ordinance on authority of Casteel v. City of Decatur, 215 Ala. 4, 5, 109 So. 571, 572 (1928). In the latter case the court had recommended such ordinances as offering the advantages of "convenience, the avoidance of expense in enacting and promulgating a volume of penal ordinances . . ., certainty."

25 The city of Bay St. Louis, Mississippi, did not stop at misdemeanors, but provided for the punishment, by fine and imprisonment, of "all acts which are made felonies or misdemeanors by the laws of the state . . ., when the same shall be committed within the limits of this city." See Ex parte Bourgeois, 60 Miss. 663 (1882). The same was true of the Decatur ordinance sustained in the Casteel case, cited in the preceding note.

26 Imprisonment at hard labor is now a commonplace. As early as 1883 Detroit was authorized to impose penalties up to $500 fine and two years' imprisonment "at hard labor or otherwise". MICHIGAN, LOCAL ACTS (1883), Act. No. 326, § 54.
of rights. Mr. Justice Miller's aphorism that "if there is anything settled [in American jurisprudence] it is that no man can be twice lawfully punished for the same offense",27 would seem to require amending: under the now generally accepted view he can be thrice punished for the same offense, once by the nation, once by the state, and once by the municipality. And although in legal contemplation three distinct laws are involved, actually there may be but one—a national law adopted by the state and in turn by the municipality.28 All that is necessary to increase the number still further is to revise the maxim that "There cannot be at the same time within the same territory two distinct municipal corporations exercising the same powers." 29 Having escaped from similar doctrines forbidding coordinate federal and state laws30 or overlapping state laws and municipal ordinances,31 this should not prove an insurmountable task.

It is refreshing to find that the California courts have uniformly refused to be seduced by this wealth of misapplied learning. They neither consider a municipal prosecution a "civil" action nor sanction the doctrine of "dual offenses".32 Yet no particular evils

27 Ex parte Lange, 18 Wall. 163, 168 (U. S. 1873).
28 "... the penal provisions of the Volstead Act are hereby adopted as the law of this state ... violations ... are subject to the penalties provided in the Volstead Act." Wright Act, Cal. Stat. (1921) c. 80, p. 79. In the intervening period many cities adopted the penal provisions of the Volstead act, but they generally altered the penalties provided for its violation. Often the penalties exceeded those provided in the federal law. See Ex parte Volpi, 53 Cal. App. 229, 199 Pac. 1090 (1921); Ex parte Kinney, 53 Cal. App. 792, 200 Pac. 966 (1921); Ex parte Polizotto, 188 Cal. 410, 205 Pac. 676 (1922); People v. Ellena, 56 Cal. App. 428, 205 Pac. 701 (1922); People v. Tomasovich, 56 Cal. App. 520, 206 Pac. 119 (1922); Ex parte Ajuria, 188 Cal. 799, 207 Pac. 516 (1922). Of course Congress can adopt a state law. United States v. Mason, 213 U. S. 115 (1909); City of Litchfield v. Thorworth, 387 Ill. 469, 169 N. E. 265 (1929); State Legislation in Support of the N. i. R. A. (1934) 34 Col. L. Rev. 1077, 1083.
29 DILLON, MUNICIPAL CORPORATIONS (5th ed.) § 354.
30 "A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility." The Passenger Cases, 7 How. 283 (U. S. 1849). And see Houston v. Moore, 5 Wheat. 1 (U. S. 1820) and Grant, The Scope and Nature of Concurrent Power (1934) 34 Col. L. Rev. 995.
31 Compare State v. Sanders, 68 S. C. 192, 47 S. E. 55 (1904), and Schroder v. City Council of Charleston, 3 Brev. 533 (S. C. 1815).
32 The federal, interstate, and international aspects of the problem are governed by the provision, "When on the trial of an accused person it appears that upon a criminal prosecution under the laws of another state, government, or country, founded upon the act or omission in respect to
have followed from this refusal to conform. The fact that our northern federal neighbor has likewise rejected both of these doctrines, while at the same time maintaining a standard of criminal law enforcement that is justly envied by many American states, would seem to indicate that the California result is by no means accidental.

II

PENAL ORDINANCES IN CALIFORNIA

A. Nature of the Offense and of Proceedings for Enforcement

The California legislature has consistently proceeded upon the theory that it may authorize a municipal corporation to denounce violations of its ordinances as misdemeanors and to provide for their punishment by heavy fines and/or imprisonment. Although the supreme court intimated, in 1874, that such action might constitute an unconstitutional delegation of legislative power, its right to do so has been sustained in every case in which it has been argued and is now settled beyond a shadow of doubt. The legislature also assumed that when this is done such an act is properly classed as a crime and prosecuted in the name of the people of the state. The court has reinforced this assumption by ruling that such an action must be prosecuted in the name of the people, and that the defendant is entitled to all of which he is on trial, he has been acquitted or convicted, it is a sufficient defense.” Penal Code § 656, first adopted in 1872. And see § 793, based on the Criminal Practice Act, Cal. Stat. (1851) 222 § 94.

33 For statutory or constitutional provisions expressly forbidding successive municipal and state prosecutions, see Ark. Dig. Stat. (1921) § 2883; Ky. Const., § 168; Tex. Code Cr. Proc. (1920) § 965. Ind. Stat. (Burns', 1926) § 2401, and R. I. General Laws (1923) c. 51, § 33, accomplish the same result by the more stringent rule forbidding coördinate state and local legislation. In New England instances of coördinate legislation seldom arise because of the narrow scope of the powers delegated to municipalities and because the courts of that section still cling to the early rule that a general grant of power to a municipal corporation does not suffice to validate an ordinance duplicating a statute. See Shelton v. City of Shelton, 111 Conn. 433, 150 Atl. 811 (1930); State v. Angelo, 71 N. H. 224, 51 Atl. 905 (1902).

34 Footnotes in this section will be kept at a minimum. The reader who desires to pursue the subject further may refer to my article Municipal Ordinances Supplementing Criminal Laws (1936) 9 So. Calif. L. Rev. 95 which is fully documented.

35 Pillsbury v. Brown, 47 Cal. 477, 480 (1874).

36 City of Santa Barbara v. Sherman, 61 Cal. 57 (1882), in which counsel, relying upon authorities from other states, argued: “This is not a
the rights and privileges, constitutional as well as statutory, and is subject to all of the provisions, normally attaching to persons accused of crime.\textsuperscript{37}

The legislature also assumed that it might authorize civil actions to redress violations of ordinances where no imprisonment is involved. But although in \textit{City of Santa Cruz v. Santa Cruz Railroad Co.}\textsuperscript{38} the supreme court conceded that actions “brought to recover a fine, forfeiture, or penalty” imposed by an ordinance of the city” constitute “a class of actions which \textit{perhaps} may be maintained . . . as ‘civil actions’, where a certain and specific sum is imposed as a fine or penalty”, surprisingly little advantage seems to have been taken of these provisions. And when the City of Sanger provided that an illegal sale of intoxicating liquor should be subject to a specific penalty of $40, recoverable in a civil action brought in the name of the city and enforced according to section 684 of the \textit{Code of Civil Procedure}, the court of appeals, first district, held this procedure unconstitutional in an opinion which is, perhaps, the classic statement of the nature of municipal prosecutions.

Pointing out that the state constitution provides that “The style of all process shall be ‘The People of the State of California’, and all prosecutions shall be conducted in their name and by their authority”, the court stated, “the Supreme Court has applied this provision of the state Constitution indifferently to cases, whether they arose under city ordinances or state statutes, where the evident purpose and ultimate effect of the proceeding was to punish the defendant for an unlawful act; that this would seem to be the true test by which the validity of the proceeding must be determined, regardless of the form or circumlocations of the statute or ordinance, there cannot be much serious question . . . it is urged by the respondent that the offense for which the defendant has been prosecuted is not such a public offense as to entitle it to the application of this section of the Constitution

criminal prosecution for a public offense. If not clearly a civil action, it is at most but \textit{quasi} criminal.” The court replied: “This action is in no sense a civil action. The complaint demands that defendants be adjudged guilty . . . and that they be punished by fine and imprisonment. . . . It is criminal.” \textit{Id.} at 58.

\textsuperscript{37} \textit{In re Guerrero}, 69 Cal. 88, 10 Pac. 261 (1886); Taylor \textit{v. Reynolds}, 92 Cal. 573, 28 Pac. 688 (1891); \textit{Ex parte Wong You Ting}, 106 Cal. 296, 39 Pac. 627 (1895) (jury trial); \textit{Miles v. Justice's Court}, 18 Cal. App. 454, 110 Pac. 349 (1910) (affidavit of prejudice); \textit{People v. Pacific Gas & Electric Co.}, 168 Cal. 496, 143 Pac. 727 (1914) (appeals).

\textsuperscript{38} 56 Cal. 143, 148 (1880).
... because it comes within that class of minor infractions of ordinances which are denoted in the decisions of several states as 'quasi criminal'. ... no such intermediate grade between civil and criminal breaches of legal obligations is known to our law ... 'A criminal case is an action, suit or cause instituted to punish an infraction of the criminal laws, and, with this object in view, it matters not in what form the statute may clothe it; it is still a criminal case'. ... We think the offense to be clearly public in its nature, and the proceeding as clearly criminal in its character.'

Although the express holding in this case was restricted to the necessity of proceeding in the name of the people, this ruling was predicated upon the broader thesis that the defendant was entitled to all of "those safeguards which the law has invoked for the protection of the liberty, property, or honor of persons accused of public offenses—the right of trial by jury in proper cases; the right to stand mute and not to be required to be a witness against oneself; the right to have the presumption of innocence prevail until overcome by proof of guilt beyond reasonable doubt and to a moral certainty as contrasted with the mere preponderance of evidence required in civil cases; ..." Consequently, even though it may be possible by proper legislation to preserve the outer form of a civil action, little or nothing is to be gained thereby.

B. Validity of Ordinances Duplicating State Laws

The authority of a municipal corporation to punish acts which are likewise embraced within the criminal laws of the state was not passed upon in California until 1887, when one Sic contested the validity of his conviction under an ordinance of the City of Stockton declaring it a misdemeanor "for two or more persons to assemble, be, or remain in any room or place for the purpose of smoking opium." The Penal Code, section 307, made similar provision for "every person who visits or resorts to any such place for the purpose of smoking opium", such place being defined as one "where opium, or any of its preparations, is sold or given away, to be smoked at such place." While the court conceded that the ordinance "is broad enough in terms to prohibit opium-smoking under all circumstances, except when the person 'keeps moving'," it construed it to apply only to opium dens. Thus

39 Ex parte Clarke, 24 Cal. App. 389, 393, 141 Pac. 831, 832, 833 (1914).
40 Id. at 833.
narrowed, the question became, Is an ordinance valid which "de-
nounces as criminal precisely the same acts which are . . . pro-
hibited by the code"? The court replied in the negative in an
opinion which may be reduced to the following propositions: 41

1. "If tried and convicted or acquitted under the ordinance, he could
not be again tried for the same offense under the general law."
2. "... an ordinance must be conflicting with the general law which
may operate to prevent a prosecution of the offense under the
general law."
3. But a municipal corporation, being a subordinate unit of govern-
ment, it follows that it "can only pass ordinances punishing the
same acts which are punishable under general laws, when
expressly authorized to do so."
4. "... no authority to pass such laws will be presumed from grants
of power general in their character", from which it follows that
no authority had been granted here.
5. Since the Constitution limits counties, cities, towns and townships
to the passage of "such local police, sanitary, and other regula-
tions as do not conflict with general laws", it follows that no
such authority can be granted.

One could not well ask for a clearer or more sweeping rejection
of the doctrine of coördinate laws. Yet just three years later
the court came dangerously close to accepting that doctrine. Sec-
tions 370 and 372 of the Penal Code declared it a misdemeanor
to obstruct a public park, square, street, or highway; and street
had been construed to include the sidewalks as well as the road-
way. The city, however, had power to "make a legal authoriza-
tion of an obstruction", and a San Jose ordinance of 1881 had
authorized fruit stands, and the like, on the inner side of such
walks. This privilege was abolished in 1890, so that a stand such
as the defendant's once more became a violation of the state law.
But in forbidding such stands, the city also provided a penalty
for their maintenance; and the defendant was proceeded against
under this ordinance, rather than under the Penal Code, and
convicted. In sustaining this conviction Judge Fox, three judges

41 In re Sic, 73 Cal. 142, 145, 146, 148, 14 Pac. 405, 406, 407, 408 (1887).
In discussing the first of its five conclusions, the court said: "The contrary
doctrine has been held in some states, but this conclusion seems more in
consonance with reason and justice. . . . In Alabama it was said (Mayor v.
Allaire, 14 Ala. 400) that assault and battery could be punished under the
ordinance and under the state law also,—the one to maintain the peace of
the state and the other the peace of the city. It is difficult to see how the
peace of the state is disturbed, except through the disturbance in the city. . . .
State laws and city ordinances all rest upon the same ultimate authority,—
the people of the state,—and they aim at the same evil." Id. at 148-149, 14
Pac. at 408.
concurring, wrote: "We are of opinion that the City of San Jose: 1) had authority, under its charter, to pass the ordinance, 2) that the same is not in conflict with the general law, and 3) that a conviction under either is a bar to a prosecution under the other." 42

Of the three postulates laid down in this statement of the court, the first is an unequivocal rejection of the third, fourth, and fifth of the propositions of the Sic case, while the second and third together constitute just as clear a dismissal of the second. Together they represent an abandonment of its ruling that there is a conflict where the ordinance and the general law punish precisely the same acts in favor of the standard American doctrine of coördinate jurisdiction, so succinctly stated by the Missouri court in the words, "... we consider the ordinance aforesaid to be in harmony with the statute. They each ... cover the same subject and have the same object." 43 But unlike the majority of our courts, they refused to predicate this conclusion upon the fiction of "dual offenses".

Had the majority rested its case with this statement, it is evident that they would have completely remade the California law. It is by no means certain, however, that the process of change would have stopped here. Later cases might well have brushed aside the remark that "a conviction under either is a bar to a prosecution under the other" 44 as an inconsiderate dictum, since the defendant was not being subjected to successive punishments, and fallen in line with the trend of the times in sustaining double punishment. 45 California would then have joined with her sister states in declaring that the guarantee that no person shall be twice put in jeopardy for the same offense means, unless both the city, or county, and the state choose to punish it. But they did not stop here. "Even if this were not so, ..." they continued, "it is conceded that the acts charged constitute a violation of the statute in relation to the obstruction of streets. The complaint states facts which constitute a public offense under the

42 Ex parte Taylor, 87 Cal. 91, 95, 25 Pac. 258, 259 (1890). I have numbered the phrases for convenience.
44 Ex parte Taylor, 87 Cal. 91, 95, 25 Pac. 258, 259 (1890).
45 For just such a line of development, starting with a decision on all fours with In re Sic, see Schroder v. City Council of Charleston, 3 Brev. 533 (S. C. 1815); State v. Williams, 11 S. C. 288 (1878); City Council of Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523 (1888); City of Greenville v. Kemmis, 58 S. C. 427, 36 S. E. 727 (1900); City Council v. Leopard, 61 S. C. 99, 39 S. E. 248 (1901), and State v. Sanders, 68 S. C. 192, 47 S. E. 55 (1904).
statute, and alleges that they were done 'contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of California,' and the judgment is not in excess of that authorized by the statute. Both the offense and the penalty was [sic] within the jurisdiction of the justice's court." 46 Hence, they sustained the sentence as one validly imposed following a lawful conviction under a state law. Mr. Justice Paterson, who dissented from the earlier reasoning, concurred in this conclusion, making the ruling unanimous.

Although the doctrine of coördinate laws seems to have been followed, sub silentio, in a second San Jose case of the following year,47 it was expressly rejected five years later 48 and from that day forward seems never to have been reasserted. After this brief respite the rule of In re Sic has returned to its own, with the result that in California we are met with the proposition that a local ordinance cannot prohibit exactly the same thing prohibited by the state law and still be valid since the constitution itself forbids coördinate laws.

Any doubt that may have existed relative to the constitutional status of this rule was removed by the decision in In re Mingo. 49 Prior to December 21, 1922, when the Wright Act, 50 adopting the provisions of the National Prohibition Act as the law of the state, became effective, there was no state law forbidding the manufacture, possession, sale, etc., of intoxicants. Consequently the counties and cities had taken over this field, and although many of them had modeled their ordinances upon the national law others had adopted more stringent regulations or had provided for more severe penalties, particularly as to the offense of possession. As the statute provided that "Nothing in this act shall be construed as limiting the power of any city or county, or city and county, to prohibit the manufacture, sale, transportation or possession of intoxicating liquors for beverage purposes", it was inevitable that the claim would be made that this validated a concurrent enforcement of such ordinances in their entirety. But the supreme court, in an unanimous opinion which quoted extensively from In re Sic, held otherwise. "A county ordinance punishing exactly the same act denounced by a state law", they stated, "is in con-

46 Ex parte Taylor, 87 Cal. 91, 95, 25 Pac. 258, 259 (1890).
47 Taylor v. Reynolds, 92 Cal. 573, 28 Pac. 688 (1891) which involved the same statutes and ordinances.
48 Ex parte Stephen, 114 Cal. 278, 282, 46 Pac. 86, 87 (1896).
49 190 Cal. 769, 214 Pac. 850 (1923).
50 CAL STAT. (1921) c. 80 p. 79.
lict therewith. . . . the situation is not changed by the legislative declaration that the act shall be construed as though there was no conflict.” 51

C. Conviction under an Invalid Ordinance as a Lawful Conviction under a State Law

Although the doctrine of coördinate laws advanced in Ex parte Taylor 52 was due for rapid and complete extinction, the second theory advanced to sustain the ruling in that case has survived. In Ex parte Mansfield, 53 decided just five years later, the requirements for its application were liberalized by restricting the necessary contents of the complaint to a single item: that the defendant be plainly informed of the nature of his offense. The fact that the complaint on which the petitioner had been tried and convicted referred only to the ordinance, and did not conclude with the declaration that his acts were contrary to the form, force, and effect of the statute, were held immaterial under the liberal rules of California pleading. As applied in numerous cases since that date it is now clear that, aside from thus stating an offense covered by the criminal laws of the state, the only facts necessary to sustain such a conviction as one properly secured under a state law are that the action be prosecuted in the name of the people of the state, and that the court trying the case have jurisdiction of the offense as one arising under state law.

Although in many jurisdictions these requirements would completely nullify the doctrine, none of them presents any particular difficulties in California. Since an ordinance is only void if it punishes precisely the same acts as those embraced in the statute, it would seem difficult indeed, in the normal case, to frame a complaint that would state an offense under the former without at the same time stating an offense under the latter. 54 Such actions will be brought in the name of the people of the state as a matter of course. It is rare, indeed, that even the third can present diffi-

51 In re Mingo, 190 Cal. 769, 771-772, 214 Pac. 850, 851 (1923), followed in In re Irverson, 199 Cal. 582, 250 Pac. 681 (1926) and In re Simmons, 199 Cal. 590, 250 Pac. 684 (1926). But the provision was construed to validate the ordinances in so far as they reached acts not punishable under the statutes. See the article cited supra note 35.
52 87 Cal. 91, 25 Pac. 258 (1890).
53 106 Cal. 400, 39 Pac. 775 (1895).
54 Of course this is not true when the complaint is brought under an ordinance drafted in general terms so as to include part or all of the acts provided against by statute, while at the same time including much more.
culties, since municipal ordinances and state laws are uniformly enforced in the same courts.

The resulting situation is well illustrated by the ruling in *Olivieri v. Police Court of Bakersfield.*

Olivieri was charged, under a city ordinance, with the illegal possession of liquor on December 21, 1922, the day on which the Wright Act became effective. His petition for a writ of prohibition was denied, the court saying: “When we compare the complaint with the provisions of the Volstead Act, which the Wright Act has made the law of this state, we are satisfied that it states a complaint thereunder. In fact, the main contention of petitioner is that the offense set out in the complaint is prohibited both by the Wright Act and the ordinance. As hereinbefore indicated, we have agreed with him in this contention, and have held the ordinance void for the reason that it attempts to legislate upon the same matter covered by the statutes of the state. The complaint, however, still stands as a perfectly valid complaint under the Wright Act, and therefore the respondent, in whose court said complaint was made, has jurisdiction to proceed with the trial of the defendant for the offense charged.”

It would seem obvious that what has been done in the name of the *Sic case* has really undone that case; for the basic premise upon which it rested—that a prosecution under an ordinance cannot be permitted to prevent a prosecution under the statute—has been accomplished by the simple expedient of switching names after the accomplishment of the fact. Similarly the doctrine of the *Taylor case*, while linguistically denied, is actually applied; for the current situation is virtually identical with a recognition of coordinate jurisdiction, but a denial of successive prosecutions. Of course this is only true as to those state offenses which may be proceeded against in a court of the municipality. Where exclusive jurisdiction is vested in the superior court the rule of the *Sic case* is unaffected.

III

THE CANADIAN LAW

Under the United States Constitution jurisdiction over the criminal law, as such, remains with the states. Except for treason, which is defined in the Constitution, counterfeiting the securi-

55 62 Cal. App. 91, 95, 216 Pac. 44, 46 (1923).

56 In many of the smaller counties the superior court has exclusive jurisdiction over state offenses punishable by a term of imprisonment exceeding six months. In all others its jurisdiction is restricted to felonies.
ties and current coin of the United States, and piracies and felonies committed on the high seas, and offenses against the law of nations, the authority of the national government to define and punish criminal acts is restricted to whatever may be necessary and proper for carrying into execution the specific powers of that government. In Canada, on the other hand, the situation is reversed. Sub-section 27 of section 91 of the British North America Act, 1867,\(^57\) vests exclusive legislative authority in the dominion parliament over the criminal law, subject to the qualification contained in section 92, sub-section 15, that a province may provide for the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within the scope of its jurisdiction.

From even a cursory examination of the Canadian Constitution it is evident that those who drafted it contemplated a scheme in which the powers of the dominion and provincial governments should be mutually exclusive. Consequently there is a total absence of provisions governing the solution of problems arising from overlapping laws, even the phrase that national laws shall be the supreme law of the land, so familiar to Americans, being absent. But it early became evident that the powers of government do not lend themselves to departmentization, and that a scheme of government had been set up which would give rise, as in the United States,\(^58\) to a vast field of concurrent power. Consequently the Supreme Court, faced with a choice between dominion supremacy, provincial supremacy, or the Austrian doctrine of equality,\(^59\) chose the first, decreeing: "... although the British North America act contains no provision declaring that the legis-

\(^{57}\) 30 and 31 Victoria c. 3 (1867) hereafter cited as Canadian Constitution.

\(^{58}\) See Grant, The Scope and Nature of Concurrent Power (1934) 34 Col. L. Rev. 995.

\(^{59}\) The Austrian Constitution of 1867 provided for a federal system in which the legislative bodies of the Länder were on a plane of equality with the parliament of the Reich, the courts having no power to pass upon the validity of the acts of either. Conflicts were reconciled according to the rule, lex posterior derogat priori. See Kelsen, Österreichisches Staatsrecht (1923) 38; Hugelmann, Das Österreichische Reichsgericht (1925) Zeitschrift für Öffentliches Recht 458. Only the fact that the Emperor retained the power of absolute veto over both national and provincial laws rendered the system workable, and it was abandoned in 1920 for the principle of national supremacy sustained by judicial review. See Eisenmann, La Justice Constitutionelle et La Haute Cour Constitutionel d'Autriche (1928) ; Grant, Judicial Review of Legislation under the Austrian Constitution of 1920 (1934) 28 Am. Pol. Sci. Rev. 670; Austrian Constitution of 1934, Art. 163.
lation of the Dominion shall be supreme, as is the case in the Constitution of the United States, the same principle is necessarily implied in our constitutional act, and is to be applied whenever, in the many cases which may arise, the federal and provincial legislatures adopt the same means to carry into effect distinct powers. 60

The doctrine of exclusive powers, in view of the fact that the dominion was given jurisdiction over the criminal law, would have necessitated provincial (and hence municipal) offenses being classed as civil or quasi-civil, 61 or at most quasi-criminal. Such a terminology, if coupled with a rule sustaining coordinate legislation, would have gone far towards validating successive dominion, provincial, and municipal prosecutions. But this frank recognition of the existence of concurrent power enabled the courts to work out a more logical interpretation of the nature of provincial power under the descriptive title of "provincial criminal laws", and to apply the realistic test, What is the nature of the penalty? 62 Whereas many American courts abandon this test when the law under consideration is a municipal ordinance rather than a statute, I have not found a single reported instance in which a Canadian court has done so. On the contrary, it has been held that "the matter complained of is in truth a criminal offence: for it is disobedience to by-laws, which are enforceable as part of the law of the land, and a person guilty of disobedience to them is liable to a penalty. This is sufficient to constitute a criminal matter." 63

60 Huson v. The Township of South Norwich, 24 Can. Sup. Ct. 145, 149 (1895). The same rule had been laid down by the English Privy Council in Canadian appeals. See Ontario v. The Dominion [1896] App. Cas. 348, 366: "It has been frequently recognized by this Board, and it may now be regarded as settled law, that ... the enactments of the Parliament of Canada ... must override provincial legislation."

61 For such an interpretation see Regina v. Bittle, 21 Ont. L. R. 605, 610 (1892). The argument was directed to prove a conclusion that is accepted today, that each province has control over the procedure to be followed in the trial of offenders against its laws. But uniformity is commonly retained through the provinces adopting, as their own, the provisions of the dominion criminal code and of the summary convictions act. And of course the same courts hear municipal, provincial, and dominion prosecutions, the dominion parliament never having exercised its power, under section 101 of the Constitution, to set up a system of dominion trial courts.


Having accepted the view that both the dominion and provincial governments may punish the same acts, the courts were necessarily faced with the question: May these powers be exercised coördinately, or does the provincial law remain in abeyance while the dominion act continues in force? Apparently quite an effort was made by counsel acting on behalf of the provincial governments to establish the American doctrine of coördinate laws, including its added provision for successive prosecutions: but most courts rejected it, occasionally with the sharp rebuke that the American rule is "contrary to all principles of justice".⁶⁴ By 1907 these views had crystallized into the rule, to venture upon a translation from a Quebec opinion, that "When the Parliament of Canada has declared an act criminal . . . a provincial legislature does not have the right to make a law punishing the same act."⁶⁵ Nor have they relaxed the rule. During the same decade in which the United States Supreme Court was definitely establishing the validity of successive state and national prosecutions in liquor cases,⁶⁶ a series of Canadian liquor decisions was applying the rule: "As the matters covered in the provincial enactment [driving an automobile while under the influence of liquor] are dealt with by the (dominion) Code, the sections are inoperative. . . . Having been made a (dominion) crime, . . . the provincial act . . . must yield to dominion legislation."⁶⁷

Since municipal ordinance prosecutions are regarded as criminal actions, and by-laws, in the eyes of the dominion, as provincial statutes, it has been impossible for the provinces to evade this rule by expanding the powers of their local governments. As early as 1883 the Privy Council, in a Canadian appeal,⁶⁸ intimated that the adoption of the dominion local option act would have the effect of immediately suspending all local powers over the liquor traffic derived from provincial legislation. Eight years later the Mani-

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⁶⁴ Regina v. Shaw, 7 Man. L. R. 518, 528 (1891); Robson and Hugg, Municipal Manual (1920) 355.
⁶⁵ Dallaire v. La Cite et la Province de Quebec, 32 Rap. Jud. Q. C. S. 118 (1907).
toba court held that a by-law making it a criminal offense to keep a "gambling house" had been superseded by a dominion act punishing the keeping of a "gaming house", the judges concluding that the two acts, at least as applied to the facts of the case, were identical. Still later it held that since rescuing animals from a pound keeper while being lawfully conveyed to a pound is a criminal offense under the dominion laws, "the council of a municipality has no power... to pass a law providing for the punishment of such an offense." Other cases have definitely established the doctrine, and a reversal would likewise necessitate a reversal of the rule forbidding coordinate dominion and provincial laws.

Of course there is still an undercurrent of opinion favoring coordinate legislation, especially among text writers. And counsel seem to have overlooked the fact that none of the rules discussed above require a province to adopt the rule that a local by-law must give way before an overlapping provincial statute. Nor do the cases go further than to hold that a dominion act, in the absence of an express statement to the contrary, overrides duplicating provincial laws. There is no reason to doubt that the courts would sustain the national legislature in providing for coordinate legislation, and certainly there is no express provision in the Constitution upon which to base a judicial veto of such a provision. In doing so Parliament could, if it saw fit, authorize successive dominion, provincial, and municipal prosecutions, even without resorting to the American fiction of "dual" and "triple"

70 Rex v. Laughton, 22 Man. L. R. 520 (1912).
71 See McClellan v. McKinnon, Ont. L. R. 219 (1882); Winslow v. Gallagher, 27 N. B. 25 (1888); Huson v. South Norwich, 24 Can. Sup. Ct. 145 (1895); Regina v. Dungey, 2 Ont. L. R. 223 (1901). And see Pike, Canadian Municipal Law (1929) 217; Robson and Hugg, Municipal Manual (1920) 355. Compare Rex v. McIntyre, 21 Can. Cr. Cas. 216 (1913), in which a defendant indicted under a dominion statute for battery pleaded that he had already been fined under a city ordinance for the same battery as a breach of the peace. The court held that the ordinance was valid and that the conviction under it constituted a bar to a prosecution under the dominion act. This is the only reported case I have been able to find in which successive prosecutions, whether dominion-provincial, dominion-municipal, or provincial-municipal, were attempted. But see infra note 72.
72 See Clement, Law of the Canadian Constitution (2d ed. 1916) 567; Poley, Federal Systems of the United States and the British Empire (1913) 262; Lefroy, Legislative Power in Canada (1898) 51; Lefroy, Canada's Federal System (1913) 329, with which compare id. 332.
offenses arising from a single act, since Canadian legislatures are unrestricted by bills of rights and can abolish the guarantee against a second jeopardy if they so desire. But while these facts may have a direct bearing upon the possible future evolution of the Canadian law they are of minor importance to us. To date, there is not a single recorded instance in which a defendant has been subjected to successive prosecutions by dominion, provincial, and municipal governments, or by any two of the three. The important fact is that a great nation, organized on a federal basis, and related to us alike by blood and by culture, has been at least as successful as ourselves in coping with the problems of criminal law enforcement without resorting to our fictions of multiple "sovereignties" and "dual" and "triple" offenses.

IV

CONCLUSION

The California and Canadian experiences demonstrated that a system of municipal corporations with extensive legislative powers and authority to impose severe penalties can be integrated into the state's legal system without sacrificing the immunity from successive prosecutions or the other guarantees which we have provided for persons accused of crime, and that in doing this there need be no sacrifice of the fullest cooperation between the state and its local governments. It would also seem to indicate that much of what has been written on behalf of the "dual offense" theory is mere rhetorical nonsense cloaked in thin legal raiment. The contention that "there is more safety

73 Such an express authorization of successive prosecutions would seem to be necessary to validate them, as the English common law—still of primary importance in Canada—rejects the doctrine of "dual offenses" even when the two governments concerned are nations. See supra note 4; CRANKSHAW, CRIMINAL CODE OF CANADA (5th ed. 1924) 1055; KEELE, THE PROVINCIAL JUSTICE (3d ed. 1851) 81; SEAGER, CRIMINAL PROCEEDINGS (3d ed. 1930) 113. I have found but a single Canadian case, and that an opinion of an inferior trial court, accepting the American view that where both the federal and provincial governments have made an offence of a certain act a jeopardy under one cannot be pleaded in bar to a prosecution under the other because the parties are not the same. Forgues v. Gauvin, 3 Can. Cr. Cas. 302 (1919). Apparently this judge conceived of himself as sustaining successive prosecutions. But as the charge under the provincial law had been dismissed on a question of form it is clear that the defendant had not been in jeopardy, and even possible that the new charge was brought under the dominion code rather than under the provincial act because of doubt as to the validity of the latter. And see supra note 70.
to the community in two conservators of peace than in one” 74 is not, as the court seemed to imply, an explanation of the validity of that doctrine so much as it is a bald statement that a guarantee against a second jeopardy for the same offense is out of place in this modern world. Such a conclusion would certainly necessitate substantiating argument, and the problems which it will raise can only be solved by making reasoning our guide rather than our accomplice.

Nor is the lesson to be learned from the cases restricted to the field of civil rights, or even of the criminal law. The attitude of mind reflected in those applying the standard American doctrine permeates the entire field of intergovernmental relations, particularly between the nation and the states. Possibly there is merit in the contention advanced to me by many Canadian officials that it is wise to place greater emphasis upon coöperation between governments than upon the conflicting rights of those governments, and that our proneness to stress the latter has tended to hinder what few conscious efforts we have made to secure the former.

LEGISLATIVE POWER VERSUS DELEGATED LEGISLATIVE POWER

O. DOUGLAS WEEKS *

I

LEGISLATURES AND MODERN LAW MAKING

The Constitution of the United States proclaims that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." 1 "One of the settled maxims in constitutional law," writes Cooley, "is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority," 2 and yet it is true that Congress passes many statutes which "follow the plan of stating in the statute a broad outline of policy and of committing to the President, or to some other administrative agency, sweeping authority to give effect to the declared policy by making detailed rules and regulations or choices between alternative legislative devices." 3 The first statement correctly sets forth a well established legal principle; the second equally correctly describes a constitutionally admissible practice of long standing, frequently upheld by the Supreme Court of the United States. In two recent decisions, 4 however, that tribunal for the first time in its history invalidated enactments embodying what it regarded as excessive delegations of congressional power. These pronouncements have served to focus interest on a still unsettled constitutional issue to which considerable attention has been given by publicists, legal writers, and political scientists, but upon which there is a marked disagreement.

In Great Britain the problem of Parliamentary delegation of the legislative power has received in recent years even greater attention, with the result that a Committee on Ministers' Powers was created and authorized to investigate developments in regard to the delegation of both legislative and judicial powers to

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1 Art. I, § 1.

2 1 Cooley, Constitutional Limitations (8th ed. 1927) 224.


administrative authorities. Its report, rendered in 1932, is highly significant not only for Great Britain but for the United States, because, basically, the similarities in the nature and increase of the practice in the two countries are greater than the differences which their dissimilar constitutional systems would presuppose.

In both countries, the discussion has brought forward many opponents to the practice. Some of them have taken the attitude that representative democracy has been dealt a body blow and that the legislative body is in effect abdicating its essential powers. In the United States, in particular, Congressional delegations have seemed to endanger the constitutional doctrine of the separation of powers and the supremacy of Congress in the field of law making; and in Great Britain the equally important doctrine of Parliamentary supremacy. Whatever the fundamental differences may be between these two constitutional theories, the issue is essentially the same under both systems, for the chief criticism is that the representative body is selling its birthright—its sovereign power to make laws—to an administrative bureaucracy which in the end will stifle the hard-earned liberties of the people and bring to naught the sacred "rule of law". In the place of "a government of laws and not of men", we are warned, there is being subtly erected a "new despotism", a dictatorship in disguise.

On the other hand, many who welcome the development see in it an indication of the incompetence of representative legislatures to the task of making laws to fit the complicated conditions which characterize the modern industrial state with its tendency to kaleidoscopic change and its supposed steady advance towards collectivism. Legislatures as talk-shops in which mere political issues could be resolved by amateurs and politicians were satisfactory enough when life was simple, but now that the business of legislation has become highly technical, they are ill-fitted for their task and are forced to seek the aid of the administration both in formulating legislative proposals and in leaving to it the work of providing the detailed content by way of filling in the blanks purposely left in statutes at the time of their enactment and of determining when and under what conditions a statute shall go into force or become inoperative. This, among other tendencies inherent in the essentially fragile nature of democracy, we are

5 Report of the Committee on Ministers' Powers, Cmd. 4060 (1932).
6 Lord Hewart, The New Despotism (1929); Marriott, The Crisis of English Liberty (1930) Prologue; Chih-Mai Chen, Parliamentary Opinion of Delegated Legislation (1933) cc. III and IV.
told, only serves to show that the "twilight of parliaments" is upon us and that verbose legislatures are "but a disagreeable incident in eternity". Government by experts is displacing "government by windbags" and the "constitutional battle of Kilkenny cats" is about at an end."

The Report of the British Committee,8 the findings of competent students of modern governmental processes both in Great Britain and the United States, the long standing practice of other democratic governments with respect to the enactment of legislation, and the general trend of progressive legal thought demonstrate, however, that both the constitutional fundamentalists and the political modernists are partly wrong. Thoughtful friends of representative government are aware that the function of legislating in the state of today is one that needs to be performed "by minds trained to the task through long and laborious study" and that "a numerous assembly is as little fitted for the direct business of legislation as for that of administration."9 Legislatures, they feel, can only represent the element of will in law making; while those best informed in the subject matter of a law and experienced in the problems of applying it must provide the element of intelligence, in other words—the administration. In short, it is futile for the legislature any longer to attempt to work out the details of large legislative changes. Statutes cannot be altered or repealed as rapidly as justice may demand in a complex world in which the state must constantly assume a greater part. If statutes are made under such conditions to embrace the whole of a legislative policy, they will be hopelessly cumbersome and prolix.10 That there are dangers in too generous delegations, there can be no doubt. Delegations are inevitable, but their growth has been haphazard and not sufficiently guarded

7 LASKI, DEMOCRACY IN CRISIS (1933) c. II; COKER, RECENT POLITICAL THOUGHT (1934) Part II; FORD, REPRESENTATIVE GOVERNMENT (1924) Part II, c. XI; SAIT, DEMOCRACY (1929) 32-35.

8 Report, supra note 5; see also: WILLS, THE PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS (1933); BLANCHLY AND OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION (1934); COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES (1927).

9 MILL, REPRESENTATIVE GOVERNMENT (Everyman's Library) 235.

10 For causes and results of delegation of legislative powers see: HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST (1936) 4-9, 22-24; DICKINSON, supra note 3, at 201; Haines, Effects of the Growth of Administrative Law upon Traditional Anglo-American Legal Theories and Practices (1932) 26 AM. POL. SCI. REV. 875; FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928) 220-221; ILBERT, THE MECHANICS OF LAW MAKING (1914) 137-146.
and their scope sometimes too sweeping. The correct solution, therefore, is neither to condemn nor accept conditions as they are, but to devise safeguards to protect the essential law making power of the legislature without insisting that it retain more than the necessary controls. In other words, we should be content with neither legislative nor bureaucratic omniscience. Just how to attain, however, a proper division between the legislative functions of the representative assembly and like functions of the administration is a problem of major constitutional importance. It involves: first, a clearer conception of what is meant by legislation; second, a better defined sphere of activity for those who enact administrative legislation, with the boundary lines more consistently and carefully maintained; and, third, a really adequate parliamentary and judicial control.

II

THE NATURE OF LEGISLATIVE POWER

Perhaps the basic difficulty is with the meaning of the terms "legislation" and "legislative power". Their legal and political connotations have been the product of historical evolution and association rather than of logic. In fact, a gift of logic is not a noteworthy trait of the English or the Americans, nor is it by any means the outstanding characteristic of their legal and political institutions and ideas. What, then, have these terms meant in the English-speaking countries? What should they be made to mean? It might be assumed from much of the learned discussion of the terms that they have embodied quite clear-cut concepts. As a matter of fact, however, their meanings are, and always have been, vague and indefinite and seemingly incapable of exact definition. The same has been true of the terms "executive" and "administration". Constitution framers and courts have been ambiguous in their explanations of these concepts; lawyers and political scientists are not in agreement as to what they mean; and even students of legislation and public administration have not been consistent in their definitions. Outside the English-speaking world, moreover, different political and legal traditions have produced still other concepts which have only contributed to the confusion and lack of agreement.

Legislation has been tersely defined as "the operation or function of legislating and the laws which result therefrom". Thus

11 Report, supra note 5, at 4-6.
12 Id. at 15.
it means the acts of preparing, proposing, considering, amending, and enacting a positive law in written form and according to some sort of formal procedure by a governmental agency authorized and constituted to perform such acts. It also means the laws thus enacted. The agency may be a person or persons, a representative body, or a combination of persons and bodies, depending upon the constitutional system. What, however, should characterize the function or power of legislating and what should be the earmarks of legislation as a type of law? John Locke stated that “The legislative power is that which has a right to direct how the force of the commonwealth shall be employed for preserving the community and the members of it,” the power “to make laws for all parts, and every member of the society prescribing rules to their actions, and giving power of execution where they are transgressed.” 18 Blackstone characterized the legislative power as that of laying down permanent, uniform, and universal rules in contrast to transient and sudden orders from a superior to or concerning a particular person. 14 Later writers have defined it as the function “of formulating rules to govern societal relations”, 15 “rules of civil conduct, or statutes,” 16 covering not necessarily all, but a well defined class. To these attributes is also added that of futurity. In the words of Justice Holmes: “Legislation . . . looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power,” 17 or as stated by Cooley “a predetermination of what the law shall be for the regulation of all future cases under its provisions.” 18 Thus is emphasized the idea of a general rule of law to be applied to all cases in the future. These attributes might seem to make legislation synonymous with what is sometimes called the general policy-framing function of government. These statements, however, are generalizations. They are subject to considerable qualification and difference of interpretation, depending upon the particular time or political system that may be under consideration.

The term “legislation” as used to describe both a process and a product is of almost modern origin. The present-day concept of law making was peculiarly the product of the modern national

13 LOCKE, TWO TREATISES OF GOVERNMENT (Everyman’s Library) 190, 193.
14 CARR, DELEGATED LEGISLATION (1921) 46.
15 HART, TENURE OF OFFICE UNDER THE CONSTITUTION (1930) 277.
16 1 COOLEY, op. cit. supra note 2, at 183.
18 1 COOLEY, loc. cit. supra note 16.
state and the emergence of the idea of national sovereignty as
the source of law. Medieval political authorities were not con-
ceived of as being able to legislate. The feudal ruler "promul-
gated" the law, but he did so in the sense in which a modern
executive or judge recognizes or "finds" the law; he did not
make it. "In mediaeval England legislation in its proper sense
was all but unknown. Laws in feudal times are in the main
declarations of existing custom . . . not enactments, but rec-
ords." 19 Written enactments of the law were in the nature of cor-
recting defects in the methods of administering the law, in clari-
fying established law, in reviving obsolete customs, and, if change
occasionally crept in, it was "concealed under a fiction". 20 The
terms "legislator" and "legislation" were sometimes associated
with a vague power in the community which "caused" or gradu-
ally altered not so much the ordinary law as the fundamental
customs determining the nature of the polity. 21 Even as the power
to legislate became an accepted function of government, enact-
ments were relatively few, were restricted in scope, and were
regarded as exceptional. Only by the fifteenth century was the
function of legislating fairly well recognized in England; 22 not
before the seventeenth century was legislation fully assigned a
place superior to common law; and it remained for the nineteenth
century to see it actively and extensively used as a vehicle for
comprehensive and rapid social change and reform. Moreover,
law-making as the supreme attribute of the state was an idea first
stated fairly clearly by Bodin 23 in the sixteenth century and in
the next century more precisely by Hobbes, 24 to both of whom
high places must be assigned in the development of the modern
concept of state sovereignty.

Because of the late development of the legislative phase of
governmental activity and the imperfect understanding of its
nature as well as of the nature of the other primary governmental
activities, there existed in England in the late medieval and
eyearly modern period of history a confused mingling of govern-
mental functions. Historically, the King's Council ("executive"),

19 McILWAIN, THE HIGH COURT OF PARLIAMENT (1910) 42.
20 Id. at 46-47.
21 McILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST (1932)
300-302, 390.
23 ALLEN, A HISTORY OF POLITICAL THOUGHT IN THE SIXTEENTH CENTURY
(1928) 407-425.
24 Hobbes, Leviathan (Everyman's Library) Part II, c. XXVI.
the law courts ("judiciary"), and Parliament were offshoots of the more ancient Curia in which little or no differentiation of function existed. Even after the identities of these three "magistracies" assumed full form, their powers remained indefinite, confused, and interrelated, with the King, theoretically at least, retaining a share in all three. Thus, while statutes came to be made by the King in Parliament, the King in Council retained ordinance and dispensing powers, which, although broadly legislative in character, were usually not derived from Parliament, and the King's justices assisted in preparing legislative proposals, interpreted statutes with great freedom, and exercised what was practically a dispensing power in given cases. Moreover, in the Tudor period there were some sweeping Parliamentary delegations of legislative power to the Crown, as well as assumptions of legislative power by the Crown, which were based neither upon the prerogative nor upon Parliamentary delegations. And withal, Parliament continued to perform acts, sometimes under the guise of enacting statutes, which were in reality executive and judicial.25

Then came the recognition in the seventeenth century of the principle of the supremacy of Parliament as a law making body, but no subsequent logical differentiation of governmental functions was ever worked out. While the Crown's independent legislative powers tended to diminish or to become subordinated to restrictions placed upon them by Parliament, they did not entirely disappear, and, on the other hand, Parliament continued to accomplish much in the form of statutes which was not legislative in essence. In America, the subordinate status of the colonial governments in which the governors were placed in juxtaposition to the legislatures allowed no theory of the supremacy of the legislative branch to develop, but, after the fashion of the English government, the commingling of governmental functions prevailed. This served to fix the traditional idea of the scope of legislation rather than a logical one, the former surviving all the theorizing and constitution-making of the American Revolution.26

John Locke, the protagonist of the philosophical doctrine of the separation of powers and the apologist of the doctrine of Parliamentary supremacy,27 was among the first in modern times to try to isolate legislation both as a process and a product. The influence of his thought was in no small degree responsible for

25 McIlwain, op. cit. supra note 19, at 311-356.
26 Luce, Legislative Problems (1935) 10-32.
27 Locke, op. cit. supra note 13, at 189, 193.
subsequent attempts in the eighteenth century to define and segregate the law making function, notably those of Montesquieu and the framers of the American constitutions. In the light of the facts, Locke too logically identified Parliament as exclusively a legislature, and, it may be added, adopted too inclusive a definition of the term legislation. Montesquieu equally erroneously mistook Parliament for a legislature, but he conceived of it as coordinate with the other branches of the English government rather than supreme. He did, however, assign to it a supremacy in the field of legislation.28 The American constitution-makers of the eighteenth century, who were influenced by both writers, accepted Montesquieu's formula of the coordination of the powers, because it fitted in best with what they were used to in the balanced relationship between the colonial governor and legislature,29 but they embodied in their documents essentially the idea of Locke to the extent of accepting the supremacy of legislation if not of the legislature. Insofar as they defined legislation, however, they thought in terms of the traditional scope of Parliamentary powers.

It is only fair to say that Locke, Montesquieu, and the Americans saw the practical difficulties of attempting to confine all powers which might be legislative in character to a body known as the legislature. Locke paid his respects to what was in effect, even if he did not call it such, the legislative power of the Crown under the prerogative.30 Both Montesquieu and Madison,31 the latter particularly when he sought to interpret the idea of Montesquieu and the actual distribution of powers under the Federal Constitution, admitted that not all the legislative power, but rather the bulk of it, should be given to the legislative branch, in order to allow the theory of checks and balances to have full play. These checks and balances involved executive control over the sessions of the legislature, executive proposals of legislation, the executive veto, the participation of the upper house in certain non-legislative functions, and tacitly if not frankly, certain rule making powers, which the executive and even the judiciary derived directly from the constitution or could exercise from the very inherent nature of their functions. These concessions of the formulators of the doctrine of the separation of powers were made to

30 Locke, op. cit. supra note 13, at 199-200.
tradition, practice, and expediency in regard to just what powers each department should exercise. In fact the framers of the Federal Constitution "did not enter into a philosophical discussion as to whether power was legislative, executive, or judicial in its nature, but deliberated in which one or more of the departments already established by them the given power could with greatest propriety and safety be vested." 32

The fact remained, however, that the bulk of what was thought of as the legislative power in the United States was vested in Congress and the State legislatures. Congress was not only given "All legislative powers," but also the power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." 33 Not only is all power to make laws vested in Congress, but it is given the power of detailed legislation and legislation in the sense of distributing powers which it could not itself exercise, as well as in the sense of passing in statutory form much that is not legislative in essence. Thus, while separation of the legislative power from the other powers is adhered to as a principle, as the legislative power is defined it is broadly comprehensive. It may therefore be argued that our government is one in which powers are commingled or integrated rather than separated.34 All depends on what is defined as legislative and what is considered administrative or executive. Congress may in fact be empowered to invade the administrative and even the executive sphere, but it does so by what is usually legislative in form if not in fact.

III

LEGISLATIVE ADMINISTRATION AND ADMINISTRATIVE LEGISLATION

Sweeping delegations have been made by both Congress and the State legislatures, and the practice of delegating what are in essence legislative determinations is of long standing, but these delegations have not been made according to any logical theory; they have been haphazard and in the main dictated by expediency and necessity. The more common American practice in legislating

34 Willoughby, Principles of Legislative Organization and Administration (1934) c. II.
has continued to be that of enacting detailed and often petty regulations in statutory form, and the practice has increased, actually if not relatively, because of the tremendous increase in statutory output. The crop of private and local bills is still large. In reference to this type of legislation, Luce pointedly asks the question: “When is a law not a law?” which he answers by saying: “When it is private, local, or special.” Indeed much of our “legislation” continues to be of this type and, hence, is essentially executive in character and not even “administrative legislation”. Moreover, American state and local governments continue to be subjected to countless statutes which enact regulations of the most detailed nature and which provide no directing superior even for minor officials other than the words of the statute itself. Thus innumerable little atoms in the executive mechanism are still made to stand on their own little islands of statutory authority with only the legislature and the courts exerting any sort of check upon their activities. This is what Tocqueville characterized as a lack of administration in the United States.

While this type of legislative control has never been carried to such extremes in the Federal government, it is nevertheless true that Congress possesses as part of its supposed legislative function plenary powers of control over administrative structure and procedure. It remains essentially a duty-assigning body, and in parcelling out assignments of power, it may determine in fine detail just how the power shall be exercised, and in effect assume a function which might conceivably belong rightfully to the chief executive or even to a mere administrative bureau chief. This is what Freund describes as “legislative administration” and its existence leads Willoughby to characterize our Congress as a general overseeing agency as well as a legislature. “In point of fact”, he states, “examination shows that the great bulk of the work of our legislative bodies consists, not in the discharge of their legislative function, strictly speaking, but in that of acting in their capacity as a governing authority of the corporation of which they are the board of directors.” And yet, all this sort

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35 Luce, op. cit. supra note 26, at 532.
36 I De Tocqueville, Democracy in America (4th ed. 1864) 87-122.
40 Willoughby, op. cit. supra note 34, at 134.
of so-called lawmaking in the United States takes the form of statutes and is conceived of as a fulfilment of the legislative function. Such legislative control of administrative activity has, to a large extent, disappeared in Great Britain, but it is still true that Parliament is constitutionally supreme. This enables it in law to do anything, and since its customary mode of action is to enact statutes, it may descend even to minutiae in making known its omnipotent will in legislative form.

It matters little that broad delegations are now characteristic of most British and many American enactments; no matter how broad they may be, the power thus delegated is the power of the legislature, or, even if in some cases it is power which the legislature may not or cannot itself exercise, it is the function of the legislature to give it or withhold it, and, if given, to determine where it shall go and how it shall be used. Thus the rule-making power of both the British Crown and the American Executive are to very large extent not inherent, but delegated. Inherent legislative power in Great Britain, or the power to issue the type of Orders in Council derived from the prerogative, is now quite restricted. A limited amount of ordinance power of a legislative character exercised by the President of the United States is derived directly from the Constitution; hence, most "legislation" by the administration is now based upon delegations.

In strong contrast to the British and American situation is that which prevails in France and most other European democracies. "In foreign countries", writes Dicey, "the legislature generally confines itself to laying down general principles of legislation, and leaves them with great advantage to the public to be supplemented by decrees or regulations which are the work of the executive." Indeed, in France it is considered an usurpation of executive power for Parliament to do more than ordain general policies in statutes, and, when it comes to the organization of the administrative structure, it is thought by many that any statutory regulation at all is "unconstitutional". Duguit in distinguishing between Parliamentary statutes and Presidential decrees or ordinances of legislative character states that statutes "are general limitations on the full activity of the individual. Ordinances are

41 Beard, Squirt-Gun Politics (July 1930) 161 Harpers 147.
42 Ilbert, op. cit. supra note 10, at 11, 12, 137.
43 Report, supra note 5, at 24-26.
44 Hart, The Ordinance Making Power of the President of the United States (1925) c. III.
general regulations of which the purpose is to organize and operate some public service;” the main distinction beyond that of content being that “an ordinance may be attacked for illegality while statutes are not subject to legal defect.” 46 Ordinances themselves are classified as follows: (1) those based upon delegations from Parliament; (2) those which “complete” a statute although not on the basis of a delegation; and (3) those which have no connection with a statute.47 When ordinance power is delegated by a statute, a usual statutory formula is: “an ordinance of public administration shall determine the measures proper for securing the execution of the present law.” 48 The third type represents legislative power considered inherent in the President of the Republic to issue ordinances “which are in no wise attached to a formal statute and are yet generally accepted as valid.” 49 This type is the most numerous and is used even to establish executive departments, a power only recently permitted in the United States in the creation of some of the new administrative agencies, and then on the basis of Congressional delegation. While it is true that the French Parliament has attempted to set certain limits on this power, the Executive has been largely successful in resisting them and has insisted that Parliament’s control of the Executive should not be through statute, but through ministerial responsibility.50

Thus it may be seen that what constitutes legislative power and the legislative product, as well as in what governmental agencies the power may be vested, are matters which are determined in no uniform manner. Legislation may take the form of: (1) statute law, insofar as it does not invade the realm of purely executive orders; and (2) administrative ordinances, which lay down legal rules applicable to all or a class of future cases, and which, if valid, have the effect of statute law. These ordinances may be made by administrative agencies: (a) under direct prerogative or constitutional grants, or under constitutional custom or “inherent” power; (b) under statutory provisions which delegate the power to supplement or “fill in” the terms of the statute or to determine upon a contingency governing the time when the statute shall go into force or its enforcement terminated; and (c) under no constitutional or statutory authority for the purpose of supplementing the terms of a statute. In Great Britain statutes

46 DUGUIT, LAW IN THE MODERN STATE (Translation by Frida and Harold Laski, 1919) 82.
48 Quoted from SAIT, GOVERNMENT AND POLITICS OF FRANCE (1920) 46.
49 DUGUIT, op. cit. supra note 46, at 81.
50 SHARP, op. cit. supra note 47, at 30-31.
were formerly detailed; in the United States they are still frequently so; in France and other parliamentary countries almost never. In the first two, administrative ordinance power of a legislative character is common, but is most frequently based on statutory delegations; in the others the independent ordinance power is great, particularly when it comes to creating and assigning duties to administrative agencies, and the power to supplement statutes invariable and usually extensive.

The power of the administration, and even of the legislature itself, to enact the details of legislative content, and the power of the administration upon occasion to determine general legislative policy, has been defined as "administrative legislation". It is a term used, not always with the same meaning, by political scientists in Great Britain and the United States, but it has as yet acquired little or no status in their law and legal literature. It exists in these countries in fact, and insofar as it is enacted by administrative agencies it is received by the courts almost as generously as if it had been enacted in the statute law, but in the United States it is not called legislation by the courts and is subjected to certain constitutional restraints, and in Great Britain its seemingly excessive use is looked upon with suspicion particularly by jurists. The reasons for this are obvious from what has previously been said, and they may be summed up in the persistent survival in both countries of what may be termed the constitutional principle of the supremacy of the representative assembly in the field of legislation. This explains the fact that most legislation by the administration is based on parliamentary delegations. In Continental European systems of government, administrative legislation has been accorded full legal status. Some French and other legal and constitutional authorities even go so far as to conceive of what we call the rule making, sub-legislative, or quasi-legislative function as almost a distinct governmental function, intermediate as to the legislative and executive functions and partaking of the nature of both—a function serving to render statutory or general legislative policies capable of applica-

51 Cheadle maintains that the function of administrative legislation "includes all acts legislative in nature beyond the adoption of the broad policy", and he adds that the legislature itself "performs essentially administrative functions when it works out details in the application of the policy". Supra note 38, at 897. When, however, administrative authorities also lay down the general policy, the term, administrative legislation, may be applied. Thus both the content and the source may govern the definition. Consult also: Pfiffner, Public Administration (1935) c. 20; Luce, op. cit. supra note 26, c. 16; and Fairlie, Administrative Legislation, (1920) 18 Mich. L. Rev. 181.
tion and, hence, necessarily antecedent to the exclusively executive function of enforcing them.footnote{52}

This theory has a claim to logic and is of some practical value even in an analysis of administrative legislation in the United States, for it suggests a supreme difficulty in drawing a clear line between minute rules which might be classified as legislative and not very different rules which are plainly executive. Indeed, the scope of a so-called legislative rule might be so narrow as to allow it to be almost if not quite executive in character. A legislative rule should bear the earmarks of some degree of generality and futurity, an executive rule should apply to a special case of enforcement at the present, but in attempting to classify particular rules, there are cases where a distinction is difficult.footnote{53} Just as it may be hard to draw the line between what may be called the policy-framing and the detailed elements in legislation proper, so is it well nigh impossible to distinguish border line cases of administrative legislation and executive commands. It is also difficult at times to distinguish administrative acts which are judicial from those which are legislative or executive. These problems not only result from the nature of the acts themselves, but because all three powers may be vested in the same administrative body or commission, as, for example, the Interstate Commerce Commission and the Federal Trade Commission. Another reason for difficulty is the lack of any standardization in the nomenclature applied to orders in which different types of power may be exercised. A variety of terms may be applied to orders of a legislative character; the same term may apply to both legislative and executive and even judicial orders or decisions.footnote{54} It is true that certain administrative acts may defy classification, but the great majority may in each given case be labelled "legislative", "executive", or "judicial".footnote{55} Loose use of terms and the necessity of resorting to legal fictions on the part of American courts in many cases conduces to further confusion.footnote{56} It may be argued that careful distinctions here make little difference. The answer is that occasionally they may make great difference. A franker acceptance of administrative legislation by American courtsfootnote{57} and a more

footnote{52} Hart, op. cit. supra note 44, at 40.

footnote{53} Pfiffner, op. cit. supra note 51, at 415-416.

footnote{54} Ibid.


systematic classification of different types of administrative orders would conduce to greater justice, more efficient government, and, it may be added in regard to systematic classification that it would result in a more carefully worked out differentiation of procedures to be applied when administrative authorities are exercising different powers. This would allay some legitimate criticisms of the so-called administrative process and would go far in eliminating what is sometimes characterized as “Star Chamber” or “bureaucratic” technique.

IV

DELEGATED LEGISLATIVE POWER

While the practice of delegating Parliamentary power began in England at least as early as the Tudor period, it came to an abrupt end with the establishment of Parliamentary supremacy and was not again revived in any marked degree until the middle of the nineteenth century, when social changes began to come rapidly and to augment the use of the legislative power in fields where the subject matter was too intricate and technical to be cared for in detail by statute. Even then, however, the practice did not establish itself at once. In fact, it could be said until comparatively recently that “The cumbersomeness and proximity of English statute law is due in no small measure to futile endeavors of Parliament to work out the details of large legislative changes.” The time arrived, however, when Parliament found it increasingly difficult to discover what its will was in many matters; hence it was forced to delegate to the King in Council, to the ministers, or to subordinate administrative agencies the privilege of willing for it, sometimes completely, but always with the power to rescind what had been granted. This tendency became marked near the end of the nineteenth century, was greatly accentuated during the Great War, and has since continued.

In the United States, delegations of what was substantially legislative power were made on a generous scale to the President

58 State ex rel. Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 220 N. W. 929 (1928).
59 Carr, op. cit. supra note 14, at 50.
60 Dicey, op. cit. supra note 45, at 50; Many private bills and provisional orders are still enacted or approved by Parliament, but the subject matter of private bills tends more and more to be delegated. Ilbert, op. cit. supra note 10, at 137.
61 See Willis, op. cit. supra note 8, c. I.
from 1789 to 1824. From 1824 to 1860, although there was more of a tendency to delegate detailed legislative determinations to subordinate officials, the delegations to the Chief Executive were more restricted. More extensive delegations to the President and his subordinates marked the period of the Civil War and Reconstruction, and thereafter the growing functions of government required a continuation of the practice.62 Beginning with the establishment of the Interstate Commerce Commission in 1887 and the subsequent multiplication of boards of a similar nature in both the federal and state governments, there developed a new type of administrative agency 63 which came to be looked upon as primarily quasi-legislative and quasi-judicial in its functions and to which very broad powers of a legislative character were delegated on the assumption that it was a direct agent of Congress or the State legislature with respect to these powers.64 With the continued expansion of governmental functions after 1900, the necessities of the Great War, and the advent of the “New Deal” Administration in 1933, the practice of delegating legislative powers to the President, executive subordinates, and administrative commissions greatly increased. Such new and extensive uses were made of it in the legislation of the National Recovery program that the United States Supreme Court in 1935 for the first time in its history “called a halt.” The delegations made from 1789 on, as previously noted, have been of two general types: supplemental legislative power; and contingent legislative power; 65 both types sometimes being provided in the same statute, a combination quite common in much of the “New Deal” legislation.66 Other types of delegations of legislative power have been from Congress to the States,67 and from State legislatures to National administrative authorities,68 local governments, and the people of

62 Comer, op. cit. supra note 8, c. III.
65 Comer, op. cit. supra note 8, at 26; Blachly and Oatman, op. cit. supra note 8, at 19-30.
the State or of some subdivision of the State to allow them to
determine by referendum whether or not a particular statute
should become effective. 69
What, then, have been the constitutional and legal theories
which have permitted these invasions of the supremacy of the
legislature? In the case of Great Britain, there are no constitu-
tional limitations to restrain Parliament from assigning power
where it will. It is true that English courts have always exer-
cised a broad power of interpreting statutes, and they have
complete freedom to invalidate what they consider to be ultra
vires attempts to use delegated power, a matter that in France
and other European states is left to administrative courts. It is
possible for Parliament to frame a statute in such a manner as to
abdicate its entire power of legislation for the duration of the
statute, that is, to delegate its right to frame the general policy of
the law as well as the power to determine the details which are
necessary to carry it out. It is also possible to place in a statute
the "Henry VIII Clause", so called because it was first used in
several statutes enacted by Parliament in the reign of that
monarch, and which gave the King and Council power to make
laws which "shall be of as good strength the vertue and effecte as
if they had been hadde and made by authoritie of Parliament." 70
This practice was short-lived, but it has been revived in recent
years in regard to sub-legislation and has been the object of much
criticism because of its preventing judicial review of orders so
authorized, although the House of Lords in the recent Yaffe
Case 71 was able to set up some slight judicial check upon the
practice. 72 The subordination of American legislatures, on the
other hand, to the grants and restrictions of written constitutions
has operated to cause our courts to review, and occasionally to
invalidate what were looked upon as alienations by the legislature
of its essential legislative power. In Great Britain, excessive
deg�\ations of Parliamentary powers are political concerns; in
the United States, they are primarily judicial. Attention may be
directed, therefore, to a summary of the constitutional and legal
status of legislative delegations as determined by the Federal
courts with some passing reference to important State decisions.

69 Duff and Whiteside, Delegata Potestas Delegari, a Maxim of American
70 Statute of Wales, 34 & 35 Henry VIII, c. 26, § 59.
71 Minister of Health v. The King (on the Prosecution of Yaffe), [1931]
A. C. 494.
72 Consult: WILLIS, op. cit. supra note 8, at 38-61; Report, supra note 5,
at 30-41.
American courts, in the first place, have been guided by the constitutional principles of the separation of powers and of popular sovereignty as the source of constitutions. These principles, however, are not legal rules. What gives them legal vitality is the legal maxim, delega potestas non potest delegari, which was derived from the law of agency. Thus legislative powers delegated by the sovereign people may not in turn be delegated. This rule has been followed practically unanimously in all cases in which delegations have been involved. The one exception granted by the courts is that which permits delegations of legislative power to local governing units. Thus State legislatures may delegate such power to municipal corporations and Congress to the District of Columbia and the Territories. It may be added that legislatures may delegate any power not legislative in character which they themselves might rightfully exercise. In general, then, no legislative power vested by a constitution in the legislature may be delegated to an administrative agency or to the people. That this should be the universal holding in the face of continuous and sometimes sweeping delegations of what, by every test, amounts to legislative power seems patently absurd, and from a practical or non-legal viewpoint it is absurd. In the words of Justice Rosenberry the courts "under one pretext or another have upheld laws in recent years that undeniably would have been held unconstitutional under conditions that existed prior to the Civil War . . . there is an overpowering necessity for a modification of the doctrine of separation and non-delegation of powers of government. In the face of that necessity courts have upheld laws granting legislative power under the guise of the power to make rules and regulations; have upheld laws delegating judicial power under the guise of power to find facts. . . . The public interest would be greatly advanced and our law clarified if the situation as it exists were frankly recognized. . . . It only leads to confusion and error to say that the power to fill up the details and promulgate rules and regulations is not legislative

73 Frankfurter and Landis, A Study in the Separation of Powers (1924) 37 HARV. L. REV. 1010.
74 Duff and Whiteside, supra note 69, at 168-174; Cincinnati, W. & Z. R. Co. v. Commissioners, 1 Ohio St. 88 (1852).
75 COOLEY, op. cit. supra note 2, at 224; contra: State ex rel. Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 220 N. W. 929 (1928).
77 COOLEY, op. cit. supra note 2, at 228.
power. . . ." 78 To repeat Mr. Justice Holmes: "It is said that the powers of Congress cannot be delegated, yet Congress has established the Interstate Commerce Commission, which does legislative, judicial, and executive acts, only softened by a quasi. . . . It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments. . . ." 79 For the courts to persist in maintaining the rule of non-delegation means that they approach, if they do not enter, the realm of legal sophistry; they are merely upholding the letter of our constitutions with the aid of a legal maxim which has been read into the documents.

The federal courts and, to a large extent, the state courts have, nevertheless, been generous in upholding delegations of legislative power, even if "softened by a quasi". In the Brig Aurora, 80 and Martin v. Mott, 81 early decisions of the United States Supreme Court, delegations of contingent legislative power to the President were upheld. In Wayman v. Southard, 82 Chief Justice Marshall stated that "the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is the subject of delicate and difficult inquiry, into which a court of law will not enter unnecessarily." While a number of early state decisions strictly applied the non-delegation rule in the case of statutes which were to have gone into effect when approved by referenda, other decisions were liberal, recognizing the maxim, but upholding delegations of what was practically legislative power. 83 After the extensive delegations which marked the advent of quasi-legislative commissions, the maxim continued to be cited, but the courts, on the whole, were "broad-minded". This was uniformly true of the decisions of the United States Supreme Court until the recent holdings in regard to the National Industrial Recovery Act, 84 but in most of

80 7 Cranch 382, (U. S. 1813).
81 12 Wheat. 19, (U. S. 1825).
82 10 Wheat. 1, 46, (U. S. 1825).
83 People v. Reynolds, 10 Ill. 1 (1848); Bancroft v. Dumas, 21 Vt. 456 (1849); Cincinnati, W. & Z. R. Co. v. Commissioners, 1 Ohio St. 88 (1852); Bull v. Read, 13 Gratt. 78 (Va. 1855); Locke's Appeal, 72 Pa. 491 (1873).
its pronouncements the Court has paid lip-service to the time-honored rule.

What has always been insisted on has been that Congress set forth a "standard" or policy in the statute or that the power of legislation be not completely abdicated. In other words, Congress must exercise its essential legislative or policy-forming function. In the Panama case, which involved delegation of the power to the President to prohibit the flow of "hot oil" in interstate commerce, the Court said: "... we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition." 85 "The Congress", the opinion goes on to say, "manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions. ... The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply." 86 These essentials the Court had stated in many previous cases. 87 Continuing, another point previously decided is repeated, namely, that "Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but futility." 88 Thus it is admitted that the delegation of quasi-legislative rule-making power may be essential to render the legislative power effective. 89 "But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." 90 Thus the Court is aware that it has allowed necessity to govern its decisions in the past, but

85 293 U. S. 388, 415 (1935).
86 Id. at 420, 421.
89 Buttfeld v. Stranahan, 192 U. S. 470 (1903).
at last the point is reached when the maxim of non-delegation has been violated. Moreover, still another principle enunciated in previous decisions was violated by the act here in question, namely, that "If the citizen is to be punished for a crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown." 91 Indeed, in the Panama case one finds nearly all the points involved in previous cases and in every instance the Court here finds a violation of these principles.

The Schecter case,92 involving the constitutionality of the NRA codes, invalidated the grant to the President to determine what constituted "Codes of Fair Competition", which codes were to become law upon his approval. The Court objected to the term "fair competition" as too indefinite an expression of statutory policy. The act, it said, did not define the term, which obviously was much broader than the "unfair competition" known to the common law or as expanded by recent law, and at any rate, the codes covered more than matters involving "fair competition". Moreover the statements of the "policy of this title" were, in general, too broad, ambiguous, and indefinite for the Court to accept. The Court also wondered how it could be "seriously concluded that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries." These bodies could not be constituted legislative bodies, for "such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress." Nor could Congress delegate an unfettered approval power to the President. These codes purported to have the effect of criminal statutes, which only presidential discretion and not the Act gave them. The presidential "finding of fact" that was required, namely, that a code "will tend to effectuate the policy of this title", was not, the Court held, the usual finding provided by previous laws, but only the "statement of an opinion". The conditions surrounding the finding were not pre-

91 Id. at 432; In re Kollock, 165 U. S. 526 (1897); Wichita Railroad and Light Co. v. Public Utility Commission of Kansas, 260 U. S. 48, 59 (1922); Mahler v. Eby, 264 U. S. 32, 44, (1923).
scribed by the statute but could be imposed by the President at will. The act, in short, provided no standards, but rather gave voice to a vague aim of rehabilitation; it left the code makers, with the approval of the President, to set the standards.

V

THE PRESENT PROBLEM

That the National Industrial Recovery Act far exceeded in its delegations of legislative power any previous grants may not be difficult to see. The question still remains, however, "what is a standard?" It is obvious that past delegations have been very broad, particularly to quasi-legislative commissions. How much of a standard has been set up when a commission is limited by nothing more definite than that its rates be "just and reasonable", and that its rules be "consistent with the public interest." If these vague terms are to be given meaning in the last analysis by the courts, then it is obvious that the judicial branch throws itself open to the charge of usurping legislative authority. Moreover, many of the matters subject to the jurisdiction of bodies like the Interstate Commerce Commission are of such technical character as to preclude competent disposition by general legislative assemblies, and the boards themselves are compelled to enunciate legislative policy. Furthermore, in the making of particular rules, "Considering the nature of the subject matter dealt with, it is quite apparent that any attempt on the part of the legislature to prescribe a standard would result in effect in a prescription of the rules and regulations themselves . . .", which would defeat the very purpose of such commissions. Perhaps, in allowing vague statutory standards to be set for quasi-legislative commissions, the courts distinguish them from "executive" officials to whom delegations of legislative powers are also frequently made. Innumerable decisions vaguely differentiate between "administrative" and "executive" authorities. A recent decision of the Supreme Court determined that the Federal Trade Commission was primarily a quasi-legislative and quasi-

95 State ex rel. Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 220 N. W. 929 (1928).
judicial body and that its members were not a part of the executive branch in the sense that the President could remove them at will as he could “executive” officials.96

These are matters which betray a lack of logic on the part of the courts in regard to the whole question of what should be embodied in statutes on the one hand and administrative rules on the other. The necessity of each case has indeed governed the courts rather than pure reason, and the recent important cases are no exception. If these seemingly prodigal and ill-drafted delegations of the “New Deal” statutes violated all proper ideas of a statutory standard, the fact remains that the principles governing delegations previously developed by the courts were so far flouted that the recent decisions do little to clarify the meaning of the term “standard”. One matter is clear, however, and that is that necessity may force some change in the judicial ideas of legislative standards. Courts need to guard against applying stricter exactions in regard to standards for new and experimental statutory policies than they apply to well-established ones.97

Is the matter, however, one for the courts alone to determine? Does not the legislature have a responsibility in clarifying concepts, and a powerful check as well on administrative agencies whose powers may be used excessively? Regardless of how much legislative power may be delegated, it is not the amount of power thus delegated that so much matters as that it be fairly and efficiently used. What is most to be desired is that the law be made by the authority best qualified to make it. That authority in many cases is not the legislature. It is well and good for the legislature to confine itself to formulating general policies, but it may be more important at times for it to exert its judgment on the application of a general policy of legislation enacted by another agency than to waste time ineptly at the start attempting to formulate the policy. The conditions to which a law is to be applied may not be discernible to the legislature beforehand. Quasi-legislative bodies oftentimes are able to acquire more ac-

97 Freund states that the practice of delegation is most firmly established in the regulation of public utilities and that “the long-continued practice of delegation also tends to remove the objection on constitutional grounds”. Freund, op. cit. supra note 10, at 218-219; Maurer, Some Constitutional Aspects of the National Industrial Recovery Act and the Agricultural Adjustment Act (1934) 22 GEORGETOWN LAW JOURNAL 207; Shilling and Wise, Constitutionality of A. A. A. Processing and Floor Stocks Taxes (1935) 4 GEO. WASH. L. REV. 43.
curate information. They frequently may more efficiently undertake investigations than legislative committees. They may even be closer to the public. Administrative agencies are tending more and more to establish and maintain constant contacts with interested groups of the public.\textsuperscript{98} A franker recognition of their legislative functions would aid in developing and regularizing procedures in formulating and enacting rules.\textsuperscript{99} Such would be conducive to the establishment of a standardized nomenclature for legislative rules\textsuperscript{100} and of requirements for the regular publication of such rules for the better information of those affected by them.\textsuperscript{101} Thus the legislature would be placed in a better position to exert a real oversight, and the courts, less concerned about maintaining the doctrine of separation of powers and the maxim of non-delegation, could perform their most legitimate function of seeing that the law is justly and properly applied.

It is obvious, therefore, that legislative powers, far from being confined to the legislature, must of necessity be shared by other agencies of government. The functions of the three departments of our government have always been commingled, but they are rapidly becoming more and more so. If popular control of government is to be maintained in a state where many and intricate phases of life must be regulated or controlled by expert bodies, the proper relationship must be established between the agency making fundamental decisions and the administrative body responsible for carrying them out. Neither must do more or less than it is equipped to do or ought to do in the interests of both the public demand and the public need.

\textsuperscript{98}\textit{Herring}, \textit{op. cit. supra} note 10.

\textsuperscript{99}\textit{Comer}, \textit{op. cit. supra} note 8, c. VI; \textit{Freund}, \textit{op. cit. supra} note 8, at 220-221.

\textsuperscript{100}\textit{Baesler}, \textit{supra} note 39, at 507.

LAW TEACHING AND PRAGMATISM

CARL C. WHEATON *

THERE CAN BE NO DOUBT that most law schools wish, in the best possible way, to prepare their graduates to meet the problems which they as lawyers must face. The question is as to how this can be done. Shall the students devote all of their time to law books of different types? Apparently, such men as Langdell and his followers thought, and still believe, that to be the proper system. Or is it better that they spend but little time in the study of appellate court decisions and textbooks and put most of their effort into attendance on court proceedings and office practice? An exponent of this idea seems to be Jerome Frank.1 This paper will, for the most part, evaluate Mr. Frank's ideas which are found stated in two articles prepared by him.2

To me, there is no question but that too little emphasis is placed by the usual university law school on what actually happens in active practice. The query is, what is the correct emphasis to be placed on theory and performance? Let us examine Mr. Frank's suggestions. His general idea is that "the law school would resemble a sort of sublimated law office."3 This does not mean that there would not be any study of books. "A few of the current type of so-called case-books should be retained to teach dialectic skill in brief-writing."4 Apparently, very few of these volumes should be used, for our author says, "in most University law schools the major part of the three years is spent in teaching a relatively simple technique—that of analyzing upper court opinions, 'distinguishing cases', constructing, modifying or criticising legal doctrines.

"Three years is much too long for that job. Intelligent men can learn that dialectical technique in about six months. . . .

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1 Frank, What Constitutes a Good Legal Education (1933) 19 A. B. A. J. 723.

2 Ibid. and Frank, Why Not a Clinical Lawyer-School (1933) 81 U. of PA. L. REV. 907.


Teach them the dialectic devices as applied to one or two fields and they will have no trouble applying them to other fields." 

The trouble with Mr. Frank here is that his mind is so keen and, when he began to study law, he had so much ability to reason things out that he did not need a long period of training to develop his dialectic talent sufficiently for a lawyer's purpose. The result is that he cannot realize that a large percentage of those men in law schools who can attain a well developed dialectic mind need much more than six months of training in which to do it. I know this to be true from the experience of twenty years of legal teaching.

What other suggestion is made concerning books to be used in a law course? "Six months properly spent on one or two elaborate court records, including the briefs (and supplemented by reading of text-books as well as upper court opinions) will teach a student more than two years spent on going through twenty of the case-books now in use." I beg to ask how many text-books and upper court opinions, in addition to one or two elaborate court records, including briefs, could be properly studied in six months by a conscientious, mentally well-equipped student? There certainly can be no objection to the examination of court records. Every scholar in a law school should have that experience. It is a splendid thing to read a good text-book in each course taken, for doing that supplies information relating to principles of law which lack of time does not permit one to cover during classes. Personally, I require such collateral reading. But to suggest that in two-thirds of a school year one can read even one elaborate court record of hundreds of pages and examine enough text-books and appellate court opinions in such a way as to do him more good than two years spent on going through the present type of case-books is more than I can understand. The single record can not be properly studied in a short period. Then, according to Mr. Frank's own statement, it would take an intelligent man about six months in which to develop the technique to be acquired from the reading of appellate court decisions. That doesn't leave a great deal of time in which to read the texts. The fact is that, after a thorough investigation of the records suggested, but few cases and not to exceed four or five text-books could be read in six months with even a fair degree of thoroughness by anyone other than a brilliant scholar. That would mean that information to be gained by the study of about fifteen case-books would be lost. Some may believe that is unimportant, for they think that the

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knowledge of what the principles of law are amounts to little. They will be forgotten and must be learned anew from time to time after one enters practice. Though many legal doctrines heard of during school days may not always be retained in a lawyer’s memory, it is necessary to study various courses so that one may, at least temporarily, have at his command information sufficient to carry him over the hurdle of a bar examination. Some believe that for a teacher of law, even to think of such a thing as a bar examination is heresy, but I venture to say that even the distinguished students of law believe that that test should be kept in mind by their instructors. It may be that Mr. Frank intends to spend more than one six months period on the reading of records, cases, and texts. If he does, more law subjects than the four or five mentioned can be covered, but it will leave less time for other things to be done during his course of law. Moreover, the six months mentioned cannot cover the entire time to be spent in the analysis of appellate court opinions, for at least that much time was to be devoted entirely to the teaching of that technique.

Having disposed of cases, texts, and records in a few months, what does Mr. Frank recommend should be done during the remainder of the law course? The student should move into a law office. This must be true, for in no other place could he do most of the proposed work. In the abstract, the idea is a good one. But how is he going to get there? He usually isn’t wanted. He shouldn’t be placed in the office of a poor lawyer with little work. Rather, he should work only with an advocate of ability who has considerable business of various types. Almost always there is no place in such an office for any but the brilliant students, and, even for them, entrée is difficult. The lawyers do not want to bother with students. They have a living to make. Their time is valuable. This statement is not guesswork. For years I have had occasion to place students in law offices and have tried to do it, for I believe that is the place for them to spend some of their time each year.

Let us presume that all law students can find ready access to law offices. What would Mr. Frank have them do there? For one thing, they should have an opportunity to practice “creative draftsmanship”—the use of fact-materials thrown at the lawyer by his client and worked out in negotiations with counsel representing the other party to the bargain. If that could be worked out, it would be an excellent thing. The difficulty is that for drawing of papers to be of appreciably greater value than draftsmanship it can, and should, be a part of the work of the present
type of law school. The law office student should sit in on conferences between the lawyer whose protégé he is and the client who has papers to draft. I doubt that both the lawyer and client would care to permit this in many cases. One or the other most often would not wish to divulge his business to a law clerk. The same practical objection applies with even more force to the recommendation that the student should observe, "The corporate director's meeting, the title closing . . . , the negotiation of settlements . . . trusts in action, wills in action . . . ." 7 If the prejudice against the presence of the student at these meetings can be overcome, and I seriously doubt that it can be eliminated, I believe, as I always have thought, that the student would be greatly benefited by attending them.

"Professional ethics can be effectively taught only if the students while learning the canons of ethics have available some first-hand observations of the ways in which ethical problems of the lawyer arise and of the actual habits (the 'mores') of the bar." 8 There can be no doubt that seeing ethics in action is an effective method of learning of proper ideals for a lawyer, but I am of the opinion that by reading what appellate courts and others say concerning the proper conduct of lawyers generally, and as applied to particular situations, one can get a very good idea of how an advocate should act professionally. It is impractical to expect many students to witness ethics in action in law offices, for, as already stated, they are persona non grata there, but actual experience gained in a school's own legal clinic is a practical possibility. Again, how many ethics problems would arise during a student's stay in an office?

Now, we proceed to the court room. "Law students should be given the opportunity to see legal operations. Their study of cases should be supplemented by frequent visits, accompanied by law teachers, to both trial and appellate courts. The coöperation of judges could easily be enlisted." 9 Could anything truer be said?

Before attending court the students should be told what to look for. After they and their instructors have visited the courts, there should be a thorough discussion by them of what they have seen and heard. Have the lawyers conducted the proceedings in the best possible way? If not, what should they have done? Were the court's rulings correct? My experience has been that courts will aid in making these visits of value. Judges have set salaries

9 Id. at 916.
and need not worry about the loss of a few minutes time. After this excellent advice concerning attending courts, Mr. Frank says that obviously "sham law-school trials can do little more than 'afford amusement' or serve 'as a relief to tedium'. They are, indeed, not the equivalent of serious work."  

In this I disagree decidedly. Such trials do not provide the best training. That is found by active participation in actual proceedings. But opportunity to obtain the benefit of such active court practice can to-day seldom come to a student. One of the most effective substitutes is the sham trial. I have learned this over a long period of years. The student discovers the general manner in which a trial is carried on. He almost always makes every effort to do well before those attending the trial. He argues preliminary motions with earnestness. Can one conscientiously claim that the result is little more than an affording of amusement and a relief to tedium, and that they are not the equivalent of serious work? By way of interpolation, I call attention to a question put by Mr. Frank. "Are the students [at Harvard] urged to attend those [Boston] courts frequently?"  

The suggested answer is, "No". I wish in fairness to that school to say that, at least in my day, the answer was, "Yes", and many of us were very often visitors at those courts. In fairness to Mr. Frank, I should add that we went alone.

While students are attending courts, Mr. Frank proposes that, "Some considerable attention should be given to the art of the judge. With the help of able judges, many of whom would be delighted to lend a hand, students can be taught something of how trials and decisions look from the bench. In that way those students who will later become judges can learn something about their future jobs."  

That is well said. Mr. Frank appears to think, at this point, primarily of the future judge. This experience should greatly aid one in learning of a judge's psychology which would help an attorney to try and argue cases more effectively.

Before the student leaves the courthouse, Mr. Frank would have him undertake "factual studies of litigation and procedure such as those conducted by Yntema and Oliphant at Johns Hopkins," for they serve to disclose what courts and lawyers and clients are actually doing. If we could have large enough facul-

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10 Id. at 917.
13 Id. at 922.
ties so that this work could be correctly supervised, if the rest of the curriculum could be arranged to give a proper amount of time for such a study, and if the students were capable of such work, there might be some value in the proposition. Even granting the availability of instructors to supervise such work, from my experience with much student help, I doubt the practicability of the idea, though, with the more brilliant students, something might be done. It is to be remembered, however, that the proposed plan is to apply to all students.

Now, we return to the classroom. Mr. Frank adds to the law curriculum "first-rate courses in logic and psychology with specific references to legal thinking." The idea that law students should have training in logic and psychology is not a new one. It existed in my college days twenty years ago, but the thought that there should be law school studies in these subjects is somewhat more recent. From what I know of college courses in logic and psychology, they do not give a lawyer an adequate training in those sciences. They seldom deal with legal problems, though they do teach the general technique which can be applied to legal problems by a good thinker. I am surprised that Mr. Frank does not consider this sufficient, since he believes that after applying the dialectic technique to one or two subjects a student should be able to use it in relation to any subject. Whether there would be time to work the subjects into the law school curriculum under Mr. Frank's scheme is doubtful. An arrangement should be made by him to carry out his idea to include them. What a wealth of opportunity there is to apply the principles of psychology while studying such subjects as evidence and trial practice. Even pleading is a field touched by psychology.

To round out his curriculum, Mr. Frank says, "For the sake of those students who may become teachers, there should be some courses in the art of teaching law." Whether he intends to give this instruction during the regular course of study he does not state. If these courses are not to be a part of a period of post-graduate study, the question of time should be considered. Could this be done along with all the other things proposed? If not, what would Mr. Frank leave out of his curriculum so that the art of teaching might be delved into? If, on the other hand, sufficient time is provided for this additional work, the suggestion seems to me to be a good one. Once a famous law teacher and I were

14 Ibid.
talking about that very thing. I believed that proper contents for such study could be provided, but he doubted it. He said that teaching was an art that must be worked out by each person in his own peculiar fashion. It seems to me there are some things that should be done by every teacher and these could be taught to prospective instructors of law. This is a reasonable idea though, naturally, some people would do them better than others and each teacher would learn of additional things he could do to perfect his teaching.

After giving us his idea of the correct content of a law course, Mr. Frank tells us of the preceptors in his suggested school. "Most of the teachers would be actively engaged in the practice of the law, although some of them would be studying, somewhat more remotely, the solution of the governmental and business and social problems with which 'the law' deals." In saying what I do at this point, let it be understood that I am not attacking the sincerity or the ability of any practitioner, either on or off the bench. I am merely stating an opinion gained from years of personal knowledge. That belief, which is very definite, is that Mr. Frank's plan to employ active practitioners to aid in much of the law school training is most impractical. The practitioners can teach practice courses, but, aside from that, they are unavailable, unless they are experts in their subjects. Nearly all active practitioners have almost no time to prepare lectures. I am not being theoretical when I say that. For several years I was associate dean of a law school whose faculty was composed almost entirely of practicing lawyers and judges. For the most part, they were excellent men. But they were busy. They came to class unprepared. With books before them, they would read to the students. I know this to be true, for students told me of the situation, and I have sat in their classrooms and seen and heard the same thing take place. Even if these men were experts, they would have to spend considerable time in preparation for each class, for every teacher knows that even after teaching a course for years he should, on the average, spend hours preparing for each class. This, of course, includes time in adding to his information from year to year. Often even these experts cannot get the time to prepare lectures based upon the books ordinarily used in law schools. The result is clear that very few practitioners should teach anything other than trial practice, though, if practitioners are to teach other subjects, they should be experts in the subjects

they are to expound, for it will probably take them less time to prepare their lectures than will be the case with non-experts. Presume that these experts are to be used. Where are they to be found? Almost exclusively in the large cities. The result is easy to contemplate. If they are to do the bulk of our teaching, all law schools not already there must move to the large cities. That might be a good thing, though I give no opinion as to the propriety of such a move. However, I venture a guess that many school authorities would balk at the idea.

It should be added that Mr. Frank believes that nearly all law teachers should have at least five years of variegated practicing experience before becoming instructors of law. To my mind, there can be no doubt that some practice experience is a real asset to a teacher. I doubt that the suggested minimum should be established. Rather, the prospective teacher's ability and the type of practice experience which he has had should be considered when the question of his employment as a teacher arises. With some men, less than five years of active practice should suffice as a proper background for entering the profession of law teaching.

As a devastating shot at the present roll of law teachers, Mr. Frank says, "It is probably true that a majority of the teachers in some of our university law schools have never met or advised a client, consulted with witnesses, negotiated a settlement, drafted a complicated contract, lease or mortgage, tried a case or assisted in the trial of a case or even written a brief or argued a case in upper court." That statement interested me, for I believe that if such a condition exists it should be corrected as new men are employed. So I investigated the records of the teachers in all of the schools which are members of the Association of American Law Schools. My authority was the "Directory of Teachers in Member Schools" for 1935, which contains the professional history of those instructors. If that source of information is correct, and I believe it is, the supposition of Mr. Frank is erroneous. There are some teachers who appear to have had no practice experience, but there is no school a majority of whose teaching staff has as little practice experience, as Mr. Frank believes it has.

I have outlined Mr. Frank's proposed law school. I have stated wherein I consider his ideas to be correct and incorrect. It is only fair now to suggest how I believe his ideas could, and should, be

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18 Id. at 724.
incorporated into the art of teaching law. I shall base my plan upon a three-year course which, I believe, is certainly not too short.

All of the teachers who are giving instruction in regular law courses should have had enough trial and office experience to have become familiar with at least the ordinary problems that arise in practice. The men who are to teach business courses such as corporations, partnership, agency, contracts, and negotiable instruments should have had considerable experience along those lines. The same should be true of those expounding procedural courses. Other similar situations can readily be worked out.

Casebooks should be used extensively the first year, as a lawyer needs to be well grounded in the analysis of decisions. Since a casebook fails to deal with many of the rules of law of the subject covered by it, every student should fill in these omissions by reading a text-book in each of the courses which are based upon casebooks. This can be done to best advantage by first studying the cases in a section of the subject and then reading the text relating to the material in that section. This plan permits one to read the text more rapidly and more intelligently than if he read it before class work on the cases. In the second and third years casebooks should be used, for I am convinced that the usual good student cannot develop the necessary analytical ability by a single year's study of casebooks. However, less employment should be made of them the second year, and still less emphasis should be put on them the third year. Some of the less difficult subjects can well be taught by good text-books during the second and third years. This will shorten the period that needs to be spent in becoming familiar with legal principles in certain fields, and will leave time for other things. In state law schools all subjects should be taught in which a candidate for bar examinations in that state is tested. Students deserve that much consideration. I then should require every candidate for a degree from such a school to pass a stiff general examination in all of the bar examination subjects, the passing grade to be that required by the bar examiners. No indication should be made by subject headings as to what divisions of the law the questions are directed. Answers would then better indicate the student's power of analysis than would be the case if the student knew what subject was covered by each question. This would not mean that they would pass the state board test, but it would force the students, by the time they were to be graduated, to be well prepared on the subjects covered by the state bar examination. Certainly that is not the case now. Such a test should be very helpful to the graduates. In other than
local schools this procedure could not very well be carried out. Perhaps, even there seniors should be tested on all of their courses. This would require them to be familiar with most of the material, aside from local statutes and peculiar court rulings of their states, with which their bar examinations would deal.

Mr. Frank is clearly right in believing that the present curriculum puts too little emphasis on practical experience. The question is how far, as a practical matter, we can go. To-day very few students can get into law offices. But they should be able to. All of us have some public duties to perform. Most people are subject to jury service. The lawyer isn't; so, why shouldn't the state say to him: "You are a court officer, a state official. You are relieved from jury service; the state needs trained lawyers; therefore, in place of spending any time on juries, you are drafted to aid in the practical training of lawyers." Let that apply to every lawyer. Then permit the executives of law schools to pick out the lawyers who are to do this work from time to time. Of course, no one lawyer should be saddled with many students, but each lawyer should have the duty to care for one student. For a time, and perhaps always, there would be some lawyers so inefficient that they should not be preceptors. They would soon be discovered and relieved of the responsibility. Naturally, this plan would not work perfectly, but it would give students an opportunity which they do not now have. The student clerks should not be mere process servers. They should draft pleadings and other legal papers, investigate law, and do anything else of value that they could. If, and only if, the lawyer and client were willing, the students should sit in on conferences. It might well be unfair to make attendance at these conferences a matter of right. However, the student should have the right and obligation to attend trials. Before they were attended, the lawyer should explain to the student that for which he should look during his attendance at court. After the trials, the proceedings should be thoroughly discussed by the student and lawyer.

This procedure I urge most earnestly, but, I am talking about what I wish could happen, not of what I believe can be brought to pass now or within many years from now. To inaugurate such a practice may take decades of education. What can be done is to have legal clinics at most schools. Where, or while, their establishment is impossible, thorough instruction should be given in relation to practice statutes and to general principles of trial procedure, and trials should be carried on at each school. This work should include the preparation of documents necessary to
trials and other original proceedings of various types of courts, both state and federal. From many years of experience, I have concluded that the best trial results are obtained by usually conducting cases already taken to appellate courts. Records of such suits, including transcripts, abstracts, and briefs are available, and students are deterred from introducing fantastic evidence. Appellate procedure should then be studied. This should include the examination of transcripts, abstracts, and briefs. Proper papers should be drafted and hearings on appeal should be had. In addition to this, there should be instruction in office practice. This should include the preparation of at least the ordinary documents which a lawyer must draw. Also, instruction in interviewing clients and attorneys in relation to different kinds of problems is advisable. All this should be done whether or not a legal clinic is possible.

An extremely important item in the practical part of every law school curriculum should be frequent supervised attendance at actual proceedings in every available sort of court in the neighborhood of the law school. This may well include talks by the courts on their reactions to proceedings. This will mean that schedules must be arranged to permit students being away from school rooms a day at a time. But the result will be worth the sacrifice of recitations.

So much for material usually considered in law schools. This is not enough. Courses in history, logic, philosophy, and psychology as those sciences apply to law, as well as public speaking for those, at least, who have not previously studied it, should be developed and taught. Moreover, readings dealing not directly with legal subjects but touching upon matters with which lawyers should be cognizant ought to be assigned for perusal. Biographies of great lawyers and materials relating to legal reforms would be proper subjects for such inquiry. If time could not be found during the regular school year for investigating these materials, summers would provide that necessary time. Most students do not go to law school during the summer and it would be better for them to continue the study of law for at least a couple of hours a day during the long vacation than for them to discard their books entirely, as is usually the case.

A concluding suggestion is that it would be wise to have societies similar to bar associations in law schools. There should be an organization in which the usual officers other than treasurer would be elected. The president might well be a senior, the vice-president a junior, and the secretary a freshman. Com-
mittees should be appointed to investigate problems in which lawyers are interested. At some meetings speakers should address the members of the association on the purposes of bar associations and on questions currently being discussed by such groups. Sections, such as are organized in some bar associations, would, probably, not be wise in small schools, as all of the students should attend all of the meetings. In large schools sections might be proper.

This is a program which, though far from perfect, should be a marked improvement on the usual present day curriculum in law schools. It is one that is practical. By spending an adequate, but not a super-abundant period on analysis, a student's ability along that line can be adequately developed. By cutting down on the time now spent in covering subjects by using texts and lectures in some of the subjects, opportunity will be given to attend court, to have trials, to study office practice, to become reasonably familiar with legal history, philosophy, and psychology, as well as public speaking, and to do some other reading with which lawyers should become familiar.

It will be noticed that many of Mr. Frank's ideas have been incorporated in a modified form in the foregoing outline of a proposed law school curriculum. Praise is his due for courageously and frankly speaking his mind on a subject vitally important to the welfare of this country. But he, as nearly all writers on school programs, has omitted the most important thing of all. That is the duty and opportunity which a law teacher has to develop in his students the will to do the best that is in them. If an instructor does that, he need never worry about the success of those under his tutelage, if they are adapted to the study of law. If they are not, they should be dropped from the law school as

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Note by the Editorial Staff: The plan offered by Mr. Wheaton has been carried out in all its essentials during the past several years at Georgetown Law School and is found to be of great merit. Here four law clubs have been organized to the bars of which qualified students are admitted.

The work done in these clubs is that suggested by the author, i.e., the preparation, trial, and appeal of actual cases pending in local courts. For example, the Pierce Butler Law Club in 1935 used as its case that of Small v. Pennsylvania R. Co., 65 App. D. C. 102, 80 F (2d) 704 (1935). The students acting as counsel went into the offices of the attorneys then acting for the actual parties, discussed the case with them, obtained the transcripts, abstracts, and briefs in the case; and, finally, when all materials available had been collected the complete case was reenacted. This included filing of appeal, submission of briefs, and final argument before a court composed of local judges. A similar procedure is followed each semester using an actual case.
soon as their inaptitude is discovered. This is due them, their parents, and the public. Some may say that a student's habits have been irrevocably determined long before he reaches a law school, but experience teaches me that that is not so. I have seen a slothful young man become an industrious student and lawyer, eager to give of his best to himself and his public.

As a parting word, I am clearly of the opinion that, whether teachers favor Mr. Frank's suggestions, the program here proposed, or some entirely different plan for legal education, they are almost to a man sincerely striving to develop the best possible legal curriculum and teaching methods. That being so, there can be little doubt that the years will continually bring improvements in the art of law teaching.
RIGHTS AND LIABILITIES OF THE INFANT PARTNER
APPLICATION OF BASIC CONTRACT PRINCIPLES

DALE E. BENNETT *

A N UNDERSTANDING analysis of the rights and liabilities of the infant partner on disaffirmance of his unprofitable partnership venture, necessarily involves a consideration of and comparison with the law governing the infant's contracts generally. The social policy manifest in the alertness of our courts to enforce the infant's privilege to rescind his contracts, when not for necessaries, has a two-fold aspect. The courts have sought to afford the infant a much needed protection, not only from unscrupulous adults who could and would often take advantage of his youthful inexperience to drive hard and unconscionable bargains, but also from his own improvidence and optimistic shortsightedness—a common trait of immaturity being to spend money without regard for relative values and future needs. The significance of this latter factor has been uniformly stressed in the cases.

The old American rule, which is probably still supported by at least the numerical majority of decisions, is that an infant can disaffirm his executed contract and recover the consideration paid, even though he may have lost or squandered all the property received in the transaction and thus will be unable to restore it and place the adult contracting party in his original position, and this regardless of whether the contract was a reasonable one and beneficial to the infant. Thus, it has been held that where

* A. B. Ohio Wesleyan University (1928), J. D. Ohio State University (1931), J. S. D. Yale University (1934), Assistant Professor of Law, University of Texas Law School; author of Bringing in Third Parties by the Defendant (1935) 19 MINN. L. REV. 163; Alternative Parties and the Common Law Hangover (1933) 32 MICH. L. REV. 36.

1 Corbin, Anson on Contracts (5th ed. 1930) 197; 1 Williston, Contracts § 238; 33 Y. L. J. 558, 559. If the infant seeking to rescind his executed contract and recover the consideration given still has the property received in his possession, the adult is entitled to its return, either as a pre-requisite to recovery by the infant, Lemon v. Beeman, 45 Ohio St. 505, 15 N. E. 476 (1888), or according to the weight of authority, by bringing a separate action against the infant, Ruchisky v. De Haven, 97 Pa. 202 (1881); Carpenter v. Carpenter, 45 Ind. 142 (1873); 1 Williston, Contracts, § 238; (1923) 72 U. OF PA. L. REV. 195.

2 In Price v. Furman, 27 Vt. 268, 270 (1885), evidence that the infant's exchange of a harness and five dollars in currency for a mare was fair and to the infant's advantage was excluded, Isham, J., stating, "It is immaterial whether the contract was advantageous for the plaintiff or not; . . . This right of the infant to avoid his contracts is an absolute and paramount right,
a minor has purchased such articles as a bicycle, an automobile, a horse, etc., and after a considerable period of use, has returned them in a greatly depreciated or damaged condition, he could recover the full consideration paid. Even in those cases where the infant has entirely disposed of the consideration received, the adult contracting party has been ordered to make full restoration. In Collins v. Norfleet-Baggs, Inc., an infant had traded a


4 In Utterstrom v. Kidder, 124 Me. 10, 124 Atl. 725 (1924), an infant who had purchased a motor truck for use in his business was held entitled to recover, upon disaffirmance of the transaction, the installments paid, without any allowance for depreciation in value or for the use of the truck. The court held that any other decision "would violate the rule adopted in this state that the minor is not obligated to place the other party in statu quo." Accord: Drennen Motor Car Co. v. Smith, 230 Ala. 275, 160 So. 761 (1935), the fact that the infant purchaser had misrepresented his age did not prevent him from recovering payments made; Arkansas Reo Motor Co. v. Goodlett, 163 Ark. 35, 258 S. W. 975 (1924), return of automobile in greatly depreciated condition; Hauser v. Mormon Chi Co., 208 Ill. App. 171 (1917); Reynolds v. Garber Buick Co., 183 Mich. 157, 149 N. W. 985 (1914); Musser v. Schock, 95 Pa. Super 406 (1928); Snodderly v. Brotherton, 173 Wash. 86, 21 p. (2d) 1036 (1933).

5 Price v. Furman, 27 Vt. 268 (1885) cited supra note 2, infant had driven mare hard for 7 or 8 weeks so that it was worth less than half its original value; Mast v. Strahan (1920, Tex. Civ. App.), 225 S. W. 790, same; Story & C. Piano Co. v. Davy, 68 Ind. App. 160, 119 N. E. 177 (1918), recovery of purchase price of piano; Whitcomb v. Josslyn, 51 Vt. 79 (1878), vendor had retaken wagon from infant for default in payment. Held, infant could rescind his contract and recover the payments made without any set-off for use and depreciation (which were greater than the amount paid); Accord: McCarthy v. Henderson, 138 Mass. 310 (1885).

6 Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906 (1890), infant recovered land conveyed without returning $350 cash payment received on purchase price thereof; Bickle v. Turner, 133 Ark. 536, 202 S. W. 703 (1918), infant who had sold tract of land for $250 cash and 4 head of horses, allowed to disaffirm and have deed set aside, although he had spent the $250 and sold the horses for $240 which had also been consumed; Eureka Co. v. Edwards, 71 Ala. 248 (1881), same; Brantly v. Wolf, 60 Miss. 420 (1882), no difference that vendee had sold land to innocent purchaser for value; Harvey v. Briggs, 68 Miss. 60, 8 So. 274 (1890); Green v. Green, 69 N. Y. 553 (1887).

In Whitman v. Allen, 123 Me. 1, 121 Atl. 160 (1923), a disaffirming infant vendor of a touring car was allowed to recover its value without restoration of a $100 payment which had been used to pay a garage bill. Accord: Lemon v. Beeman, 45 Ohio St. 505, 15 N. E. 476 (1888); Morse v. Ely, 154 Mass. 454, 28 N. E. 577 (1891).

7 197 N. C. 659, 150 S. E. 177 (1929); followed in McCormick v. Crotts, 198 N. C. 664, 153 S. E. 152 (1930). There an infant had purchased a theatre projecting machine paying $298.20 and leaving an unpaid balance
motor truck for a roadster and made a cash payment for the balance of the agreed price. On the destruction of the roadster in a wreck, the infant elected to disaffirm and was allowed to recover the cash payment plus the fair market value of the truck, the court further providing that if the truck itself were returned to the infant, the jury should assess "a reasonable amount for depreciation and use, if any, while in the possession of the defendant" ... an exceedingly favorable holding, it is submitted, for the infant. Similarly, insurance premiums have been recovered without deduction for the cost of keeping the insurance in force.8

The practical policy underlying these decisions was clearly enunciated by Judge Sweetland when he declared, in McGuckian v. Carpenter,9 that the law seeks to protect the infant from "the consequences of his own improvidence and folly. It is the same lack of foresight (as that causing him to make improvident contracts) that in most instances leads to his dissipation of the proceeds of his voidable contract. To say that he shall not have the protection by disaffirmance with which the policy of the law seeks to guard him, unless he has sufficient prudence to retain the consideration of the contract he wishes to avoid, would in many instances deprive him, because of his indiscretion, of the very defense which the law intended that he should have against the results of his indiscretion." 10

While the old rule afforded a much needed protection in the common run of cases where either the infant had been over-reached by the adult or misled by his own improvidence and indiscretion, its rigid, unseeing application to all situations has often worked an unjust hardship on the other contracting party.

of §276.40. After about 2½ years use, the infant was allowed to disaffirm and recover the entire amount he had paid, although the jury found the machine's present value to be only $87.50.


9 43 R. I. 94, 110 Atl. 402 (1920), (explanatory words by author enclosed in parenthesis). A minor was allowed to recover the entire amount of his payment on the purchase price of a horse, wagon and harness, although prior to disaffirmance he had disposed of the articles retaining none of the proceeds therefrom.

10 See similar statements in Snodderly v. Brotherton, 173 Wash. 86, 21 P. (2d) 1036 (1933), and Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906 (1890).
In cases where an infant has made a contract which, while not for necessaries, was eminently fair and reasonable, and what he has received was clearly of such a nature as to be beneficial rather than an ill-advised extravagance, there is no sound reason why he should recover the consideration paid without tendering or making a deduction for value received. Thus our courts have shown an increasing tendency in recent decisions to apply the so-called “benefit” rule, in an effort to effect an equitable line of demarcation which will adequately protect the infant and at the same time prevent his imposing to any serious extent upon others. The pivotal question in these decisions is whether the contract was fair, reasonable and actually beneficial. Judged by these criteria, the mere enjoyment of such services or property as the infant wanted, which is ordinarily deemed a benefit in the eyes of the law, is not enough. It is because the infant has little sense of relative values or needs and frequently desires things which are grossly extravagant that he has been given the cloak of contractual immunity. The consideration received must be beneficial from an objective standard, and the contract must not only be fair and free from any overreaching on the part of the adult, but also must be a reasonable one with regard to the financial position of the infant contracting party.

This view was first announced in Johnson v. Northwestern Mutual Life Insurance Co. where an infant who had enjoyed

11 56 Minn. 365, 59 N. W. 992 (1894); followed in Link v. N. Y. Life Ins. Co., 107 Minn. 33, 119 N. W. 488 (1909). The rule probably originated in the decisions interpreting the English Infant’s Relief Act of 1874 (Section 1), which were very liberal in finding a benefit where the infant sought to recover money payments for goods consumed or used. See Corbin, Anson on Contracts (5th ed. 1930) § 159 as to English law, and § 161 b(4) as to the American tendency.

An indication that some courts may go to the extent (at least where all parties are minors) of preventing the infant from even disaffirming a clearly advantageous contract is found in Schmidt v. Horton, 52 Nev. 302, 287 Pac. 274 (1930). See also Doyle v. White City Stadium Ltd. [1935] 1 K. B. 110, discussed in Can. Bar Rev. May 1935, p. 319, infant, professional boxer, not permitted to recover his share of fight proceeds which had been forfeited on his disqualification in accordance with regulations of the Boxing Commission to which he had agreed.

In Maryland the courts have drawn a rather arbitrary distinction with payment of money as the controlling factor. In an executed contract where the infant has paid in money he has not been permitted to disaffirm and sue the other party for his advance; but where the consideration was in some other medium of exchange, as land or chattels, he has been allowed a recovery. The term “benefit,” often mouthed by the Maryland courts, is apparently used in a very broad sense so as to mean little more than “valuable con-
the protection of a life insurance policy for four years was not allowed to disaffirm and recover the full amount of premiums paid, but was limited to the "cash surrender value" of the policy, deduction being made for the cost of carrying the insured as a risk. The infant, according to the court, had enjoyed the actual benefit, which he could not return, of having his life insured for four years, and the contract was free from unfairness and fraud. The application of any other rule in case of such fair and clearly beneficial contracts, declared Judge Mitchell, would not only work an injustice to others, "but it would be positively injurious to the infant himself" in that it would virtually debar his making any contracts except for necessaries and prevent even advantageous business dealings, because of the danger of contracting with him.

In line with this decision, the Minnesota court subsequently held that a minor who disaffirmed his contract for the conditional purchase of a multigraph and brought action to recover payments, should deduct the value of the benefits received. The jury found the contract in that case to be reasonable and provident. There has been considerable differences of opinion among courts applying the "actual benefit" rule, as to whether the infant's purchase of an automobile or other vehicle is a prudent and beneficial transaction; and even assuming a unanimity of consideration." Brawner v. Franklin, 4 Gill 463 (1846); Wilhelm v. Hardman, 13 Md. 140 (1859). See 14 R. C. L. 240 for a discussion of this rule.


In Pettit v. Liston, 97 Ore. 464, 191 Pac. 660 (1920), an infant was denied recovery of a $125 payment on the purchase price of a motorcycle, the vehicle having been damaged to the extent of $156. Bennett, J., declared that "it would be intolerably burdensome for everyone concerned if merchants and other business men could not deal with them (infants) safely, in a fair and reasonable way in transactions of this kind." Other decisions allowing deductions for depreciation include: Creer v. Auto Exchange, 39 Conn. 266, 121 Atl. 888 (1922), automobile; Sparandera v. Staten Island Garage, 117 Misc. 780, 193 N. Y. S. 392 (1921), use of machine for 5 months; Rice v. Butler, 160 N. Y. 578, 55 N. E. 275 (1899), bicycle; Bartholomew v. Finnemore, 17 Barb. (N. Y.) 428 (1854), horse; Gaither v. Wallingford, 101 Ore. 389, 200 Pac. 910 (1921), automobile; Myers v. Hurly Motor Co. Inc., 273 U. S. 18 (1926), following Rice v. Butler but basing its holding on the maxim that "he who seeks equity must do equity." Sutherland, J, stressed the "deterioration" of the car due to abuse, rather than any "actual benefit" accruing to the infant.

But see Lavoie v. Wooldridge, 79 N. H. 21, 104 Atl. 346 (1918), where an infant who had paid $210 on the $275 purchase price of an automobile was allowed to recover his entire payment although the car was worth only $50 when returned. As to the question of benefits the court stated, "while it is
opinion as to the true test in such cases, it is doubtful if any definite rule of thumb could or should be established. Such practical questions as the wealth or earning capacity of the minor, whether the automobile was used solely for pleasure or was used in carrying on a profitable business, etc., must be considered in determining the reasonableness of the purchase.

I

THE INFANT'S PARTNERSHIP CONTRACT—RIGHTS ON DISAFFIRMANCE

Turning more specifically to our partnership problem—certain general principles have been established by repeated judicial affirmation. It is well settled that an infant's partnership contract is voidable, as are his other contracts except for necessary, and subject to disaffirmance which is permitted in most jurisdictions either before or a reasonable time after he reaches maturity. The authorities and decisions are also uniform in holding that after disaffirmance the infant is relieved of all personal liability for the firm debts, either to creditors or to his co-partners for contribution.\(^\text{14}\) In \textit{Mehlhop v. Rae}\(^\text{15}\) the court even went so

true, as Wooldridge contends, that the pleasure to be derived from the use of the car may be a benefit to a minor within the meaning of this rule, whether Lavoie was benefited by using the car in the way he did depends on whether using it that way was the reasonable thing for a boy in his station of life to do; and as the facts are understood the court has found that using the car in the way Lavoie did was not a reasonable thing for him to do.” Accord: Klaus \textit{v.} Thompson Auto \\& Buggy Co., 131 Minn. 10, 154 N. W. 508 (1915), purchase of automobile considered unreasonable and improvident; Steigerwalt \textit{v.} Woodhead Co. Inc., 186 Minn. 558, 244 N. W. 412 (1932), purchase of Ford Coupé held improvident but recovery of purchase price denied because of the infant's fraudulent misrepresentation as to his age.

\(^{14}\) \textit{Mecham, Elements of Partnership} (2nd ed. 1930) § 49; 1 Williston, Contracts § 229; \textit{Rowley, Modern Law of Partnership}, § 188; James \textit{v.} Alford, 15 La. Ann. 506 (1860); Adams \textit{v.} Beall, 67 Md. 53, 8 Atl. 664 (1887); Crew Levick \textit{v.} Hull, 125 Md. 6, 93 Atl. 208 (1915); Folds \textit{v.} Allardt, 35 Minn. 488, 29 N. W. 201 (1886); Gordon \textit{v.} Miller, 111 Mo. App. 342, 85 S. W. 943 (1905).

\(^{15}\) 90 Iowa 30, 57 N. W. 650 (1894). Although this is the only decision in point, its holding is stated as the law in \textit{Rowley, Modern Law of Partnership}, § 188. In writing the opinion in that case, Judge Rothrock endeavors to treat the contract of partnership and the contracts of the firm with third parties as separate, stating, that it is clear “that a minor may well disaffirm one of these contracts and not the other.” But, applying the general contract principle that “an infant cannot disaffirm so much of the contract as is unfavorable to him and treat the remainder as effectual.” 1 \textit{Williston, Contracts}, § 236, it would appear far more logical to require the infant
far as to hold that an infant could repudiate and avoid personal liability upon contracts of the firm without disaffirming the partnership contract itself, and no cases directly in point have overruled this anomalous decision.\(^{16}\)

Along other avenues the path is not so well beaten. One of the most vexatious problems arises where the infant seeks to disaffirm his partnership contract and recover the money put into the firm, either as a consideration for being admitted as a partner in an existing business or as a capital contribution to a new partnership enterprise. Here two distinct classes of parties must be considered: First, creditors and other third parties who have had business dealings with the firm; and, secondly, the infant’s co-partners.

A. Recovery of Contribution as against Third Parties.

As regards this first class, it is well settled that although the infant may escape personal liability by disaffirmance, his contribution to the firm capital is irrevocably subject to their claims and cannot be recovered unless firm debts are either paid or secured.\(^{17}\) Although the result reached is sound and equitable, the reasons offered by the courts and accepted by the text authorities as a justification of this departure from the general rule that an infant may disaffirm his executed contract and recover the consideration paid, are far from convincing.

An argument frequently relied upon is that “the adult partner has a right to insist upon the assets of the firm being applied to

who seeks to affirm his contract of partnership to affirm the prejudicial as well as the beneficial relations and obligations arising therefrom. Such a rule would allow the infant ample protection, but at the same time would prevent an abuse of his favored position in the eyes of the law.

\(^{16}\) In Salinas v. Bennett, 33 S. C. 285, 11 S. E. 968 (1890), often cited as contra to Mehlhop v. Rae, there was no attempt to hold the infant partner personally liable, but merely to foreclose on firm property which included his contribution. Accord: Conroy v. Sawyer, 92 Me. 463, 43 Atl. 27 (1899).

\(^{17}\) Yates v. Lyon, 61 N. Y. 344, 346 (1874), in upholding an assignment for the benefit of creditors by a partnership one of whose members was an infant (dictum since no evidence of disaffirmance by infant on reaching his majority), Reynolds, J. stated that the supposed equity of an infant should not prevail against that of the firm creditors, and that the utmost exception the minor ought to claim is exemption from personal liability; Shirk v. Skultz, 113 Ind. 571, 15 N. E. 12 (1888). An infant partner sought to have a receiver appointed to convert firm goods into money and return his investment, paying the balance to firm creditors. The court appointed the receiver as requested, but the firm debts were paid before the infant received any of his contribution. Further cases and authorities cited in notes 18-27, infra.
the payment of firm debts, and the infant's right to rescind is subject to that equity." 18 Otherwise, according to this line of reasoning, the adult is left to shoulder the entire burden of the partnership liabilities but deprived of a substantial portion of the firm assets. 19 Why the adult partner should receive such special consideration is hard to understand. It was he who cajoled the infant into entering and probably was the guiding hand in the unfortunate enterprise. As in other cases where an adult contracts with a minor, he runs the risk that, on disaffirmance, the infant will demand a return of the consideration paid, with resultant loss to him.

In *Lyghtel v. Collins* 20 the court held recovery of the infant's contribution to be subject to partnership debts, declaring "This follows from the fact that his capital was not to his partner, but to the firm." This view, that when the infant enters a partnership his funds actually made a part of the enterprise are irrevocably dedicated to the payment of partnership debts, has been adopted in one form or another by most text-writers on the subject. Burdick feels that although the "conception of the firm as an entity" has not been formally declared by the courts, it is sustained by the cases; 21 Mechem states that "a sort of non-statutory limited partnership" is created "with the infant as the limited partner"; 22 and Williston concludes that this limitation on the privilege of the infant "can only be explained on the theory that the contract of partnership creates a status so far as the capital actually embarked in the business is concerned, from which the infant cannot escape." 23

Such a summary disposal of the problem has been very properly criticized by the author of a Harvard Law Review note 24 who points out that Williston's suggested explanation that a status is created by the partnership so far as money actually put into the

18 Hill v. Bell, 111 Mo. 35, 19 S. W. 959, 961 (1892); followed in Elm City Lumber Co. v. Haupt, 50 Pa. Super. 489, 493 (1912), a case weakened by fact that infant had disaffirmed contracts of firm but not the partnership itself.

19 In Pelletier v. Coutre, 148 Mass. 269, 271, 16 N. E. 400 (1889), after pointing out that the infant could disaffirm and escape personal liability, Devens, J. declared, "having placed the whole responsibility on another (his partner), having extricated himself from all liability, to allow him to retain the property or to assert and maintain a title to it, or any portion of it, until the debts are satisfied, would be manifestly unjust."

20 11 Ohio Dec. 161 (1891), *dictum* as there were no debts.

21 Burdick, *Partnership*, at 95-96.

22 Mechem, *Elements of Partnership* (2nd ed. 1920) § 49.

23 1 Williston, *Contracts*, § 229.

24 40 Harv. L. Rev. 472, 474.
firm is concerned, from which the infant cannot escape, seems merely a statement of the result, which is reached on grounds of policy. The writer places a very refreshing emphasis on the why rather than a mere statement of the what as to the infant's rights when he states:

"So strong is the modern desire for commercial stability that it tends to triumph over the protection of those not sui juris, at least to the extent of preventing them from unsettling transactions at the expense of persons not dealing immediately with them. Nor is the limitation of the infant's power of disaffirmance for reasons of policy without precedence. The same policy, it will be observed, does not exist where the rights of firm creditors are not involved."

Such practical considerations as "the complexity resulting from the large number of persons involved," the undesirability of uprooting a long series of business transactions, and the fact that the average mercantile creditor relies largely on the ostensible firm assets rather than inquiring into the personal responsibility of the partners, weigh in the creditor's favor. For the same reasons the disaffirming infant partner has not been permitted to recover such part of his contribution as may have passed to a third person under an executed contract, the benefits of which the partnership has enjoyed.

B. Recovery of Contribution as against the Adult Partner.

In cases where neither firm creditors nor third parties are involved the above considerations of practical expediency and commercial stability do not arise. The partners have dealt directly with one another as in the creation of any other contractual relationship. There is no apparent reason why those general principles governing the minor's executed contracts should not be followed when the infant member of a losing partnership enterprise seeks to disaffirm and recover his entire contribution to the firm capital rather than merely his proportionate share of the

25 Corbin, Anson on Contracts (5th ed. 1930) § 158, n. 1.
26 Gay v. Johnson & Bodge, 32 N. H. 167, 171 (1855), Perley, C. J., stated: "in mercantile transactions, the creditor trusts to the property more than to personal liability of his debtor. . . . The creditor trusted to the partnership funds, the debt was contracted to increase those funds, and the personal discharge of one partner can have no effect to impair the equitable rights of the creditor over the partnership property."
27 Holmes v. Blogg, 8 Taunt. 508 (C. P. 1818) infant partner not permitted, on disaffirmance, to recover money paid as his share of rentals for property leased and occupied by the partnership; Latrobe v. Dietrich, 114 Md. 8, 78 Atl. 983 (1910).
depleted assets. Thus, in those jurisdictions which rigidly enforce the repudiating minor’s claims, little difficulty should be encountered. The infant partner is entitled to at least the same consideration as the improvident minor who buys an automobile and after wrecking it, or using it until greatly depreciated, disaffirms and seeks to recover the purchase price. In other jurisdictions it should be a question of actual benefits. That, however, is merely how one might expect the decisions to line up.

When we turn to the cases, we discover that the courts have, with practical uniformity (even including those states where the strict law ordinarily grants complete immunity), sought to apply the “benefit” rule to partnership contracts, though not without some diversity of interpretation. A very logical application of the principle is found in Breed v. Judd, a Massachusetts case.28 There an infant, in consideration of an outfit to enable him to go to California, agreed to give the party staking him one-third of all the avails of his labor on the trip. The venture was a success and the infant turned over a share of the proceeds as promised. Subsequently he sought to recover the money thus paid, but the court refused relief, pointing out that “the contract was reasonably beneficial to the infant” and was fully executed.

In a losing partnership arrangement, where the problem usually arises, the actual benefits received in Breed v. Judd are not present, but the Massachusetts courts have made no distinction. The Breed case was cited in Moley v. Brine 29 as authority for a denial of any advantage to the infant partner on dissolution of the firm. The court asserted that the infant having actually entered the partnership, had “had the benefits of it while it lasted” and hence should bear his proportionate share of the capital deficiency. This ruling was followed in a decision refusing to allow an infant partner, who had been in the firm for a year and six months, to recover his capital contribution.30

Compare with those cases the holding of the Massachusetts court in White v. New Bedford Cotton Waste Corporation 31 that an infant stockholder could, on disaffirmance of his contract, recover money paid for shares in a corporation. Judge Morton rec-

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28 67 Mass. 455 (1854), this jurisdiction has ordinarily followed the older and liberal rule as to the infants recovery on disaffirmance of his contracts. (See notes 2-6, supra).
29 120 Mass. 324 (1876).
30 128 Mass. 99 (1880), the court here treated the infant’s contribution as having acquired the definite character of a partnership asset.
ognized a limitation on the infant's rights in case of a beneficial contract, but declared that as a matter of law "it clearly could not be held in this case that it was beneficial." Similarly in Godfrey v. Mutual Finance Corporation 32 a minor was allowed to recover the full amount paid a corporation for shares of stock, in spite of evidence offered by the defendant that the corporation had suffered a 34 per cent impairment of capital and could not refund 100 per cent to all stockholders. In writing the opinion, Judge De Courcy rejected the partnership cases, cited by the defendant's counsel, where the infant had been limited to his ratable share of the firm assets. He said that they "were decided on principles peculiar to the law of partnership," and concluded, "by the plaintiff's disaffirmance his contract became void from its inception, and his right to recover the money paid related back to the time of payment; it was not affected by the subsequent depreciation of the corporate assets."

If the infant's rights are to be decided according to actual benefits received, there is no good reason to distinguish between the partner and the stockholder in a losing business enterprise. The benefit derived by either is illusory at best, and it can hardly be argued that entering into such an arrangement has been a wise and provident act. A possible tendency in Massachusetts toward the requirement of an actual benefit, as in the corporation cases, is evidenced by the decision in Kelly v. Halox. 33 In allowing an infant, who had paid $600 toward his share of capital for a restaurant business and continued in the partnership only two weeks, to recover his contribution, the Court stated, "It is the established law of this Commonwealth that a minor who disaffirms a contract need not put the other party thereto in statu quo before beginning an action for recovery of what he parted with." The facts, however, that there had been no diminution of

32 242 Mass. 197, 136 N. E. 178 (1922), the minor offered to surrender the stock certificates and all money received as dividends. Accord: Prudential Building & Loan Association v. Shaw, 26 S. W. (2d) 168 (Tex. Com. of App. 1930), statute exempting juvenile shares from being written down held not discriminatory; as it merely preserved the right, already existing, of an infant shareholder to disaffirm and recover from an insolvent Building & Loan Association all the money he had paid in, free from any claims for premiums, fines and losses, except that he must restore any consideration received which he still retained. Indianapolis Chair Mfgr. Co. v. Wilcox, 59 Ind. 429 (1877), infant recovered sum paid for corporate stock out of his earnings.

33 256 Mass. 5, 152 N. E. 236 (1926), no firm creditors were involved.
capital and the partnership relation was short-lived were emphasized by the court.\(^\text{34}\)

The Illinois Appellate Court, in *Kuipers v. Thome*,\(^\text{35}\) permitted the infant partner to rescind and recover money advanced for a half interest in a business, without any averments of fraud or misrepresentation. The holding was in accord with a previous Supreme Court decision\(^\text{36}\) granting full reimbursement to an infant stockholder who had purchased $1500 of the $4500 capital stock of a corporation and had actively engaged in the business thereof for three and a half years prior to disaffirmance. Likewise, the New York Court held in *Sparman v. Keim*\(^\text{37}\) that an infant partner in a losing business could recover his contribution, since "he had received no benefit from it except the sum of $112.69 which, on the trial, he said had been paid to him out of the business, and which he offered to restore by deducting it from his claim." This decision has been followed in other jurisdictions, where although deduction has been made for any money received from the firm, the courts have failed to recognize any benefit derived from the mere participation in partnership affairs.\(^\text{38}\) Such

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34 Assuming that the short duration of the partnership was a deciding factor, one may ask, "how long must a losing partnership continue to constitute a benefit?"

35 182 Ill. App. 28 (1913).


37 83 N. Y. 245 (1880). Although actual fraud was not established, it appears that the adult may have somewhat taken advantage of the gullibility of youth, in representing the enterprise as a paying business. The decision, however, was placed squarely on the lack of benefit and very logically applied the New York rule in that regard.

38 In *Thomas v. Banks*, 224 Mich. 488, 195 N. W. 94 (1923), an infant had purchased a half interest in a cafe at the solicitation of the adult partner who represented that it was making money. After assisting in operation of the cafe for about two months the infant discovered that it was a losing business and disaffirmed. The court allowed him to recover his contribution less anything he had received from the partnership fund. After pointing out that the controlling factor should be whether the infant was permanently benefited by the consideration received, Bird, J., concludes: "We are inclined to the rule followed in *Sparman v. Keim* on the ground that it is the better rule and more in keeping with the former holdings of this court with reference to infant's contracts."

In *Lyghtel v. Collins*, 11 Ohio Dec. 161 (1891), a minor who had purchased an interest in a commission business, and remained in the partnership for two and a half months, was allowed to recover his capital investment, Bates, J., followed *Sparman v. Keim* and declared, "an infant's right to rescind a contract of partnership is the same as his well-settled right to rescind any other contract. Hence, he can rescind and recover back what he paid, subject to the following limitations growing in part out of his
holdings appear entirely consistent with the underlying theory of those decisions applying the "actual benefit" doctrine to the infant's contracts.

In the two cases where the question was directly raised, recovery of the value of the infant partner's services has been refused on the ground that such services were not rendered for the adult partner, but for the firm which became non-existent on disaffirmance.\(^{39}\) Possibly this highly technical distinction . . . plus the feeling that it would be a perversion of the infant's contractual immunity to require the adult members of a losing partnership not only to return the infant's contribution, but also to pay him for personal services from the depleted partnership funds—may be a sufficient justification of the decisions; but they are somewhat out of line with the usual rule that the infant, on disaffirmance, may recover for all value given.

relations as a partner: First, he can not rescind the burden and keep the benefit, but must revoke the entire contract or none. Hence, all he has received from the firm must be deducted from what he put in and only the balance recovered. Second, partnership creditors must be paid out of the assets before he is paid . . ." Also, in Shirk \emph{v.} Shultz, 113 Ind. 571, 15 N. E. 12 (1888), the court decided that the infant partner's contribution was subject to firm debts, but indicated by way of dictum that as between the partners themselves the infant might be allowed to recover his entire contribution.

\emph{Contra:} In \emph{Ex Parte Taylor}, 8 De G. M. & G. 254 (Ch. 1856), where an infant partner who had disaffirmed after being in the firm for about a year was not permitted to prove in bankruptcy for his contribution, the court distinctly stated that in the absence of a showing of fraud, the infant partner could not have recovered his capital payment had the business remained solvent. The case of \emph{Corpe v. Overton}, 10 Bing. 252 (C. P. 1833), appears \emph{contra} but may be distinguished on its facts. In \emph{Ex Parte Taylor} the minor had received a consideration (the actual value of the consideration was apparently of little concern) namely, being taken into the partnership, while in \emph{Corpe v. Overton} there was merely an executory contract to form a partnership with an advance payment by the infant to be forfeited if he failed to carry out his agreement. Thus since no partnership was ever formed and the infant "derived no advantage whatever under the contract," he was allowed to recover his deposit.

The Maryland Court, in \emph{Adams v. Beal}, 67 Md. 53, 8 Atl. 664 (1887), disallowed the demand of an infant member of a losing partnership to recover his $2900 payment, applying the well-established general rule of that jurisdiction that an infant who has partially enjoyed the benefit of his contract cannot recover \emph{money} paid to the adult contracting party (see note 11 supra). The decision may be subject to criticism for the emphasis placed on the payment of money, and the seeming disregard of the actual benefit received; but it is in line with the other decisions of the Maryland Courts as to infant's contracts.

II

THE INFANT'S LIABILITY FOR PARTNERSHIP TORTS

An interesting problem in regard to the effect of the minor's repudiation of his partnership agreement, arises in connection with the rule, predicated on general agency principles, that a partner is liable for any torts committed by his co-partners or employees while engaged in the transaction of firm business. Can the disaffirming infant partner be held under the doctrine of *respondeat superior* for the tortious acts of others? No partnership cases directly in point are available so we must look to analogous cases in the law of agency for our guides.

The infant's appointment of an agent and any acts performed thereunder were originally held to be *absolutely void*, with the result that the minor could not affirm even those acts which were beneficial. Thus the position taken by the court in *Burns v. Smith*, that the doctrine of *respondeat superior* which rests upon the principal-agent (master-servant) relationship could have no application to the infant employer, has been supported by the comparatively few cases in point.

Probably the situation most nearly on all fours with our partnership problem is that presented in *Wilcox v. Wunderlich*, a Utah decision. Two juvenile co-owners of an automobile, having

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40 Rowley, Modern Law of Partnerships § 504.
41 Trueblood v. Trueblood, 8 Ind., 195 (1856); Poston v. Williams, 99 Mo. App. 513, 73 S. W. 1099 (1903); see note (1924) 31 A. L. R. 1001, for other cases in point.
42 29 Ind. App. 181, 64 N. E. 94 (1902). Wiley, C. J., stated: "In law an infant cannot become a master or be responsible as a master for the negligence or want of skill of his agent or servant. As he cannot create an agency, he cannot appoint a servant and therefore cannot delegate powers to another."
43 Covault v. Nevitt, 157 Wis. 113, 146 N. W. 1115 (1914), infant owner of store building not liable on doctrine of *respondeat superior* for negligence of janitor employed by him. Kerwin, J., states: "It is true that an infant may be liable for his personal torts. But it seems well settled that an infant cannot be made liable for the torts of one acting under him, because he has no power to appoint an agent or servant and thereby create the relation of master and servant." Robbins v. Mount, 4 Roht. (N. Y.) 553, 27 N. Y. Super. 553 (1867). Infant owner of building not liable for janitor's negligence. Monell, J., held that the rule of *respondeat superior* was not applicable to the infant employer because he was incapable at law of appointing an agent or a servant, and he could not delegate powers to another, nor make a guaranty of the fidelity, care or skill of such other which is the foundation of the rule of *respondeat superior*. Also, Smith v. Kron, 96 N. C. 392, 2 S. E. 533 (1887).
44 73 Utah 1, 272 Pac. 207, 223 (1928).
been out riding, decided to drive to a certain service station where they could get a flickering headlight repaired. On the way to the service station, defendant Wunderlich who was driving, negligently ran over and killed a small boy. It was not clear from the evidence whether defendant Heiner was still in the car when the accident occurred, or had got out before they reached that point. In allowing a non-suit as to defendant Heiner in an action for wrongful death, Judge Straup stated,—"There could be no liability based upon agency, or joint venture, or contractual relation between himself (Heiner) and Wunderlich, Jr., for the reason that infants are not liable directly or indirectly, on their contracts, and liability on this score necessarily involves the recognition of a contract." 45

Another ramification of the principle involved is found in Hampel v. Detroit etc. Ry. Co. 46 where the court refused to impute the negligence of the driver of a team to a fourteen year old child he had given a lift. The court said it was conceded by the plaintiff that the driver's negligence would have been imputable if the intestate were an adult "upon the fiction that he was her "agent (citing cases establishing that to be the law in Michigan 47). But this infant lacked capacity to make him her agent."

During recent years a substantial majority of the courts have sought to place an infant's appointment of an agent and acts of the agent thereunder, in the same category as the other consensual acts of a minor, and to treat them as voidable rather than

45 In this decision, as in a number of others, the courts have adopted the somewhat erroneous premise that the appointment of an agent must rest ultimately upon a valid contract between the principal and agent (or master and servant as the case may be). They then conclude that since the infant cannot make a binding contract he cannot appoint an agent so as to become liable for his torts. Such reasoning is hardly in accord with the modern view that the authorization of an agent or servant need not arise out of a contract with all the technical requirements thereof. Agency often depends solely on the fact of appointment.

The above theoretical objection is, however, of slight significance for whether we consider the authorization of an agent as contractual or merely consensual, it is well established that such authorization by an infant is at least voidable.


47 For a good discussion of the Michigan rule that the driver's negligence will be imputed to a "gratuitous guest" when the latter seeks to recover for injuries due to the negligence of a third party, see Note (1933) 32 Mich. L. Rev. 274.
absolutely void. In one of the earlier decisions applying this rule, Judge Mitchell pointed out that the reason for treating an infant's contracts as voidable was to give the infant an opportunity to decide for himself, on reaching his majority, whether they are beneficial or prejudicial. He declared that the exception, engrafted on the almost universal doctrine as to the voidability of the infant's acts and contracts, "that the act of an infant in appointing an agent or attorney and consequently all acts and contracts of the agent or attorney under such appointment are absolutely void," did not "seem to be founded on any sound principle."

Professor Charles O. Gregory agrees that where the agency is considered void and non-existent the courts have very properly relieved the infant of liability for torts committed by his servant or agent; but asks whether under the more modern view that the agency or employment is voidable the infant can escape liability for torts already committed by the agent or servant by merely dismissing him. He then answers his question in the negative relying largely on the New York decision of Casey v. Kastel. In that case a minor who had ratified a wrongful sale of stock by her broker, subsequently disaffirmed on the broker's inability to pay over the sale price. She joined as defendants in an action for conversion, her broker, another brokerage firm associated with him in the sale, and the corporation transferring the stock on its books to the vendee. No claim was made against the ultimate purchaser. Judgment was given against all three defendants in the lower court. The Court of Appeals, however, held that the infant's appointment was voidable and not void. Although holding the brokers because they refused, after disaffirmance, to return the stock or tender its value, the court reversed the judgment against the corporation on the ground that the transfer was

48 Corbin, Anson on Contracts (5th ed. 1930) § 439; Benson v. Tucker, 212 Mass. 60, 98 N. E. 589 (1912); Simpson v. Prudential Life Ins. Co., 184 Mass. 348, 65 N. E. 673, 674 (1903); Potter v. Fla. Motor Lines, 57 Fed. (2d) 313, 316 (S. D. Fla. 1932); Bloomquist v. Jennings, 119 Ore. 691, 250 Pac. 1101, 1103 (1926), (dictum), "while there is authority to the contra, the modern trend of decisions, which we think announce the better rule, hold that the appointment of an agent by a minor, is not void, but only voidable." See collection of cases in 81 A. L. R. 1001.

49 Coursolle v. Weyerhauser, 69 Minn. 328, 72 N. W. 697 (1897).


52 237 N. Y. 305, 142 N. E. 671 (1924).
legal when made and it could not have lawfully refused the transfer. Such an act, lawful when done, could not, according to Judge Pound, be rendered tortious by any retroactive effect of the disaffirmance of the agency. "Until disaffirmance by the infant the authorized acts of the parties were not wrongful. The fiction of relation back, whereby, to prevent injustice, an act done at one time is considered to have been done at some antecedent period should not be utilized to make those who deal with the infant's property tort-feasors as of a time when they did no wrong."

Gregory maintains that "as a corollary" to the assertion in Casey v. Kastel that the doctrine of relation back should not be applied in defining voidable to make tort-feasors out of innocent parties, "voidable should be similarly construed in considering the torts of an infant's agent or servant when the infant defendant seeks protection by avoiding the contract of agency or employment." That Gregory's corollary is a far cry from the proposition in Casey v. Kastel is evident when the purpose and effect of that decision are considered. To hold that the infant's disaffirmance of his voidable agency will not work retroactively so as to make tort-feasors out of adults who have dealt with him in good faith, is merely to prevent an abuse of the shield of infancy; but to hold the infant liable for torts committed by his agent or servant prior to disaffirmance, a liability arising entirely out of the principal-agent or master-servant relationship, would be to deny him that complete protection which it has been the policy of the law to afford.

The purpose of the newer rule that the infant's appointment of an agent is voidable was to extend rather than curtail the infant's privilege, by affording him an opportunity to decide for himself on reaching his majority whether the fruits of his agency were beneficial or prejudicial. Thus he was enabled to ratify advantageous agencies as he had always been permitted to ratify beneficial contracts. In dealing with his voidable contracts the courts have not hesitated to give the infant's disaffirmance a retroactive effect where such a construction was necessary in order to fully protect him. Likewise, if the infant's protection in re-

53 Notes 48 and 49, supra.
54 For example, in Godfrey v. Mutual Finance Corp., 242 Mass. 197, 136 N. E. 178 (1922) the infant stockholder who disaffirmed was allowed to recover back the full purchase price of his shares although the corporation had suffered a 34% impairment of capital. De Courcy, J., stated: "by the plaintiff's disaffirmance his contract became void from its inception, and his right to recover the money paid related back to the time of payment; it was not affected by the subsequent depreciation of the corporate assets."
gard to his appointment of agents is to be complete, his disaffirmance must relate back and relieve him of liability for both past and future acts of such agents, whether contractual or tortious. It is not only because of the infant’s propensity for making unwise and improvident contracts, but also because he is deemed incapable of the selection and supervision of agents and servants that he has been granted immunity from liabilities incurred by those employed by him. Whether the infant’s appointment be treated as void or voidable, the policy underlying the rule and the need for protection remain the same.

While most of the cases granting the infant immunity from liability for the negligent acts of his agents have been decided under the old rule that the infant’s appointment was absolutely void, the court in Potter v. Florida Motor Lines 55 did not appear at all bothered by the change. In that case the defendant in an action for injuries sustained in an automobile accident sought to impute the negligence of the driver of the other car to the infant plaintiff; the sole basis of the defense being that the parties were engaged in a joint enterprise. There was no allegation that the infant was owner of the car or had any actual control over the driver other than that resulting from the existence of a common undertaking. 56

In rejecting the defendant’s plea of contributory negligence, the Court emphasized and relied upon two apparently uncontroverted principles. He first pointed out that “As a legal concept, joint enterprise is not a status created by law. It is a voluntary relationship, the origin of which is wholly ex contractu. Liability of one member of a joint enterprise for the acts of another

55 57 F. (2d) 313 (S. D. Fla. 1932).
56 The court distinguished Atchison etc. Ry. v. McNulty, 285 Fed. 97 (1923), plaintiff in her father’s car permitted young gentleman friend to drive, sitting beside him; McKerall v. St. Louis Francisco Ry. Co., 257 S. W. 166 (Mo. App. 1924), deceased allowed a girl friend to drive her father’s car returning home from town, and it was emphasized that she was in charge of the car; and Bosse v. Marye, 80 Cal. App. 109, 250 Pac. 698 (1926), on the ground of actual control by the infant plaintiff, saying “those decisions, however, are not based upon agency nor upon imputed authority to control derived merely from a supposed contract of joint enterprise. They are based upon actual authority to control, exercised through another.”

Similarly, in Masterson v. Leonard, 116 Wash. 551, 200 Pac. 320 (1921) (not alluded to in the principal case) the negligence of a boy guiding a bicycle was imputed to another riding with him, the Court stressing the fact that the possession and general control of the bicycle were in the passenger who had a right to be heard in its management even though he had temporarily relinquished control over it.
member is a vicarious liability founded upon the relationship, and springs from the operation of law upon the relationship into which the parties have voluntarily brought themselves by contract. In its ultimate analysis the relationship is one of mutual agency flowing from a limited partnership. It is largely governed by principles analogous to those applicable to partnership and agency.”

The Court's second premise was that “While an infant may become a member of a partnership, his contract, being executory, is voidable at his election. . . . He cannot bind himself absolutely in the appointment of an agent, any attempted appointment being at least voidable and subject to disaffirmance by a personal plea of infancy.”

Piecing two and two together, Judge Strum, speaking for the Court, declared that the rule that the infant is liable for his torts, applies only to his “pure torts or torts simpliciter,” and not to those torts founded upon his invalid or voidable contracts. The opinion then concluded that in the case at bar the infant could not be charged with the driver's negligence, over his disaffirmance of the relationship upon which his tort liability was founded, because to hold him for such torts “would put an end to the protection afforded infants by the law.”

Application of the above principles to the infant partner's personal liability for torts committed by his co-partner or those in their employ logically follows. The result is the same, whether the agency rests on the contract of partnership or depends on the fact of appointment, express or implied. Both the infant's con-

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57 Judge Strum further declared, at p. 317 of the opinion, “as the relation of joint enterprise is based upon partnership or mutual agency, the relationship presupposes the existence of an antecedent contract, express or implied. Such a contract is the sine qua non of the relationship. Where, as here, the tort and the contract on which the tort depends are inseparable, a married woman (the other plaintiff was a married woman without contractual capacity) cannot be charged therewith, neither can an infant be charged over his disaffirmance of the contract. Consequently neither of these plaintiffs can be regarded as members of a joint enterprise so as to impute to them the consequences of the driver's negligence.”

58 The writer of a note in (1927) 40 HARV. L. REV. 472, 473 appears to draw a distinction without a difference when he states, “since, however, an infant is liable for his own torts, there seems no reason in policy why he should be able to escape liability for the torts of his co-partner even by disaffirming the contract of partnership, for the agency of the co-partner depends, not upon the contract of partnership, but upon the fact of appointment.”

Whether the agency of the co-partner (or of a firm employee) rests upon the contract of partnership directly or merely indirectly by virtue of an
tracts and his appointments of agents or servants are at least voidable; so that, regardless of which view we choose, the infant partner who disaffirms should be relieved of all such liability, contract or tort, as is founded exclusively on the principal-agent or mutual agency relationship.

The whole problem of the infant partner's rights and liabilities must be solved by the application of those well-established rules, based on sound and practical policy, which govern the infant's contracts and authorizations in general, departing therefrom only when and where the reason of such rules clearly fails. Our courts have usually adopted this policy—guarding carefully the infant's necessary protection, yet tending to increase their vigilance in preventing its use as an instrument of oppression.

 implied appointment, it is submitted that a disaffirmance of the partnership agreement should normally operate as a repudiation of the agency. Further, it is well-settled by judicial decision that the infant's agency relationship is at least voidable and thus subject to his disaffirmance. (See notes 41-49, supra.)
THE SUPREME COURT OF THE UNITED STATES *

THE VALIDITY of the power conferred by Congress upon the Public Works Administration to make grants and loans to state governmental subdivisions has been the subject of many controversies and a decision in a test case has been awaited with considerable expectancy in many quarters. The question, however, remains in an unsettled state.

Public Works Administration—Loans to County for Electric Plant

With the admonition that "delusive interests of haste" should not interfere with the orderly processes of the law, the Supreme

* Written December 16, 1936.
Court of the United States sent the *Duke Power case* \(^1\) back to
the lower courts for a retrial without expressing any opinion as
to the right of the Federal Government to finance publicly owned
hydroelectric plants in competition with private enterprise.

In a *per curiam* opinion, delivered by Mr. Chief Justice Hughes,
it was declared that the case presented irregularities in prac-
tice which should not be overlooked. The procedure by which
the case reached the Supreme Court was analyzed after it had
been first remanded by the circuit court. The decision indicated
that when Public Works Administrator Ickes terminated the
former contract for the loan—out of which the controversy
arose—and made a new contract with Greenwood County for the
construction of the project known as Buzzard Roost, a retrial in
the light of the changed situation was required. It was stated
that where upon appeal it appears that the controversy has be-
come entirely "moot"—that is, the issues have so changed that
no cause of litigation remains—the appellate court should have
set aside the decree of the district court with directions to dis-
miss. Since the decree of the district court was not vacated
by the circuit court, the trial court had no jurisdiction to re-
open the case. But upon arrival in the district court new evidence
was taken, including passages from Mr. Ickes' book, "Back
to Work," but there was excluded from consideration all evi-
dence save that relating to the new contract, and it was there
held that this agreement justified no modification of the original
decree for an injunction in favor of the power company. The
case was then taken to the circuit court.

In the opinion of the Supreme Court, it was added that there
thus existed a situation in which both courts below failed to act
in accordance with the standards of proper procedure. The cir-
cuit court could not leave in effective operation the final decree
of the district court and at the same time revest that court with
jurisdiction to retry the case. The appellate court failed to make
its ruling with proper clarity and definiteness. For that reason
the district court failed to understand the essential purport of
the order to remand. The district court did not understand that
it was revested with complete jurisdiction and its proceedings
were not taken and its decision was not rendered with a con-
sciousness of its power and duty.

In order that the case may be properly heard and determined,
it was said, the decree of the circuit court was reversed and the

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cause remanded with the directions that the decrees entered by the district court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts and that the cause be retried upon the issues then presented.

Constitutional Law—State Fair Trade Acts

Perhaps the most outstanding decision of the Supreme Court so far during its present term arose out of the so-called Fair Trade Acts of the States of California\(^3\) and Illinois,\(^3\) which penalize the sale at retail of branded goods at prices less than those fixed in contracts between the manufacturer or distributor and any other retailer. It results in the establishment of a precedent which will undoubtedly cause "tremendous repercussions" throughout the retail selling field. Since the provisions of both statutes were substantially identical, as were the facts and the questions raised, though two opinions were rendered by the Court, one covering the two cases\(^4\) arising under the Illinois statute and the other\(^5\) that of California, only the decision in the former discussed the principles involved at any great length.

It was unanimously held that the statutes were not unconstit

The statutes declare it to be unfair competition, though the person advertising, offering for sale, or selling such commodities is not a party to such a contract, if it is known by him that there

\(^3\) Gen. Laws of Calif. (1933), Tit. 614, Act 8782, § 14.


was such an agreement in existence with other dealers in regard to the particular products. The dealers in these cases were not parties to such contracts, but knowingly sold at "cut prices" (below those stipulated in the contracts which the producers had with other dealers). This resulted in a diminution of sales on the part of those dealers who maintained the set prices.

To the contention that the statutes in question denied the owner of property the right to determine for himself the price at which he will sell, as supported by a long line of decisions of the Supreme Court, it was stated that those cases dealt only with legislative price fixing and "constitute no authority for holding that prices in respect to 'identified' goods may not be fixed under legislative leave by contract between the parties". The acts in the cases now before the Court were declared not to infringe the doctrine of those cases. They do not attempt to fix prices, it was declared, nor do they delegate such power to private persons. Legislative permission is merely given to contract with respect thereto. They contain no element of compulsion but simply legalize their acts, leaving them free to enter into the authorized contracts or not as they may see fit. Though the dealers own the commodity, it was added, they do not own the trade-mark or the good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation.

What apparently seems to be an opposing view previously taken by the Court in regard to price-fixing agreements, as disclosed by previous decisions in cases arising under the Sherman Antitrust Act, holding such contracts, in the absence of statutory authority, to be invalid as constituting an unlawful restraint in trade, was carefully distinguished by Mr. Justice Sutherland. It was pointed out that no constitutional objection was foreseen at the time, and that in one decision it was suggested that ap-

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8 Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373 (1911); Boston Store v. American Graphophone Co., 246 U. S. 8 (1918); Bauer v. O'Donnell, 229 U. S. 1 (1913).


plication be made to Congress to remedy the situation. In fact bills authorizing standardization-of-price agreements in respect to such identified goods were at one time introduced in the Congress, but they did not result in statutory enactment.

Bankruptcy—Trust Funds—Preference

In *McKey v. Paradise*, it was held that a claim of an employees welfare association, upon the bankruptcy of the employer, for the amount of dues deducted by the employer from the wages of the members but not paid to the association, under an agreement between the employer and the association, was not entitled to a preference over other creditors. It was pointed out by Mr. Chief Justice Hughes, in the opinion of the Court, that no actual money was taken from the pay envelopes of the employees and deposited in any account of the bankrupt, but that the matter was handled as a mere bookkeeping entry and that at no time did the bankrupt segregate any money due the association or deposit any money in any separate trust account or bank account. It was stated that the employer was not a trustee of the funds but a debtor who merely had failed to pay his debt.

Workmen's Compensation—Injury on Navigable Waters

In an opinion delivered by Mr. Justice McReynolds, the Court passed upon a conflict of jurisdiction between the New York Workmen's Compensation Act and the maritime law which was raised by the claim of an employee growing out of injuries received as the result of an explosion occurring on a steamboat during the transportation of employees of a construction company to an island in the East River, the locale of their employment. The transportation was furnished under a contract between the owner of the boat and the contractor, and the injuries were held to be compensable under the State Workmen's Compensation Act. The Court sustained the finding of the lower court, which held that the contract had no direct relation to navigation but was part

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11 See Hearings before the Committee on Interstate and Foreign Commerce on H. R. 13805, 63d Cong., 2d and 3d Sess. (1915); H. R. 13568, 64th Cong., 1st and 2d Sess. (1916).
12 Nos. 4-5, Oct. Term, 1936, decided December 7, 1936.
of the contract of employment, it being non-maritime in character with no direct relation to navigation, business or commerce of the sea.

Criminal Law—Federal Employees and Pensioners on Juries

The Supreme Court upheld the Act of Congress 15 removing the disability of Government employees and persons receiving pensions, otherwise competent, as jurors in the District of Columbia in cases in which the United States is a party, in United States v. Wood.16 It was contended by the defendant that the statute contravened the Sixth Amendment to the Federal Constitution which guarantees the right of trial by an impartial jury, on the theory that Federal employees and persons receiving pensions from the Government have such an interest as to make them impliedly biased regardless of actual partiality. In an exhaustive opinion, written by the Chief Justice, pointing out the distinction to be made between actual and implied bias of a juror, it was disclosed that there was no settled practice under the English law establishing an absolute disqualification of governmental employees to serve as jurors in criminal cases. For this reason such a disqualification cannot, upon the ground of such a practice, be treated as embedded in the Sixth Amendment. Nor was there such a disqualification in the colonies or in the states at the time of the adoption of the amendment in question. It was further declared that even if it could be said that at common law such a disqualification existed, the Court was of the opinion that Congress had the power to remove it, in view of the general acceptance that the amendment does not preclude legislation making women qualified to serve as jurors in criminal prosecutions, although that too was not allowed at common law. Likewise the reduction in the number of peremptory challenges of the accused existing at common law has previously been upheld.17 It was stated that to impute bias as a matter of law to the jurors in question, who were two clerks employed in executive departments and one recipient of a civil war pension (the case involving petit larceny from a private corporation), was no more sensible than to impute bias to all storeowners and householders in cases of larceny or burglary. The decision recognized that the statute in question was passed to meet a public need and that no

15 49 STAT. 682 (1935).
16 No. 34, Oct. Term, decided December 7, 1936.
interference with the actual impartiality of the jury was contemplated, since the law permits full inquiry as to actual bias in any instance.

Though not rendering a separate opinion in the case, it was announced that Justices McReynolds, Sutherland and Butler dissented on the basis of the decision in Crawford v. United States, which held that a postal employee was disqualified as a juror in a prosecution in the District of Columbia for conspiracy to defraud the United States in relation to a contract with the Post Office Department. This case was distinguished by the Chief Justice, who further pointed out that the statutory law then in force in the District of Columbia exempted from jury duty "salaried officers of the Government", and observing that the employment of the juror in that case was "in the very department to the affairs of which the alleged conspiracy related", stated finally that the question of legislative power to remove the exemption was not passed upon at that time.

National Banks—Liability of Estate of Stockholder for Assessment

In Pufahl v. Estate of Elvira J. Parks, it was held that an Illinois statute which bars and excludes from participation in the inventoried assets of the estate of a decedent, claims which have not been filed within one year from the granting of letters testamentary or letters of administration, is applicable to a claim filed by the receiver of a national bank for the amount assessed against the estate of a stockholder of the bank under the National Banking Laws. This is true although the receiver was not appointed and the assessment was not made until after the expiration of the year provided for the filing of claims. In delivering the opinion of the Court, Mr. Justice Roberts stated that the receiver's claim, although based upon a Federal statute, may be enforced "only in conformity to the law of the forum governing the recovery of debts of like nature".

Telephone Companies—Uniform Accounting System

An order of the Federal Communications Commission prescribing an uniform accounting system for telephone companies

18 212 U. S. 183 (1909).
19 51 STAT. 1224 (1901), D. C. CODE (1929) Tit. 18, § 316.
20 No. 18, Oct. Term, 1936, decided December 7, 1936.
21 ILL. REV. STAT. 1935, Ch. 3, Par. 71.
22 13 STAT. 118 (1864); 48 STAT. 189 (1933); 49 STAT. 798 (1935), 12 U. S. C. A. §§ 64 & 66 (1936).
subject to the Communications Act of 1934 \(^{23}\) was upheld by the Court in *American Telephone & Telegraph Co. v. United States*.\(^{24}\) In holding that the order of the Commission was not harsh and arbitrary, it was explained by Mr. Justice Cardozo, speaking for an unanimous Court, that in order to come within such a classification such order must appear to be so entirely at odds with fundamental principles of correct accounting as to be the expression of a whim rather than an exercise of judgment. The object of requiring accounts to be kept in an uniform way and to be open to the inspection of the Commission is not to enable the Commission to regulate the affairs of corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act so that it may properly regulate such matters as are really within its jurisdiction. It was said to be one of the purposes of the order to make less obscure the acquiring of property with a “nuisance value” placed upon it as contrary to its market or intrinsic value. All the objections raised were carefully discussed point by point by Mr. Justice Cardozo, and the Court concluded that construction of the regulations by the Commission itself (such construction being binding on the Commission in its future dealings with the companies), is enough to dispel the fear that in their practical operation they will become “instruments of hardship”.

**Constitutional Law—State Chain Store Tax**

The Iowa chain store tax law \(^{25}\) was invalidated by the Supreme Court in a brief opinion to which Justices Brandeis and Cardozo dissented. The tax was based on gross receipts from sales according to an accumulative graduated scale. The decision \(^{26}\) affirmed the holding of the District Court of the United States for the Southern District of Iowa \(^{27}\) to the effect that the statute violated the equal protection clause of the Fourteenth Amendment by creating an arbitrary discrimination. In thus tersely disposing of the case, the Supreme Court followed the authority of *Steward Dry Goods Co. v. Lewis*.\(^{28}\) The Iowa statute provided for a tax of from $25 on the first $50,000 of gross re-

\(^{23}\) 48 STAT. 1093 (1934), 47 U. S. C. A. § 402(a) (1936 Supp.).

\(^{24}\) No. 74, Oct. Term, 1936, decided December 7, 1936.

\(^{25}\) IOWA CODE (1935) Ch. 329 c-1.


\(^{28}\) 294 U. S. 550 (1935).
receipts up to $1,000 for each $10,000 of gross receipts in excess of $9,000,000. The section of the law taxing chain stores in the state on the basis of the number operated was not involved in this decision.

National Banks—Insolvency—Preference

In *Mechanics Universal Joint Co. v. Culhane,* it was held that where a director of an insolvent national bank, being president and manager of a corporation which is a depositor in the bank, and having knowledge of the insolvency of the bank, signed and forwarded for collection a check of the corporation, thus enabling the depositor to withdraw funds which stood to its credit with the insolvent bank on the day before it closed, such action constitutes a breach of duty, as director, and the withdrawal is null and void as a preference over other creditors. This was held under authority of Section 5242 of the Revised Statutes of the United States. Mr. Justice Brandeis, who delivered the opinion of the Court, denounced the conduct of the director, declaring that the duty not to defeat the just and equal distribution of the assets in event of insolvency rested upon all who obtain such knowledge by reason of their connection, including directors and employees as well as executive officers.

Public Utilities—Stay Pending Determination of Another Suit

The bounds of power and discretion of a court to stay proceedings in one suit to abide a decision in another suit in a different court were clarified by the Supreme Court in an unanimous opinion, delivered by Mr. Justice Cardozo. The decision arose out of two cases in which certain non-registered holding companies sought to enjoin the enforcement of the Public Utility Holding Company Act of 1935 on the ground that the act in its entirety is unconstitutional and void. In deciding the particular issue involved, it was held that the exercise of its discretion was abused by the District Court for the District of Columbia in so far as it stayed proceedings in the suits until the validity of the act should be determined by the Supreme Court of the United States in another suit by the Security and Exchange Com-

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29 No. 17, Oct. Term, 1936, decided November 9, 1936.
30 13 STAT. 115 (1864); 17 STAT. 603 (1873), 12 U. S. C. A. § 91 (1936).
mission in another Federal court. The suit was brought to compel certain other holding companies to register in accordance with the Act.

It was asserted, without so deciding, that the uttermost limit for the stay in order for it not to be immoderate would be the date of the decision in the district court in the suit selected as a test case of the act. Mentioning that the proceedings in the district court in that case had already continued for more than a year without a decision, with the possibility of an intermediate appeal to the circuit court of appeals, and that a second year or even more may go by before a review by the highest tribunal may be had, the stay in the cases before the Court were said to be immoderate and hence unlawful unless so framed in its inception that its force would be spent within reasonable limits, so far at least as the situation was susceptible of prevision and description. The causes were remanded to the district court with the direction that a new appraisal of the facts be made by the court whose function it is to exercise discretion, such appraisal being made in the light of the situation existing and developed at the time of the rehearing. Benefit and hardship must be set off, the opinion stated, the one against the other, and upon an ascertainment of the balance, discretionary judgment should be exercised anew.

**Monopolies—Clayton Act**

In a brief opinion, deciding the case of *Pick Manufacturing Co. v. General Motors Corporation,*35 involving the effect of section 3 of the Clayton Act34 upon a clause in a contract between an automobile manufacturer and its dealers whereby the dealers agreed not to sell or use in repairs of cars made by the manufacturer any parts not made or authorized by it, the Court accepted the findings of the courts below35 that the effect of the clause has not been in any way substantially to lessen competition or to create a monopoly.

**International Extradition—Treaty with France**

The Supreme Court of the United States passed upon an interesting phase of international extradition as affecting the discretionary power of the President in *Valentine v. Neidecker.*36 Mr. Chief Justice Hughes, a former Secretary of State, speaking

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33 No. 12, Oct. Term, 1936, decided October 26, 1936.
35 80 F. (2d) 641 (1935).
36 Nos. 6-8, Oct. Term, 1936, decided November 9, 1936.
for the Court, stated that the Franco-American Treaty of 1909 does not confer power on the President to grant extradition of native-born citizens. "There is no Executive discretion to surrender an individual to a foreign government, unless that discretion is granted by law." The provision of the treaty under observation, in Article V stated that "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

Bankruptcy—Priority of Tax Claims—State and Municipal

In its opinion in the case of Missouri v. Ross, the Supreme Court disposed of a question as to the interpretation of Section 64b, sub-division 6 of the Bankruptcy Act, concerning the priority of taxes owing by the estate of a bankrupt to the State of Missouri, as against taxes owing to the City of St. Louis. In holding that the tax claims were of equal rank under Section 64b(6) of the Bankruptcy Act, and that the available funds must be prorated between the claims according to their respective amounts, Mr. Justice Sutherland asserted that the claim of the state is not entitled to priority on the theory that unpaid taxes constitute debts, and therefore fall within Section 64b(7) which gives priority to "debts owing to any person who by the laws of the states ... is entitled to priority". Conceding that taxes are debts, it was said, they are carved out of the general provisions of Paragraph 7 and put in a special class under Paragraph 6, which enumerates taxes due to the United States, state, county, district, or municipality, and thus fall within the rule that special provisions prevail over general ones which, in the absence of the special provisions, would prevail. It was further declared that Congress clearly intended to place the various governmental units in a single class upon terms of equality one with the other, since it took great pains to set forth the order of priority in distinct paragraphs under separate numerals.

Taxation—State License for Importers of Beer—Twenty-First Amendment

An unanimous decision of the Court which it is expected will have far-reaching effects upon state revenue legislation was rendered in State Board of Equalization of California v. Young's

38 No. 3, Oct. Term, 1936, decided November 9, 1936.
Market Co.\textsuperscript{40} The California Alcoholic Beverage Control Act of 1935\textsuperscript{41} imposed an annual license fee of $500 on dealers in beer brought into the state, but placed no such license fee on wholesalers dealing in locally brewed beer. Mr. Justice Brandeis, speaking for the Court, refuted the contention of certain California beer importers that the law violated the constitutional provisions concerning commerce and equal protection. It was conceded that the contention of the importers would have been valid prior to the adoption of the Twenty-first Amendment to the Federal Constitution, which provides in Section 2 that “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited”, not because it resulted in discrimination but because such a fee would be a direct burden upon interstate commerce.

\textit{Constitutional Law—State Unemployment Insurance}

By the mere entry of an order, the Supreme Court affirmed the decision of the Court of Appeals of New York\textsuperscript{42} which held the New York Unemployment Compensation Law\textsuperscript{43} not to be violative of the Federal Constitution. The reason for disposition in this manner of the three cases\textsuperscript{44} before it involving the validity of the law was the equal division of the Court, four to four, on the question of affirmation or reversal of the judgments. Due to his illness, Mr. Justice Stone took no part in either the hearing of the arguments or the decision. Following its established practice, the names of the members of the Court who voted for or against affirmation of the respective judgments were not disclosed.\textsuperscript{45}

In the decision by the New York court, it was said to be immaterial whether the statute be considered as an exercise of the police power, in seeking to meet the evils and dangers of unemployment in the future, or of the taxing power of the state, since

\textsuperscript{40} No. 22, Oct. Term, 1936, decided November 9, 1936.

\textsuperscript{41} GEN. LAWS OF CALIF. (1935 Supp.), Tit. 278, Act 3797, §§ 5 & 49.

\textsuperscript{42} 271 N. Y. 1 (1936).

\textsuperscript{43} N. Y. LAWS, ch. 468 (1935); CONS. LAWS OF NEW YORK, 1936 Supp., Ann., §§ 500-31, art. 18.


\textsuperscript{45} Petition for rehearing before a full court filed December 14, 1936.
there was nothing unreasonable or unconstitutional in a legisla-
tive act which accomplishes such a result.

Though the action of the Supreme Court of the United States
in these cases has no direct bearing on the constitutionality of the
Federal Social Security Act, it assures the continued operation,
for the time being, at least, of those provisions of the national
law relating to unemployment compensation.

Miscellaneous Cases

By denying a petition for certiorari the Supreme Court left
in force a decision of a lower court in City of New York v. Goldstein, which had held that a city sales tax collected from
purchasers by a bankrupt, but which had not been paid over to
the city by him was not such a tax under the terms of the Bank-
ruptcy Act as entitled it to priority over other general creditors
of the bankrupt, but that the money was merely a debt owed to
the city representing funds collected for the benefit of the city.

Likewise in Village of Winnetka v. Reschke, the decision of
a state court was left in full force by the mere denial of a
writ of certiorari. The state court had held that a zoning ordi-
nance classifying certain land as residential was unreasonable
and deprived owners of property without due process of law
in view of the correlative facts that the property was located on
a busy thoroughfare, that other property on the same block was
devoted to industrial uses, and that use of property for commer-
cial purposes made it more valuable.

In a similar manner the Court sustained the decision of the
lower Federal courts in the case of Siemens & Halske Actien-
gesellschaft v. Central Hanover Bank & Trust Co., which had
held that German corporations which issued bonds providing for
payment in United States gold coin in New York were not justi-
ﬁed in failing to pay the principal and interest on the ground
that they were prevented by foreign exchange laws and regula-
tions of the German Reich from acquiring or disposing of the
necessary foreign exchange to make payments in full dollars in
New York.

47 84 F. (2d) 982 (1936).
50 Nos. 357-8, Oct. Term, 1936, certiorari denied, October 26, 1936.
52 84 F. (2d) 983 (1936).
53 No. 361, Oct. Term, 1936, certiorari denied, October 26, 1936.
Attention is invited to the fact that certiorari is allowed in relatively few cases, that the allowance is a matter of discretion and not of right, and the discretion is exercised only in cases so presented that the Court is satisfied that either because of the importance of the question of Federal law involved or of the conflict of decision disclosed between the circuit courts of appeal, the challenged decision should be re-examined.

Argued Cases

Three cases involving legislation enacted by Congress during the past two or three years await the decision of the Supreme Court of the United States. The power of Congress to levy retroactively a tax on interests in silver is being contested in \textit{United States v. Hudson Co.}\textsuperscript{54} It is contended that the Silver Purchase Act of 1934, providing retroactively for a levy of the tax provided by the statute, which subjects to the tax all transfers of interests in silver bullion consummated prior to the date of enactment of the statute, is invalid and unconstitutional under the due process clause of the Fifth Amendment.

The constitutionality of the so-called convict-labor law relating to the transportation in interstate commerce, and the labeling, of convict-made goods, is being contested in \textit{Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.}\textsuperscript{55} The question raised is whether the Ashurst-Sumners Act,\textsuperscript{56} making it unlawful to transport in interstate commerce convict-made goods when intended to be received, possessed, sold or used in violation of state laws, and requiring that packages containing such goods shipped in interstate commerce be labeled before shipment so as to designate the articles as convict-made, is a proper exercise of the power of Congress under the commerce clause of the Federal Constitution, or is an unconstitutional attempt on the part of Congress to deal with matters reserved to the states and to the people by the Tenth Amendment, particularly in view of the trial court's findings that prison-made goods are not in themselves harmful to health, peace or good order.

The validity of a joint resolution of Congress,\textsuperscript{57} which empowered the President to declare unlawful the sale of munitions to countries at war in the Chaco is to be determined in \textit{United States v. Curtiss-Wright Export Corporation.}\textsuperscript{58} The joint reso-

\textsuperscript{54} No. 97, Oct. Term, 1936, argued November 17, 18, 1936.
\textsuperscript{55} No. 138, Oct. Term, 1936, argued November 20, 1936.
\textsuperscript{57} 48 Stat. 811 (1934).
\textsuperscript{58} No. 98, Oct. Term, 1936, argued November 19, 20, 1936.
olution declared it unlawful to sell arms and munitions of war in the United States to countries at war in the Chaco if the President, first administratively finding that such prohibition may contribute to reestablishment of peace between those countries, and consulting thereafter with governments of other American Republics, makes a proclamation to that effect. The constitutional question, of course, is as to whether such a statute constitutes an unconstitutional delegation of legislative power by the Congress to the President.

Cases Recently Docketed

The validity of a statute of Louisiana which levies an annual excise on corporations, and exempts from its provisions corporations, the whole capital stock of which is owned by a bank, but does not exempt corporations whose stock is wholly owned by an insurance company, is questioned in Union Building Corporation v. Conway.59 The questions of denial of the equal protection of the laws, and of due process of law, are at issue here.

In United States v. Belmont,60 there is presented the novel question as to whether decrees of the Soviet Government dissolving a Russian corporation, appropriating its assets and terminating all rights of creditors and stockholders therein, are enforceable in the United States so as to transfer to the Soviet Government title to a bank deposit in New York forming a part of the assets of such corporation.

The validity of the Federal Commodity Exchange Act of 1936 is the subject of an attack in the case of Board of Trade of Kansas City v. Milligan.61

Orders—Rules of the Court—Admission to Practice

It was ordered that Rule 2 of the Rules of this Court be amended, effective February 1, 1937, to read as follows:

"1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest court of a State, Territory, District, or Insular Possession, and that their private and professional characters shall appear to be good.

"2. Not less than two weeks in advance of application for admission, each applicant shall file with the clerk (1) a certificate

59 No. 516, Oct. Term, 1936, filed November 11, 1936.
60 No. 532, Oct. Term, 1936, filed November 17, 1936.
61 No. 519, Oct. Term, 1936, filed November 13, 1936.
from the presiding judge or clerk of the proper court showing that he possesses the foregoing qualifications, (2) his personal statement under oath setting out the date and place of his birth, the names of his parents, his place of residence and office address, the courts of last resort to which he has been admitted, the places where he has been a practitioner, and, if he is not a native born citizen, the date and place of his naturalization, and information respecting any reprimand of any court pertaining to his conduct or fitness as a member of the bar, and (3) two letters or signed statements of members of the bar of this court, not related to the applicant, who are resident practitioners within the State, Territory, District, or Insular Possession (to which the application refers as provided in paragraph 1 of this rule) stating that the applicant is personally known to them, that he possesses all the qualifications required for admission to the bar of this court, that they have examined his personal statement and that they affirm that his personal and professional character and standing are good.

“3. Admissions will be granted only upon oral motion by a member of the bar in open court, and upon his assurance that he has examined the credentials of the applicant filed in the office of the clerk in accordance with the foregoing requirement and that he is satisfied that the applicant possesses the necessary qualification.” The amendment was dated December 7, 1936.

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OF LATE, the plight of the "Gypsy Farmer" has commanded increased recognition. On November 17, 1936, President Roosevelt appointed a special commission of Government officials and private citizens to consider the problem and to report by February 1 on the "most promising ways of alleviating the shortcomings of the farm tenancy system". The state governments have also taken action to cope with this problem. A joint meeting of the more interested states has recently been held in Little Rock, Arkansas, at which meeting the report of the Farm Tenancy Commission appointed last spring by Governor Futtrell of Arkansas was considered.

The problem of the farm tenant is not a new one. The census of 1880 shocked students of American agriculture when it revealed that some 25 per cent of our farmers were tenants. Since 1880 the problem has become increasingly serious. The census of 1920 reported that 38 per cent of our farmers were tenants. By 1930 the figure had increased to 42 per cent. Today, it is estimated that upwards of 45 per cent are tenants. These figures are for the country as a whole. In certain areas where the farm is devoted to the raising of cash crops, the figures are much higher. In some of the best prairie counties of Illinois (wheat) 70 to 80 per cent of the farms are operated by tenants. The 1930 census revealed that Iowa (corn and hogs) had a tenancy percentage of 47.3. The problem is most acute in the Southern cotton states, not only because the percentage of tenancy is higher,

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2 N. Y. Times, Nov. 22, 1936, § 4, p. E 7, col. 3. See also note 6, infra.
3 Hearings before Subcommittee on Agriculture and Forestry on S. 1800, 74th Cong., 1st Sess. (1935) 16.
4 Ibid.
5 Id. at 6.
6 Ibid. In 1919 Illinois passed a law setting up a Farm Tenancy Commission to investigate, among other things, "the growth of farm tenancy in this state". Ill. Laws 1919, p. 83. The Commission filed its report in 1920, and recommended the discouragement of land speculation, the enactment of "tenant's rights" laws, and long-term federal credit to enable tenants to achieve ownership.
but more important because, except for Texas, most of the tenants are share-tenants and share-croppers, rather than cash-tenants. The census of 1930 reports that the nine states with the highest percentage of tenancy were the cotton producing states. In these states the percentage varies from 49.2 for North Carolina to 72.2 for Mississippi.  

Thus, it appears that one hundred and fifty years of liberal land policies by the state and national governments have not achieved the American ideal of owner-operated, family-sized farms. Let us briefly examine the factors which have negatived, to a large extent, the purposes of the federal homestead and reclamation laws, and the state land settlement laws. In the South the farm tenant system grew out of the plantation system of slavery days. In the West, and to a lesser extent in the South, farm tenancy has been the result of commercial farming for a cash crop with attendant land speculation. Farm tenancy has been further increased during the depression by the flood of bankruptcies and foreclosures, resulting from the collapse of the farm products price structure.

The already sad state of the farm tenant was further aggravated by the increased mechanization of production, the depletion of soil fertility caused by intensive cultivation of cash crops, and the operation of the Agricultural Adjustment Administration. Former farm tenants bereft of all resources turned to the relief rolls.

7 79 Cong. Rec. 5752 (1935).
8 Many states followed the national Government in seeking to have their surplus lands quickly settled. Wash. Laws 1919, c. 188; amended 1921, c. 90; 1923, c. 34, c. 112; Ex. 1925, c. 62; Wis. Laws 1917, c. 503; 1919, p. 1441, 1450; Wyo. 1919, c. 143. Also, many states enacted soldier settlement legislation after the World War. 9 Encyc. Soc. Science 60.
9 Johnson-Embree-Alexander, The Collapse of Cotton Tenancy, passim. The authors are members of the Presidential Committee to investigate farm tenancy.
10 Hearings before Subcommittee of the Committee on Agriculture and Forestry on S. 1800, 74th Cong., 1st Sess. (1935) 16.
11 Yearbook of Agriculture (U. S. Dep't Agric. 1936) 53.
13 Statistics indicate that a much higher percentage of farm tenants and sharecroppers were forced to seek relief than was the case with farm-owners and managers. "In the Appalachian and Ozark area, out of 354,244 owners and managers, 9 per centum were on relief; out of 103,885 tenants and 34,984 croppers, 38 per centum were on relief. In the Lake
Most of the former farm tenants were given direct relief with the aid of federal funds. A great many, however, were loaned small sums of money to enable them to lease land through the efforts of the rural rehabilitation program of the Federal Emergency Relief Administration. The Resettlement Administration has continued this rural rehabilitation program. The net effect of these efforts has been to enable the displaced farm tenant to regain his former status of tenancy. Aside from this question of temporary rehabilitation there have been three proposals suggested to deal broadly with the problem on a permanent basis. The first of these suggestions accepts tenancy as a permanent institution and merely seeks to give the tenant some security in his tenure and improvements by the enactment of "tenants' rights" laws by the various states. The second proposed method is the establishment of a system of state tenancy under which the state holds legal title to land and the tenant has a permanent leasehold. The third method suggested is for the Government to aid in the establishment of small holdings by long-term credit.

The Federal Government has been under pressure for a great many years to undertake a program of long-term credit to enable the landless farm tenant, cropper, and laborer, to achieve independent ownership.

The 74th Congress in making appropriations for relief recognized that the problems of farm tenancy had made for a critical rural relief situation. In 1935 Congress made available a sum of money not to exceed $500,000,000, for "rural rehabilitation and relief in stricken agricultural areas, and water conservation, states, out of 83,000 owners and managers, 22 per centum were on relief, and out of the 10,308 tenants, 49 per centum were on relief." Id. at 41.

14 Id. at 41-43.
16 See the Farm Relocation Act of 1933, Ala. Laws 1933, p. 184.
17 See note 6, supra; also see (Secretary of Agriculture) Wallace, The Next Four Years in Agriculture (Dec. 2, 1936) LXXXIX THE NEW REPUBLIC 1148. England has adopted this as one method of dealing with the problem. Hearings before the Subcommittee of the Committee on Agriculture and Forestry on S. 1800, 74th Cong., 1st Sess. (1935) 20.
18 This method was adopted to some extent in Russia after the 1917 revolution. Id. at 21.
19 Immediately after the World War, Congress was besieged to pass some form of soldier settlement legislation, but did not do so. BIBLIOGRAPHY OF LAND SETTLEMENT (U. S. DEP'T AGRIC. 1934) 61 et seq. In the 70th and 71st Congresses bills were introduced under which the Federal Government was to aid in the establishment of "organized rural communities". These bills were never enacted. Id. at 180.
trans-mountain water diversion and irrigation and reclamation”.

The same act also authorized a program of permanent rehabilitation. It was provided that:

“Funds made available by this joint resolution may be used, in the discretion of the President, for the purpose of making loans to finance, in whole or in part, the purchase of farm lands and necessary equipment by farmers, farm tenants, croppers, or farm laborers. Such loans shall be made on such terms as the President shall prescribe and shall be repaid in equal annual installments, or in such other manner as the President may determine.”

By Executive Order, the Resettlement Administration was created to administer these sections of the Act.

It was felt by many, however, that the farm tenancy problem affected the general welfare of the country to such an extent that the problem merited more judicious consideration by Congress than was possible in an appropriation bill for relief. In the last session of Congress many bills were introduced looking to this end. Let us now turn to an examination of the program of federal aid embodied in the farm tenancy bills of the 74th Congress which were proposed in an attempt to deal in an adequate fashion with one of the most serious problems of American rural life.

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21 Exec. Order 7027 of April 30, 1935; Exec. Order 7200 of Sept. 26, 1935. There was also transferred to the Resettlement Administration the Subsistence Homesteads program by Exec. Order 7041 of May 15, 1935. The Subsistence Homesteads program had been set up pursuant to § 208, Title II of the National Industrial Recovery Act, Pub. L. No. 67, 73d Cong., 1st Sess. (June 16, 1933), and, previous to the transfer to the Resettlement Administration, had been administered under the Department of Interior, pursuant to Exec. Order 6209 of July 21, 1933. The type of activity administered under the Subsistence program should be distinguished from that administered under the farm tenancy program. To a large extent the subsistence homesteads were a manifestation of a back-to-the-land movement. See also Pa. Laws 1933, p. 915. Section 208 of Title II of the National Industrial Recovery Act seeks to remove the “over balance of population in industrial centers”. The theory of the farm tenancy program is to help those already on the land.
PART II

The Bankhead-Jones Farm Tenancy Bill

This bill proposed by Senator Bankhead and Representative Jones creates a corporation to be known as the Farmer's Home Corporation which is declared to be an agency and instrumental-

22 On March 26, 1935 Senator Bankhead introduced S. 2367, a bill "To create the Farmers' Home Corporation, to promote more secure occupancy of farm and farm homes, to correct the economic instability resulting from some present forms of farm tenancy, to engage in rural rehabilitation, and for other purposes". This bill was referred to the Committee on Agriculture and Forestry. On April 11, 1935, the bill was reported with amendments (Sen. Rep. No. 446). The bill was debated and amended in the Senate, and on April 24, 1935, it was resubmitted with instructions to report it out again not later than May 12, 1935 (79 Cong. Rec. 6289 (1935)). On May 9, 1935 the bill was reported out again (Sen. Rep. No. 603). It was further debated and amended, and finally passed the Senate on June 20, 1935 (79 Cong. Rec. 9960 (1935)). On June 26, 1935, it was referred to the House Committee on Agriculture.

On March 26, 1935, H. R. 7018, a companion bill to S. 2367, was introduced by Mr. Jones and referred to the Committee on Agriculture. In April 1936, the House Committee on Agriculture considered a confidential committee print entitled PROPOSED SUBSTITUTE FOR "FARM TENANCY" BILL (S. 2367). In May 1936, the House Committee on Agriculture considered a second print of a PROPOSED SUBSTITUTE FOR "FARM TENANCY" BILL (S. 2367). These confidential committee prints are entitled: "A Bill to establish the Farmers' Home Corporation, to encourage and promote the ownership of farm homes and to make the possession of such homes more secure, to provide for the general welfare of the United States, to provide additional credit facilities for agricultural development, to create a fiscal agent for the United States; and for other purposes". These prints bear no numbers. The writer was informed by the Committee that these prints may be cited and discussed. Copies are available from the Committee. Discussion in the text will center about Confidential Committee Print No. 2, with reference to other forms of the bill in the Senate for purposes of comparison.

The House Committee also has on file a typewritten transcript of the hearings which took place on April 16, 1935 on H. R. 7018. The only published hearings on farm tenancy in the 74th Congress were held on March 5, 1935 before a sub-committee of the Senate Committee on Agriculture and Forestry in their consideration of S. 1800, a bill similar to S. 2367. No action was taken on S. 1800, as such; the Senate considered and passed S. 2367 instead.

Aside from the bills noted above, the following bills concerning farm tenancy were also introduced in the 74th Congress: H. J. Res. 270, by Mr. Amlie; H. R. 3644, by Mr. Wood; H. R. 7768, by Fulmer; H. R. 6281, by Mr. McSwain; and H. R. 6613 by Mr. Starnes. No action was taken on these bills.

These 74th Congress bills will lapse, of course, on January 3, 1937. The current 75th Congress, however, will have before it similar legislation, in view of the events noted in the introduction.
ity of the United States. The Corporation is to have succession in its corporate name until dissolved by act of Congress; is authorized to adopt and use a corporate seal which shall be judicially noticed, and to sue and be sued in its corporate name, in any state or federal court of competent jurisdiction.23

The management of the Corporation is vested in a Board of Directors of three to be designated by the President from officers or employees of the Department of Agriculture.24 The Board is empowered to choose a chairman and vice chairman from its members, and to adopt such by-laws and to promulgate such rules and regulations as may be necessary or convenient.

Capital stock in the sum of $50,000,000 is authorized.25 The bill authorizes the President to allocate $50,000,000 to the Secretary of the Treasury from the Emergency Relief Appropriation Act of 1936,26 or any similar act of the 74th Congress. This sum is to be subject to call, in whole or in part, by the Board of Directors of the Corporation.

The Corporation is authorized to borrow a sum which shall not exceed one-fifth of the paid-in capital of the Corporation. No indebtedness is to have a maturity in excess of one year.27 The

23 Where Congress sets up an instrumentality of government, it has been held that Congress may determine the extent to which that instrumentality may be subject to suit and judicial process. Federal Land Bank of St. Louis v. Priddy, 295 U. S. 229 (1935). In this case the Supreme Court held that since Congress had seen fit to make the Federal Land Banks liable to suit, by implication the property of the banks was liable to execution and attachment.

24 The bill as it passed the Senate had the following provision in it concerning the Board of Directors: “The management of the Corporation shall be vested in a board of directors (hereinafter referred to as the ‘board’) of five members, consisting of the Secretary of Agriculture and the Governor of the Farm Credit Administration as members ex officio, and three members to be appointed by the President, by and with the advice and consent of the Senate, and not more than two of said three members shall be members of the same political party”. The bill as introduced in the Senate contained similar language except that there was no provision for a bi-partisan board.

25 The bill as introduced in, and passed by, the Senate also had provision for $50,000,000 of capital stock with additional power vested in the President, however, “to increase such capital stock from time to time in such amounts as may be necessary to carry out the functions of the corporation”.


27 The limited indebtedness authorized by this substitute form of the bill is to be compared with the bill as it was introduced in, and passed by, the Senate. The Senate bill authorized the Corporation to issue $1,000,000,000 in unconditionally guaranteed bonds. When the Senate bill was reported out a second time (Sen. Rep. No. 603, 74th Cong., 1st Sess., 1935), however,
Corporation is further empowered to buy and sell bonds of the United States or the bonds of any corporation, which are fully and unconditionally guaranteed, both as to principal and interest, by the United States. The Secretary of the Treasury is authorized to designate the Corporation as a depository of public money, and may also employ the Corporation as a financial agent of the Government. With the approval of the Secretary of the Treasury, the Federal Reserve banks are authorized to act as depositories, custodians and fiscal agents for the Corporation.

The bill states that it shall be the duty of the Corporation "to establish, and assist in the establishment of," 28 farms and farm homes, for the purpose of encouraging the ownership of farm homes and improving the situation of farm tenants".

a proviso was inserted as follows: "None of said bonds shall be issued within one year after the approval of this Act. Within three years after the approval of this Act not more than $300,000,000 of said bonds may be issued ". The bill as it passed the Senate contained this proviso.

28 Confidential Committee Print No. 2 of the House substitute bill does not have any express provision in it authorizing aid to cooperative associations. Authorization may possibly be implied from the duty of the Corporation to assist in the establishment of farms and farm homes, and the broad powers given the Corporation to carry out this duty. The bill as it was originally introduced and reported out the first time from committee (Sen. Rep. No. 446, 74th Cong., 1st Sess., 1935) contained no express reference to cooperatives. When the bill was reported out the second time (Sen. Rep. No. 603, 74th Cong., 1st Sess., 1935), it empowered the Corporation "to assist the beneficiaries of this Act in the organization of cooperatives ". This authorization remained in the bill as it passed the Senate, and Confidential Committee Print No. 1 of the House substitute bill also contained a provision expressly empowering the Corporation to assist in the organization of farmers' cooperative associations and farmers' non-profit corporations. Experience would seem to show that the failure to provide for cooperative aid in a bill of this sort may foredoom the program.

Secretary Wallace, in testifying before the House Committee on Agriculture, pointed out that in foreign countries where land ownership was made a part of the national policy, such as in Denmark and Ireland, a widespread cooperative movement accompanied the land settlement plan. Unpublished hearings before the House Committee on Agriculture on H. R. 7018, 74th Cong., 1st Sess. (April 16, 1935) 92. See also Childs, Sweden, The Middle Way, ch. X, passim. In this connection, Senator Bankhead's remarks on Denmark, reported in 79 Cong. Rec. 5753 (1935), should be noted. Also, the late Elwood Mead, in commenting on the California post-war land settlement scheme, stated that one of the lessons the failure of the scheme taught was that only group or colony settlement should be attempted, and that cooperative activity in buying and selling was an essential of rural progress. 9 Encyclopedia of Social Sciences 64.
In order to carry out this duty, the Corporation is empowered:

To acquire, by purchase, gift, or otherwise, any real or personal property or any interest therein; 29

To improve, develop, or maintain any property or interest therein;

To construct, maintain or acquire necessary buildings, improvements, furnishings, equipment, improvements and machinery, supplies, facilities, and live stock; 30

And to perform any acts necessary to put into effect the powers granted either now or in the future by Congress. 31

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29 No form of the bill, either in the Senate or the House contains any express provision authorizing condemnation proceedings in the acquisition of land. In each form, acquisition by "purchase, gift, or otherwise" (italics supplied) is authorized. The legislative history indicates that condemnation proceedings were contemplated only for purpose of title clearance, and not for general use in the acquisition of land. *Hearings before the Senate Committee on Agriculture and Forestry on S. 1800, 74th Cong., 1st Sess., (1935).* 11; and 79 Cong. Rec. 5751-52 (1935). It would seem, however, that the Corporation could exercise the power of eminent domain under the law of August 1, 1888, which provides in part as follows: "In every case in which the Secretary of the Treasury or any other officer of the Government has been, or shall be authorized to procure real estate for the erection of a public building or for other public uses, he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so..." 25 Stat. 357 (1888), 40 U. S. C. A. § 257 (1926). United States *v.* Threlkeld, 72 F. (2d) 464 (C. C. A. 10th, 1934). Concerning the constitutional aspects of eminent domain in a farm tenant program, see *Eminent Domain*, Part III, *infra.*

30 The bill as introduced in, and passed by, the Senate exempted lands acquired by the Corporation from Rev. Stat. § 355 (1875), 40 U. S. C. A. § 255 (Supp. 1936), which provides in part as follows: "No public money shall be expended upon any site of land purchased by the United States for the purpose of erecting thereon any armory, arsenal, fort, fortification, navy yard, custom house, lighthouse, or other public building of any kind whatsoever, until the written opinion of the Attorney General shall be had in favor of the validity of the title..." Since the exemption is omitted in the House substitute bill, it would seem that title to all lands acquired by the Corporation would have to be cleared by the Department of Justice. See decision of the Comptroller General of September 11, 1935, No. A-65054.

31 In this connection Senator Robinson stated: "Manifestly, the purpose is not merely to provide the purchaser with a small tract of land on which he may make his home, but it is also to add to that the resources which are necessary to enable him to secure the equipment and other things essential to the making of a home." 79 Cong. Rec. 5924 (1935).

32 The bill as originally introduced and reported out the first time (Sen. Rep. No. 446, 74th Cong., 1st Sess. 1935) provided for the employment of personnel without regard to the provisions of other laws applicable to employment and compensation. The bill as reported out a second time (Sen.
The benefits of the acts are to be made available to natural persons who are farmers or who are about to become engaged in farming, but preference is to be given to "applicants who are married or who have dependent families, or who are farm tenants, sharecroppers, farm laborers, or who were recently farm tenants, sharecroppers, or farm laborers." Page 16 of the Committee Print sets forth a so-called Proposed Amendment I, which provides for county committees consisting of a business man, a farmer and a credit man to certify persons entitled to receive the benefits of the Act.

The Corporation is forbidden:

To make loans to refinance any indebtedness incurred in the acquisition of real property which has not been acquired from the Corporation;

To transfer title to a purchaser until at least 25 per centum of the purchase price has been paid;

To lease any property for a longer term than five years except when an option to purchase is granted to a lessee, in which case the time limit may be ten years;

To provide farms which are not "limited in area to the approximate size, as determined by the preceding federal census, of an average farm in the same locality, or which exceeds in cost the price of property of similar size and value in the same locality".  

Lessees are forbidden to assign or sell their leases without the consent of the Corporation.

In order to deter purchasers from creating voluntary liens on the property, or from selling or agreeing to sell the property, each contract of sale and lien instrument is to have a permissive

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Rep. No. 603, 74th Cong., 1st Sess., 1935) did not exempt the Corporation's employees from the Civil Service laws and the Classification Act of 1923, as amended. In the course of the Senate debate the committee amendment was further amended to exempt attorneys from the civil service laws and the Compensation Act. 79 Cong. Rec. 9932 (1935). Thus, the bill was passed by the Senate with all the Corporation's employees except attorneys subject to the general laws applicable to other government employees. The House substitute bill provides for the exemption of all personnel from the Civil Service laws, but does make them subject to the Classification Act of 1923, as amended.

The United States Census, 1930, revealed that the average farm contained 156.9 acres, and that the average value per farm—land and buildings—was $7,614. At 79 Cong. Rec. 9919 (1935) appears the census table giving the average size and average value of farms in every state in the Union. See also id. at 6197.
acceleration provision. This provision is also to apply if any involuntary lien is established.34

The Corporation is empowered to fix the amortization period and rates of interest 35 on all loans other than certain ones stipulated by the bill to follow similar loans by the Farm Credit Administration.

All property of the Corporation, and all obligations issued to, or by, the Corporation are to be tax exempt 36 "except that any real property of the Corporation is to be subject to territorial, state, county, municipal, and other local taxation to the same extent according to its value as other real property is taxed".37

34 It was the hope of the proponents of this measure that some device could be inserted in the bill which would deter the mortgaging of these lands so as to prevent the recurrence of the situation that happened in the West after the original homestead and reclamation laws. As soon as the homesteader secured his patent, the land would be mortgaged and a goodly percentage would pass into absentee hands by foreclosure. Id. at 5755, 9944.

35 S. 2367, as originally introduced in the Senate, had provision for the issuance of bonds, and it was provided that the rate of interest to be charged by the Corporation upon indebtedness owed to it should not be less than the bond interest rate and could include a reasonable charge to be applied toward the expenses of administering the provisions of the Act not to exceed one per centum per annum. The bill passed the Senate with the provision that "the rate of interest to be charged by the Corporation upon indebtedness owed to it shall be not to exceed 3½ per centum per annum and may include a reasonable charge to be applied toward the expenses of administering the provisions of this Act, not to exceed one per centum per annum."

36 In Smith v. Kansas City Title and Trust Company, 255 U. S. 180 (1921), the Supreme Court held that since the Federal Farm Loan Act of July 17, 1916, as amended (39 Stat. 360, 40 Stat. 431), was a valid exercise of Congressional power, Congress could make the bonds of federal farm loan agencies tax-exempt. In the case of Federal Land Bank of New Orleans v. Crossland, 261 U. S. 374 (1922), the Supreme Court cited the Smith case and held that first mortgages executed to Federal Land banks were exempt from an Alabama general tax on mortgages because the Federal Farm Loan Act of July 17, 1916, as amended (39 Stat. 360, 40 Stat. 431), provided that first mortgages to land banks should be tax-exempt from federal, state and local taxation.

37 Since Congress may exempt legally constituted agencies from taxation, it follows that Congress may allow taxation to any degree it desires. In the case of the national banks, the Supreme Court, in Owensboro National Bank v. Owensboro, 173 U. S. 664 (1899), pointed out that the measure of the power of states to tax national banks, their property or their franchises, was set forth in Rev. Stat. § 5219 (1875), 12 U. S. C. A. § 548 (1923), which confined taxation to the shares of stock in the names of the shareholders and to an assessment of the real estate of the banks.

Aside from allowing property to be placed on the local tax rolls and assessed in the same measure as other local property, Congress may provide for grants in lieu of taxes. S. 2367, as originally introduced, had such pro-
The Comptroller General is directed to audit the accounts of the Corporation at least once each Governmental fiscal year for the sole purpose of making the report to the President and Congress, together with such recommendations as the Comptroller General deems advisable. The Corporation also is directed to make a full annual report of its activities to the Speaker of the House of Representatives.

The bill provides that the jurisdiction, civil and criminal, over persons resident on lands acquired shall not be changed by reason of such acquisition.

In the Committee Print appears a so-called Proposed Amendment II, which transfers the personal property of the Resettlement Administration to the Corporation and gives discretion to

vision. The Corporation was authorized "to make payments to states and governmental subdivisions thereof, for the furnishing of such public services and facilities as are customarily provided for use of taxes and assessments to the farms, farm homes, and farm communities established as provided for hereinafter". The bill passed the Senate with this provision. In this connection, Pub. L. No. 837, 74th Cong., 2nd Sess. (June 29, 1936) and Pub. L. No. 845, 74th Cong., 2nd Sess. (June 29, 1936) should be noted. Pub. L. No. 837 authorizes grants in lieu of taxes where local governmental units supply services to Public Works Administration projects. Pub. L. No. 845 authorizes the Resettlement Administration to make such grants in lieu of taxes where local governmental units supply services to "any Resettlement project or any rural-rehabilitation project for Resettlement purposes".

S. 2367, as originally introduced, provided that the Corporation "shall determine its necessary administrative and other expenditures under this Act and the manner in which they shall be incurred, allowed and paid, without regard to the provisions of any other law governing the expenditure of public funds". In the course of the debate on the bill, the bill was amended to provide that all claims and accounts of the Corporation should be submitted to the General Accounting Office. 79 Cong. Rec. 9933 (1933). The bill passed the Senate with this provision.

Senator Bankhead, in opposition to the amendment, pointed out that there was ample precedent for the exemption of the Corporation accounts from clearance by the General Accounting Office. He states, "I assume the theory is that there are many items and transactions which cannot well be handled if they are required to go through the General Accounting Office." Ibid.

Both the Home Owners Loan Corporation, 48 Stat. 1263 (1934), 12 U. S. C. § 1463; (1938), and the Farm Credit Administration, 46 Stat. 13, 12 U. S. C. A. § 11416 (1929), have been given authority to audit their own accounts and have been exempted from the regular procedure requiring audit by the General Accounting Office. See also Skinner and Eddy v. McCarl, 275 U. S. 1, 8 (1927).

Pub. L. No. 837 and Pub. L. No. 845, both of the 74th Congress, 2d Sess. (June 29, 1936), also provided for a reextension of local civil and criminal jurisdiction over the lands involved under those statutes.

For a complete discussion of the problems of federal and state jurisdiction, see Glick, The Federal Homesteads Program (1935) 44 Yale L. J. 1324, 1360.
the President to so transfer the real property. The Corporation is authorized to exercise the powers, functions, and duties conferred upon the Resettlement Administration or administrator thereof.\textsuperscript{40}

PART III

Constitutional Aspects

During the debate in the Senate on S. 2367, Senator King stated: \textsuperscript{41}

"In my opinion, this measure may not be defended upon constitutional grounds, and it is saturated with socialistic, or at least paternalistic, qualities foreign to Democratic ideals and the concepts of the founders of this Republic."

At another point in the debate, Senator Dickinson stated: \textsuperscript{42}

"I do not believe the Government has any authority to buy land. I do not believe the Government under the constitution was ever expected to go into the land business."

Let us now turn to the constitution and the cases in an attempt to determine the accuracy of the statements quoted above.\textsuperscript{43} The

\textsuperscript{40} See note 21, supra. Pub. L. No. 605, 74th Cong., 2nd Sess. (May 20, 1936), the Rural Electrification Act, deals with a similar problem involving the assimilation of an emergency organization by a statutory agency. Section 8 of this Act provides as follows: "The administration of loans and contracts entered into by the Rural Electrification Administration established by Executive Order Numbered 7037, dated May 11, 1935, may be vested by the President in the Administrator authorized to be appointed by this Act; and in such event the provisions of this Act shall apply to said loans and contracts to the extent that said provisions are not inconsistent therewith. The President may transfer to the Rural Electrification Administration created by this Act the jurisdiction and controls of the records, property (including office equipment) and personnel used or employed in the exercise and performance of the functions of the Rural Electrification Administration established by such Executive Order."

\textsuperscript{41} 79 Cong. Rec. 6212 (1935).

\textsuperscript{42} 79 Cong. Rec. 6005 (1935).

\textsuperscript{43} It is to be noted that the Corporation was not given immunity from suit. This, of course, dispenses with the problem of when a suit against the United States is not a suit against the United States. Cf. Franklin Township \textit{v.} Tugwell, C. C. A. (D. C.) May 18, 1936. A plaintiff seeking to halt the farm tenancy program must still encounter another technical hurdle, the question as to his standing in a court. Under the doctrine of Frothingham \textit{v.} Mellon, 262 U. S. 447 (1922), a federal taxpayer as such cannot sue to enjoin the expenditure of federal funds unless he alleges some immediate threat of substantial injury to his individual interest. It would seem, however, that where an individual sues as a local taxpayer on the ground that tax
applicable constitutional powers to be discussed are the general fiscal powers of the Federal Government and the power to spend for the general welfare.\textsuperscript{44} Let us then attempt to determine exemption of property acquired by the Federal Government will have the effect of increasing his local taxes, he would have a standing in court because the probability of increased local taxes constitutes a threat of immediate injury. Franklin Township v. Tugwell, supra. A suit of this nature by a local taxpayer may be averted by the inclusion in a farm tenancy bill of a provision making the property acquired taxable, or in lieu thereof, making grants to the local government commensurate with the municipal services to be performed for the tax exempt property. Under the doctrine of Massachusetts v. Mellon, 262 U. S. 447 (1922), and Florida v. Mellon, 273 U. S. 12 (1926), a suit by a state is also banned unless the state alleges an immediate threat of injury to its interest.

Shareholder suits would seem to be the easiest way to acquire a standing in court. A stockholder in a corporation might sue the corporation to enjoin investment in securities issued pursuant to a farm tenancy program on the ground that such securities were not legal investments because of the unconstitutionality of the authorizing statute. This was the nature of the suit in Smith v. Kansas City Title and Trust Co., 255 U. S. 180 (1921), which tested the validity of the Federal Farm Loan Act of 1916. Another type of suit might be similar to that in the case of Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936). In that case it was held by a 5-4 decision that the plaintiff had a standing in court to enjoin the corporation in which he was a shareholder from disposing of certain properties to the Tennessee Valley Authority upon an allegation that the contract was beyond the constitutional powers of the Federal Government.

It may also be that individuals will have a standing in court to complain of the farm tenancy program on the theory of unlawful competition. Frost v. Corporation Commission, 278 U. S. 515 (1929); Greenwood County v. Duke Power Company, 81 F. (2d) 986 (C. C. A. 4th, 1936). It is also to be noted that in the Franklin Township case, supra, although it was held that individuals whose rental income would be depressed because of competition from the model community proposed had no standing in court on the theory of unlawful competition, yet the local township was held to have a standing in court on the ground that its proprietary interest in certain rented property would be damaged. See also U. S. v. Dern, 68 F. (2d) 773 (App. D. C. 1934).

Where the Government seeks to condemn property, the defendant property owner may of course, raise the constitutional issues.

\textsuperscript{44} Art. IV, § 3 of the Constitution provides: "That Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." This provision in the Constitution is, of course, not a grant of substantive power; it is, in effect, an incidental power of dealing with property acquired by the Federal Government in the exercise of its delegated substantive powers. In Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936), it was held that under the authority of Art. IV the Federal Government could dispose of surplus electrical energy generated at the so-called Wilson dam, which was constructed pursuant to the war powers of the Federal Government. The Chief Justice pointed out that the Government, "... rightly conceded at the bar, In substance, that it was without constitutional authority
whether the Federal Government could use the power of eminent domain in the execution of a farm tenancy program.

The Fiscal Powers. There is reason to believe that the long term credit aspects of a farm tenancy program may be constitutionally grounded in the fiscal powers of the Federal Government, provided the administrative vehicle is also designated as a depository of public moneys and is empowered to deal in Government securities.

In Norman v. Baltimore and Ohio Railroad,45 one of the Gold Clause Cases, Mr. Chief Justice Hughes had occasion to point out the breadth of the federal fiscal powers in the following language:

"The broad and comprehensive national authority over subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power 'to make all laws which shall be necessary and proper for carrying into execution' the other enumerated powers." 46

In Smith v. Kansas City Title & Trust Company,47 the validity of the Farm Credit Administration was sustained on the basis of the fiscal powers delegated to the Congress by the Constitution. In that case an action was brought by a shareholder of the defendant company to enjoin the defendant from investing the bonds of the Federal Land Banks and Joint Stock Land Banks upon the ground that the Federal Farm Loan Act of July 17, 1916,48 authorizing these agencies, was unconstitutional and therefore the bonds were not a legal investment. The defendant shareholder claimed that these agencies were created, not to act

to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States." (Italics supplied.) Id. at 356. It must be remembered that the issue in the Ashwander case was narrowed to the validity of the methods used in disposing of surplus current from the Wilson dam. The validity of the entire TVA program was not before the court. Cf. Mr. Justice McReynolds, dissenting; id. at 356.

46 Id. at 303.
47 255 U. S. 180 (1921).
48 40 Stat. 431, entitled, "An Act to provide capital for agricultural development, to create standard forms of investment based upon farm mortgages, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create Government depositories and financial agents for the United States, and for other purposes."
as fiscal agencies, but rather to make available long term agricultural credit at a low interest rate; that this was not a Governmental function. Mr. Justice Day pointed out that the Court would not question the motives of Congress when it sets up a lawful fiscal agency, and concluded that:

"creation of these banks, and the grant of authority to them to act for the Government as depositories of public moneys and purchasers of Government bonds, brings them within the creative power of Congress although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Banks, or the authority given to national banks to carry on additional activities, destroyed the power of Congress to create these institutions." 50

In the Smith case, the so-called federal fiscal agents were empowered to carry on a private banking business in various types of rural credit. Under a farm tenancy program, the Corporation would not only be carrying on a banking business in another type of agricultural credit, but would also be engaging in the business of buying, selling and leasing lands, and building houses. Although the fiscal powers of the Federal Government may be sufficient authority for the Government's entrance into a general banking business, it would seem questionable whether the fiscal powers are sufficient authority for the entrance of the Government into the real estate business and the construction industry.

General Welfare Clause. It would appear that the only possible constitutional basis for a farm tenancy program of the type contemplated would be the general welfare provision of the Tax Clause. Article I, Section 8 of the Constitution, the Tax Clause, provides that

"The Congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States." 51

In United States v. Butler, the United States Supreme Court for the first time declared by way of dictum that the Hamiltonian view of the general welfare clause, rather than the Madisonian,

49 255 U. S. 180, 210 (1921).
50 Id. at 211.
51 The general welfare provision in the Preamble to the Constitution is, of course, not a grant of power. Jacobson v. Massachusetts, 197 U. S. 11 (1904).
52 297 U. S. 1 (1936).
is the correct one. The adoption of this view would mean that the power of the Federal Government to spend for the general welfare is not merely a power incidental to the other powers delegated in Article I of the Constitution, but rather is a great substantive power of itself on a par with the other delegated powers.

In the Butler case, a majority of the Supreme Court held the agricultural adjustment program invalid in spite of the Court’s espousal of the Hamiltonian view of the general welfare clause, because it was found in that case that the joint exercise of the taxing and spending powers was merely a step in a general plan to regulate agricultural production, a matter which the Federal Government cannot regulate directly because of the lack of delegated power, and therefore prohibited to the Federal Government by the Tenth Amendment.

The farm tenancy program is not an attempt to use the taxing and spending powers to regulate agricultural production or land tenure, matters reserved to the states under the Tenth Amendment. If a tax were laid on all absentee landlords and the proceeds appropriated in advance, to be available to farm tenants, the situation would be similar to the Butler case. It must be emphasized that we are concerned here with an appropriation in aid of agriculture, not with an attempt to expropriate, by means of taxation, the property of one class of persons in order that it may be given to another.

In the Butler case, Mr. Justice Roberts drew a distinction between

"a statute stating the conditions upon which money shall be expended and one effective only upon assumption of contractual obligation to submit to a regulation which otherwise could not be enforced."

He further stated:

"Many examples pointing the distinction might be cited. We are referred to appropriations in aid of education, and it is said that no one has doubted the power of Congress to stipulate the sort of education for which money shall be expended. But an appropriation to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the Constitution is clearly bad. An affirmation of the authority of Congress so to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power."

53 Id. at 66.
54 Id. at 73.
55 Id. at 74.
It would appear that in a farm tenancy program, Congress would be enacting "a statute stating the conditions upon which money shall be expended". A farm tenancy statute is similar to the educational statute adverted to and sanctioned by Mr. Justice Roberts. In a farm tenancy program, the Federal Government would not be seeking to regulate the relationship between tenants and landlords, but only seeking to make available funds to farm tenants in order that they may achieve independent ownership. The farm tenant, the recipient of the aid, would not be obliged to sign away any constitutional rights; the only conditions laid down by the Federal Government, to wit, those embodied in the so-called scientific farm and home plans, would be calculated to aid the recipient of federal funds to achieve independent ownership; and more important, these conditions are important for the protection of the Government's security for the loan. The language quoted above from the majority opinion indicates that it was assumed that Congress could so condition expenditures of funds in order to make the spending effective. It is only where a conditional appropriation is part of a broad scheme to regulate indirectly what the Federal Government cannot regulate directly, the situation in the Butler case, that conditional appropriations are valid.

Mr. Justice Roberts, in the Butler case, expressly pointed out that, although the Court subscribed to the Hamiltonian view of the general welfare clause, it was not necessary in order to decide the case before it "to ascertain the scope of the phrase 'General Welfare Clause of the United States' or to determine whether an appropriation in aid of agriculture falls within it." 56 Mr. Justice Roberts, however, pointed out the "wide range or discretion permitted to the Congress" when the subject was the "general welfare". He stated: "How great is the extent of that range when the subject is the promotion of the general welfare of the United States, we need hardly remark." 57 Some writers have suggested that the Court would not challenge appropriations by the Congress for the "general welfare". 58 It has been suggested that the Court would not inquire into what constitutes welfare but only into the question whether the welfare was local or national. 59 It

56 Id. at 68.
57 Id. at 67.
would seem that the judicial function in passing upon an appropriation for the "general welfare" would be no different than in a case where the judiciary passes upon the exercise by Congress of any other delegated power. The Supreme Court has many times pointed out, and Mr. Justice Roberts did again in the Butler case,\(^59\) that it is not the judicial function to inquire into the wisdom of Congressional action, but only to determine whether Congress has overstepped the powers delegated to it by the Constitution.

Where an individual charges that Congressional action is unauthorized by the delegated powers of the Constitution, (and therefore banned by the Fifth and Tenth Amendments) it is the judicial function to decide whether the statute is in reasonable furtherance of some delegated power. If there is any possibility that the statute is reasonably related to the delegated power in question, then the statute is sustained. In the case of the general welfare clause, it is still a judicial function to decide whether in a given instance before the Court it can be said that a Congressional appropriation by no reasonable possibility is conducive to the general welfare.

In construing appropriations for the general welfare, the further question is involved of what constitutes general as compared with some other kind of welfare. As noted above, it has been suggested that the test of the validity of an appropriation for the welfare of the country, is whether the welfare is general or local.\(^61\) It must be remembered that the powers of the Federal Government are asserted over the same persons and property as are the powers of the states. To say that the welfare must never be local is to deny the Federal Government the power to spend for the general welfare, other than in the District of Columbia of the Territories. As a matter of logic, a situation of national concern can only be the combination of similar conditions in widespread localities. The similarity of widespread local conditions does not give the Congress any greater power than it already has, but simply makes the exercise of the existent power to spend for the general welfare reasonable.

It would seem that there can be no hard and fast rule as to when an appropriation is, or is not, for the general welfare. Everyone would agree that an appropriation of $5,000 to farm tenant Jones to enable him to buy a farm would not be for the general welfare. As a matter of fact, it could be stated cate-

\(^{60}\) 297 U. S. 1, 67 (1936)

\(^{61}\) See note 59, supra.
gorically that the appropriation would be only for the welfare of farm tenant Jones. But the situation changes where Congress, after an investigation of the relationship of farm tenancy to the national economy, finds that a program which enables farm tenants to achieve independent ownership would make for stability in the social and economic life of the nation. Nor would it seem necessary that every farm tenant should be given the opportunity of achieving an independent status. It cannot be said that the validity of an appropriation for the general welfare depends upon making the appropriation available to a certain number of people. All that can be said is that an appropriation is for the general welfare when the benefits of the appropriation are made available to such a number of people that the cumulative result will have a substantial and beneficial effect upon the social and economic life of the country.62

62 In Franklin Township v. Tugwell, C. C. A. (D. C.) A. (D. C.) May 18, 1936, plaintiffs (taxpayers, landlords, and local township) brought suit to enjoin the purchase of lands by the Resettlement Administration for the purpose of erecting thereon a model suburban community. The Government filed a motion to dismiss, equivalent to a demurrer under the federal equity rules. The demurrer was sustained and the plaintiffs appealed. The question before the appellate court was whether the parties had a standing in court, and therefore whether the motion to dismiss should have been overruled. It should be noted that the question of standing in court is a damage question. The plaintiff must allege immediate threat of substantial injury to his legal rights. The other allegation of unconstitutionality is assumed as true until the damage question is disposed of. Only then does the constitutional issue come into play. The court decided that certain of the plaintiffs had a standing in court and remanded the case for trial below. The majority of the Court then indulged in obiter dictum to the effect that there had been an unconstitutional delegation of power to the administrative officers. The majority further assumed to hold that the statute and Exec. order (Pub. Res. No. 11, 74th Cong., 2nd Sess.; Or. 7027, April 30, 1935) involved made it apparent that this was an attempt to regulate the density of agricultural population; that the power to spend for the "general welfare" was an incidental means to redistribute the population against the will of the states. Judge Stephens, dissenting on the obiter dictum involving constitutional issues, pointed out that perhaps a spending statute cannot be assailed on the ground of unlawful delegation of power because it may well be that spending in an administrative, not a legislative, function. Furthermore, on the assumption that the delegation rule applies to a spending statute, it may also be that a wider discretion is permissible in the delegation of spending powers than of regulatory powers. It is to be noted that the Supreme Court seemingly has allowed a wider discretion in delegation pursuant to Article IV of the Constitution, the property clause, than it has in the case of regulatory powers; U. S. v. Grimaud, 220 U. S. 506 (1911). Judge Stephens also pointed out that the majority had assumed to pass upon the constitutional merits involved without any fact record before it, the majority stating that the lump sum appropriation for relief was unconstitutional on its face.
Eminent Domain. In discussing land acquisition pursuant to the Bankhead Farm Tenancy bill, it was noted that where a statute authorized a federal officer to acquire land, that officer could institute condemnation proceedings in view of the U. S. Code provision which provides that:

"In every case in which the Secretary of the Treasury or any other officer of the Government has been, or shall be, authorized to procure real estate for the erection of a public building or for other public uses, he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever, in his opinion, it is necessary or advantageous. . . ." 63

Congress, of course, could specifically ban the use of eminent domain in carrying out a farm tenancy program. Let us assume, however, that Congress does not proscribe condemnation proceedings in the acquisition of land. Further, assume that a federal officer charged with the duty of land acquisition for such program decides that a particular area of 2,000 acres would make a desirable site for a farm tenancy project. After negotiations with the owners of the various tracts comprising this area, the federal officer finds that there is one owner of a twenty acre tract in the middle of the site who refuses to sell his land on the ground that the Government's offer is too low. Let us now assume

Furthermore, he asserted that it was a uniform rule of the Supreme Court to decline to pass on constitutional questions unless there had been a finding of facts below, citing Hammond v. Schappi Bus Line, 275 U. S. 164 (1927), where Mr. Justice Brandeis, speaking for the Court, used the following language: "Before any of the questions suggested, which are both novel and of far reaching importance, are passed upon by this Court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence." Id. at 171-172.

Insofar as the constitutional issues in this particular case were concerned, Judge Stephens said, "... there would seem to be two inquiries in respect of the Welfare Clause, first whether general conditions of unemployment and destitution do affect the general welfare, and, if so, second, whether a statute passed 'in order to provide relief, work relief and to increase employment by providing for useful projects,' as above particularized, including, so far as this case is concerned, housing, is an appropriate means of administering to the general welfare. The answer to each of these inquiries depends upon facts, such as, so far the first inquiry is concerned, the extent and probable permanence of unemployment and destitution, the probable effects thereof upon the nation through, conceivably, such factors as social disorder, crime, sickness and the like, and such as, so far as the second inquiry is concerned, the need of employment in such industries as furnish materials for housing, and the need and the extent thereof of houses for the destitute. Other facts may aid in one way or another the solution of these two problems. It is not possible to foresee all of the ramifications of pertinent fact involved; it is that very impossibility which makes decision before hearing upon the merits unwarranted."

that, pursuant to the statutory provision, the federal officer has condemnation proceedings instituted. The landowner defends his recalcitrance by alleging that the Federal Government in carrying out a spending program, cannot force a man to part with his land against his wishes; that the Federal Government cannot acquire lands by eminent domain for this purpose.

The landowner specifically charges that to condemn his land for development and resale to another private citizen is not to do so for a "public use"; that this is a violation of the due process clause of the Fifth Amendment; and, further, that the use of eminent domain makes it apparent that the Federal Government is seeking to regulate land tenure in the several states, a subject over which Congress has no control and which is reserved to the states under the Tenth Amendment.

In the case of the United States v. Certain Lands in Louisville, Kentucky,\(^\text{64}\) the Circuit Court of Appeals decided that the Federal Government could not condemn land to be used as a site for a slum clearance project under Title II of the National Industrial Recovery Act.\(^\text{65}\) The question whether the Federal Government can use eminent domain as an auxiliary power to the spending power has never been considered by the Supreme Court in any case.\(^\text{66}\) Let us briefly examine the power of eminent domain in relation to our theory of state and Federal Governments and evaluate the Louisville case in the light of our findings.

The reports reveal two lines of decisions dealing with eminent domain. The first of these are state cases wherein the defendant is charging that the contemplated use is not a public one, and,


\(^{65}\) 48 STAT. 195 (1933).

\(^{66}\) It has been suggested that the Supreme Court has decided that eminent domain may be used pursuant to the general welfare clause in the case of United States v. Gettysburg Electric Ry., 160 U. S. 668 (1896). See Corwin, The Spending Power of Congress (1923) 36 Harv. L. Rev. 548, 577. It would seem, however, that in the Gettysburg case, exercise of eminent domain was authorized on the basis of the war powers of the Federal Government, although language may be found in the opinion which points to the general welfare clause. The Court pointed out the importance of the site in question from the point of view of burial of the Civil War dead and study of military history.

Other cases in the reports may, at first glance, give the impression that they were decided under the general welfare clause. Upon closer examination it is revealed that some other delegated power of the Federal Government was in question. Cf. United States v. Threlkeld, 72 F. (2d) 464 (C. C. A. 10th, 1934) [national forest on the public domain, pursuant to Art. IV, Light v. United States, 220 U. S. 523 (1910)]; United States v. 2,271.29 acres, 31 F. (2d) 617 (W. D. Wis. 1928) [wildlife refuge established pursuant to the treaty power, Mo. v. Holland, 252 U. S. 416 (1920)].
therefore, he is being deprived of his property without due process of law. The cases do not lay down any hard and fast rule as to what constitutes a public use.

In Hairston v. Danville and Western Railway Company,\footnote{67 208 U. S. 598 (1908).} Mr. Justice Moody stated:

"The courts of the states, whenever the question has been presented to them for decision, have, without exception, held that it is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses, even though full compensation for the taking be required. But, as has been shown by a discriminating writer (1 Lewis on Eminent Domain, 2nd ed. sec. 157), the decisions have been rested on different grounds. Some cases proceed upon the express, and some on the implied, prohibitions of state constitutions, and some on the vague reasons derived from what seems to the judges to be the spirit of the constitution or the fundamental principles of free government. The rule of state decision is clearly established and we have no occasion here to consider the varying reasons which have influenced its adoption. But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question." \footnote{68 Id. at 606.}

An examination of the state cases reveals also that where a defendant in a condemnation suit instituted pursuant to state authority challenges the contemplated use on the ground of being deprived of his property without due process of law, the court will examine all the facts bearing upon the activities for which condemnation proceedings are being exercised.

In Clark v. Nash,\footnote{69 198 U. S. 361 (1905).} Mr. Justice Peckham pointed out that the validity of a state statute authorizing eminent domain in a given instance "may sometimes depend upon many different facts, the existence of which would make a 'public use', even by an individual, where, in the absence of such facts, the use would clearly be private".

In the Clark case, the Supreme Court was considering whether a Utah statute was valid which allowed one private citizen to condemn the land of another private citizen for the purpose of constructing an irrigation canal. The defendant in this condemnation suit brought by a private citizen pursuant to the statute contended that "although the use of water in the State of Utah for the purposes of mining, irrigation or manufacturing may be a 'public use' where the right to use it is common to the people,
yet that no individual has the right to condemn land for the purpose of conveying water in ditches across a neighbor's land, for the purpose of irrigating his own land alone, even where there is, as there is in this case, a state statute permitting it". The Supreme Court held that the fact that one person would use the water from this irrigation ditch did not mean that the land was being condemned for a "private use." It is apparent from this case that the court sustained the condemnation of land because it was shown that the state action in permitting the use of one of its sovereign powers was reasonably calculated to aid its citizens in coping with the problem of water scarcity and consequent arid land. In this case it would seem that the Court was really considering whether it was reasonable for the state in its exercise of its police power to limit private rights in land in order to deal with the problem of water scarcity. This is the ordinary question in every case where a state regulation is challenged on the ground of due process. The Court inquires whether the state's action was reasonably necessary to cope with the evil to be remedied. From this view of the case it would follow that the real question in these cases under the Fourteenth Amendment is simply one of reasonableness of state action. The fact that in this case the sovereign power of eminent domain was invoked to make state action effective, rather than some other sovereign power, does not alter the situation. In other words, the Court having looked at the evil and finding that the remedy is adapted to coping with the evil, comes to the conclusion that the state action was reasonable.\footnote{Ordinarily, where the state in its exercise of its police power curbs the rights of one class of people to aid another, it does not directly take tangible property from the one to be conferred upon the other. State regulation usually concerns itself with legal rights and privileges, with the result that in the last analysis actual property is curbed or enhanced. For example, where state regulation requires the presence of certain safety appliances in factories, in the last analysis it costs the employer something to install the appliances and increases the "real" wage of the employee because he will not have to pay so many doctor bills. Although the courts have gone a long way in allowing Government to curb property rights, yet they have refused to allow the total expropriation of one man's property in order that it may be given to another, unless compensation is made. Cf. Miller \textit{v.} Shoene, 276 U. S. 272 (1928). In Louisville Joint Stock Land Bank \textit{v.} Radford, 295 U. S. 555 (1935), Mr. Justice Brandeis pointed out that Government should use the power of eminent domain where it seeks to expropriate completely the property of one class of person for the benefit of another, and where the taking is in the public interest. He stated: "If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort
In *Nebbia v. New York*, 71 the Supreme Court considered the question whether price regulation of milk by a state was a valid exercise of the police power. The defendant in that case claimed that he was being deprived of property without due process of law because price regulation was only valid regarding businesses "affected with a public interest" or "clothed with a public use", and that his milk business was not one of these. In that case Mr. Justice Roberts laid to rest these legal shibboleths as regards price control. He stated:

"In several of the decisions of this court wherein the expression 'affected with a public interest', and 'clothed with a public use', have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." 72

It is submitted that likewise as regards eminent domain the phrase "public use" is meaningless and confusing in that it affords no basis for decision, no criterion for exclusion and inclusion in dealing with varying fact situations, but only serves to confuse the question of the validity of the exercise of power which, again, is one of reasonableness of state action, a due process question.

In the *Clark case*, eminent domain was held to be reasonable where the benefits were conferred on one person. In other cases it has been held that unless the recipient of the benefits conferred by the condemnation proceeding holds himself open to serve the public without discrimination, the exercise of the power of eminent domain is not reasonable, or in the language of the cases, is for a "private use". This is the rule in those cases

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must be had to proceedings by eminent domain; so that, through taxation the burden of the relief afforded in the public interest may be borne by the public." *Id.* at 602. It is also to be noted that those courts of equity which balance the conveniences in suits to abate nuisances indulge in a species of eminent domain when they allow the nuisances to continue upon payment of all past and future damages to the plaintiff. *Smith v. Staso Milling Co.*, 18 F. (2d) 736 (C. C. A. 2d, 1927).

71 291 U. S. 502 (1934).

72 *Id.* at 536.
which deal with the exercise of the power of eminent domain by a so-called public utility.\textsuperscript{78}

The second line of cases deal with the exercise of the power of eminent domain by the Federal Government. It has been recognized that although the Constitution does not expressly grant the power of eminent domain to the Federal Government, yet this power is to be implied from the "elastic clause" as one "necessary and proper" to carrying out those powers specifically delegated to Congress.\textsuperscript{74} It is an auxiliary power. Also, the Fifth Amendment impliedly recognizes this power in the Federal Government by providing "that private property shall not be taken for a public use without just compensation". The language of the federal cases and federal statutes\textsuperscript{75} is also couched in terms of "public uses".

In view of the fact that the Federal Government is one of specifically delegated powers, it follows that the auxiliary power of eminent domain can only be used in reasonable furtherance of some delegated power. Where a defendant in a condemnation suit by the Federal Government charges that his lands are not being taken for a "public use", he is in effect alleging that the Federal Government is attempting to do something by means of the power of eminent domain which it has no delegated power to do under the Constitution. He is challenging, not the power of eminent domain as such, but rather the lack of power of the Federal Government, or he may be alleging that the use of eminent domain is not in reasonable furtherance of the specifically delegated power. Thus, in our hypothetical farm tenancy case where the defendant alleges that his lands are not being taken for a "public use" he is in effect asking the court to determine whether Congress has the delegated power to undertake such program, and assuming it has, whether the use of the auxiliary power of eminent domain is in reasonable furtherance of such program. In examining the questions in the case the court will have to determine whether a farm tenancy program can be sustained on the power delegated to Congress by the Constitution to spend for the general welfare. Assuming that the court answers this question

\textsuperscript{78} Jones \textit{v.} North Georgia Electric Co., 125 Ga. 618 (1906); Fallsburg Power and Manufacturing Co. \textit{v.} Alexander, 101 Va. 98 (1903).

\textsuperscript{74} Kohl \textit{v.} United States, 91 U. S. 367 (1876). Congress may grant the power of eminent domain to corporations which are government instrumentalities, such as a corporation building a bridge over a navigable river to be used as a post and military road. Luxton \textit{v.} North River Bridge Co., 153 U. S. 525 (1894).

\textsuperscript{75} See note 29, \textit{supra}. 
in the affirmative, it must then go on to determine whether the exercise of the auxiliary power of eminent domain is reasonably "necessary and proper" to make effective the Congressional power to spend.

Where the defendant charges that the Fifth Amendment is being violated because his property is being taken without due process of law, the questions before the court are not different from the case where the defendant alleges that the power of eminent domain is not being exercised for a "public use." In fact, the questions to be considered by the court in each instance are the same ones noted above, that is, whether a farm tenancy program can be sustained on the basis of some delegated power of Congress and, further, assuming it can, whether the exercise of the power of eminent domain is reasonably appropriate to make the program effective.

The majority in the Louisville case recognized that the rule of "public use" in the state eminent domain cases under the Fourteenth Amendment involved questions of state power, not some peculiar rule of eminent domain law. Judge Moorman pointed out: "What the cases hold is that there is nothing in the Fourteenth Amendment to prevent a state from exercising the power of eminent domain to carry into effect a policy which, in the light of the needs and exigencies of the state, may be regarded as promotive of the public interest. This was the ground of decision in Clarke v. Nash, 198 U. S. 361, and Greene v. Frazier, 253 U. S. 233." 76

But when the court came to consider the specific question in the case, that is whether the Federal Government could use the power of eminent domain in furtherance of a program pursuant to Title II of the National Industrial Recovery Act, it assumed that there was some peculiar doctrine of public use to be discussed rather than a question of power under the general welfare clause, and the further question, whether the use of the power of eminent domain was in reasonable furtherance of the general welfare clause. After pointing out that since the founding of the Republic there had been two schools of thought on the scope of the General Welfare Clause, the Hamiltonian and the Madisonian, the court assumed that it did not have to decide that question but could decide nevertheless on a so-called rule of "public use". Judge Moorman stated: "Whatever its extent [the general welfare clause] may be, in our opinion it does not carry with it the power here claimed to condemn private property to the end that appro-

76 78 F. (2) 684, 687 (C. C. A. 6th, 1935).
Appropriations may be made for purposes deemed by Congress to be for the public welfare." 77

It would seem that the majority really espoused the Madisonian doctrine of the general welfare clause in their discussion of "public use". The language of the majority in their discussion of "public use" indicates that it was their opinion that programs of slum clearance and alleviation of unemployment through direct action by the Federal Government were not authorized by the General Welfare Clause. Judge Moorman said: "In the exercise of its police power a state may do those things which benefit the health, morals and welfare of its people. The Federal Government has no such power within the states. Green v. Frazier, supra, and Jones v. City of Portland, 245 U. S. 217, 224, dealt with legislation enacted pursuant to this power. In the latter case the court pointed out that it was not its function, under authority of the Fourteenth Amendment, 'to supervise the legislation of the states in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character'. Thus in these and other cases involving state action the court dealt with the subject of public use as it pertained to the powers of the sovereign claiming the right to take. It must be similarly dealt with in the case at bar. As so considered with reference to the Federal Government, it does not, in our opinion, include the relief of unemployment as an end in itself or the construction of sanitary houses to sell or lease to low-salaried workers or residents of slum districts. The tearing down of the old buildings and the construction of new ones on the land here sought to be taken would create, it is true, a new resource for the employment of labor and capital. It is likewise true that the erection of new sanitary dwellings upon the property and the leasing or the selling of them at low prices would enable many residents of the community to improve their living conditions. It may be, too, that these group benefits, so far as they might affect the general public, would be beneficial." (Italics supplied.) 78

In view of the subsequent express espousal of the Hamiltonian view of the General Welfare Clause by the Supreme Court in the Butler case, it is submitted that the authority of the Louisville case is impaired in view of the fact that the language of the majority indicates the decision was based on the Madisonian view of the general welfare clause.

77 Id. at 686.
78 Id. at 687.
In our hypothetical farm tenancy condemnation case, the defendant has also taken the position that where the Government seeks to use the power of eminent domain to take property from one individual in order that it may be given to another, the Federal Government is in effect seeking to regulate land tenures in the several states, a subject matter over which Congress has no control and which is reserved to the states under the Tenth Amendment.

In *United States v. Butler* it was held that the power of taxation could not be used as an incidental step in a complex statutory plan to regulate agricultural production. In that case it was found by the majority that taxation was being used to expropriate the property of one class of persons in order that it might be given to another. In our discussion of the general welfare clause, it was pointed out that we are concerned here with an appropriation in aid of agriculture, not with an attempt to regulate either agricultural production or land tenure. It was further pointed out in the discussion that our farm tenancy situation would be similar to the Butler case if Congress passed a statute laying a tax on all absentee landlords and appropriated the proceeds in advance to be available for expenditure to farm tenants. The question now is whether the condemnation of the defendant’s lands for the purpose of making a spending program effective, makes for a regulation of land tenure. The land of such recalcitrant owner is being condemned not because the Federal Government desires to regulate his behavior in any way, but only to make it possible to carry out a widespread appropriation in aid of agriculture. If the Federal Government levied a 100 per centum tax on the lands of all recalcitrant landowners, it could rightly be objected that this was a penalty, not a tax. But the case is far different where the Federal Government seeks to condemn the land because the measure of damages in the condemnation proceedings is the fair value of the property. It is true the landlord is being forced to give up his land, but the giving is adequately recompensed. In *Kohl v. United States*, the Supreme Court pointed out that unless the Federal Government could exercise the power of eminent domain in carrying out its delegated powers “the constitutional grants of power may be rendered nugatory and the Government . . . [made] dependent for its practical existence upon the will of state or even upon that of a private citizen.”

In the Butler case, the Supreme Court held that the power of taxing and the power of spending constituted a great

79 91 U. S. 367 (1875).
independent grant of power to the Federal Government on a par with the other delegated powers in the Constitution. The very same arguments which make it necessary for the Federal Government to exercise the power of eminent domain pursuant to other delegated powers, are applicable to the powers conferred on the Federal Government by the tax clause.\textsuperscript{80}

Nor can any distinction be drawn between the so-called regulatory powers, \textit{e.g.}, the commerce power, and the spending power. The power of eminent domain has been used to further many non-regulatory aspects of the commerce power. Where the Federal Government condemns a site for a lighthouse, the constitutional authorization is to be found in the commerce power, and although it is true that in some aspects the commerce power is a regulatory power, yet it cannot be maintained that the Government is regulating anything when it constructs a lighthouse.\textsuperscript{81}

\textit{Conclusion}

In conclusion, it is submitted that a farm tenancy statute similar in scope to the Bankhead-Jones Bill of the 74th Congress may be constitutionally grounded in all aspects upon the general welfare clause, and to a limited extent, upon the fiscal powers; further, that the powers of the Federal Government will not be exceeded by resorting to eminent domain to condemn the lands of individual landlords who refuse to sell at a fair price.

A. B. S.

\textsuperscript{80} In Van Brocklin \textit{v.} Tennessee, 117 U. S. 151 (1885), it was held that the Federal Government has the power to sell private lands in the several states for unpaid federal taxes, and that such lands, while in the possession of the Federal Government, are exempt from state taxation. In this case, the Supreme Court decided that the Federal Government could use compulsory process to enable it to exercise the power of taxation. It is said that the power to spend is a complement to the power to tax, and therefore the Federal Government may use compulsory process in carrying out the power to spend. But there may be a distinction between the two powers. Perhaps only a few patriotic citizens would pay taxes if there were no compulsory process to enforce payment. On the other hand, it may be said that the power to spend would not be rendered nugatory by lack of compulsory process (assuming eminent domain is compulsory process, which it is not legally, though perhaps factually). It would seem, however, that eminent domain is necessary to make the spending \textit{reasonably effective} upon the general welfare, which, after all, is the only constitutional justification for any spending. It cannot be said that Congress may not take the necessary incidental steps to assure that the spending is done in the most appropriate place.

\textsuperscript{81} Chappell \textit{v.} United States, 160 U. S. 511 (1895).
THE MERCHANT MARINE ACT OF 1936

Policy of the Legislation

"TO FURTHER THE DEVELOPMENT and maintenance of an adequate and well-balanced merchant marine, to promote the commerce of the United States, to aid in the national defense, to repeal certain former legislation, and for other purposes", is the curt declaration of policy of the Merchant Marine Act of 1936. Thus, for the first time, Congress authorizes direct subsidies to build a merchant fleet, although this has been the policy of every other major mercantile nation for many years. A Maritime Commission, which has been urgently needed for some time, is also established by this Act. With respect to the subsidies, the new law substitutes a system of direct aids for the indirect subsidies now granted in the form of compensation for the carriage of ocean mail, and attempts in this way to bring about a sufficient number of replacements to modernize our merchant marine fleet, which has become so obsolete that without generous subsidies it can no longer hope to compete in international trade.

The Merchant Marine Act of 1928 has proved to be woefully inadequate to carry out the results hoped for by its proponents. It not only lent itself to certain abuses of administrative power, but also failed to protect the taxpayer from unconscionable practices indulged in by some of the ship owners who were receiving Government aid. These defects, together with the fact that the American fleet was not modernized as expected, prompted President Roosevelt, in a message to Congress, to recommend that direct subsidies be made to American shipping under the careful supervision of the Government. As a result of this message and

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1 Pub. L. No. 835, 74th Cong., 2d Sess. (June 29, 1936.)
divers hearings by both the House of Representatives and the Senate the Merchant Marine Bill of 1936 became law.

Provisions of the Act

The provisions of the Act may be succinctly summarized as follows: Title One sets out the policy or purpose of the legislators in enacting the law. This purpose has been heretofore discussed. Title Two creates the United States Maritime Commission and sets up the machinery by which it is to accomplish the purpose of the Act. The Commission is to be composed of five men appointed by the President with the advice and consent of the Senate, whose terms of office are for two, three, four, five and six years, their successors to hold office for the term of six years. The appointments are to be made with due regard for the qualities demanded by the position, but no one is to be appointed who, within three years prior to his appointment, shall have been employed by, or have had any pecuniary interest in, "any carrier by water or substantial pecuniary interest in any other person who derives a substantial portion of his revenues from any business associated with ships or shipping". Under this title the powers, functions, funds, and duties vested in the former United States Shipping Board by the Shipping Act of 1916, the Merchant Marine Act of 1920, the Merchant Marine Act of 1928, and the Intercoastal Shipping Act of 1933 are to be transferred to the new Maritime Commission. Herein is also found the fact that upon the expiration of two years after the Act has been approved, the President has the power to transfer to the Interstate Commerce Commission all or any one of the regulatory powers, regulatory functions, and regulatory duties which by this title are vested in the United States Maritime Commission. The remainder of this title is devoted to giving the Commission broad

8 Hearings before the Merchant Marine and Fisheries Committee on H. R. 7521, 74th Cong., 1st Sess. (1935).
9 Hearings before the Commerce Committee on S. 3500, S. 4110, S. 4111, 74th Cong., 2d Sess. (1936).
powers to carry out the purposes of the Act as set out by the
collectors in Title One.

Title Three authorizes and directs the Commission to investi-
gate the employment and wage conditions in ocean-going ship-
ning, and, after making such investigation and after appropriate
hearings, to incorporate in the contracts authorized under Titles
Six and Seven of this Act minimum manning scales, minimum
wage scales, and reasonable working conditions for all officers
and crews employed on all types of vessels receiving an operating
subsidy. Further than this, it provides that for a period of one
year after the effective date of this Act, all officers, and at least
eighty per cent of the crew, of passenger vessels in respect of
which subsidies have been granted, shall be citizens of the United
States. The members of the crew not citizens must be members
of the steward's department and must have declared their inten-
tion to become citizens. After the expiration of one year the
percentage of citizens must be increased five per cent each year
until ninety per cent of the entire crew, including all licensed
officers, are citizens. As to cargo vessels, all officers and members
of the crew must be citizens of the United States.

Title Four provides for the settlement of ocean-mail contracts
made pursuant to the Merchant Marine Act of 1928, 17 and the
time limit within which the former holders of ocean-mail con-
tracts may apply to the Commission for direct subsidies to replace
the former contracts. Together with these provisions there is a
complete transfer to the Commission of all the duties and powers
now vested in the Postmaster General with respect to existing
ocean-mail contracts executed pursuant to the Merchant Marine
Act of 1928. 18

Title Five involves the matter of a construction-differential
subsidy. Under this title any citizen of the United States may
apply for aid in the construction or reconditioning of vessels to
be used in an essential foreign service. The Commission has the
power to approve the application only if it finds that the service
requires a new or reconditioned vessel to meet competitive con-
ditions or to promote foreign commerce; that the proposed vessel
will meet the needs of the service and the requirements of com-
merce; that the applicant possesses the necessary ability, ex-
perience, and financial resources; and that the granting of the
aid is calculated to carry out the purposes and policy of this Act.
The Commission enters into a contract with the successful bidder

in order to protect the interest of the United States, and concurrently enters into a contract with the applicant for the purchase by him of such vessel, upon its completion, at a price corresponding to the estimated cost of building such vessel in a foreign shipyard. The construction-differential subsidy equals the excess of the American cost over the fair and reasonable cost to a foreign competitor if this difference does not exceed more than thirty-three and a third per cent of the construction cost of the vessel, although this last provision is subject to exception where the Commission possesses conclusive knowledge that the difference is greater. Further, the Commission is authorized to loan to the applicant seventy-five per cent of the cost of construction, which is not to be paid to the shipbuilder until the applicant has advanced twenty-five per cent of the construction cost to the shipbuilder. The remainder of this title is devoted to regulations which the Commission must apply to the applicant concerning the use of the ship after completion, and to the shipbuilder with respect to profits to be made from construction and other matters pertinent thereto.

Title Six of this Act authorizes the Commission to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels which are to be used in an essential service in the foreign commerce of the United States. The conditions necessary to be fulfilled by the applicant before the Commission can approve the application are next set out. If the Commission approves the application it may enter into a contract with the applicant for the payment of an operating-differential subsidy, which contract shall provide that the amount of the operating-differential subsidy shall not exceed the excess of the fair and reasonable cost of operating the vessel, over the fair and reasonable cost of operating the same vessel under the registry of a foreign country whose vessels are substantial competitors of the vessel or vessels covered by the contract. An important feature of this title is that no such operating-differential subsidy shall be paid until the contractor shall have furnished evidence satisfactory to the Commission that the wages prescribed in accordance with Title Three of this Act have been paid to the ship's personnel. This title further sets out the powers of the Commission with respect to the regulation of routes of the vessels receiving the subsidies, with respect to the time of payment of the subsidy and the amount thereof, and many other regulations with which the shipowner must comply in order to receive the subsidy.

Title Seven involves the powers of the Commission with regard to private charter operations. Whenever the Commission shall
determine that the objectives of this Act are not being carried out, and this is approved by the President, the Commission will be authorized and directed to carry out the long range provisions of the Act. This will occur when there is no demand for the building of new ships on the part of private shipowners, or the reconditioning of old ships, at which time the Commission is authorized to build new ships, recondition old ones, and charter them to private operators. The Commission shall not charter its vessels to private operators except upon competitive sealed bids, but it is privileged to reject the highest bid or all the bids upon certain conditions, and reopen the bidding. This title further provides that each charter shall contain certain provisions, and lays down regulations which the charter party must follow. Under this title is also found a statement of those acts which are violations of the Act, and the penalties which attach to these violations.

Title Eight involves the contract provisions and regulations which must govern any shipowner or ship operator receiving subsidies under Titles Six or Seven, in his relations with the Commission. It attempts to circumvent the evils of lobbying and, in effect, imposes the provisions of the "Holding Company Act" 19 on those receiving subsidies under the Merchant Marine Act of 1936. 20

Title Nine of the Act covers miscellaneous points such as definition of various words and phrases used throughout the Act, the right of the government to requisition ships under this Act in time of any national emergency and the rights of the owners of such ships when they are requisitioned. Further, there is an enumeration of the previous legislative enactments which are repealed by this Act.

Apparent Inconsistencies of the Act

The Act on its face seems strangely inconsistent in that minimum wages and hours are specifically prescribed with respect to the manning of ships receiving a government subsidy under Title Six, but there is no provision for hours and wages in the construction of the ships with the aid of the government under Title Five of the Act. The Commission is a party to the contract with the applicant for the construction of the ship, and with the shipbuilder who is constructing the ship, and it could very readily

incorporate in the contracts provisions that certain minimum hours be worked and minimum wages be paid to those involved in the construction, in much the same manner as these requirements are set down in the operating contract under Title Six.

From previous legislation enacted, such as the National Recovery Act,21 which collapsed after the decision of the Supreme Court in the Schechter case,22 the Davis-Bacon Act,23 and the recently approved Walsh-Healey Act,24 it seems to be the policy of the Government to establish fair trade regulations and to promulgate fair competition with respect to labor. That being the established policy, it is necessary to look further than the Merchant Marine Act of 1936 25 itself to determine whether or not minimum hours and wages will be incorporated in the ship construction contracts under this Act.

The Walsh-Healey Act 26 prescribes minimum hours and wages (as determined by the Department of Labor) to be incorporated in the invitation for bids for the manufacturing or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000. Thus the Walsh-Healey Act 27 would have no application to the construction of ships under Title Five of the Merchant Marine Act because there is no mention of construction in the former. Further, an amendment to the Walsh-Healey Act was offered on the floor of the House of Representatives 28 to include the word “construction” and thus specifically cover the building of ships under Government contracts. The amendment was voted down on the assumption that the Davis-Bacon Act 29 was applicable.

However, the Davis-Bacon Act seems to have no application to the construction of ships. The Act requires “that the advertised specifications . . . shall contain a provision stating the minimum wages to be paid”, and that such wages are to be set forth by the Secretary of Labor on the basis of those “prevailing for the corresponding classes of laborers and mechanics employed on

projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the state in which the work is to be performed”. An opinion of the Attorney General, while not conclusive, sheds a reasonable interpretation on the provisions of the act. The Attorney General has said: “Obviously this language connotes a situs at which the work is to be performed, known when the specifications are advertised. To construe the statute as requiring inclusion in the specifications of a wage scale based upon wages prevailing at a particular place or site the location of which is unknown at the time of advertisement would lead to an absurd consequence.” 30 Inasmuch as the location of the actual work of ship building would not be known at the time of inviting bids, for the reason that there is no geographical limitation upon the persons entitled to bid on the work, it would seem that the Davis-Bacon Act would have no application to Title Five of the Merchant Marine Act of 1936.

This apparent inconsistency on the part of the Government with respect to its policy of protecting minimum wages could be overcome by a favorably decided test case in which the Maritime Commission had used its discretion on this point, or by an amendment to the Merchant Marine Act of 1936,31 to the Walsh-Healey Act 32 or the Davis-Bacon Act 33 with the purpose of protecting minimum wages under Title Five of the Merchant Marine Act.

Constitutionality of the Act

As to the constitutionality of the Act itself there seems to be little doubt. This Act provides for conditions of labor to be incorporated in the contracts of those who voluntarily assent to contract with the Commission. Shipowners or shipbuilders who do not desire to subject themselves to the regulations of the Government set out in this Act, are under no obligation to do so. The Supreme Court of the United States in the case of Ellis v. United States,34 when the question of the validity of the eight-hour law was tested, decided that Congress has the power to prescribe conditions in public contracts.35

W. J. O'D.

30 38 Ops. ATT'Y GEN. No. 37 (1936).
34 206 U. S. 246 (1906).
35 Legis. (1936) 25 GEORGETOWN LAW JOURNAL 144.
SOME ECONOMIC ASPECTS OF THE SURTAX ON UNDISTRIBUTED PROFITS OF CORPORATIONS

PROBABLY NO PROVISION of the Revenue Act of 1936 has excited more conflicting public opinion than the new surtax on undistributed profits of corporations. Divergent comments have been prompted by practical considerations of the effect of this new venture in tax reform. One critic has gone so far as to say that it is not only possible, but distinctly probable, that the undistributed profits tax will be a major cause of the next economic collapse experienced by the United States. The leaders of one of the major political parties during the recent campaign labeled the provision as one that could not be justified either as a revenue measure or a desirable tax reform. Public officials, periodical commentators, political theorists, economists, and representatives of business are all united in viewing this provision as something distinctly new in the history of tax legislation. The tax, based on undistributed profits at graduated rates, after certain adjustments, has been said to have been designed to pro-

2 Id. at § 14.
3 Hearings before Committee on Ways and Means on Revenue Act of 1936, 74th Cong., 2d Sess. (1936) 433. (Article by David Lawrence.)
4 The new surtax on undistributed profits is not imposed directly on undistributed profits, but on the "adjusted net income" of corporations. The "adjusted net income" is determined by deducting from the total net income realized by the corporation, first, the normal tax paid by the corporation; second, the credit allowed for interest on obligations of the United States and its instrumentalities. The "undistributed profits" are determined by deducting from the "adjusted net income" (1) credit allowed for the amount of dividends paid, and (2) credit allowed for the extent to which payment of dividends is restricted by contracts executed prior to May 1, 1936. The surtax rates on the "adjusted net income" are: First 10 per cent of adjusted net income, 7%; next 10 per cent, 12%; next 20 per cent, 17%; next 20 per cent, 22%; remainder of undistributed net income, 27%.

If, for example, a corporation had an adjusted net income of $85,000, had paid out dividends totaling $30,000, and was under no contract restricting the payment of dividends, its "undistributed profits" would amount to $55,000. The surtax rates, taking the percentages from the adjusted net income, but taking only so much as would equal the total of the undistributed profits, would then be computed as follows: First 10% of adjusted net income—that is, 10% of $85,000, viz., $8,500, at 7%, is $595; next 10%—$8,500—at 12%, $1,020; next 20%—$17,000—at 17%, $2,890; next 20%—$17,000—at 22%, $3,740; balance—$4,000—at 27%, $1,080. Totals—Undistributed net income, $55,000; surtax, $9,325.

For a detailed explanation of the computation of the tax, including normal tax computations, see 14 TAX MAG. 399, 400.

For a comprehensive discussion of the legal aspects of the undistributed profits tax as foreshadowed in the Treasury Regulations, see Hendricks,
duce required additional revenue and at the same time establish a more equitable system of taxation. In the words of the President of the United States (in his tax message to Congress prior to the enactment of the Act), this form of tax "would accomplish an important tax reform, remove two major inequalities in our tax system, and stop 'leaks' in the present surtaxes".

It is the purpose of this paper to afford a practical consideration of the possible economic effects of this legislation, as reflected in the arguments leveled against the tax and also those urged in its support.

It is evidently the purpose of the surtax on undistributed profits to induce the corporations to distribute in the form of dividends a greater proportion of their profits than has been the practice in the past. The measure has been characterized as advancing a principle of equity into our tax system, and as tending, through its primary ends, to (1) the elimination of the present inequalities in our taxation of business profits as between incorporated and unincorporated business; (2) the removal of a very important source of tax avoidance inhering in our present income tax laws; and (3) as a consequence of the elimination of inequalities and sources of tax avoidance, the increase of federal revenues to the extent necessary to balance the regular budget of the Federal Government, that is, to balance all federal expenditures other than those made for the purposes of relief. Proposals evidencing an intention of incorporating the principle of the undistributed profits tax into law have heretofore been submitted to Congress, but have been rejected. Certain groups opposing the surtax, view it not in the light of a tax on corporate earnings, but as a penalty on the accumulation of protective reserves, as a preventive to proper business rehabilitation and expansion, and as discouraging prudent business management.


7 See statement of Ellsworth C. Alvord in Hearings before Committee on Ways and Means on Revenue Act of 1936, 74th Cong., 2d Sess. (1936) 835.


9 Hearings before Committee on Finance on Revenue Act of 1936, 74th Cong., 2d Sess. (1936) 939. (Supplemental memorandum of Associated Industries of Rhode Island and Rhode Island branch of National Metal Trades Assn.)
Such opinion raises the interesting question as to the constitutionality of the tax. Is Congress, under the guise of reaching something within its powers, laying a charge upon what is beyond them? The Supreme Court of the United States has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment to the Constitution.\textsuperscript{10} The Supreme Court has also ruled that if a taxing measure is revenue-raising on its face, its constitutionality may not be attacked simply because it may also incidentally accomplish a regulatory purpose.\textsuperscript{11}

A careful consideration of the provisions of Section 14 of the Act\textsuperscript{12} indicates that the tax is not arbitrary and capricious, and that it is revenue-raising.

The wholehearted rejection tendered the undistributed profits tax by representatives of business in their appearances before the House Ways and Means Committee\textsuperscript{13} and the Senate Committee on Finance,\textsuperscript{14} when these bodies conducted hearings on the proposed tax bill,\textsuperscript{15} is worthy of mention. The majority of those speaking in behalf of business interests viewed the tax as economically unsound, as unduly oppressive and arbitrary in its provisions, and as constituting a direct threat to the continuation of sound business policy. This general assilament found its chief expression in citing the prevention of the retention of adequate "rainy-day" reserves, and in the discouragement offered the legitimate and proper expansion of business. The arguments submitted pointed out that a reasonable retention of profits in the surplus account is necessary to provide the larger capital demanded to meet the requirements of a natural growth of industry, and that the stability of corporations would be imperiled by the curtailment of a reasonable surplus account.

\textsuperscript{10} Nichols \textit{v.} Coolidge, 274 U. S. 542 (1927).
\textsuperscript{11} McCray \textit{v.} U. S., 195 U. S. 27 (1904). "Since . . . the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise." \textit{Id.} at 59; United States \textit{v.} Doremus, 249 U. S. 86 (1919) (upholding the Harrison Anti-Narcotic Act). But cf. United States \textit{v.} Constantine, 296 U. S. 287 (1935); Bailey \textit{v.} Drexel Furniture Co., 259 U. S. 20 (1922).
\textsuperscript{12} Pub. L. No. 740, 74th Cong., 2d Sess. (June 22, 1936), § 14.
\textsuperscript{13} \textit{Hearings before Committee on Ways and Means on Revenue Act of 1936, 74th Cong., 2d Sess.} (1936).
\textsuperscript{14} \textit{Hearings before Committee on Finance on Revenue Act of 1936, 74th Cong., 2d Sess.} (1936).
Mr. Carl Snyder, economist for the Federal Reserve Bank of New York, and former president of the American Statistical Association, contributed the statement that "when a country is adjusted to a certain rate of growth, complete and general employment depends on a corresponding offering of new capital and the utilization of this capital for the expansion of productive capacity". He further stated that the greatest proportion of new capital appears to be created in industry itself, and each individual industry, as a rule, takes care of its own capital requirements. It is a tradition in general use that in well-managed concerns about half of the annual net income is available for distribution in dividends. "One dollar for dividends, one dollar for improvements" appears to be the provident arrangement. As a consequence, in representative and good times, such as the period 1923 to 1929, the relationship of the net amount of dividends paid out to private persons and that booked as reserve or forward balance for possible new construction, repairs, and replacements, was approximately equal. It is to the coordination of the facts that steady production means constant returns, and that constant returns assure a steady stream of new capital required for growth, that we must inevitably admit the resultant achievement of high wages and a steady rise in living conditions. "It is certainly not an accident that the United States can show the highest rate of industrial growth in the past 100 years of all countries, excepting latterly Japan, and that it is just in the United States where the highest wages are paid and where there is the widest distribution of general prosperity." Those opposing the undistributed profits tax do so with the abiding conviction that any tax measure calculated to disturb the tranquility of operation of the foregoing economic factors is essentially detrimental to the best interests of the American people.

The unemployment factor has been considered by those opposing the tax. They contend that it has repeatedly been demonstrated under our present system of economics that employment is tied to industrial growth, so that any interruption of this growth results in unemployment. Where, for any reason, business confidence is undermined, and capital and enterprise become cautious, a resultant decrease in employment is perceived. The

16 Hearings before Committee on Ways and Means on Revenue Act of 1936, 74th Cong., 2d Sess. (1936) 234.
17 Id. at 229.
18 Id. at 233.
19 Id. at 229.
decrease in purchasing power, which characterizes every depression, is largely due to the cessation or lowering of the so-called business purchases, that is, purchases by concerns of raw materials, auxiliary materials, machinery, etc. This resulting damming of sales has the effect of a continuing circle of receding production, receding prices and wages, and receding employment.\footnote{Id. at 230.} Full employment seems dependent on the maintenance of the steady growth of producing plants. If new construction on old or new plants is suddenly limited, as it is contended this tax must inevitably limit it, a recession in employment demand seems distinctly probable, and in its wake a chain of ominous effects dangerous to any stable economic development.

With respect to the prevention of corporate retention of adequate reserves to maintain existence during depression years, Mr. Raymond Moley, editor of the magazine TODAY, condemned the tax as unsound. He characterized the accumulation of reserves as the "life insurance policies of business firms".\footnote{H. R. Rep. No. 2475, 74th Cong., 2d Sess. (1936) 22.} Any obstruction to the making of proper provision for "hard times" and unforeseen contingencies, it is argued, is running directly contrary to social and economic security.\footnote{Ibid.} It might be said that any business which enters a depression either stripped of its reserves or possessing greatly depleted surplus accounts is doubtful of continued existence. Business firms, generally, pursue the prudent policy of building up reserves in good years to insure continued existence during lean years.

The Department of Commerce is authority for the statement that from 1930 to 1934, inclusive, business income paid out in the United States exceeded income produced by 26.6 billions of dollars.\footnote{Id. at 23.} This amount of money reflects the contribution of business from its reserves for the purpose of recovery and relief. Because of this the claim is made that had a tax policy, such as is now in force, been effective from 1930 to 1934 no such contribution could have been made.\footnote{Ibid.}

Because of the fact that no attempt is made under Section 14 to tax past accumulations of surplus,\footnote{The tax is applicable to each taxable year commencing after December 31, 1935. XV Int. Rev. Bull. No. 32, at 4 (1936).} a disparity of position is said to exist as between the well-established, deeply entrenched cor-
poration and the newly-organized business enterprise. It is said that the tax measure hits the little and helps the big. The corporation with years of accumulated surplus on hand, which is not reached by the new law, is perhaps only too willing to favor a tax which will subject its newly-organized competitor to the disadvantage of being penalized for doing in the future the very thing that has provided this margin of competitive superiority. This places the newly-organized corporation on a disadvantageous competing basis, which may result in its being forced out of business. Such a result is said to be indicative of "monopolistic practices". 

With regard to the smaller corporations, it is said that the tax, with its retarding effect on accumulations of reserves sought to be built up for the purpose of "plowing them back" into the business, may result in stifling the growth of such corporations. In this connection the statement of President Roosevelt in June 1935 is worthy of attention: "The drain of a depression upon the reserves of business puts a disproportionate strain upon the modestly capitalized small enterprise. Without such small enterprises our competitive economic society would cease."

Among the objections to the tax is one to the effect that the results of the undistributed profits tax will cause considerable restriction on corporate credit. The difficulty experienced in the past by business enterprises in securing bank loans for expansion purposes is not alleviated by the new tax. Those in a position to extend credit will be wary of making loans to corporations with reduced assets and consequently weakened financial structures.

The assertion that before the tax there existed inequalities between incorporated and unincorporated business is said to disregard the fact that individuals and partnerships seldom if ever conduct business of any substantial size in competition with corporations, and the fact that the alleged inequality can be cured very readily by the formation of a corporation at slight expense and no inconvenience. Avoidance of taxation is said to exist merely by reason of the failure of a corporation to distribute

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28 Ibid.
29 Testimony of Royal Little, Hearings before Committee on Ways and Means on Revenue Act of 1936, 74th Cong. 2d Sess. (1936) 288.
31 Id. at 836.
each year all its earnings or profits, even though from every business point of view such a distribution would be improper and unsound. Opponents of the tax claim that the fact that the corporation itself pays a tax upon its income is apparently overlooked, as is also the fact that the earnings which are accumulated and reinvested are usually productive of income and consequent additional revenue.\textsuperscript{32} 

The tax has also been assailed on the ground that it does not make adequate provision for industries burdened with debt. A corporation seeking to meet an existing debt is enormously handicapped by having the very earnings available for that purpose heavily taxed by the Government unless distributed as dividends.\textsuperscript{33}

Assuming for the purposes of argument that the inequities actually exist, and are of practical importance, the question arises as to whether, should these inequities be removed, they would not be replaced by greater inequities. Is the cure more burdensome than the alleged disease? From this point of view the tax appears to be an unfair penalty upon corporations, at rates which cannot be supported by theory, accepted principles, or practice, with the probability of other and more serious discriminations to follow.\textsuperscript{34}

The contention has also been advanced that the primary purpose of the tax (to produce additional revenue) will be defeated because the corporation, rather than incur a heavy tax at the expense of nondistribution of profits, will invest such profits in tax-exempt securities. This contention seems at least to have some foundation in fact, since a perceptible increase in the purchase of tax-exempt securities has already taken place.\textsuperscript{35}

The objections to the tax, in general, may be summarized as follows:

1. It will prevent the retention of adequate "rainy-day" reserves, and thus seriously imperil the security of business;
2. It will discourage business rehabilitation and expansion and as a consequence retard recovery and reemployment;
3. It will prohibit the proper retention of financial protection for lean years and for unforeseen contingencies;
4. It will stifle the growth of smaller corporations and will impede the development of new enterprises;

\textsuperscript{32} Ibid.
\textsuperscript{34} Statement of Ellsworth C. Alvord, Hearings before Committee on Ways and Means on Revenue Act of 1936, 74th Cong., 2d Sess. (1936) 836.
5. It will foster monopolies by placing the newly-organized business on an unfair competing basis with the strongly-entrenched corporation with years of accumulated surplus;

6. It will oppress businesses burdened with debts, and will effect a restriction on corporate credit;

7. It will create inequities in excess of those alleged to exist before the enactment of the provision;

8. It will result in forcing profits into tax-exempt securities and thus defeat the purpose of raising additional revenue.

The weight of the arguments up to this point has been distinctly unfavorable to the principle of the undistributed profits tax, and has generally repudiated it as being unduly oppressive, arbitrary, unreasonable, and impractical. However, there are many arguments which tend to picture the tax as eminently fair and productive of increased revenue. Chief among these is the contention that the undistributed profits tax has effectively removed the inequality that existed between the taxation of corporations as compared with taxation of other forms of business enterprise and the inequality that existed between large and small shareholders. Supporters of this contention point out that the corporate form of business, by withholding unused profits from the beneficial shareholders, enjoyed an unfair tax advantage over the individual and partnership forms of business. The earnings so held were tax-free to the extent that the old law, in effect, permitted a deferment of any surtax on corporate earnings until they were distributed to the shareholders, and if such earnings remained undistributed they bore no surtax whatsoever.\textsuperscript{36} The individual and partnership businesses could not minimize their taxes by failure to distribute business profits. In addition it is claimed that the old law grossly discriminated against the small shareholder by effectively insuring greatly increased profits to the large shareholder.\textsuperscript{37} Prior to the undistributed profits tax the wealthy stockholders preferred to retain such profits in their corporate shells rather than suffer the individual surtax as a result of their distribution. The war and post-war periods are cited as conclusive proof of such damming up of inordinate corporate surpluses.\textsuperscript{38} The new tax, then, is looked upon as a measure calculated to force tax payments by wealthy stockholders at the time when their investment produces the income and not at some subsequent time

\textsuperscript{36} Remarks of Hon. Fred M. Vinson, 80 Cong. Rec. 10337 (1936).

\textsuperscript{37} Testimony of David Stock, Hearings before Committee on Ways and Means on Revenue Act of 1936, 74th Cong., 2d Sess. (1936) 429.

\textsuperscript{38} Ibid.
when those controlling the corporation may decide to distribute the corporate income. The old evil was unfair not only from the standpoint of defeating Government revenues, but also from the standpoint of depriving the small shareholder of earnings to which he was justly entitled.\textsuperscript{39}

It has been argued by those opposed to the tax that the new law virtually prohibits the accumulation of necessary "rainy-day" reserves, and thus imperils the existence of the corporation under the pressure of hard times. This contention is not altogether true because there is really no close connection between a balance-sheet surplus and surplus cash. A company may show a large accumulated surplus, and at the same time possess little available cash for the reason that the surplus earnings have been directed into other assets, or have been expended to pay liabilities. For opposite reasons an enterprise may have far more cash than it needs and at the same time show a very small surplus, or even a profit and loss deficit. This condition did in fact exist in many important companies at the height of the depression in 1931-1933. On the whole it does not appear to have been a well-defined policy of leading corporations to build up a substantial cash reserve out of the profits of prosperous years.\textsuperscript{40} The large cash holdings that have been characteristic of recent years, in the case of industrial companies, were in good part the result of additional stock financing before the crash of 1929.\textsuperscript{41} Quite aside from this assertion, the method of issuing taxable stock dividends is an effective means whereby the corporation can actually retain earnings in its treasury without paying the undistributed profits tax. This is apparent when it is perceived that the corporation is allowed a credit against its undistributed net income for taxable stock dividends before applying the undistributed profits tax.\textsuperscript{42} Such a method should not be considered tax avoidance because the income in question has already gone through the surtax mill.\textsuperscript{43}

\textsuperscript{39} Remarks of Hon. Fred M. Vinson, 80 Cong. Rec. 10337 (1936).

\textsuperscript{40} It has been demonstrated that the accumulation of large corporate surpluses "assisted materially in causing the depression" by withholding funds from consumption, by stimulating over-expansion of industry, and also by assisting the stock market boom in consequence of allocating corporations' surplus funds into brokers' loans. See testimony of G. C. Haas, Director of Research and Statistics, Treasury Dept., Hearings before Committee on Finance on Revenue Act of 1936, 74th Cong., 2d Sess. (1936) 59.

\textsuperscript{41} See Graham, \textit{The Undistributed Profits Tax and the Investor} (1936) 46 \textit{Yale L. J.} 12.

\textsuperscript{42} Remarks of Hon. Fred M. Vinson, 80 Cong. Rec. 10340 (1936).

\textsuperscript{43} \textit{Ibid}. 
The objection that the tax will discourage business rehabilitation and expansion is met with the assertion that the corporation is free to issue stock rights and thus secure the needed capital. A striking example is afforded by the net income report of the American Telephone & Telegraph Co. for the period 1921 to 1930, inclusive. For that period $1,169,000,000 represented the net income derived. Cash dividends paid during the period amounted to $854,000,000. Earnings carried to surplus totaled $315,000,000. During the same period the American Telephone & Telegraph Co. raised from stockholders, through the issuance of stock rights, $958,000,000, or in other words, $104,000,000 in excess of the cash dividends paid. The ability of a corporation to obtain cash from its investors is here reflected as being derived from its excellent dividend record. In view of the fact that the undistributed profits tax induces the distribution of dividends, it seems a fair conclusion to say that the ability of corporations to secure needed capital through issuing additional stock is considerably enhanced.

With respect to the allegation that the new tax discriminated against the small corporation in favor of the large, the proponents of the tax point to the fact that the majority of small corporations will pay a smaller normal tax than was the case under the old law, and are also allowed an additional cushion in respect to the undistributed profits tax. The following table affords a comparison of the normal tax rates as they now exist with those in effect under the Revenue Act of 1935.

<table>
<thead>
<tr>
<th>Revenue Act of 1936</th>
<th>Revenue Act of 1935</th>
</tr>
</thead>
<tbody>
<tr>
<td>First $2,000</td>
<td>12½</td>
</tr>
<tr>
<td>Next $13,000</td>
<td>13</td>
</tr>
<tr>
<td>Next $25,000</td>
<td>14</td>
</tr>
<tr>
<td>Balance</td>
<td>15</td>
</tr>
</tbody>
</table>

It can be seen from the above table that corporate net income which exceeds $40,000 will bear the same tax rate as was imposed by the Revenue Act of 1935, while on the other hand incomes not in excess of $40,000 will pay a smaller tax rate. This is readily perceived as an advantage to the small corporation.

In addition to the relief afforded the small corporation by the reduced rates of the normal tax, the undistributed profits tax allows a specific credit in the case of a corporation with an adjusted net income of less than $50,000. Under such provision a corporation with an adjusted net income of $5,000 would never

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pay an undistributed profits tax of more than 7 per cent if it retained all its earnings. Similarly, corporations with adjusted net incomes between $5,000 and $50,000 will have their taxes materially reduced by this cushion provision.47

These figures, based on a total retention of earnings, will be materially reduced by dividend distribution. For example, a 50 per cent distribution will result in an undistributed profits tax of 3½ per cent in the case of a corporation with an adjusted income of less than $10,000; of 5½ per cent in respect to a corporation showing $20,000 as adjusted net income, and 7½ per cent for a corporation with an adjusted net income of $50,000.

Another method of counteracting the effect of the undistributed profits tax is suggested whereby the corporate directors, instead of declaring a dividend, may issue notes of the corporation carrying a certain rate of interest. There have been cases where bonds have actually been distributed among shareholders, instead of cash, by way of dividends according to their fair market value at the time they were issued.48 There is thus a choice between giving the shareholders an additional interest as creditors or increasing their equity in the enterprise by giving them stock.49

Banking and certain insurance corporations are not subject to the undistributed profits tax, but bear a flat rate.50 This was

47 On the assumption that a corporation has an adjusted net income of $40,000 and has paid out $20,000 in dividends, the specific credit simply increases the 7% bracket to $5,000. On the further assumption that there exists no contract restricting the payment of dividends, the undistributed profits would amount to $20,000. The surtax on undistributed profits would be determined as follows:

<table>
<thead>
<tr>
<th>Per cent of adjusted net income</th>
<th>$5,000 at 7%—$350.</th>
<th>4,000 at 12%—$480.</th>
<th>8,000 at 17%—$1,360.</th>
<th>3,000 at 22%—$660.</th>
</tr>
</thead>
<tbody>
<tr>
<td>First 10%—$4,000, increased under the specific credit provision</td>
<td>$5,000 at 7%—$350.</td>
<td>4,000 at 12%—$480.</td>
<td>8,000 at 17%—$1,360.</td>
<td>3,000 at 22%—$660.</td>
</tr>
<tr>
<td>Next 10% ..........................</td>
<td>4,000 at 12%—$480.</td>
<td>8,000 at 17%—$1,360.</td>
<td>3,000 at 22%—$660.</td>
<td></td>
</tr>
<tr>
<td>Next 20% (balance)................</td>
<td>8,000 at 17%—$1,360.</td>
<td>3,000 at 22%—$660.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Totals—Undistributed Profits ........... $20,000 Surtax $2,850.

See 14 Tax Mag. 400.


49 An example may be cited of a corporation having a net income of $50,000. It has a $25,000 obligation falling due for which it has not made provision. If it issues interest-bearing notes to its shareholders to the extent of $25,000, the indebtedness of the corporation is in reality being transferred from a third party to the real owners of the organization. See remarks of Hon. Fred M. Vinson, id. at 10340.

50 Section 104 (b) of the Act provides as follows: Rate of Tax.—Banks shall be taxable in the same manner as other corporations, except that they
deemed advisable in view of the fact that the law requires the maintenance of certain reserves by such organizations, and it would seem contrary to the spirit of the law to tax for retaining what is required to be retained. The undistributed profits tax is not applicable to foreign corporations.51 It is also inapplicable to corporations in receivership, which are subject only to the graduated normal tax.52

Supporters of the tax further point out that the act contains adequate safeguards to prevent unreasonable taxation of incomes in the case of corporations in distress or with inadequate earnings to take care of their immediate business requirements. They cite provisions of the act allowing deductions from gross income in case of depreciation, depletion, bad debts, and certain other business losses.53 Earnings retained because of contracts not to pay dividends, or to use such earnings to discharge a debt, are not subject to the penalty tax if such contracts were executed prior to May 1, 1936.54

The contentions of the proponents of the undistributed profits tax may be summarized as follows:

1. The new corporation tax dictates substantial justice by providing that the earnings of corporations, whether paid by corporations as such or by stockholders after the earnings are distributed, shall bear the same tax as those who are in business as individuals or as partnerships. In this way an inequitable fiction has been prevented from working a tax injustice;

2. The contention that the tax prevents the accumulation of adequate protective reserves for "rainy days" and unforeseen contingencies is offset by the fact that there are adequate means available for retaining earnings under the present law;

3. The argument that the tax discourages business rehabilitation and prevents natural growth and expansion is nullified in view of the available means of securing necessary additional capital;

4. The smaller corporations are benefited rather than hampered by the operation of the tax law. This can be more readily per-

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shall not be subject to the surtax imposed by Section 14, and except that the normal tax imposed by Section 13 shall be at the rate of 15 per centum instead of at the rates provided in such Section. Pub. L. No. 740, 74th Cong., 2d Sess. (June 22, 1936) § 104 (b). See also § 14 (d) (3).

51 Id. at § 14 (d) (4).
52 Id. at § 14 (d) (2).
53 Id. at § 23.
54 Id. at § 26 (c).
ceived by a comparison of the normal rates under the old and new law and by a comparison of the graduated rates applicable to the small and large corporations in respect to their income earning power;

5. Certain credits have been provided to encourage the smaller and weaker enterprises, and certain allowances for depreciation, depletion, bad debts, and business losses testify to the fundamental justice underlying the principle of the tax.

In short, the adherents of the present law contend that the undistributed profits tax will, in an equitable and nondiscriminatory manner, bring about what it was designed to accomplish.

Quite irrespective of the arguments for and against the tax, it has had certain definite results that are noteworthy at the present time. During the last few weeks of 1936 announcements have been made of extra dividends, of bonuses, and of wage increases, running into millions of dollars. Each day brings announcement of further actions of this character, and when the statistics are finally compiled for the calendar year 1936, the total of these disbursements will probably reach, if not pass, the half billion mark.\(^5\)\(^5\) The immediate effect of these payments is calculated to place a great amount of money in active circulation. This should naturally greatly augment the volume of retail trade and in turn stimulate greater production. Increased employment seems a natural consequence. This increased purchasing power, and its natural attendant features, would seem likely to become a material contributing factor to general recovery.

Treasury experts, on Saturday, November 21, 1936, forecast that approximately a quarter of a billion dollars in taxes will be collected from individuals whose aggregate income for 1936 will be in excess of 600 million dollars. These experts attribute the big incomes this year to the undistributed profits tax, and point out that approximately 200,000 individuals owning stocks in corporations will be forced into the higher brackets due to the wide distribution of dividends. These experts further state that this rising flood of dividends and profits pouring into investors' pockets will be, in all probability, a major factor in bringing next year's budget into balance.\(^5\)\(^6\)

It is also interesting to note the many intimations that have been made by those high in governmental authority to the effect that a revision or amendment of the tax on undistributed profits is contemplated at the next session of Congress. Speculation has


been rife in many financial circles in this respect, but the assertions of various persons connected with the administration and Congress seem worthy of comment. Chairman Doughton of the House Ways and Means Committee, which originates all tax legislation, has only recently spoken of the possibility of a revision of the corporate surplus tax. Chairman Jesse Jones of the Reconstruction Finance Corporation has suggested a revision of the corporation tax to permit firms to withhold earnings for plant expansion or construction, and for those ridden by debt, without the imposition of penalty taxes. President Roosevelt, in a campaign speech at Worcester, Mass., October 21, 1936, stated that if imperfections were discovered in the administration of the undistributed profits tax, they must be corrected for the good of American business. Senator Harrison, Chairman of the Senate Committee on Finance, in speaking recently of the undistributed profits tax, expressed the opinion that "the law was going to work out all right". He went on to point out that "there will, however, be a study of the provisions with a view to trying to present a more liberal basis of taxation in the case of corporations which are in debt or have obligations. No doubt some corporations had to pass through many lean years. They found it necessary to borrow money to continue to operate. It seems rather hard that when they have just one good year they should be forced to pay a heavier tax, when they have already paid much money out to reduce their debts. We tried to make some adjustment to meet such cases. But the time was short. It was a difficult problem. The experts desired more time to work it out". Another possible change in the law that may be considered, Harrison said, "is a provision to encourage modernization or rebuilding of plants". Harrison said that any change in the law would not be effective for the year now closing, stating that the taxes will have to be paid.

E. J. H., Jr.

58 Ibid.
NOTES

INSURANCE—The Doctrines of Waiver and Estoppel.

Perhaps no other problem in the law of insurance has more harassed the courts and text writers than the application of the doctrines of waiver and estoppel as these enter into the determination of whether or not recovery should be had by a plaintiff who has not fulfilled a condition in his insurance policy, yet pleads that such unfulfilled condition does not prevent his recovery due to some act on the part of the insurer which renders such condition inoperative. The causes to which this general vexation may be laid are: (a) The amazing diversity on the subject among recognized authorities; (b) The failure of individual writers, at least until recent years, either to recognize, understand, or explain the fundamental differences between waiver and estoppel; (c) The tendency of most courts to avoid any pronouncement upon a distinction which is so widely regarded as merely a nice academic refinement without solid foundation in fact and their eagerness to hide this fault by asserting that the words "waiver" and "estoppel" are synonymous terms used at random to describe one and the same doctrine; lastly, (d) The fact that, insurance questions being matters of "general commercial law", the federal courts are not bound by the decisions of the state courts.1 Hence the former often reach conclusions universally opposed to those of the latter courts, even though resulting from identical facts, so that any reconciliation of the two is impossible and may continue to be so independently of the possibility of an eventually uniform understanding of the doctrines by courts of both systems.2

The plan of this paper is to present a retrospective analysis of the causes of the confusion as enumerated above; to emphasize what the writer believes to be the clear and important distinction between the two doctrines; and to present some decisions in which the courts have recognised and applied the doctrines severally.

Definition of Terms.

Waiver is usually defined as an intentional relinquishment of a known right.3 Estoppel on the other hand, is the preclusion of a person from asserting a fact by previous conduct which has led a third party to act to his detriment in reliance thereon.4 Thus it is evident that each concept embraces facts which are not in any sense identical. One who waives must intend to do so and must know of the existence of the right which he gives up. One whose conduct causes him to be estopped, however, may not be aware of the existence of his right and certainly does not intend to deprive himself of it.

The Authorities.

A text-book on insurance was published early in the present century by Professor Vance, which became a leading work in its field. In this treatise Mr. Vance had a chapter on waiver and estoppel in which he quite admirably selected the leading cases on the subject. He included such cases as *Union Mutual Insurance Co. v. Wilkinson* and *Redstrake v. Cumberland Mutual Fire Insurance Co.* which severally drew the distinction underlying the doctrines. Nevertheless, Mr. Vance was unfortunately more swayed by decisions which confused the terms so that he concluded: "While thus distinguishable in theory, the doctrines of waiver and estoppel, as applied to insurance contracts, cannot be profitably treated separately, since the same circumstances that will raise an estoppel will usually also afford sufficient evidence of an implied waiver."

Because of the peculiar location of the conclusion quoted above, its importance is emphasized. Consequently, the belief that the doctrines are synonymous is dominant with the reader throughout the remainder of the chapter. The later statements suggesting possible distinctions between waiver and estoppel cannot therefor be appreciated fully.

After a lapse of only a year a rather remarkable article on waiver in insurance law was published by an eminent member of the Canadian Bar. This is the work of a revolutionary rather than a reformer. In it Mr. Ewart presents an adequate picture of the chaos existing in the law as a result of the diverse decisions on matters of waiver and estoppel. His conclusion

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6 Id. at c. 10.
7 18 Wall. 222 (1871). Vance, op. cit. supra note 5, at 345.
10 Vance, op. cit. supra note 5, at 343 § 120. No harsh criticism of the learned writer is intended, for, at other places in the same chapter, distinctions between the two doctrines are pointed out. It is evident that the patent *non sequitur* is common to all courts and writers of the period. In fact, it is submitted, that Mr. Vance more nearly approached the correct differentiation of the doctrines than any other of his contemporaries. See Mat, *Insurance* (1900) 1182 § 497; Elliot, *Insurance* (1907) 148; Richards, *Insurance* (1909) 105.
11 Ibid. It is the third paragraph of the summary which heads this chapter.
12 Ibid. at 343, 344, 346.
13 Ewart, *Waiver in Insurance Cases* (1905) 18 Harv. L. Rev. 365. The ideas formulated in this article were later developed and expounded in Mr. Ewart's *Waiver Distributed among the Departments Election, Estoppel, Contract, Release* (1917).
14 Among the cases presented are the following: Kiernan v. Dutchess, etc., 150 N. Y. 195, 44 N. E. 698 (1896); approved in *Germania v. Pitcher*, 160 Ind. 392, 64 N. E. 921 (1902), (both cases holding waiver to be a new contract); *Order of United Commercial, etc. v. Bonz*, 27 Colo. App. 423, 150 Pac. 822 (1915), (waiver necessarily a matter of mutual intention); Smith v. Snyder, 185 Pa. 541, 32 Atl. 64 (1888) (waiver the product of express agreement); *Lindwood Park Co. v. Van Dusen*, 60 Ohio St. 185, 58 N. E. 726 (1900) and *Terrel v. Proctor*, 173 S. W. 996 (Tex. Civ. App. 1915) (waiver must be founded on consideration); *Viele v. Germania*, etc., 26 Iowa 56 (1858) (waiver is not in the nature of contract; requires no consideration, but does require the support of an estoppel). Schwartz v. Wilmer, 90 Md. 136, 44 Atl. 1059 (1899) (waiver cannot be regarded as a contract and does not require a new consideration to support it); *Fairbanks v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113 (1902) (waiver of formal rights requires no consideration and thus differs from contract; waiver of substantial rights must be supported by consideration).
is that we should depart completely from the use of the word "waiver" in the law, for, he maintains, while it has a popular meaning it does not have any exact technical or legal sense and the varied decisions on the subject results from equally varied interpretations of that word.\textsuperscript{15} As a substitute he advises using the term "election" coupled with that of "estoppel" the two representing, of course, distinct concepts. The substitution is presented as a panacea for the recognized confusion in the subject.

In brief Mr. Ewart's position is this: since, by the weight of judicial interpretation, the word "void" as used in insurance policies means voidable, the important question presented by a suit on a policy in which breach of condition is alleged is whether or not there has been some act on the part of the insurer showing that he has elected to avoid the policy. Without this showing, Mr. Ewart contends, the policy is to stand and recovery thereon is to be granted in spite of any noncompliance with the conditions provided therein.\textsuperscript{16} He offers a supposed pleading under his view—in a suit on a policy of insurance, "the company's plea ought not to be forfeiture; and the insured's reply ought not to be 'waiver'. On the contrary the company, if it would succeed, must plead default and election, consequent upon the default, to terminate the policy. Upon that plea issue will be joined."\textsuperscript{17}

The result of thus applying Mr. Ewart's theory is to shift the burden of proof from the plaintiff (to prove waiver) to the defendant (to prove election). He not only recognized this outcome but offered it as one much to be desired.\textsuperscript{18} A further result is a solution to the highly controversial problem of the application of the parol evidence rule, \textit{i.e.}, by this theory the rule never has to be applied.\textsuperscript{19} If, for example, the insurer knows of breaches of conditions prior to or contemporaneous with the issuance of the policy but accepts premiums, he cannot later plead election to terminate. By accepting the payments he has given indication of his election to continue the contract.\textsuperscript{20}

It is interesting to note the effects of the Ewart theory on Professor Vance. The latter published an article\textsuperscript{21} eight years after the appearance of Mr. Ewart's treatise. It is neither an espousal, a challenge, or even a reply to Ewart though the latter's work is referred to as an "amusing book".\textsuperscript{22} Without venturing an opinion on what caused it, it is quite evident that something had impressed Mr. Vance greatly since his former writing. He now champions the distinctions which ought to be made between waiver

\textsuperscript{15} \textsc{Ewart}, \textit{op. cit. supra} note 13, at 15.
\textsuperscript{16} \textit{Id.} at 194.
\textsuperscript{17} \textit{Ibid.}
\textsuperscript{18} \textit{Id.} at 197. \textit{Sed quaere:} is it advisable to have such an arbitrary change in pleadings and proof when courts have the duty of rendering justice to both plaintiff and defendant? Should they go so far as to hold a defendant liable on a contract, the very terms of which have been violated, simply because he cannot show that he had done some additional act the performance of which was never contemplated in the literal wording of that contract?
\textsuperscript{19} \textit{Id.} at 209—214.
\textsuperscript{20} \textit{Id.} at 210. But, Mr. Ewart does not tell us how the court is to learn that the insurer had a knowledge of the breaches at the time of the making of the contract. How, in most cases, could the court get such knowledge except by hearing from the plaintiff the very parol testimony which the rule necessarily excludes?
\textsuperscript{21} \textsc{Vance}, \textit{Waiver and Estoppel in Insurance Law} (1925) 34 \textsc{Yale L. J.} 834.
\textsuperscript{22} \textit{Id.} at 845 n. 45.
and estoppel. He shows by many cases, however, that the courts still often confuse the doctrines and even deny the distinctions. His reference to Mr. Ewart's book concludes with a statement showing that, even regarding the theory of election as sound, any election must include a waiver of the alternative right not elected.

Response to Professor Vance was quickly forthcoming from Mr. Ewart in the form of a direct reply published in the next volume of the same periodical. Mr. Ewart is adamant but gives due respect to the thorough exposition given the subject by Mr. Vance. He analyzes the hypothetical cases presented by the latter but is satisfied that all can be explained by his own theory. His conclusion is noteworthy. He admits the failure of his attempted "reformation" and asks for a new edition of Vance's text in which (while it would be impossible to reconcile the cases and their underlying philosophies) a workable legal definition of waiver will be given and in which that "foolish notion" will have no place.

Professor Vance brought out the edition suggested by Mr. Ewart four years later, and its enlightening section on waiver and estoppel has been referred to as a distinct contribution to insurance law. At the outset a new, or at least a modified, definition of waiver is enunciated: "Waiver is usually defined as the intentional relinquishment of a known right, but it may be more narrowly and accurately defined as the intentional giving up of a known privilege or power." This definition supplies an answer to Mr. Ewart's frequent statement that, since void means voidable, it follows that "a breach of condition creates no forfeiture; . . . on the contrary, a breach has no effect upon the policy." By it Mr. Vance shows that a breach of condition does have an important effect since it makes the policy dependent on the power now raised in the insurer to terminate it.

The Distinction between Waiver and Estoppel.

Whether or not the insurer intended to avail himself of this power is the essence of waiver. The essence of estoppel, on the other hand, is whether or not the insurer has misstated facts in reliance on which the insured has changed his position. The distinction is concisely drawn by Mr. Vance: "Waiver is conventional in nature . . . while estoppel is tortious in quality. . . ." Even though both may be present in most cases, it is far

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23 Id. at 841 et seq. as to waiver; Id. at 857 et seq. as to estoppel.
25 Vance, op. cit. supra note 21, at 845 n. 45.
26 Ewart, Waiver in Insurance Law (1926) 35 Yale L. J. 970.
27 Id. at 973-977.
28 Id. at 978 entitled: Epilogue.
29 Ibid.
30 Ibid.
32 Id. c. 9. This chapter is a reprint of the article of 1925 plus several substantial additions.
34 Vance, op. cit. supra note 31, at 451 § 128.
35 Stated most precisely by Mr. Ewart in his "Waiver" in Insurance Law (1928) 13 Iowa L. Rev. 129 at 144.
36 Vance, op. cit. supra note 31, at 451 § 130.
from correct to hold them to be synonymous.\textsuperscript{37} Professor Vance notes his having "unhappily" confused them in his first edition \textsuperscript{39} in order to emphasize the elusiveness of both concepts.

Which Doctrine Should Prevail?

The question of which doctrine—"election and estoppel" or "waiver and estoppel distinguished"—should prevail as a basis for decisions arising in this field of insurance law will depend upon which one more nearly approaches the actual facts involved in suits on policies. The former is only qualifiedly logical, the qualification being this: the logic of the theory depends on the assumption universally made by the courts that policies may only become voidable and not void, even though the latter is provided for by their terms. This, as has been said above, is a judicial determination resulting from a desire to assist an insured who, due often to mere carelessness, has done something to prevent his own recovery on his policy. Most attempts to do justice by not insisting on too strict compliance with the terms of a written instrument cannot be carried to their logical conclusion without doing injustice. This, it is submitted, is the case when the burden of proving waiver is replaced by making it the duty of the insurer to prove his election to terminate.

Waiver can be shown to coincide more closely with the actual facts. Remembering that breach of condition raises in the insurer a power to avoid his liability, an analogy may be made to the use of Statutes of Limitations as a defense in actions of debt. In such cases, after the lapse of the statutory period of time, a bar (power to prevent) to recovery is made available to the defendant. His liability in a sense still exists, for, unless he pleads the statute, he will be considered to have waived it and his opponent will recover the debt due.\textsuperscript{39} He may also waive the defense by a new promise without any new consideration. Just so, where an insured breaches a condition, a similar bar to his recovery is made available to the insured—\textit{i.e.}, his power to terminate the policy. His liability, too, in the same sense continues to exist, for, unless he avails himself of the breach, he waives it by his pleading and the insured will recover on the policy. Likewise, any clear evidence of his intent to excuse the breach will waive the defense and in many cases there need be no new consideration.\textsuperscript{40}

The Courts.

Even a cursory investigation of the decisions on waiver and estoppel shows what a hopeless task it would be to try to reconcile or even classify them. The United States Supreme Court in the case of Union Mutual Insurance Co. v. Wilkinson\textsuperscript{41} recognized the nature of estoppel. In this case the defendant's agent had written into the policy the age and the cause of death of the insured's parents, which facts were now claimed to be false. In

\textsuperscript{37} Id. at 456.
\textsuperscript{38} Id. at 457 n. 19.
\textsuperscript{39} Barclay v. Barclay, 206 Pa. St. 307, 55 Atl. 985 (1903).
\textsuperscript{41} 13 Wall. 222 (1871).
reply the plaintiff wanted to show that the insured had told the agent she had no knowledge of these facts about her parents and that the answers written in by the agents were not those received from her. The company objected on the ground that such testimony would violate the parol evidence rule. The Court, however, allowed it to be given, holding that the rash conduct of the agent created an estoppel and that the parol evidence rule did not apply to estoppels because of their equitable nature.42

The Wilkinson case represented the Supreme Court doctrine until the beginning of the present century.43 At that time, a "remarkable and conspicuous judicial somersault was completed"44 by the decision in Northern Assurance Company v. Grand View Building Association.45 The facts were that a fire insurance policy was conditioned on its being the only insurance covering the property. Actually there was another policy on the same building which was brought to the attention of the agent, but he did not endorse the policy to that effect as was provided for in such case. At trial, parol testimony as to the agent's knowledge was allowed, and was held to estop the defendant from setting up the breach. This was affirmed by the Circuit Court of Appeals46 but the Supreme Court held the admission of the parol testimony to be error. The opinion of Mr. Justice Shiras notes no distinction between waiver and estoppel. In effect it allows an insurance company to issue what it knows to be a valueless policy, accept premiums thereon, and then avoid liability because of a circumstance of which it has always been constructively aware. Surely this was an example of estoppel based upon the acceptance of the premiums with the knowledge of the breach and the parol evidence rule ought not to have applied. Hard as it may seem, however, the Northern Assurance Company Case is, of course, the present federal rule on the inadmissability of parol evidence and, since it does not distinguish between waiver and estoppel, there is evidently no such distinction made any longer in federal courts,47 at least as to different applications of the parol evidence rule under each concept.

Misapplication.

It is not intended to convey the impression that a correct understanding of waiver and estoppel will do away with the parol evidence rule. That rule must be recognised and insisted upon in proper cases or written contracts will have no value. For example, in all cases where alleged waivers and estoppels arise solely out of negotiations between the agent and the insured prior to the issuance of the policy-contract the mistake must not be made

42 Vance, op. cit. supra note 31, at 454, gives a good explanation of the reason why this is so.
43 At least the Wilkinson Case was followed in Insurance Co. v. Mahone, 21 Wall. 152 (1874); Eames v. Insurance Co., 94 U. S. 621 (1876); and in Continental Life Ins. Co., v. Chamberlain, 132 U. S. 304 (1899).
44 The phrase is from Vance, op. cit. supra note 31, at 502.
45 183 U. S. 308 (1902).
46 101 Fed. 77 (C. C. A. 8th, 1900).
of calling what is simply a false promise an estoppel and on that erroneous ground disregarding the rule. This is what was done in such cases as Sovereign Camp W. O. W. v. Richardson and Pfeister v. Missouri State Life Insurance Co. In the former the statement of the agent, made prior to his issuing of the policy, that the war-risk clause would not be enforced was held to estop the company from resisting liability and the plaintiff was permitted to use parol testimony to prove the promise of the agent. Since estoppel can only result from misstatements of past or present facts and not from promises, there is no estoppel raised in such circumstances; hence, the parol evidence rule ought to have been enforced.

Conclusion.

A final word must be added directing attention to what is probably the most important reason why distinction must be made between waiver and estoppel. It is the matter of consideration. Since waiver is essentially the intended relinquishment of a defense, some waivers are binding though not supported by any consideration other than that upon which the policy itself was founded. Estoppels, on the other hand, always require something in the nature of a consideration, namely, a detrimental act on the part of the insured. Mr. Vance's example is that a person, having a policy containing a condition against his taking part in military service, enlists and is killed in action. The company informs the beneficiary that, out of a sense of patriotism, it has decided not to enforce the condition and will pay the full amount of the policy. Later it refuses to do so. This being a true waiver, the company has no longer a defense to a suit on the policy. No consideration has been given, no detrimental act on the part of the insured or the beneficiary has occurred, no one has changed his position in reliance upon any misstatement, so, clearly no estoppel has arisen and recovery can only be had under the doctrine of waiver.

E. A. D.


History.

Arbitration as a means of settling controversies has been valid at common law from a very early date. Once an award has been made pursuant to an arbitration agreement, it may be enforced specifically in equity if a contract between the parties in the same terms will be specifically enforced. When the agreement to arbitrate disputes is still executory, however, the rule is well-established that courts of equity will never compel the parties thereto specifically to perform an arbitration agreement.

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48 151 Ark. 231, 236 S. W. 278 (1921).
49 85 Kan. 97, 116 Pac. 245 (1911).
50 Vance, op. cit. supra note 31, at 467 n. 49.
53 See Cohen, COMMERCIAL ARBITRATION AND THE LAW (1918); Sayre, DEVELOPMENT OF COMMERCIAL ARBITRATION LAW, 37 Yale L. J. 595, 596-612 (1928).
At common law, agreements to arbitrate are held to be revocable, with nothing more than nominal damages awarded for the breach of the agreement. The doctrine of revocability as applied to such agreement arose from a dictum of Lord Coke, in Vynior's Case,4 "if I submit myself to an arbitration . . . yet I may revoke it, for my act, or my words, cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable". It is doubtful if this dictum ever correctly stated the law, but it became firmly entrenched in the common law, supported by an overwhelming weight of authority, so that it could be changed only by legislation, and not by the courts themselves.

All but two states in this country have had arbitration statutes of one type or another,5 but none of the earlier statutes remedied the defects of the law as it then existed; they did not make agreements to arbitrate disputes that might arise in the future irrevocable, nor did they allow the courts to enforce such agreements specifically by giving them power to name arbitrators if one of the parties to the agreement should fail to appoint thereunder, or should refuse to do so pursuant to the agreement. These early statutes, therefore, did little more than recognize the legality of arbitration agreements when the parties thereto voluntarily performed.

The first statute in this country attempting to remedy the defects as they then existed in the law of arbitration is the New York Arbitration Law, enacted in 1920.6 This statute made agreements to arbitrate disputes that might arise in the future irrevocable and enforceable. The act was vigorously attacked on constitutional grounds, but the New York Court of Appeals, in Berkovitz v. Arbib & Houlberg,7 unanimously sustained the constitutionality of the measure.

Since 1920 other states have felt the need of similar legislation, and statutes modeled after the New York Act have been enacted in other jurisdictions,8 and by the Federal government.9 It is the United States Arbitration Act which we propose to consider in the remainder of this article.

Summary of the Act.

Briefly, the act provides that an arbitration agreement arising out of maritime transactions, or transactions involving commerce shall be valid, enforceable, and irrevocable, except for such grounds as exist in law or equity to revoke any contract.10 The court may stay the trial of any suit

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4 8 Co. 80a, 81b, (K. B. 1609). The dictum of Lord Coke, quoted above, was unnecessary to anything decided in the case, which was an action of debt on a bond brought by Vynior against one Wilde, for failure to submit to an arbitration. Wilde defended that no award had been made, and Vynior rejoined that Wilde had revoked his agreement to arbitrate. Wilde demurred, and judgment went for the full penalty under the bond.

5 Oklahoma and South Dakota excepted.

6 NEW YORK ARBITRATION LAW (1921), Sections 1-10.

7 230 N. Y. 261, 130 N. E. 288 (1921); (1921) 6 CORN. L. Q. 432; (1921) 19 MICH. L. B. 866.


10 Id. § 2.
involving an arbitration agreement, if the proceeding is properly referable to arbitration, until such arbitration has been had. An aggrieved party may apply to the court of the United States which, in the absence of an agreement to arbitrate, would have had jurisdiction of the case. After notice, the court will hear the parties, and if the making of the arbitration agreement, or its breach, is not in issue, it will then issue an order directing the parties to proceed to arbitration pursuant to the terms of the agreement. If the agreement, or its breach, is in issue, the court will proceed summarily to the trial thereof. If the finding be that no agreement in writing for arbitration has been made, or, if made, that there has been no breach thereof, the proceedings will be dismissed. Otherwise, the parties will be directed to proceed with arbitration in accordance with the terms of their agreement. If the agreement provides for the manner of naming arbitrators, they will be named in that manner, but if the agreement does not provide a method of selecting arbitrators, or if one or more of the parties does not so appoint, then the court shall appoint arbitrators who will act under the agreement as if named therein. All applications to the court shall be heard as motions. Arbitrators may compel the attendance of witnesses, and the production of records where necessary to the determination of the final award. If the parties in their agreement have provided that the court shall enter judgment upon the award made, and have specified the court, then at any time within one year after the award has been made, any party to the agreement may apply to the court for an order confirming the award as made. If no court is specified in the agreement, the application shall be made to the United States District Court for the district in which the award is made. The award may be vacated for fraud or partiality; misconduct of the arbitrators; or if the arbitrators exceed, or imperfectly execute their powers. The award may be modified or corrected on the application of any party to the agreement if the award has been made on a material miscalculation, or if mistake is evident in the award as made, or if the arbitrators have awarded on a matter not submitted to them.

Interpretation of the Act.

The act was the outgrowth of a movement of growing momentum. Business men generally had come to dislike and distrust the expense and result of litigation arising out of business disputes. They felt that the results reached in courts of law often disregarded the common principles of business, and they had long preferred, when possible, to settle disputes according to practical considerations, rather than principles of law which business men considered as secondary to practicality and dispatch in the finished result. Arbitration had the growing support of the business world, as well as

11 Id. § 3.
12 Id. § 4.
13 Id. § 5.
14 Id. § 6.
15 Id. § 7.
16 Id. § 9.
17 Id. § 10.
18 Id. § 11.

20 Information collected by the Department of Commerce over the past several years has clearly shown that the substantial elements of the American business public are
the official support of important legal organizations.21 The statute arrived, then, upon a world waiting for its coming, and was well received, both by business and by the bar. The American Bar Association Journal had this to say: "No piece of commercial legislation, no enactment at the request of lawyers has been passed by congress in a quarter of a century comparable in value to this." 22

It was thought that the Act would eliminate three evils: 1. Delay caused by congestion in the courts and technicalities arising under proceedings in court. 2. Expense of litigation. 3. Failure of litigation to reach a result satisfactory to business men. It was thought that the first two of the evils would certainly be eliminated,23 and that the third would, at least, be lessened. A new era was about to dawn on the country in the settlement of commercial disputes.

The constitutionality of the act was directly upheld in Marine Transit Corp. v. Dreyfus.24 It was thought that the federal courts, in their interpretation of the new statute, would be influenced by the liberal interpretation given by the New York courts to the New York statute, since the provisions of the two are largely identical. Thus, New York courts had held that the agreement to arbitrate was to be interpreted liberally,25 and that arbitration proceedings should comply with the spirit, rather than the letter, of the law.26

Such has not been the result in the federal courts up to the present time. The courts have placed a very narrow construction upon the statute. In Lehigh Structural Steel Co. v. Rust Engineering Co.,27 the two companies had a contract whereby the Lehigh Company would fabricate certain steel, and the Rust Company would erect the steel as it was delivered to them by the Lehigh Company. The contract provided for the arbitration of any disputes that might arise under the contract, but did not, in specific words, provide for the entry of judgment upon the award that might be made under the agreement to arbitrate. The court refused to confirm the award, holding that a plaintiff seeking summary judgment on an award made pursuant to an agreement to arbitrate must bring himself clearly within the statute. The Supreme Court refused to review this ruling, but the decision has been severely criticized, and it has been said that "if opportunity does arise it is to be hoped that the Court will not sanction so illiberal a construction of the United States Arbitration Act." 28

overwhelmingly in favor of arbitration in the settlement of commercial disputes." Herbert Hoover, Foreword To Yearbook on Commercial Arbitration (1927).

See the records of the American Bar Association, 1920, 1923, 1924, and particularly of its Committee on Commerce, Trade and Commercial Law.

"From our summary of the provisions of the federal law, it will appear how thoroughly delay has been excised from the settlement of disputes. There are no technical pleadings to be drawn and settled, no multiplicity of motions to be decided, and only the very briefest delay in the decision of the preliminary matter where and how the arbitration shall proceed. Probably the great majority of arbitrations are decided at one hearing, and the award is made within two or three days after the matter is submitted to the arbitrators." Id., at page 156.


It may well be that the progress of arbitration under the statute is being hindered by this tendency on the part of the courts to interpret the statute strictly.

Conclusions.

It is doubtful if the claims made by proponents of arbitration can be sustained in toto. It is difficult at this time properly to estimate the value of the United States Arbitration Act. It probably has not helped materially in the settlement of commercial disputes. While nothing has arisen in the federal courts which would show very clearly just how much the statute does cheapen the cost of settlement of commercial controversies, the result in *Lehigh Structural Steel Company v. Rust Engineering Company*\(^29\) would seem to show that proceedings under an arbitration agreement can be as expensive and as productive of delay as can actual litigation. It certainly does not appear to be any cheaper to arbitrate as the parties did there, and then have to settle their differences at law, after an unsuccessful attempt at an arbitration, and it is not a more rapid means of arriving at a settlement than recourse to the courts in the first instance would be. The classic example of the expense and delay that may be caused by an abortive attempt at arbitration is *Electrical Research Products, Inc. v. Vitaphone Corporation*.\(^30\) The two companies had a patent-license contract, which provided that any disputes arising thereunder would be submitted to arbitration. Such a contract, involving many details, should have been an ideal one for the exercise of arbitration, saving the parties endless litigation. The result was quite different from that anticipated, however. In 1928 a dispute arose under the contract, and arbitrators were appointed, and an effort made to arrive at an amicable settlement. In 1930 one of the arbitrators resigned, and another was appointed in his stead. In 1932, the parties to the agreement came into court, and confessed their inability to arrive at any settlement of their differences. Thirty-two formal hearings had been held over a period of four years, and the two companies had spent $750,000.

The courts will always remain the chief forum for the determination of controversies. Arbitration can be a very helpful hand-maiden, but only in certain classes of cases. Arbitrators tend to become champions of the particular side that appointed them, thus lessening, if not destroying entirely, the original theory of arbitration—an impartial, brief determination of the rights of the parties by unbiased minds. Too, extremely complicated and involved disputes are not proper cases for arbitration. It is of doubtful value where the facts are so complicated that they can not be readily borne in mind, and where there must be recourse to minutes and briefs. Few men can be found who will give continuous attention to a lengthy arbitration. Arbitration is of greatest value in cases of disputes between persons in the same business, where the facts are well-known, and all the parties are thoroughly familiar with the situation. Where the final award of the arbitrators must be based on knowledge acquired through long study of the particular case, one of the chief advantages of arbitration, namely, a speedy settlement, will be lost through long adjournments in which the arbitrators may study the case. In such cases the courts will always remain more capable of justly deciding the issue than arbitrators, and the result


\(^30\) 20 Del. Ch. 417, 171 Atl. 738 (1934).
will be just as reasonable from the standpoint of the business man as one arrived at through arbitration would be. Arbitration should remain an informal method of settling disputes, and the bench and bar should give careful thought to the difficulties in the way of expense and delay that have driven the parties to arbitration in the first instance. All the technical aspects of arbitration should be removed, so that in cases of actual arbitration of controversies susceptible to such settlement there will be less and less recourse to the courts in connection with the arbitration proceedings themselves.

D. G. R. McD.

JURISDICTION TO TAX UNDER THE FOURTEENTH AMENDMENT.

I. Jurisdiction to Tax the Person

What, precisely, the jurisdiction of the state to tax may be is often difficult, if not impossible, to state, but a few definite principles may be discovered and a fairly comprehensive scheme worked out from the decided cases. For example, we know that the state of New York cannot assess and collect a tax upon the person of a resident domiciliary of California, and the mere fact that the Californian owns real property in the former state does not alter the situation. The decision of the Californian to spend his two weeks vacation in the Empire City does not add to the powers of the New York tax collector, though residence for a "considerable" time would make him subject to tax.

II. Jurisdiction to Tax Property

Multiple or double taxation is now held to be forbidden by the Fourteenth Amendment to the Constitution of the United States. By double taxation is not meant a plurality of taxes on the same economic asset, as a tax upon a mortgage and another upon the land mortgaged, or a tax upon capital stock in addition to the various taxes on the corporate property. Nor can one state be prevented from levying several taxes upon the same legal right, since, otherwise, it could achieve the same object merely by raising a single tax to the equivalent of the sums of the several taxes. What is forbidden, however, is the taxation of the same legal right by competing jurisdictions. In some cases the power to tax exists in but a single state, in others several states may be conceded the power but only one the right to exercise this power.

A. Real Property

The rule is plain that the only jurisdiction which may tax real property is the jurisdiction in which the real property is located, i.e., the situs.

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2 What will constitute a "considerable" time cannot be stated for all cases. In Haavik v. Alaska Packers' Ass'n, 263 U. S. 510 (1923), four months was held a period of sufficient length to afford a jurisdictional base for a personal, or poll, tax.
3 Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204, 210 (1930).
4 As in the case of land.
5 E.g., in Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905) Kentucky had power to tax the cars found within the state but the right to tax was denied because the cars had already been taxed elsewhere under the "average situs" doctrine; in New York Central Ry. v. Miller, 202 U. S. 584 (1906) both power and right existed in New York because the cars were not shown to have had a taxable situs elsewhere.
Incorporeal hereditaments—chattels real—as, leases, easements, franchises, profits, are treated by the courts as land.\(^7\)

(1) Mortgages and the Theory of Equitable Conversion

No clear-cut solution has yet been reached in eliminating double taxation of mortgages (or notes or bonds secured by mortgages). In *State Tax on Foreign Held Bonds*\(^8\) debts were said to possess value, and were therefore property, only at the domicile of the creditor; that “The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was both at law and in equity a mere security for the debt.”\(^9\); hence has no situs except at the domicile of the owner, and certainly cannot be taxed as land, or by the state in which the land is located independently of the bond-holder's domicile. This view was affirmed in *Kirtland v. Hotchkiss*\(^10\) which sustained the right of Connecticut to tax bonds held by a Connecticut resident secured by a mortgage on Illinois lands, on the theory that the mortgage was mere security for the debt. However, in 1898,\(^11\) Oregon having by statute declared that real estate mortgages should be considered as land and, together with the debt secured, taxed at the situs of the realty, the Supreme Court sustained a tax by Oregon on a California holder of notes and mortgage payable in California but secured by Oregon lands. The latest cases on the subject\(^12\) fail to reconcile the differences.

A few years ago great trouble was caused by the application of the doctrine of “equitable conversion” to taxation, not merely because it imposed a great burden upon the executor to decide to whom to pay the death and inheritance taxes, but because it involved in many cases unjust double taxation due to conflicting applications by the jurisdiction in which the decedent died domiciled and that in which the land might be situated.\(^13\) At

\(^7\) Louisville, etc., Ferry Co. v. Kentucky, 188 U. S. 385 (1903). Kentucky levied a tax upon the franchise of the ferry company operating between Kentucky and Indiana measured by capitalizing the earnings on a 6 per cent return basis and subtracting the value of tangible realty and personalty located in both states. * Held, “... a franchise ... belongs to the class of estates called incorporeal hereditaments. ... A ferry franchise is as much property as a rent or any other incorporeal hereditament, or chattels, or realty. ... In Kentucky the right of the widow to have dower assigned to her in a ferry has been recognized.” Id. at 395. Since the Kentucky franchise granted only the right to use the shore of Kentucky, another franchise from Indiana was necessary to operate across the river, and the assessment assailed had taxed the value of both franchises, whereas the Kentucky franchise was held the only franchise which was taxable property within Kentucky's borders.

\(^8\) 15 Wall. 300 (1873).

\(^9\) Id. at 322-323.

\(^10\) 100 U. S. 491 (1879).


\(^12\) Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930); Baldwin v. Missouri, 281 U. S. 586 (1930).

\(^13\) A South Carolina resident devised lands located in Pennsylvania to trustees to sell and give the proceeds to a Philadelphia hospital. A South Carolina inheritance tax upon this land was upheld on the ground that an equitable conversion took place by the terms of the will and the lands then became personally in the hands of the executors, and as universal succession is governed by the testator's domicile the tax was proper, especially since the court anticipated that Pennsylvania would, in line with earlier decisions, follow the same theory and double taxation would not result. Land Title & Trust Co. v. South Carolina Tax Comm., 131 S. C. 192, 126 S. E. 189 (1925). But Pennsylvania did tax those lands, following the rule of Frick v. Pennsylvania, 265 U. S. 473 (1925) in Commonwealth v. Presbyterian Hospital in Philadelphia, 287 Pa.
the present time most states have repudiated this doctrine insofar as it applies to taxation, leaving the question more or less academic.

B. Personal Property

(1) Tangible

It is now generally recognized that tangible personal property, permanently located within a state, is subject to taxation by that state regardless of the domicile of the owner. But tangible personality is not always permanently located in a single state and a determination of its situs for taxation may be rather difficult.

Property merely passing through a state cannot be taxed therein since it cannot be said ever to have achieved a situs. If this property which is passing through the state, be stopped in transit, a definite test is available to determine its taxability. If the purpose of the stop is to facilitate the continuance of the journey or to protect the very existence of the property, the goods are not taxable. But if the stop is made for the benefit of the owner the tax may be levied even though the stop be a matter of but a few hours. Hence double taxation may take place when goods are stopped in transit in several places on different tax days, but no inequity results because the avoidance of the extra tax is within the control of the owner.

Though property merely passing through may not be taxed, yet it often happens that there is a steady stream of this property in passage, securing protection from the state through which it is passing for which some return should be made. So it is held that an average amount of this property may be said to have established a situs and thus be taxed. This "average situs" doctrine has so far been applied only to rolling stock, but certainly the day is not far distant when it will be applied to busses, moving vans, and perhaps even to the goods and merchandise shipped by car or bus.

By application of the ancient fiction of the law, *mobilia sequuntur personam*, it was possible that tangible personal property already taxed at its situs might also be taxed at the domicile of the owner. In 1905, however, the Supreme Court held that inasmuch as the basis of taxation was that...
the taxing state was requiring payment for the protection it afforded the
property, if no protection was given there could be no tax, hence a corpora-
tion domiciled in Kentucky could not be taxed by Kentucky on tangible
personal property never in the state but permanently located outside.22 The
ancient maxim, it was said, was intended to "do equity", and must be re-
jected where inequity (double taxation) results. As to tangible personality,
it was held inequitable to apply the maxim, but not so as to intangibles, since
they were difficult to discover, and the result was practically no taxation at
all of intangibles unless they were taxed at the domicil of the owner.
In the following year the Court sustained a tax by the state of New York on
all the cars of a railroad domiciled in that state,23 over the objection that
the tax could be levied only on those cars permanently in the state or found
to have an average situs within the state, on the ground that the railroad
had not sustained its burden of proving that any specific cars had attained
an average situs elsewhere.24
In keeping with the rules stated above, the Court held in Selliger v. 
Kentucky 25 that, tangible personalty having acquired an actual situs in
another state, warehouse receipts for such property could not be taxed as
the equivalent of that property, since the receipts do not create a second
property of equal value with the first.26
Tangible personal property such as coins, currency, etc., may be taxed
only by the state in which it is found, not by the domicil of the owner; 27
and although the owner has merely loaned property to be kept in another
state, if he has no present purpose of taking it back, it may acquire a taxable
situs in the other state.28

(a) Unit Rule and Corporate Excess Doctrine

A state, in taxing a foreign corporation having property within its limits,
may tax all property of the corporation used within the state, and where

22 The decision was foreshadowed in Delaware & Lackawanna Ry. Co. v. Pennsylvania, 198 U. S. 341 (1905), in which Pennsylvania included in the assessment of the capital stock of a Pennsylvania corporation the value of coal owned by the corporation, but permanently located in New York, where it had already been taxed, the court holding that the coal was beyond the taxing power of Pennsylvania. But in Southern Pacific Co. v. Kentucky, 222 U. S. 63 (1911), the plaintiff owned ocean-going vessels which could never have come within the state's borders, yet all were held taxable in Kentucky because it was not shown that a permanent taxable situs outside the state had ever been acquired—a showing of actual taxation elsewhere not being required. A tax on vessels owned by a non-resident corporation was sustained in Old Dominion Steamship Co. v. Virginia, 198 U. S. 299 (1905), on the ground that the vessels had obtained a taxable situs in Virginia because operating exclusively on rivers wholly within the state.


24 "... It does not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there." Id. at 597.


26 Here whiskey had been shipped to Germany and all the courts of the taxing state conceded that the whiskey itself could not be taxed by the state. The lower state courts held the receipts themselves could not be taxed either, but the state Court of Appeals upheld the tax as a tax on the receipts measured by the value of the whiskey. The case was narrowly decided on the pleadings, prescribing from the questions whether the whiskey really had attained a situs outside of Kentucky, whether the receipts were negotiable, and whether the whiskey could be delivered without a return of the receipts.

27 Blodgett v. Silberman, 277 U. S. 1 (1928), where the articles were in a safe deposit box in New York and the owner lived in Connecticut.

28 City Bank Farmers Trust Co. v. Schnader, 293 U. S. 112 (1934) (art objects loaned to a Philadelphia gallery by a New York decedent).
the property consists of rolling stock which moves both within and without the state, it may apply the "average situs" doctrine. The state of Pennsylvania devised a scheme of taxing this property on its "going concern" value, whereby the tax was termed a capital stock tax and the assessment was made by the "unit rule", i.e., the value of all the corporate property within and without the state was computed and the assessment for the state declared to be such proportion of the capital stock as the mileage of the corporation's cars within the state bore to the whole mileage of the system throughout the entire country. The scheme was sustained in Pullman's Palace Car Co. v. Pennsylvania. The tax was, by a majority of the Court, held to be a tax on property and not a license or privilege tax. But in computing the total value of the system, only those elements of property which enter into the operation of the system, and have a direct relation to the business of the entire system, may be considered, if they are, in reality, located outside the taxing state; hence personal property permanently located in another state, and which in no way enters into the operation of the system or in any manner affects the earnings of the system, cannot be included in the total valuation. In 1919 an application of this "unit rule" of assessment was held invalid in the Union Tank Line Co. case, on the ground that the "plan pursued is arbitrary and the consequent valuation grossly excessive". The Pullman Co. case was distinguished on the ground that in it the company had sought to escape all taxation and had not complained that the amount of the assessment was excessive; here the Tank Line Company admitted the right of the state of Georgia to tax its cars but successfully contended that the valuation was arbitrary and out of proportion to the true value of its property within the state. Said the Court: "... we upheld the power of a State to tax property actually within its jurisdiction upon a fair valuation considered as part of a going concern. ..." 

Closely allied to this assessment according to the "unit rule" is a further extension of the state taxing power to include not only a fair proportion of the going concern value of the physical property, but also a fair proportion of that intangible asset called "good-will", which makes the value of a system greater than the sum of all the physical parts. This good-will has

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29 141 U. S. 18 (1891).
30 The theory of the tax was that the property of the company in Pennsylvania had a value as a link in a chain, as a unit in a system, that was different from the mere intrinsic value of the property itself. In the Hall case, 174 U. S. 70 (1899), cited supra note 19, the tax was on the intrinsic value of the average number of cars used within the state throughout the year; here the valuation of the entire system was made and a portion of that value attributed to the physical property in Pennsylvania on the basis of mileage use.
33 Id. at 282.
34 Id. at 283-5. The company admitted having an average of 57 cars within the state throughout the taxable year, each car having an intrinsic value of $380, the admitted taxable property being, therefore, $47,310. The state assessment, however, was on a valuation of $291,196, derived, according to the Pullman's Palace Car Co. rule, in this manner: total mileage of all cars throughout the country (251,991) is to the mileage travelled in Georgia (6,976.5), as the value of the entire company ($10,518,333.16) is to the fair value of the property used in Georgia, or $291,196, which was the value assessed. (The figures here used are from the official report of the case.)
35 Id. at 286. That the validity of the use of the "unit rule" depends upon the particular case and the fairness of the method, see Great Northern Railway Co. v. Weeks, 297 U. S. 135, 143-5 (1936).
often been referred to as "corporate excess", and the right of each state in which the company carries on business to tax a fair share of this good-will was sustained by a 5-4 decision in Adams Express Company v. Ohio, in 1897.\footnote{166 U. S. 185 (1897).} Ohio undertook to tax all property of the Express Company within the state. The value of all real and personal property within the state amounted to but about $67,000.00, as against a little over four million dollars of property in the entire country. However, the market value of the stock of the company was over sixteen million dollars. Considering this market value of the stock, the state of Ohio assumed that there was some intangible property asset amounting to the difference between the value of the stock and the value of the property of the company, which ought to be taxed, and the Supreme Court upheld the contention of the state, that "whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation,"\footnote{Id. at 220.} and allowed a tax to be levied upon this good-will.\footnote{Id.} In this case the state was allowed to tax that proportion of this good-will which could fairly be said to be property in Ohio. In a later case\footnote{Id. at 323, 324; supra note 8.} a tax by the state of corporate domicil on the entire good-will of a corporation was allowed, from which it follows that there can be double taxation of "corporate excess".\footnote{Kirtland v. Hotchkiss, 100 U. S. 491 (1879).}

(2) Intangible

(a) Debts

State Tax on Foreign Held Bonds\footnote{New Orleans v. Stempel, 178 U. S. 309 (1890).} held that the state of a debtor could not impose a tax on the debt, where it was evidenced by a bond which was in the possession of the creditor at his domicil, saying that only the state of the creditor's domicil might tax.\footnote{Id.} Six years later a creditor complained that he was being taxed on property not within the state,\footnote{Id.} but the Court upheld the tax. The "business-situs" rule was laid down in 1899,\footnote{Kirtland v. Hotchkiss, 100 U. S. 491 (1879).} under which a state could tax debts due a non-resident if the evidences of debt were kept within the state by a resident agent for the purposes of collection,

\begin{itemize}
\item \footnote{Cream of Wheat Co. v. Grand Forks, 253 U. S. 325 (1920).}
\item \footnote{Id. at 323, 324; supra note 8.}
\item \footnote{Kirtland v. Hotchkiss, 100 U. S. 491 (1879).}
\item \footnote{New Orleans v. Stempel, 178 U. S. 309 (1890).}
\end{itemize}
deposit, or re-investment within the state, and, in the year following, this
business-situs was held not defeated by the device of sending the notes to
the owner at his domicil, when they were returned to the agent for collection
and re-investment, the agent having power of attorney to deal with the
notes, mortgages and money as an owner.45

A bank account was held properly taxed under the inheritance tax laws
by the domicil of the debtor, even though a tax had already been paid at the
creditor's residence, in Blackstone v. Miller,46 former decisions being rejected
because they dealt with specialties.

In 1907 a property tax on notes kept in Indiana was invalidated because
the creditor was a non-resident and the notes evidenced dealings of the
owner's agent in Ohio,47 the mere physical presence of the notes being
insufficient basis. In a space of only seven years, however, the Court changed
its mind and allowed a tax on notes by the state where they were located, in
Wheeler v. Sohmer,48 an opinion by Mr. Justice Holmes who applied the
common law rule chattelizing choses in action. Mr. Justice McKenna con-
curred on the ground that there was a clear distinction between property
and succession taxes, and that the tax valid here would not have been good
as a property tax. The three dissenters could see no distinction between
inheritance and property taxes in relation to jurisdiction to levy.49 Yet
Fidelity & Columbia Trust Co. v. Louisville50 held good a tax on a resident
measured by a bank account located in a foreign state, in another Holmes
opinion.

Thus we see that so short a time ago as 1917 a debt could be taxed at
the domicil of the creditor,51 at the domicil of the debtor,52 at the business
situs,53 and at the place where the evidence of indebtedness was located,54
and, in view of Rhode Island Hosp. Trust Co. v. Doughton,55 we may not
distinguish types of taxes.56

45 Bristol v. Washington County, 177 U. S. 133 (1900). It is difficult to suggest
what factors constitute business-situs. Evidently not the continued presence of the
evidences of indebtedness, as the Bristol case shows. Cf. Baldwin v. Missouri, 261
U. S. 586 (1930). But there must be a continuing series of transactions within the
taxing state, not a single loan or debt, for in Beldr v. South Carolina Tax Comm.
252 U. S. 1 (1930) a business-situs for an inheritance tax on money loaned by an
Illinois decedent to a South Carolina corporation and on dividends declared in his
favor was held not to exist. In all the decided cases the creditor had an agent in
the taxing state—quaere, is this element essential? It has been suggested that this
tax is really an excise, Lowndes, Jurisdiction to Tax Debts (1931) 19 GEORGETOWN
LAW JOURNAL 427, 445-7, but Wheeling Steel Corp. v. Fox, 298 U. S. 193, 212 (1936)
sustained what the Court termed a "property tax" on the business-situs theory, see
note 63, infra, and texts thereto.
46 188 U. S. 189 (1902).
48 233 U. S. 434 (1914).
49 Id. at 446. See Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 80
(1926) in which this dissent was adopted by the Court.
50 245 U. S. 54 (1917).
51 State Tax on Foreign Held Bonds, 15 Wall. 300 (U. S. 1873); Kirtland v. Hotchkiss,
100 U. S. 491 (1879).
52 Blackstone v. Miller, 188 U. S. 189 (1903).
53 New Orleans v. Stempel, 175 U. S. 209 (1899); Bristol v. Washington County,
177 U. S. 133 (1900).
55 270 U. S. 69, 80 (1926).
56 Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 209-210 (1930) points out
that a debt may be taxed in four jurisdictions.
Blodgett v. Silberman sustaine... of the decedent’s domicil to tax succession... Blodgett v. Silberman sustained the right of the state of the decedent’s domicil to tax succession... of a bank account in another state, and of life insurance, stocks and bonds where the certificates were never at the domicil.

But 1930 saw the beginning of the end of multiple taxation of debts, for in Farmers Loan & Trust Co. v. Minnesota the Court expressly overruled Blackstone v. Miller, holding that the domicil of the debtor could not tax, and in Baldwin v. Missouri overruled Wheeler v. Sohmer in refusing to allow taxation of notes and bonds permanently kept in the state by a non-resident, thus taking the law back to State Tax on Foreign Held Bonds. However, the question of taxation at the “business-situs” was left open.

The latest case on the subject, Wheeling Steel Corp. v. Fox, decided at the last term of Court in an unanimous opinion written by the Chief Justice, deserves more than passing mention. A Delaware corporation with sales offices throughout the country and its principal manufacturing plants in Ohio, had established its “commercial domicil” at which “the management functioned” in West Virginia. Its money in banks there and in other states, which resulted from the original checks or drafts of its customers sent from the Wheeling office, and its accounts receivable arising from invoices “subject to acceptance or rejection ... and ... payable at Wheeling”, were held to have situs at no other place than the general office at Wheeling. The Court defined the business-situs of choses in action as “the place where they arise in the course of the business of making contracts of sale”; and strongly intimated that intangibles are now to be governed by the same rule as tangibles—“the law of the place where the property is kept and used”, and that intangibles which have acquired a business-situs are exempt from taxation at the owner’s domicil.

277 U. S. 1 (1928).
280 U. S. 204 (1930).
Id. at 209.
281 U. S. 586, 596 (1930). Mr. Justice Holmes, in his dissent, said, after mentioning Wheeler v. Sohmer: “I suppose that these cases and many others now join Blackstone v. Miller on the Index Expurgatorius—but we need an authoritative list.”
Lowndes, Jurisdiction to Tax Debts (1931) 19 GEORGETOWN LAW JOURNAL 427.
298 U. S. 193 (1936).
Id. at 211-215. “Thus the contracts of sale become effective by the action taken at the Wheeling office and there the accounts are kept and the required payments are made. In the face of these facts, it cannot properly be said that the credits arise either where the goods are manufactured or at the sales offices where the orders are taken.” Id. at 212. “From the Wheeling office proceed the items deposited and there the withdrawals are directed and controlled. In the light of this course of business as shown by the agreed statement of fact, we find no sufficient basis for concluding that the bank accounts thus maintained and controlled were properly attributable to the Corporation at any place other than at its general office at Wheeling.” Id. at 214. (Italics supplied.)

“The accounts are not necessarily localized in whole or in part where the goods are made but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale. We said, in Virginia v. Imperial Coal Sales Co., 293 U. S. 15, 20, that we were not able to perceive any sound reason for holding that the owner must have real estate or tangible property within the State in order to subject its intangible property within the State to taxation.” Id. at 213.

“When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable
(b) Stock Exchange Seat

There have been only two cases in the Supreme Court involving the taxation of membership privileges of stock exchanges. The first,\(^{67}\) decided in 1916, sustained the right of the state where the exchange was located even though the seat holder was a non-resident; in the other \(^{68}\) the membership was held personal property rightly taxable at the domicil of the holder.

to them in legal conception. Accordingly we have held that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the owner's domicile for purposes of taxation. *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 211. And having thus determined 'that in general intangibles may be properly taxed at the domicile of their owner', we found 'no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles.' *Id.*, p. 212. The principle thus announced in *Farmers Loan & Trust Co. v. Minnesota* has had progressive application. *Baldwin v. Missouri*, 281 U. S. 586; *Beidler v. South Carolina Tax Comm'n*, 282 U. S. 1; *First National Bank v. Maine*, 284 U. S. 312, 328, 329. But despite the wide application of the principle, an important exception has been recognized.

"In the case of tangible property, the ancient maxim, which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the 'law of the place where the property is kept and used.' *First National Bank v. Maine*, *supra*. It was in view of the enormous increase of such property since the introduction of railways and the growth of manufactures' that it came to be regarded as 'having a situs of its own for the purpose of taxation, and correlative to [be] exempt at the domicile of the owner.' *Union Refrigerator Transit Co. v. Kentucky*, *supra*, p. 207. There has been an analogous development in connection with intangible property by reason of the creation of choses in action in the conduct by an owner of his business in a State different from that of his domicile. *New Orleans v. Stempel*, 175 U. S. 309; *Bristol v. Washington County*, 177 U. S. 135; *Board of Assessors v. Comptoir National*, 191 U. S. 388; *Metropolitan Life Insurance Co. v. New Orleans*, 205 U. S. 395; *Liverpool & L. & G. Insurance Co. v. Board of Assessors*, 221 U. S. 346.

"These cases, we said in *Farmers Loan & Trust Co. v. Minnesota*, *supra*, p. 213, 'recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business.' We adverted to this reservation in *Beidler v. South Carolina Tax Comm'n*, *supra*, p. 8, and in *First National Bank v. Maine*, *supra*, p. 321." *Id.* at 209-210.

"... But the State insists that the accounts receivable and bank deposits of the Wheeling Steel Corporation have acquired a taxable situs in West Virginia and that they have no taxable situs in Delaware, where the Corporation was chartered.

"Second.—The Corporation complied with the laws of the State of its creation in designating its 'principal' office in that State... The office in Delaware is maintained through the service of an agency organized to furnish this convenience to corporations of that description. To attribute to Delaware, merely as the chartering State, the credits arising in the course of the business established in another State, and to deny to the latter the power to tax such credits upon the ground that it violates due process to treat the credits as within its jurisdiction, is to make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering State all the tangible possessions of the Corporation without regard to their actual location.

"The constitutional authority of West Virginia to tax the accounts receivable and bank deposits in question cannot be denied upon the ground that they are taxable solely in Delaware. *The question is whether they should be deemed to be localized in West Virginia.*" *Id.* at 210-211. (Italics supplied.)

\(^{67}\) *Rogers v. Hennepin County*, 240 U. S. 184 (1916).

\(^{68}\) *Citizens National Bank v. Durr*, 257 U. S. 99 (1921). The *Rogers* case was not overruled, on the ground that there was no ban to double taxation. *Id.* at 109. The *Rogers* case can be reconciled on the ground that in it the state of the business-situs was taxing. But cf. *Wheeling Steel Corp. v. Fox*, 298 U. S. 193 (1936).
(c) Partnership Interest

In Blodgett v. Silberman, the only case in point, the Court reviewed the nature of a partnership under the laws of New York, where this one existed, and found that the interest of a partner was simply a right to share in the partnership assets after satisfaction of liabilities; consequently was personal property and therefore taxable at the decedent's domicil. This case limits itself to the nature of the partnership interest under the state law and so does not decide that such interests are always taxable only at the owner's domicil.

(d) Shares of Stock

The earlier attacks on taxation of shares of stock by a state other than that of the owner's domicil were on the ground of impairment of the obligation of contract, and in Corry v. Baltimore the right of the state of incorporation so to tax was upheld because the tax law was in effect at the date of incorporation. Hawley v. Malden held stock taxable at the residence of the shareholder, since it was a chose in action and took the domicil of the owner, but left open taxation such as in Corry v. Baltimore. Frick v. Pennsylvania affirmed this double taxation by allowing a tax by the stockholder's domicil on the value of the stock less the amount of the tax paid to the state of incorporation. In Susquehanna Power Co. v. Tax Comm. of Maryland, the same statute as in Corry v. Maryland was invoked to tax all the capital stock of a Maryland corporation, the value of the corporate real property being deducted from the assessment, and the corporation being authorized to assess the stockholders the amount of the tax. Objection to the tax by the corporation was overruled. The following year, holding that there is no difference between property and inheritance taxes, the Court allowed only the state of the stockholder's domicil to levy an inheritance tax.

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*277 U. S. 1 (1928).
*2 Id. at 11.
*199 U. S. 466, 477 (1905).
*222 U. S. 1 (1914).
*268 U. S. 473 (1925). The state of incorporation was said to have prior right to levy a death transfer tax. Id. at 497.
*74 (Case No. 2) 283 U. S. 297 (1931).
*The appellant claimed the tax was on intangible shares of stock owned by a non-resident, with taxable situs at the owner's domicil, the sole owner of all the shares being a Pennsylvania corporation. The state court held this was an indirect tax on personal property of the corporation, valid because such personality could have been taxed directly. Mr. Justice Stone, speaking for the Court, said: "The tax was thus sustained on an adequate state ground, and it is unnecessary to consider the objections made to it on constitutional grounds. None of them is directed at the statute viewed, as the state court has construed it, as imposing a tax on the personal property of appellant. Nor is it necessary on this record to consider how far any objection made may be availed of by the non-resident stockholder, in the event of an attempted enforcement of the provisions of the statute which authorize the tax to be charged to stockholders, and create a lien upon the stock." Id. at 300. (Italics supplied.)
*First National Bank of Boston v. Maine, 284 U. S. 312 (1932). With reference to the holding in the Frick case, where an inheritance tax by the domicil of the corporation was countenanced [268 U. S. 473, 497 (1925)], the Court said that since Farmers Loan & Trust Company [280 U. S. 204 (1931)] "this and all other instances of such approval... have ceased to have other than historic interest."
Hence, although Corry v. Baltimore and Frick v. Pennsylvania fall by the wayside, leaving the stockholder's domicile the only state which can tax the share stock, yet the Susquehanna case implies that the capital stock may still be taxed by the corporate domicile and, of course, any transfer of shares on the books of the corporation as well.

(e) Trust Estates

The corpus of a trust of real property, of course, can be taxed only where the realty is situated; the same rule applying to trusts of tangible personality after the Union Refrigerator case.\(^7\) Where, however, the corpus consists of intangibles possibilities of multiple taxation exist. Before the Supreme Court found multiple taxation repugnant to due process of law, a person receiving the income could be taxed upon the corpus of a trust regardless of where the property or the trustees were, and regardless of the place of administration of the trust.\(^8\) But in 1929 the Supreme Court refused to allow Virginia to tax Virginia residents on the corpus of a trust of intangibles, held in Baltimore by Maryland trustees, of which they were the beneficiaries.\(^9\)

\(^{11}\) Union Refrig. Transit Co. v. Kentucky, 199 U. S. 194 (1905).

\(^{12}\) In Hunt v. Perry, 163 Mass. 287, 43 N. E. 103 (1896) cestuis qui trustent contested the power of the state to tax them on account of the corpus held by a non-resident trustee under a will proved and administered elsewhere. The court said: "There is no more reason for holding this to be beyond the power of the legislature than there would be for holding the taxation of cattle and sheep, of manufactured goods, or of shares in corporations intangible here, because situated out of the state." Id. at 291-2, 43 N. E. at 104 (italics supplied).

\(^{13}\) Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83 (1929). A trust had been established in Baltimore with the Trust Company as trustee for the minor sons of the trustor. The trustee was instructed to accumulate the income and, when the older son reached the age of 25 years, to pay him his respective half of the corpus together with half of the income accumulated to date, the balance with its accumulated income to be paid the other son on his reaching 25; if either son died before receiving his share of the principal and accumulations it was to be paid to his children living at his death, otherwise added to the share of the survivor. The beneficiaries being infants, Virginia assessed for taxation the whole corpus of the trust estate holding that the sons together with the administrator of the deceased trustor owned the fund, and, being residents of Virginia, the fund was taxable under the rule mobilia sequuntur personam. The majority of the Court held that "the general rule must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice, whether through double taxation or otherwise. . . . Here, where the possessor of the legal title holds the securities in Maryland, thus giving them a permanent situs for lawful taxation there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded." Id. at 92. "The reasons which led this court in Union Refrig. Transit Co. v. Kentucky, 199 U. S. 194, and Frick v. Pennsylvania, 268 U. S. 473, to deny application of the maxim mobilia sequuntur personam to tangibles apply to the intangibles in appellant's possession. They have acquired a situs separate from that of the beneficial owners. The adoption of a contrary rule would 'involve possibilities of an extremely serious character' by permitting double taxation, both unjust and oppressive." Id. at 93.

Mr. Justice Stone, with whom concurred Mr. Justice Brandeis, concurred on the ground that this tax was levied against the trustee, domiciled in Maryland, on securities in its exclusive possession there, and so outside the jurisdiction of the state, and held further that the question of a tax on the equitable interests of the beneficiaries was not presented and ought not have been decided. The interests of the
The year before, the Court, speaking through Mr. Justice Holmes, voided a tax on the whole value of the corpus of a trust fund, held by a non-resident trustee, levied upon the life tenant, saying: "The assessment is a bare proposition to make the petitionier pay upon an interest to which she is a stranger. This cannot be done." 60

The Safe Deposit Co. case, however, specifically leaves open the question of the "power of Virginia to lay a tax upon the fair value of any interest in the securities actually owned by one of her resident citizens," 61 by which words the majority seem to refer only to a tax on income, as the Maguire case 62 is cited, but Mr. Justice Stone felt that the power to levy a tax on the equitable interests of the beneficiaries should also be left open.

These cases, of course, overrule the principle in Hunt v. Perry. 63 Yet it has not been decided that a state may not tax a resident remainderman, 64 whether his interest be vested or contingent, and, as we have seen, there is nothing to prevent taxation of mortgagor and mortgagee as well. Nor does the Brooke case decide that the life tenant has no taxable interest in the corpus, but only that that interest is not in the entire corpus.

The distinction taken by Mr. Justice Stone was held by the Court of Appeals of Maryland to be covered otherwise by the majority opinion, in Mayor, etc., of Baltimore v. Gibbs, 65 where a resident life tenant was taxed on the capitalized value of her income, as though she were the recipient of a taxable annuity, although the trust property was held by the trustee in Pennsylvania. The court said there was no middle ground between income and principal, and that the process here used was, in effect, to tax a portion of the principal making the result differ from that held unconstitutional in the Safe Deposit case "only as a part differs from the whole." 66 This question reached the Supreme Court in Senior v. Braden, 67 but the point was not decided as the case went off on other grounds.

beneficiaries, he agreed with the majority, are contingent merely. Mr. Justice Holmes dissented, holding the beneficiaries had more than mere equitable interests, and that as their interest was vested (possibly subject to being divested) Virginia could tax the whole corpus. But cf. Wheeling Steel Corp. v. Fox, 298 U. S. 193, 298-210 (1936).

63 165 Mass. 287, 43 N. E. 103 (1896), cited supra, note 78.
64 See Dunn v. Dunn, 99 Tenn. 598, 606, 42 S. W. 259 (1897), upholding a tax on the life tenant for the full value of the land.
65 166 Md. 364, 171 Atl. 37, cert. denied, 293 U. S. 559 (1934).
66 Id. at 372, 171 Atl. at 40.
67 295 U. S. 422 (1935). The case involved the right of Ohio to levy a property tax on transferable certificates of trust held by a resident. The trusts consisted of parcels of land, some being Ohio land and some situated in other states, held by trustees free from any control by the owners of the certificates, the trustees merely paying the certificate holders a pro rata share of the net profits. The rate of tax was 5 per cent of the aggregate income paid to the certificate holders. Over the contention of the state and the decision of the Ohio courts that these certificates were in themselves a species of intangible property and subject to taxation, the Court held them interests in land protected from taxation by the Fourteenth Amendment insofar as they represented land lying outside of Ohio, and as to the land in the state not taxable because it would result in a lack of uniformity, conceded by counsel to be contrary to the state constitution. The Court, at 432-3, quoted with approval from Brown v. Fletcher, 235 U. S. 589, 599: "... the trust property was held by the Trustee, not in opposition to the cestui qui trust so as to give him a chose in
We have, then, possibility of multiple taxation of trusts where the trustee is domiciled in one state, the intangibles have a business situs (seat of administration) in another, and the cestui is domiciled in a third. Even if the Gibbs decision is accepted we still have two states which can tax.

C. Income

Little has been done by the Supreme Court in determining the jurisdiction to tax incomes under the 14th Amendment. In 1920, prior to the decisions forbidding double taxation by property and inheritance taxes, the Court held that a state could tax the income of a non-resident arising from property situated, and business carried on, within the state. The same year, in Maguire v. Trefry, a tax on the income of a resident arising from a trust of intangibles held and administered in another state, exempting the income from securities taxed to the trustee at its domicil, was sustained. This latter case has been considerably weakened by the dictum in Senior v. Braden that "The opinion [in the Maguire case] accepted and followed the doctrine of Blackstone v. Miller, 188 U. S. 198 and Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54. Those cases were disapproved by Farmers Loan & T. Co. v. Minnesota, 280 U. S. 83, and views now accepted here in respect of double taxation. See Baldwin v. Missouri, 281 U. S. 586; Beidler v. South Carolina Tax Comm'n, 282 U. S. 1; First National Bank v. Maine, 284 U. S. 312." Yet it was this same justice, who, speaking for the Court in the Safe Deposit case, specifically left open the question presented by Maguire v. Trefry.

action, but—in possession for his benefit in accordance with the terms of the testator's will. . . . The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. . . ." Mr. Justice Stone, with whom were Justices Brandeis and Cardozo, dissented on the ground that these certificates were property in themselves analogous to shares of stock in a land-owning corporation, and so taxable as intangibles. He condemned that part of the majority opinion respecting the Ohio lands saying that the Court was concluded by the holding of the Ohio court, and concessions of counsel were of no avail in granting jurisdiction to decide the point.

In First National Bank v. Maine, 284 U. S. 312, 323, 326 (1932), it was said: "The decision of this court in the Farmers Loan case was foreshadowed by its decision in Safe Deposit & T. Co. v. Virginia, 280 U. S. 83. There it was held that intangibles such as stocks and bonds, in the hands of the legal holder of the title in the state of his residence, may not be taxed at the domicile of the equitable owner in another state. . . . The rule of immunity from taxation by more than one state, deductible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it." The denial of certiorari in the Gibbs case takes on real meaning in view of this and what the Court said in the Wheeling Steel Corp. case: "[tangible personality] . . . came to be regarded as 'having a situs of its own for the purpose of taxation, and correlatively to [be] exempt at the domicile of its owner.' Union Refrigerator Transit Co. v. Kentucky, supra, p. 207. There has been an analogous development in connection with intangible property. . . ." 298 U. S. 193, 210 (1936). Therefore this author expects the Court to allow trusts of intangibles to be taxed only at the place where the trust is administered, which will, of course, in some instances correspond with the domicil of the beneficiary and in most instances correspond with that of the trustee.


253 U. S. 12 (1920).


280 U. S. 83, 91 (1929).
The next pronouncement on this subject was in *Lawrence v. State Tax Comm'n*, 286 U. S. 276 (1932), wherein the Court upheld a tax on the income of a resident arising from the construction of a highway in another state.

Thus, from the decided cases to date, we find that the state where the property lies may tax the income arising therefrom, yet at the same time the state of the domicile may also tax it under the *Maguire* and *Lawrence* cases. And under the rationale of *Virginia v. Imperial Coal Sales Co.*, 293 U. S. 15, and *Wheeling Steel Corp. v. Pox*, 298 U. S. 193, may not a third state tax if the business management is there carried on?

The states are not in accord as to the implications to be drawn from the decisions on property taxes since the *Safe Deposit case*, or their effect upon income taxes. The questions involved and the results reached by certain of the states are ably presented in two articles written soon after *Farmers Loan & Trust Co. v. Minnesota* and its companion cases. Typical examples of results reached are *In re Opinion of the Justices* and *Hutchins v. Comm'r of Corporations & Taxation*. The former case held that a tax could not be levied upon the income of residents arising from land or tangible personalty having a situs outside the state, but that the rule did not apply to intangibles. The *Hutchins case* refused to uphold a tax on resident trustees for income from trusts of intangibles located and administered in another state where the trusts were taxed as having a situs. There is now pending before the Supreme Court a case in which the New York Court of Appeals upheld a tax on the income of a resident life tenant of a trust of New Jersey realty and bonds and mortgages on New Jersey land held by the trustee in the latter state.

Will the Supreme Court adopt the reasoning of the New Hampshire court and of the New York minority and avoid the tax as being on property outside the jurisdiction, thus re-affirming the *Pollock case*? Or will it hold income to be a distinct species of property? In the latter case will it follow *Maguire v. Trefry* as indicated in the *Safe Deposit case*, or allow the income

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83 The scope of this note is to discuss the taxation of income merely as it applies to conceded residents or conceded non-residents, whether the source of income is land, personalty, or business operations, precluding from questions of apportionment so far as possible. For this reason many cases dealing with taxes on income will be omitted. For discussions of related topics, see: Notes 75 L. ed. 879 (1931); (1921) 11 A. L. R. 313; (1921) 15 A. L. R. 1326; (1931) 70 A. L. R. 468; (1931) 71 A. L. R. 685; (1933) 87 A. L. R. 382.

84 The value of services of management would seem to be a legitimate expense, deductible if performed in a state other than the one taxing, and was specifically adverted to in Shaffer v. Carter, 252 U. S. 37, 55 (1920).


86 84 N. H. 555, 149 Atl. 321 (1930).

87 272 Mass. 422, 172 N. E. 605 (1930).

88 No. 404, Oct. Term, 1936.

89 People ex rel. Cohn v. Graves et al., 271 N. Y. 553, 3 N. E. (2d) 508 (1938) (a 4-3 decision). The majority opinion consists of two very short paragraphs holding the tax good, cites no cases other than to say that Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429 (1895), did *not* hold a tax on income from realty to be a tax on realty, and gives no other reason for its views. The dissent, covering more than three and one-half pages in the Northeastern Reporter, relies upon the *Pollock case*, Senior v. Braden, and an earlier New York decision, Pierson v. Lynch, 237 App. Div. 763, 263 N. Y. Supp. 259, *aff'd*, 263 N. Y. 533, 180 N. E. 684 (1933) (*per curiam*), where a tax on the income of a resident from lands in another state held in her own name was overruled. The reasoning of the dissent is most convincing.
to be taxed only where the management is exerted as suggested in the *Wheeling Steel Corp.* case and where the property from which it arises is located as held in the *Shaffer case* and suggested in *Senior v. Braden*?

The decision in this case will probably show whether the domicil of the recipient, place of management, or situs of the income producing property will be determinative. Clearly the Court must choose if it is to carry the ban on double taxation into the field of income taxes.

**Lee Fischer Dante.**

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CONFLICT OF LAWS—Divorce—Submission of Defendant to Jurisdiction.

The plaintiff and the defendant were married in 1921 and were domiciled in California continuously until the bringing of this petition for divorce by the wife. Prior to the present suit, the husband had suggested that a Mexican divorce might be an easy solution to their difficulties, to which the wife had agreed. They consulted an attorney, together, and ultimately a divorce was granted to the husband in Chihuahua, the wife submitting to the jurisdiction of the Mexican court and filing confession of judgment. Subsequently, the husband married another woman, and shortly thereafter, this action for divorce was begun by the wife in California. The husband's defense was the Mexican decree. Held, the foreign court did not have jurisdiction of the marital status, and its decree was no defense to the present action even though the present plaintiff had submitted to its jurisdiction. Kegley v. Kegley, — Cal. App. —, 60 P. (2d) 482 (1936).

Jurisdiction to determine the marital status of parties depends on the matrimonial domicil. Atherton v. Atherton, 181 U. S. 155 (1901); Haddock v. Haddock, 201 U. S. 562 (1906); Ditson v. Ditson, 4 R. I. 87 (1856). This rule results, as the court in the principal case points out, from the theory that the state is a party to divorce actions, as well as the litigants themselves, and as a party, it will determine the status of its domiciliaries in accordance with the public policy of the state. While ordinarily the matrimonial domicil follows the domicil of the husband, that is not the case when he is the offending party. The Supreme Court of Rhode Island said in Ditson v. Ditson, supra, at 103, that the domicil of the parties, for purposes of jurisdiction in divorce matters, is dependent on the domicil of the "wronged and petitioning party". The domicil of the petitioning party must be bona fide, however. A person cannot transfer the matrimonial domicil by a mere sojourn for the purpose of obtaining a divorce. Streitwolf v. Streitwolf, 181 U. S. 179 (1901).

Divorce is a proceeding in rem, since it is an adjudication on the status of the parties. The several states have the right to determine the status of their domiciliaries. A state in which the couple are not domiciled has no jurisdiction of the subject matter and its courts are not qualified to pass on the case. Haddock v. Haddock, supra. If the claimed residence is colorable only, the courts of the state have no jurisdiction over the marital status. Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684 (1914). Therefore, the decree of a court which has no jurisdiction is not entitled to full faith and credit in the courts of sister states under the Constitution of the United States. Bell v. Bell, 181 U. S. 175 (1901); Frazier v. Frazier, 61 App. D. C. 279, 61 F. (2d) 920 (1932). In line with this rule of law is the corollary that when the subject matter is without the jurisdiction of the court, the parties may not, by consent, confer jurisdiction on the court. Andrews v. Andrews, 188 U. S. 14 (1903). The invalidity of the Mexican divorce in the principal case cannot be disputed, especially in view of the fact that neither party left California to attend proceedings in Chihuahua.

The defendant, however, raises the question of estoppel. While the court did not allow the defense, on the ground that jurisdiction cannot be conferred by estoppel, an interesting point presents itself as to the policy of allowing a conniving spouse to attack a decree to which he or she had consented, when it turns out that its invalidity will better that person's situation from
a pecuniary point of view. The cases show four instances at least when the foreign decree may not be attacked by the party submitting to the jurisdiction.

(1) Where an attempt is made to procure a subsequent divorce in the state of domicil on the ground that the remarriage of the other party was a violation of marital duties owed the petitioner. Loud v. Loud, 129 Mass. 14 (1880); Langewald v. Langewald, 234 Mass. 269, 125 N. E. 566 (1920). In the latter case, the wife was allowed to show the previous decree was void, but was not allowed to take advantage of it.


(4) Where the defendant in the foreign court has remarried in reliance on the validity of the decree. Kelsey v. Miller, 203 Cal. 61, 263 Pac. 200 (1928). In none of these cases was the decision based on estoppel, save in the Gilbert and Kelsey cases, since it is difficult to spell out a strict estoppel. The courts appear to be guided by a public policy, which decrees giving to the consenting party an advantage which would unsettle domestic relations and perhaps in some cases, make bigamous a marriage entered into in reliance on a foreign decree. This is the apparent basis of decisions upholding the validity of foreign divorces against attack by third parties, where the third party attempts to benefit thereby after doing some act in reliance on the foreign decree, such as marrying one of the parties. Atkinson v. Atkinson, 65 App. D. C. 241, 82 F. (2d) 847 (1936); Hubbard v. Hubbard, 228 N. Y. 81, 126 N. E. 508 (1920). In the case under discussion it would seem that the wife should have been denied a divorce in California because it was an attempt to take advantage of her collusion in obtaining the Mexican divorce, and had the effect of making the husband's second marriage bigamous until rendition of the decision given in the instant case. See 1 Beale, Conflict of Laws (1935), § 111.3.

E. J. Q., JR.

CONFLICT OF LAWS—Trusts Created Inter Vivos and by Will.

By a deed of trust executed in 1920 in New York, naming his daughter trustee and giving his grandchildren, yet unborn, life interests, the donor, William Donner, granted to his son, Joseph, as a life beneficiary a power of appointment to carry out the donor's wishes in regard to his personal property. In 1929, by a sealed instrument specifically referring to the power, Joseph Donner appointed his two children beneficiaries. He died in 1929, leaving a will executed in 1927, which did not refer to the power or the property to which the power applied. Meanwhile, with consent of the donor, the defendant company was named successor-trustee and the trust property was moved from New York to Delaware, the home of the defendant. The plaintiff, guardian of the two children of Joseph Donner, sought an accounting. The deed of 1929 was invalid under the New York law against perpetuities, although valid in Delaware. Under Delaware law, the residuary clause of the will was insufficient to execute the power of appointment and
under New York law that clause could not be given effect because of the limitations upon the power. On rehearing, Held, New York law governs, the intent of the testator, in the absence of contributing reasons, being evidenced by the fact that when the trust and power were created, the donor was domiciled in New York, along with the trustee and all the beneficiaries, the securities were located there, and delivery to the trustee was effected in New York. Wilmington Trust Co. v. Wilmington Trust Co., —— Del. Ch. ——, 186 Atl. 903 (1936).

Persons may by will or deed establish trusts in property restraining alienation during the life of the beneficiary, and limitations on the power depend on the *lex loci rei sitae*, in case of Realty, and in the case of personalty, on the law where the trust was created, or is to be administered. *Spindle v. Shreve*, 111 U. S. 542 (1884); *McLoughlin v. Shaw*, 95 Conn. 102, 111 Atl. 62 (1920). Authorities universally hold that land transactions are weighed and criticized in connection only with the law of the situs; hence it is proposed to deal here only with trusts of movables or personalty, created by testamentary instruments and *inter vivos* agreements. Each class has its peculiarly applicable rules, the former being usually governed, as to validity and certain other features, by the law of the testator's domicil, and the latter generally by the law of the place of administration.

Where the issue is whether the donee of a power under a will executed the power, the law of the domicil of the donor of the power governs, not the law of the donee's domicil. *Lane v. Lane*, 20 Del. 368, 55 Atl. 184 (1903); *Russell v. Joys*, 227 Mass. 263, 116 N. E. 549 (1917); *Barret v. Berea College*, 48 R. I. 258, 137 Atl. 145 (1927); *In re Sloan's Estate*, 7 Cal. App. (2d) 319, 46 P. (2d) 1007 (1935).

The selection of a foreign trustee and possession of the fund outside the state where the testator was domiciled does not affect the rule. *Farmum v. Pennsylvania Co.*, 87 N. J. Eq. 108, 99 Atl. 145 (1916); *cf. Mercer v. Buchanan*, 132 Fed. 501 (C. C. W. D. Pa. 1904). The case of *Sewall v. Wilmer*, 132 Mass. 131 (1882) is an often cited domestic case. There, a testator, domiciled in Massachusetts devised an estate, partly consisting of personalty located there, to trustees, to hold one-half in trust to the use of his daughter until she became 21 years of age, and then to convey it to her, and to hold the other half during her life, and convey it in the same manner as the daughter by her will should appoint. The daughter went to live in Maryland and died there leaving a will, which was not a valid execution of power in Maryland, but was valid in Massachusetts. It was held that the Massachusetts law governed and that the power was well executed. *In re New York Life Insurance and Trust Co.*, 209 N. Y. 585, 103 N. E. 315 (1913); *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 73 F. (2d) 970 (C. C. A. 1st. 1934). So with regard to the question of succession for tax purposes, *Wachovia Trust Co. v. Doughton*, 272 U. S. 567 (1926).

The general rule that the testamentary creation of a power is controlled by the law of the domicil of the testator is not one of invariable application, as shown by a series of cases in New York, including *Hope v. Brewer*, 136 N. Y. 126, 32 N. E. 558 (1892), and *Robb v. Washington and Jefferson College*, 185 N. Y. 485, 78 N. E. 359 (1906). The rule followed in these decisions is that where a disposition of trust property is made by will in a state whose law invalidates it for non-compliance with the law of trusts and perpetuities, it will be upheld as a valid bequest, if not contrary to the law of the state where the property is to be held and the trust administered.
A change of domicil by the trustee, which is accompanied by a change in the location of the trust property itself, does not change the status of the trust. *Swetland v. Swetland*, 105 N. J. Eq. 608, 149 Atl. 50 (1930), aff'd, 107 N. J. Eq. 504, 153 Atl. 907 (1931); 2 BEALE, CONFLICT OF LAWS (1935) § 260.

As a general rule, the domicil of the creator of a power in an inter vivos agreement is not so important, in contrast with the creation of such power in a testamentary instrument. However, speaking for the court in *Swetland v. Swetland*, supra, at 614, Berry, V. C. said: "I think it clear that the law of testator's domicil applies as well to an inter vivos trust, as to a testamentary trust." The New Jersey view evidently is that the law of the settlor's domicil governs in either case. The reason is given in Second National Bank of Paterson v. Curie et al., 116 N. J. Eq. 101, 172 Atl. 560, 561 (1934): "The situs of a trust of personality created inter vivos is at the domicil of the donor and the law of the state in which the trust has its situs determines its validity." Delaware does not follow this rule. *Bouree v. Trust Francais des Actions de la Franco-Wyoming Oil Co.*, 14 Del. Ch. 332, 127 Atl. 56 (1924); RESTATEMENT, CONFLICT OF LAWS (1934) § 297.

In the well-reasoned case of *Hutchison v. Ross*, 262 N. Y. 381, 187 N. E. 65 (1933), the Court of Appeals upheld as valid a trust executed by a Canadian settlor, which was invalid in Canada, the place of execution. Following the tendency of courts to validate trusts, a rational basis for the decision was found in the intention of the settlor that New York law apply. The court did not rule that a trust administered in New York was valid or invalid according to the New York law. The law of the domicil was not excluded, as is shown by the recent case of *Shannon v. Irving Trust Co.*, 246 App. Div. 280, 285 N. Y. Supp. 478 (1st Dep't 1936). There it was held that the New Jersey domicil of the grantors and the beneficiaries was a sufficient basis for upholding the declaration of the parties that the New Jersey law should apply to the question of the validity of execution of a trust fund administered in New York and not against the public policy of that State.

The decisions of the Supreme Court of the United States on situs of personalty for the assessment of taxes greatly modify the maxim *mobilia sequuntur personam*. Some confusion has been present but much will disappear on adverting to the distinction between the states and the government. As between the states, for the purposes of taxation, the situs of personalty is at the domicil of the testator, according to the case of *First National Bank of Boston v. Maine*, 284 U. S. 312 (1931). However, *Burnet v. Brooks*, 288 U. S. 378 (1932), cites with approval the statement in *De Ganay v. Lederer*, 250 U. S. 376, 382 (1918), namely: "But this court has frequently declared that the maxim [mobilia sequuntur personam], a fiction at most, must yield to the facts and circumstances of the cases which require it; and that notes, bonds and mortgages may acquire a situs at a place other than the domicil of the owner, and there be reached by the taxing authority." See 2 BEALE, CONFLICT OF LAWS (1935) § 255. 2.

The diversity of decisions upon the topic at hand can be ascribed, it is ventured, to the different considerations indulged in by the courts as being most important, for instance, the place of execution, domicil, situs of the res, local law, the instrument itself as showing intention, and the sometimes improper citation of the Supreme Court tax cases.

J. J. O'C.
CONSTITUTIONAL LAW—Compulsory Unemployment Insurance—Due Process.

The New York Unemployment Insurance Law was enacted as Chapter 468 of the Laws of 1935 on April 25, 1935. The act was passed in furtherance of the objectives of the Social Security Act, 49 Stat. 620, 42 U. S. C. A. §§ 301-1305 (1935), (cf. The Social Security Act and the Constitution, Legis. 1936, 24 Georgetown Law Journal, 665) under one of the provisions of which (§ 1101), an excise tax on pay rolls is levied against described employers with respect to the individuals in their employ. In the event of the enactment of any compulsory state unemployment insurance plan, such as the act under consideration, employers may offset ninety per cent of the federal tax against their contributions to the state fund. The New York statute requires annual contributions, based on the amount of the pay roll, to be paid by the employers of four or more persons. These contributions are payable into a central (pooled) unemployment insurance fund, and are disbursed ultimately to the described class of unemployed workers in benefits of limited amounts.

The plaintiffs, various New York corporations and employers affected by the Act, challenged the validity of the statute and alleged that it was repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution. The plaintiffs attacked the classification of the statute regarding both those who are to contribute to the fund, and those who will receive its benefits.

At Special Term, the state was given judgment in two actions, except as to subdivision 2 of § 504 of the Act, which permits benefits after a ten-week waiting period to those discharged for cause or unemployed because of strike. In the third action, plaintiffs had a judgment, and all parties sought a declaratory judgment as to the constitutionality of the statute, in an appeal from the Court of Appeals of the state. Held, that the statute did not violate the Fourteenth Amendment to the Constitution, nor any other provision thereof, and that the statute was valid in its entirety. W. H. H. Chamberlin, Inc. v. Andrews, Industrial Com'r. et al.; E. C. Stearns and Co. v. same; Associated Industries of New York State, Inc., v. Department of Labor of New York et al., 271 N. Y. 1, 2 N. E. (2d) 22 (1936).

The judgments in these cases were severally affirmed in the Supreme Court of the United States, per curiam, by an equally divided court with Mr. Justice Stone absent.

The principles involved in this case are well settled, although their application invariably necessitates the most delicate balancing of relationships. It is elementary that the police power inherent in the legislatures was never surrendered by the several states. Through the exercise of this power, "the state may regulate the relative rights and duties of all persons within its jurisdiction and promote the common good and welfare". People v. Byrne, 99 Misc. 1, 163 N. Y. Supp. 682, 685 (Sup. Ct. 1917); Jacobson v. Massachusetts, 197 U. S. 11 (1905). In formulating the instant statute, the legislature, it is true, has allowed benefits (other conditions being fulfilled) even to those who have private sources of income, and to those who refuse other work of a certain kind when offered. The act furthermore treats all employers alike with no separate accounting system for each on a merit basis. The courts, however, cannot void a law merely on the basis of the wisdom or adequacy of its stated policy. Green v. Frazier, 253 U. S. 233 (1920); Standard Oil Company v. Marysville, 279 U. S. 582 (1929); Borden's Farm
Products v. Ten Eyck, 297 U. S. 251, 56 Sup. Ct. 453 (1936); Fearon v. Treanor, 248 App. Div. 225, 258 N. Y. Supp. 368 (1st Dep't 1936); "So far as the requirement of due process is concerned and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose. The courts are without authority either to declare such policy, or when it is declared by the legislature, to override it." Nebbia v. New York, 291 U. S. 502, 537 (1934); Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929 (1936). The fact that a legislature discriminates in favor of a certain class does not render its action arbitrary if the line that is drawn is reasonably founded, or if a state of facts reasonably can be conceived to support it. St. Louis Consolidated Coal Co. v. Illinois, 185 U. S. 203 (1902); State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527 (1931). Thus the court in the principal case was satisfied that the state through its investigation had classified those to receive benefits so as to reach the weakest spots. This suffices. The plaintiffs may not then argue that the drawing of the line at employers of four employees is arbitrary. The line must be drawn somewhere. Jeffrey Mfg. Co. v. Blagg, 285 U. S. 571 (1915). In St. Louis Consolidated Coal Co. v. Illinois, supra, an inspection law was held not unconstitutional by reason of its limitation to mines where more than five men were employed at one time. The court held this to be a type of classification which the legislature is free to adopt. Only where the classification is wholly capricious or unreasonable will it be said that equal protection of the law is denied. Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (1902); Adkins v. Children's Hospital, 261 U. S. 525 (1923). But this does not prevent the imposition of special burdens on one class of people or another if the imposition is for the public good. A law may be limited in its application providing it affects alike all persons similarly situated. Barbier v. Connolly, 113 U. S. 27 (1885); Marshall v. South Carolina Tax Commission, 178 S. C. 57, 182 S. E. 96 (1935).

The plaintiffs urge that the unemployment insurance law in question cannot be sustained as a tax measure. The courts invariably hold, however, that the power to raise money for what the legislature upon investigation has found to be a legitimate governmental function is complete. Jones v. City of Portland, 245 U. S. 217 (1917); and the legislature has a wide discretion in selecting the property, business, trade, calling, or occupation upon which the cost shall fall. Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232 (1890); Brown-Forman Co. v. Kentucky, 217 U. S. 563 (1910); State Board of Tax Commissioners v. Jackson, supra; People ex rel. Hatch v. Reardon, 204 U. S. 152 (1907). The mere fact that a law regulating classes might properly have included others does not condemn it. Barbier v. Connolly, supra; Quong Wing v. Kirkendall, 223 U. S. 59 (1912); Pacific American Fisheries v. Alaska, 269 U. S. 269 (1925); Swiss Oil Corp. v. Shank's, 273 U. S. 407 (1927). Strong proof, moreover, must be brought forth to overcome the presumption that the classification chosen by the legislature is violative of the Fourteenth Amendment. Facts of such a nature must be set forth as clearly to rebut the presumption that the legislature acted on a reasonable, and not an arbitrary basis. Green v. Frazier, supra; O'Gorman and Young, Inc. v. Hartford Fire Insurance Co., 282 U. S. 251 (1931). Lawrence v. State Tax Commissioners, 286 U. S. 276 (1932). In the light of these principles, the court in the instant case rejected the argument that the statute involved taxation for the benefit of a special group, not the public at large. It held that "employers generally are not so unrelated to the
unemployment problem as to make a moderate tax upon their pay rolls unreasonable or arbitrary". W. H. H. Chamberlin, Inc. v. Andrews, supra, 2 N. E. (2d) at 24.

The defendants rely strongly on the cases involving workmen's compensation statutes to sustain the present act. Employers' Liability Cases, 207 U. S. 463 (1908); Mountain Timber Co v. Washington, 243 U. S. 219 (1917); Arizona Employers' Liability Cases, (Arizona Copper Co. v. Hammer), 250 U. S. 400 (1919). New York Central R. R. Co. v. White, 243 U. S. 188 (1917) involves the constitutionality of the Workmen's Compensation Law of New York, N. Y. Laws, 1913, c. 16; N. Y. Laws, 1914, cc. 41, 316. The court stated at page 197, "... the close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is of course recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest ". Admittedly, no common law liability is removed by the statute in the principal case. It was not, however, the physical suffering alone which was the basis of compensation acts, but also the loss of earning power with its direct effect on the individual, his family, and in turn the state, of which the family is an integral unit. This reasoning prompted the court to say in New York Central Railroad Company v. White, supra, at 203: "But besides, there is a loss of earning power; a loss to what stands to the employee as his capital in trade. This is a loss arising out of the business, and however it may be charged up, is an expense of operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge?" Who likewise is to bear the charge of the severe undermining done the state by unemployment? In the principal case the court answers this question, "Power in the state must exist to meet such situations, and it can only be met by raising funds to tide over the unemployment period. Money must be obtained and it does not seem at all arbitrary to confine the tax to a business and employment out of which the difficulty principally rises ", W. H. H. Chamberlin, Inc. v. Andrews, supra, 2 N. E. (2d) at 26. It is certainly well settled that "an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use ". Noble State Bank v. Haskell, 219 U. S. 104, 110 (1911); Head Money Cases, 112 U. S. 580 (1884); Clark v. Nash, 198 U. S. 361 (1905); Nicchia v. People, 254 U. S. 288 (1920); Sheep Dog Cases (Longyear v. Buck), 83 Mich. 236, 47 N. W. 234 (1890); State v. Cassidy, 22 Minn. 312 (1875).

The end or aim of the statute, however, must be one within the scope of the power sought to be exercised. In Railroad Retirement Board v. Alton R. R. Co., 295 U. S. 330 (1935), it was held that the Railroad Retirement Act of June 27, 1934, 48 STAT. 1283, 45 U. S. C. A. §§ 1-14 (Supp. 1935), was invalid as not constituting a regulation of commerce within the meaning of the Constitution. There is a strong difference of opinion between the majority and minority contentions in the instant case regarding the applicability of this decision. The Railroad Retirement Act established a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act. The court found it arbitrary and unduly burdensome in numerous compulsory features, especially the requirement of pooled contributions with all carriers being treated as a single employer; also the retroactive provisions which extended pension benefits to former employees who made no contribution to the fund. The court, it must be noted, does not appear to condemn the "pooling" of funds as such, but rather the inequitable
classifications under which the pool was secured, and the classification of those benefitting thereby. The central pooling of funds, when incidental to the valid exercise of a constitutional power, has already been upheld. Noble State Bank v. Haskell, supra; Mountain Timber Co. v. Washington, supra. Failing to come within the federal power, the Railroad Retirement Act could not be maintained as a police measure since no police power exists in the federal government. United States v. Dewitt, 9 Wallace 41 (U. S. 1869). Cf. Note (1936) 25 GEORGETOWN LAW JOURNAL 161.

The dissenting opinion follows the stricter philosophy of constitutional interpretation in its adamant refusal to accept the finding of the legislature as having any bearing on the immediate factual problem of serving the public welfare. The minority cites Railroad Retirement Board v. Alton R. R. Co., supra, as not being distinguishable from the instant case on the recognized theory that the due process clause of the Fifth Amendment bears the same relation to an act of Congress that the similar clause of the Fourteenth Amendment does to state legislation. Nebbia v. New York, supra at 525. Yet, the Head Money Case, supra, is rejected as involving a federal question. The dissenting opinion further argues that the statute cannot be sustained as a tax law as it is "the expropriation of money from one group for the benefit of another". United States v. Butler, 297 U. S. 1, 61 (1936). It overlooks the statement which immediately follows these words, "We may concede that the latter sort of imposition is constitutional when imposed to effectuate legislation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation". In short, the difference in reasoning between the majority and minority opinions seems to be one of viewpoint as to what are the respective provinces of legislature and judiciary.

The majority decision in the principal case is in the best tradition of the liberal jurists. The court sums up its argument as follows, "Whether we consider such legislation as we have here a tax measure or an exercise of the police power seems to be immaterial. . . . Here we are dealing simply with the power of the legislature to meet a growing danger and peril to a large number of our fellow citizens, and we can find nothing in the act itself which is so arbitrary or unreasonable as to show that it deprives any employer of his property without due process of law or denies to him equal protection of the laws". W. H. H. Chamberlin, Inc. v. Andrews, supra, 2 N. E. (2d) at 26.

J. E. C.

CONSTITUTIONAL LAW—National Labor Relations Act—Injunction.

The plaintiff, a Delaware corporation, owning and operating a shipbuilding plant at Quincy, Massachusetts, known as the Fore River Plant, asked for injunctive relief against threatened proceedings by the defendants, presuming to act by virtue of the Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. A. §§ 151-166 (Supp. 1935), known as the National Labor Relations Act, hereinafter referred to as the Act. The plaintiff is engaged in the business of designing and building vessels of various kinds under specific contracts and has approximately 5,000 employees. It fabricates substantially all materials used in the building of vessels, and for the most part builds boilers and main propelling machinery for each vessel. The vessels are delivered at the Fore River Plant. The cost of materials represents less than one-half the entire cost of the vessel. The complaint of the National Labor Relations
Board charged the plaintiff with indulging in practices declared unfair by the Act, in that it seeks to dominate and interfere with an organization of plaintiff’s employees. The bill states that the investigation instituted by the defendants will work harm to the plaintiff’s reputation, both with the public and with its employees; that strife will be injected into labor relations, now harmonious; that such proceeding will entail considerable expense; that it will involve an unwarranted examination into the books, records, and affairs of the plaintiff, with a resultant disclosure of confidential information; that it will require attendance of employees at hearings and generally disrupt and interfere with the plaintiff’s business. It is further alleged that failure to comply with any order of the defendants will subject it to heavy penalties, imposed by the Act. The plaintiff asserts its right to deal with its employees in respect of rates of pay, wages, hours of employment, and other working conditions in a manner mutually satisfactory to it and its employees. It is alleged further that the relations existing between the plaintiff and its employees at said plant do not constitute interstate commerce; nor do they burden and obstruct such commerce. So far as the foregoing allegations were allegations of fact, they were admitted for the purpose of the defendants’ motion to dismiss. Held, although the plaintiff could not invoke the powers of the equity court for the sole purpose of testing the validity of the Act, nevertheless the equity court could prevent the threatened investigation of relations between the shipbuilding company and its employees by members of the Labor Board if the Act were unconstitutional; if the investigation would result in irreparable damage to the company, and the danger thereof was immediate. The court found that the regulation of the relation between a shipbuilding company and its employees is beyond the power of Congress and is not justified on the theory that the relationship between the manufacturer and his employees is caught in the current of interstate commerce, or that disturbance of such relationship will affect free flow of commerce. Bethlehem Shipbuilding Corporation, Limited v. Meyers et al., 15 F. Supp. 915 (D. Mass. 1936).

There are numerous cases wherein equitable relief has been denied in proceedings somewhat similar to those in the Bethlehem case, supra, brought against the Labor Board or its agents. In some of these cases, it is quite apparent that the court acted upon, or indulged the presumption that the Act was a valid enactment. Precision Casting Co. v. Boland et al., 13 F. Supp. 877 (W. D. N. Y. 1936); Bemis Bro. Bag Co. v. Feidelson, 13 F. Supp. 153 (W. D. Tenn. 1936); Blood & Co., Inc., v. Madden et al., 15 F. Supp. 779 (E. D. Pa. 1936); Joel et al. v. Rosseter et al, 15 F. Supp. 914 (N. D. Cal. 1936); Associated Press v. Herrick, 13 F. Supp. 897 (S. D. N. Y. 1936); see also, National Labor Relations Board v. New England Transp. Co., 14 F. Supp. 497 (D. Conn. 1936).

One case has been found in which the court concurred in defendant’s argument that the court was powerless to intervene if the Act was unconstitutional. S. Buchsbaum & Co. v. Beman, 14 F. Supp. 444 (N. D. Ill. 1936). Contra: Bendix Products Corp. v. Beman, 14 F. Supp. 58 (N. D. Ill. 1936); cf. Remington-Rand v. Lind et al., W. D. N. Y., (1936) 4 U. S. L. Week 102.

In Poinderex v. Greenhorn, 114 U. S. 270 (1884), the court notes the distinction between the sovereignty and the government of it and stresses the point that when the government acts within the sphere of its agency it is a perfect representative but outside of that, it is a lawless usurper.
Assuming the Act to be unconstitutional the equity court has jurisdiction to interpose its power to prevent a threatened invasion of the property rights of the plaintiff. Rickert Rice Mills, Inc. v. Fontenot, 297 U. S. 110 (1936); Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); Pratt v. Stout, 85 F. (2d) 172 (C. C. A. 8th, 1936); Bendix Products Corp. v. Beman et al., supra.

It is no answer that the Act provides for judicial review. The remedies of the Act fall with the other provisions of the Act, if it be held unconstitutional in toto. The plaintiff is left with no adequate or complete remedy at law. El Paso Electric Co. v. Elliott et al., 15 F. Supp. 81 (W. D. Tex. 1936); Terrace v. Thompson, 263 U. S. 197 (1923); Bendix Products Corp. v. Beman et al., supra.


That the power of Congress over interstate commerce may not be extended by a declaration of purpose, and congressional findings, to manufacturing activities, whenever the raw material is imported, or the finished product exported from the state where the manufacturing takes place, is no longer open to debate. Schechter Poultry Corp. v. United States, supra.

So far as respects the policy of Congress to seek to prevent strikes and labor disputes, with their effect upon interstate commerce, see, Carter v. Carter Coal Co., supra. A further showing of the lack of power in Congress to interfere with the employer-employee relation of an intrastate enterprise may be found in Adkins v. Children's Hospital, 261 U. S. 525 (1923); Morehead v. People of New York ex rel. Tipaldo —— U. S. ——, 56 Sup. Ct. 918 (1936).


The power to regulate commerce includes the power to enact all appropriate legislation for its protection and advancement, and in exercising this authority, the government has the power to facilitate the amicable settlement of disputes which threaten the service of necessary agencies of interstate transportation. However, decisions have been handed down over a considerable period of time which are wholly consistent with the view that such direct effect would not flow from a labor disturbance between a manufacturer and his employees. Coe v. Errol, 116 U. S. 517 (1886); Hammer v. Dagenhart, 247 U. S. 251 (1918); United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 (1921); United Leather Workers' International Union v. Herkert, etc., Co., 265 U. S. 457 (1923). The case last cited affords a good illustration of the application of the rule to a labor dispute.

The decisions rendered in cases arising under the Act are of two types. First, cases where the board has applied to the federal circuit court for judicial enforcement of its order, as provided by the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. A. § 10 (Supp. 1935). Second, cases
where the employer has petitioned the court to enjoin the National Labor Relations Board or its agents from investigating the employer-employee relation.

Under the first classification, the order of the board was enforced in the cases of National Labor Relations Board v. Associated Press, 85 F. (2d) 56 (C. C. A. 2d, 1936), and National Labor Relations Board v. Washington, Virginia, and Maryland Coach Line, C. C. A. 4th, (1936) 4 U. S. L. Week 134; in which it was held that a rewrite man for the Associated Press and the drivers employed by an interstate bus line, respectively, were engaged in interstate commerce, and therefore subjected to the commerce power of Congress.

In the cases of National Labor Relations Board v. Jones & Laughlin Steel Corp., supra; National Labor Relations Board v. Fruehauf Trailer Co., supra; National Labor Relations Board v. Foster Bros., C. C. A. 4th, (1936) 4 U. S. L. Week 133; National Labor Relations Board v. Friedman-Harry Marks Clothing Co., Inc., 85 F. (2d) 1 (C. C. A. 2d, 1936), the petition of the Board was denied on the ground that labor disputes between employer and employee engaged in the manufacturing of steel, automobile trailers and clothing did not have a direct effect on interstate commerce.

Under the second classification the injunction was granted in the cases of Pratt v. Stout, 85 F. (2d) 172 (C. C. A. 8th, 1936); Eagle-Pitcher Lead Co. v. Madden, 15 F. Supp. 407 (N. D. Okla. 1936); Oberman v. Pratt, W. D. Mo., (1936) 4 U. S. L. Week 184, on the ground of irreparable injury and inadequate remedy at law; while in the cases of Bradley Lumber Co. v. National Labor Relations Board, 85 F. (2d) — (C. C. A. 5th, 1936); and Remington-Rand v. Lind et al., supra, the injunction was denied because the court was of the opinion that the petitioner had an adequate remedy at law as provided in the Act. It is worthy of note that the courts in five circuits, and the District Court for the District of Columbia, have held that an employers' petition for an injunction against the Board should be denied since the Act provides an adequate remedy at law.

J. H. D.

CONSTITUTIONAL LAW—Twenty-First Amendment—Effect on State Regulation of Liquor Imports.

This was a bill to enjoin enforcement of a California statute, which imposes a license fee of $500 for the privilege of importing beer to any point within the State. An additional license is required for the activity of selling. The plaintiffs, wholesalers of beer, attacked the statute on the ground, among others, that it is repugnant to the commerce clause of the Constitution. Held, the Twenty-First Amendment gives the several states power to forbid all importations which do not comply with the conditions they prescribe. The power granted is not qualified by requiring the states to permit foreign liquors to compete on equal footing with domestic liquors. State Board of Equalization of California et al. v. Young's Market Co. et al., — U. S. — (1936).

Quoting from the opinion: "The plaintiffs insist that to sustain the exaction of the importers license-fee would involve a declaration that the Amendment has, in respect to liquor, freed the states from all restrictions on the police power. . . . The question for decision requires no such generalization."

Before Congress had interposed in regulation of the liquor traffic, it was well settled that a state might prohibit sale of liquor brought within its territorial limits and incorporated in the mass of goods therein. The License Cases, 5 How. 504 (U. S. 1846). Regulation of manufacture and sale of intoxicating liquors within its borders was deemed proper exercise of its police power. Bartemeyer v. Iowa, 18 Wall. 129 (U. S. 1873); Beer Co. v. Massachusetts, 97 U. S. 25 (1877); Foster v. Kansas, 112 U. S. 201 (1884); Mugler v. Kansas, 123 U. S. 623 (1887). A state could not place conditions upon importation. That would be regulating interstate commerce in derogation of the exclusive regulatory power of Congress. Bowman v. Chicago etc. Ry. Co., 125 U. S. 465 (1888). And if a state undertook to regulate sale of liquor in the original package in which it had come within the state, it came in sharp conflict with the commerce clause. Leisy v. Hardin, 135 U. S. 100 (1890), citing Brown v. Maryland, 12 Wheat. 419 (U. S. 1827) as "virtually" deciding this question. For discussions of the original package doctrine, generally, see (1927) 11 MINN. L. REV. 368; Note (1923) 26 A. L. R. 971. It may be noted that Leisy v. Hardin disapproves Chief Justice Taney's view, stated in Pierce v. N. H., one of the License Cases, supra at 585, that Congress by failing to regulate interstate commerce indicates an assent that the states may do so, until such time as it chooses to exercise its dormant power. Leisy v. Hardin, supra, at 118.

Intending to restore to state prohibition laws the potency of which they had been deprived by application of the original package doctrine to interstate shipments of liquor, Congress passed the Wilson Act, 26 STAT. 313 (1890), 27 U. S. C. A. § 121 (Supp. 1935), providing that liquors should, upon arrival in a state, be subject to the police power, and not exempt by reason of being introduced in the original package. The Act was construed as devesting liquor of interstate character upon its arrival in a state, permitting state laws to operate upon it. In re Rahrer, 140 U. S. 545 (1891); Adams Express Co. v. Iowa, 196 U. S. 133 (1905); Rosenberger v. Pacific Express Co., 241 U. S. 48 (1916). But the sphere of state regulatory power was materially diminished when a divided court held that liquors had not "arrived", within the meaning of the Act, until delivered to the consignee. Rhodes v. Iowa, 170 U. S. 412 (1898); Vance v. W. A. Vandercook Co., 170 U. S. 438 (1898).

The Act was judicially determined to operate on a principle identical with that of the Wilson Act as declared in *In re Rahrer*, supra, but differing from the prior act in that it advanced the time of divestiture to the moment the liquor crossed the state line. Congress, it was said, cannot delegate to a state power to regulate interstate commerce. But it may strip commodities of their interstate character. When that takes place, state legislation to regulate interstate traffic in those articles will not conflict with the regulatory power of Congress. *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U. S. 311 (1917).

The divestiture theory carries artificiality written on its face. A gallon of liquor and a gallon of water are shipped across the border of a "dry" state together. The gallon of water is in interstate commerce, the gallon of liquor is not. At the border of a state permitting liquor sales, liquor is in interstate commerce; at the border of a dry state it is not. Instances might be multiplied.

Language in *Leisy v. Hardin*, supra, offers a way around divestiture and at the same time avoids unconstitutional delegation of power. Interstate commerce is per se national, demanding uniform regulation. So long as Congress does not enact regulatory legislation, or permit the states to do so, by that fact it indicates its will that such commerce shall be free and unencumbered. *Leisy v. Hardin*, 135 U. S. 100, 109 (1890). From this principle, the conclusion might be drawn, that, although the commodities to be controlled remain in interstate commerce, yet when Congress speaks, indicating its will that this commerce need not be unfettered, then the states may regulate. Perkins, *The Sales Tax and Transactions in Interstate Commerce* (1933) supra, at 111.

Discussion of divestiture in relation to the special field of state control of liquor imports is now rendered sterile. The people have remitted to the states power to control interstate commerce, to some degree at least. The question of delegation of power cannot rise again in this connection. While the Webb-Kenyon Act, supra, was not repealed by the Eighteenth Amendment, *McCormick & Co. v. Brown*, 286 U. S. 131 (1932), it has no present utility to the states, since the power vested by the Twenty-First Amendment must be broader than that authorized by that Act. Quoting again from the court in the principal case: "Prior to the [Twenty-First] Amendment, it would obviously have been unconstitutional to have imposed any fee for [the] privilege [of importing]."

But divestiture is alive in other fields of interstate commerce. Recently the theory of *In re Rahrer*, supra, has been invoked to sustain state legislation forbidding sale of prison-made goods within a state, enacted pursuant to the Hawes-Cooper Act, 45 STAT. 1084 (1929), U. S. C. § 60 (1934). *Whitfield v. Ohio*, 297 U. S. 431, 438 (1936), (1936) 24 GEORGETOWN LAW JOURNAL 1013. And either divestiture or its alternative suggested as following from *Leisy v. Hardin*, supra, may yet open to the states an important source of revenue, now barred by the commerce clause, through the medium of federal legislation permitting taxation of sales in interstate commerce by the consumer state. Perkins, *Sales Tax and Transactions in Interstate Commerce*, supra.

J. K.

CONTRACTS—Leases—Anticipatory Breach.

This was an action for damages arising out of breach of a covenant to pay rent, contained in a lease, which provided for a term of thirty years;
rent to be paid on an ascending scale over a period of fifteen years, at which time a new rental was to be reached by mutual agreement or arbitration. The defendant bank occupied the premises for several years under the lease, paying rent. Then in March 1933, a conservator was appointed for the bank under the Emergency Banking Act. The conservator ultimately abandoned the lease and vacated the premises. The lease contained no provision for liquidated damages in case of breach. The petitioner asked to recover not only rent which had accrued to the date of the action, but rent to become due in the future under the lease. Held, while breach of an executory contract relating to personality created a right of action for anticipated damages, still a breach of a covenant to pay rent does not vest in the landlord a right to sue for rent to become due in the future, in the absence of a provision to that effect in the lease. Cooper, Bank Comm'r v. Casco Mercantile Trust Co., — Me. —, 186 Atl. 885 (1936).

Where there is an anticipatory breach by one party to a bilateral contract the other has an immediate right of action for damages. Hochester v. De la Tour, 2 E. & B. 678 (Q. B. 1853); Frost v. Knight, L. R. 11 Ex. (1872). In the United States this doctrine has been adopted by the greatest number of jurisdictions. Roehm v. Horst, 178 U. S. 1 (1900); Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79 (1900); O'Neill v. Supreme Council A. L. of H., 70 N. J. Law 410, 57 Atl. 463 (1904); Tipple v. Tipple, 189 App. Div. 28, 177 N. Y. Supp. 813 (3rd Dept'1919). And Central Trust Co. v. Chicago Auditorium Ass'n., 240 U. S. 581 (1916) holds that where a party to a partially executed or executory contract expressly repudiates his part of the agreement before time for performance, the other party can treat the contract as ended and sue at once for the anticipated damages on the breach. The renunciation must be clear and unequivocal. Dingley v. Oler, 117 U. S. 490 (1886); McNamara v. Cerf, 4 F. (2d) 997 (C. C. A. 2d, 1924); Vittum v. Estey, 67 Vt. 158, 31 Atl. 144 (1894). The refusal to perform must be of the whole contract or of a covenant going to the essence of the contract. Rauer's Law & Collection Co. v. Harrell, 32 Cal. App. 45, 162 Pac. 125 (1917); Phosphate Mining Co. v. Atlantic Oil & Fertilizer Co., 20 Ga. App. 660, 93 S. E. 532 (1917).

A covenant to pay rent is an executory contract, since it is to pay sums of money as rent accruing at stated times in the future. Bordman v. Osborn, 23 Pick. 295 (Mass. 1839). Yet a covenant to pay rent, although an executory contract, is distinguished from contracts relating to personality, as Lord Coke said, because of "the diversity between duties which touch the reality and the mere personality". Co. Lit, *292b.

In the case of In re Roth & Appel, 181 Fed. 667, 669 (C. C. A. 2d, 1910), the court said "... a covenant to pay rent creates no debt until the time stipulated for the payment arrives". Repudiation of a lease by the lessee does not operate to mature immediately all the rent reserved in the lease and to enable the lessor to recover installments to accrue in the future. Moore v. McDuffie, 71 F. (2d) 729 (C. C. A. 9th, 1934); Oliver v. Loyden, 163 Cal. 124, 124 Pac. 731, 732 (1912); Sharon v. American Co., 172 Mo. App. 509, 157 S. W. 972 (1913); McCreary v. Lindenhor, 172 N. Y. 400, 65 N. E. 208 (1902); 3 WILLISTON, CONTRACTS (1920) § 1303.

If the landlord accepts the surrender of the lease, Riley v. Hale, 158 Mass. 240, 33 N. E. 491 (1893), or even justifiably evicts the tenant, he cannot recover future rent. Watson v. Merrill, 136 Fed. 359 (C. C. A. 8th, 1905). Action for unaccrued rent is too uncertain and indefinite, the rent not being provable until the date it is due and therefore the landlord cannot
sue until the due date is past. Pacific States Stores Corp. v. Rosenshine, 113 Cal. App. 266, 228 Pac. 155 (1931); Hermitage Co. v. Levine, 248 N. Y. 333, 162 N. E. 97 (1928).

All courts are in accord with the doctrine that rent due up to the time of the breach is collectible in one action. Simon v. Kirkpatrick, 141 S. C. 251, 139 S. E. 614 (1927). When the lessor enters and declares a forfeiture for a failure to pay, rent then due is collectible. Sharon v. American Co., 172 Mo. App. 509, 157 S. W. 972 (1913).

A landlord is under no obligation to relet the premises, but may remain inactive and sue the tenant for the rent as the installments mature. Rice v. Dudley, 65 Ala. 68 (1880); Merrill v. Willis, 51 Neb. 102, 70 N. W. 914 (1897). The tenant may relet however, Moore v. McDuffie, supra, and then he is entitled to the difference between the contractual rent and the rent received on reletting up to the time of the trial. Smith v. Irwin, 289 S. W. 113 (Tex. Civ. App. 1926).

Several recent decisions are authority for the rule that if the landlord, upon the breach, relets the premises for the remainder of the original term, then the damages are at once ascertainable, and an action will lie at once for the future damages ascertained by the difference between the contractual payments and the rent agreed upon in the lease of reletting. Moore v. McDuffie, supra; Bradbury v. Higginson, 162 Cal. 602, 123 Pac. 797 (1912).

In the case of In re Mullins Clothing Co., 238 Fed. 58 (C. C. A. 2d, 1916), a lease was treated as a bilateral contract with dependent promises, and the court held that on an anticipatory breach of the lease the landlord could recover future damages immediately, to be determined by the difference between the stipulated rental fee and the rental value of the premises at the time of the breach. This doctrine has not found much favor in other jurisdictions.

Another line of reasoning upon which cases like the one being discussed may rest goes upon a theory of unilateral contract. Covenants in a lease are independent promises, because a lease is regarded primarily as a conveyance, and the law of leases was settled before the law of mutually dependent covenants was established. Powell v. Merrill, 92 Vt. 124, 103 Atl. 259, 261 (1918). Independent promises in a bilateral contract are in effect separate unilateral obligations. 3 WILLISTON, CONTRACTS (1920) § 1329.

The doctrine of anticipatory breach does not apply to unilateral contracts. Roehm v. Horst, supra; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561 (1893). It follows, therefore, that the rule which prohibits enforcement of anticipatory repudiation as a breach in unilateral contracts, also forbids such treatment of an independent obligation in a bilateral contract.

L. C.

CORPORATIONS—Unauthorized Practice of Law.

This was a proceeding by the Attorney General to prohibit the defendant corporation's continuing certain activities, alleged to constitute an unlawful and unauthorized practice of law, in violation of a Massachusetts statute expressly forbidding all practice of law by corporations. MASS. GEN. LAWS (Ter. Ed.) c. 221, § 46, as amended by STAT. 1935, c. 346, § 1. The defendant conducts an extensive business in the collection and adjustment of commercial accounts for goods sold, mainly in behalf of wholesale merchants and manufacturers in the shoe business. The master found that the defendant often exercised a large discretion as to whether or not legal proceedings should be instituted, and acted in the settlement and compromise of suits. The
company advised its clients as to their claims, and recommended suit by attachment or otherwise. With the express consent of the customer, the defendant selected the attorney, instructed him to commence suit, fixed his charges, advanced the costs, and advised him as to the method and procedure relative to such suits. The attorney's fee was split, the defendant receiving forty per cent. It drew agreements, assignments, and other legal documents of various kinds relating to the business of others than itself. Held, the corporation was improperly and illegally engaged in the practice of law. *In re Shoe Mfrs. Protective Ass'n, Inc.*, —— Mass. ——, 3 N. E. (2d) 746 (1936).

Because its character is unsuited to a personal relation, the corporation is uniformly barred from the learned professions. A corporation cannot lawfully organize to practice law, under a statute providing that "three or more persons may become a stock corporation for any lawful business". *Matter of Co-operative Law Company*, 198 N. Y. 479, 92 N. E. 15 (1910). Nor can the corporation practice law indirectly by hiring competent lawyers to practice for it. *People ex rel. Chicago Bar Ass'n v. Chicago Motor Club*, 362 Ill. 50, 199 N. E. 1 (1935). The corporation may, of course, employ lawyers to perform legal work necessary to its own main business.

The original common law prohibition of the practice of law by a corporation has in recent years been embodied in statute in about half the states. Most of these statutes make it a crime for a corporation, its officers, or agents, to engage in the practice of law. *Ill. Rev. Stat.* (Smith-Hurd, 1935) c. 32, §§ 411-415; *Md. Ann. Code* (Bagby, 1924) art. 27, § 19; *Mich. Comp. Laws* (1929) § 10175; *Mo. Rev. Stat.* (1929) § 11693; *N. Y. Penal Law* (1936) § 280; *R. I. Gen. Laws* (1923) § 6238; *W. Va. Code* (1931) c. 30, art. 2, § 5. But a statute is not necessary to punish the unauthorized practice of law. Courts have the inherent power to punish for contempt those practicing before them without a license. *People ex rel. Ill. State Bar Ass'n v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N. E. 901 (1931) in which the Supreme Court of Illinois held that its power to license attorneys to practice carried with it the implied power to punish unauthorized persons for usurping that privilege, and found the defendant corporation guilty of contempt of the Supreme Court in so engaging in illegal practice, imposed a fine, and enjoined the corporation from further continuing such activities. *People v. Ass'n of Real Estate Taxpayers*, 354 Ill. 102, 187 N. E. 823 (1933). Injunction is a proper remedy. *Land Title Abstract & Trust Company v. Dworken*, 129 Ohio State 23, 35, 193 N. E. 650, 655 (1934); *Boykin, Solicitor General v. Hopkins*, 174 Ga. 511, 162 S. E. 796 (1932).

Common functions of the collection agency, such as advising clients, effecting settlements, retaining attorneys, and related activities have often been held to constitute the practice of law, prohibited to corporations. *Berk v. State ex rel. Thompson*, 225 Ala. 324, 142 So. 832 (1932); *Midland Credit Adjustment Co. v. Donnelley*, 219 Ill. App. 271 (1920); *Creditors' National Clearing House v. Bannwart*, 227 Mass. 579, 116 N. E. 886 (1917); *State v. Retail Credit Men's Ass'n*, 163 Tenn. 450, 43 S. W. (2d) 918 (1931). But *Washington State Bar Association v. Merchants' Rating and Adjustment Company*, 83 Wash. Dec. 556, 45 P. (2d) 26 (1935) held that suit by the corporation on claims assigned to it for collection did not constitute the practice of law.

Recent decisions and statutes reflect the very decided stand taken by the courts and bar associations against the practice of law by corporations, including not merely the conduct of cases in courts, but the preparation of
pleadings and other papers, conveyancing, the drafting of legal instruments of all kinds, and in general all advice to clients and action taken for them in matters requiring the use of any degree of legal knowledge or skill. People v. Securities Discount Corp., 361 Ill. 551, 198 N. E. 681 (1935); Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910 (1934); In re Otterness, 181 Minn. 254, 232 N. W. 318 (1930); Sharp-Boylston Co. v. Haldane, —— Ga. ——, 187 S. E. 68 (1936) (dissenting opinion).

The growing corporate encroachment on fields customarily deemed by the lawyer his exclusive and licit domain presents a social question of serious portent, as to which it seems almost impossible for either lawyer or layman to take an unbiased viewpoint. The state does not license lawyers for the purpose of setting up a privileged class, but for the protection of the general public. The right of the attorney to a monopoly in his field is co-extensive with the necessity therefor. The laws creating and regulating the professional status are not for the benefit of the lawyer, but for the public benefit. This must be the major premise in an analysis of the problem.

The courts, in condemning the corporate practice of law, justify their conclusion chiefly on three grounds. First, it is said that the corporation is inherently incapable of carrying on the practice of a profession. In re Opinion of the Justices —— Mass. ——, 194 N. E. 313 (1935). The right to practice law is a personal right, attaching to the individual, from whom, in the interest of the public, the state exacts standards of training, education, and ethics. "A corporation, as such, has neither education, nor skill, nor ethics." Evans J., in State v. Bailey Dental Co., 211 Iowa 781, 785, 234 N. W. 260, 262 (1931). This view fails to recognize that the corporation could act only through licensed attorneys. Prof. Wormser, in dissecting the statement, concludes that there is no inherent reason why a corporation cannot carry on the practice of a profession. Maurice Wormser, Corporations and the Practice of Law (1936) 5 Fordham Law Rev. 207, 211. Second, while usually not expressed, the underlying theory in most of the cases is that the bar would be 'degraded' if its members became subject to the orders of a corporation. Third, and most serious objection, is that the employee's duty to his employer is repugnant to a full discharge of his professional trust. As the attorney of a corporation his first allegiance would be to his immediate employer, the corporation, and he would have, therefore, at most, an incidental and divided loyalty to the client. Matter of Co-operative Law Co., 198 N. Y. 479, 484, 92 N. E. 15, 16 (1910).

The public does not share the courts' distrust of double allegiance. The layman is likely to regard efforts by lawyers to improve and purify the administration of justice as born of a selfish motive. Patronage of business reflects satisfaction with the corporate handling of certain easily standardized legal services, as performed by trust companies, banks, real estate offices, collection agencies, receivers, title companies, and the like. Application of modern commercial methods to this kind of legal work has resulted in greater efficiency and economy. In Cleveland, in a single year, fourteen corporations aggregated an income of nearly two million dollars from illegal indirect practice. Jackson, The Position of the Bar Toward Corporate Fiduciaries (1932) 18 A. B. A. J. 241, 242. Business resents the assumption that the interest of the employer is necessarily adverse to the demands of professional ethics. To the argument that such litigation results from the bungling of laymen in drafting legal documents and giving legal advice, the answer is that the corporations employ attorneys or clerks highly trained to perform their special duties. As to honesty, trust, and ethics, a survey of
the administration of bankrupts' estates, a field where honesty is at a premium, reflects an unflattering comparison of the relative worth of professional and corporate standards. William J. Donovan, Report on the Administration of Bankrupts' Estates (N.Y., 1931).

The fact is that certain types of corporations do practice law, and because of the present attitude of the lay public, the courts are unable effectively to prevent such activities. It has been suggested that corporate practice be recognized as a fait accompli, and theoretical discussions abandoned, to deal with the actual condition. By recognition, the state could regulate such practice, and impose on the corporation requirements and standards of skill and ethics. Wormser, Corporations and the Practice of Law, supra, at 217.

B. M.

EQUITY—Statute of Frauds—Specific Performance.

In December, 1932, Mamie Pfeiffer requested Helen Ranson to live with and take care of her and help maintain her home. In consideration therefor she orally agreed to make a will, leaving Helen Ranson and her minor son her house at 2046 Coral Street, Philadelphia, together with all her other possessions. In January 1933, this offer was accepted and the plaintiff lived with Mrs. Pfeiffer, performing duties in accordance with the oral agreement until her death on May 14, 1936. Mrs. Pfeiffer had, at her death, failed to make a will, or to convey the property to the plaintiff. A bill in equity was filed, praying that the heirs at law be ordered to execute a deed for the premises to the plaintiff, and for such further relief as might be deemed just and equitable. The chancellor granted the specific relief prayed for, but upon appeal this order was reversed. Held, the contract was unenforceable, being an oral contract within the Statute of Frauds. Adequate compensation for personal services could be obtained in a court of law. Kacpia et al v. Lessig et al, — Pa. ——, 196 Atl. 760 (1936).

The courts have universally held that an oral agreement to make a will leaving realty and other property in consideration for services rendered is within the Statute of Frauds. In Nelson v. Masterton, 2 Ind. App. 524, 28 N. E. 781 (1891), it was decided that a niece who had entered the home of her uncle in the understanding that he would make her his heir, was not entitled to relief, as the contract was unenforceable under the Statute of Frauds. So also are Grantham v. Grantham, 205 N. C. 363, 171 S. E. 331 (1933); Taylor v. Wait, 140 Ore. 680, 14 P. (2d) 283 (1932); Gray v. Cheatham, —— Tex. ——, 52 S. W. (2d) 762 (1932); Fitzgerald v. Upson, —— Tex. ——, 74 S. W. (2d) 1061 (1934). The courts however will sometimes make an exception to the above rule, usually under the doctrine of part performance, as to which, compare Burns v. McCormick, 233 N. Y. 230, 135 N. E. 273 (1922) (adhering to the evidentia rei of the English courts), with Warren v. Warren,, 105 Ill. 568 (1882), which adopts the majority American view of a quasi equitable estoppel. In the case of In re Tetlow's Estate, —— Pa. ——, 184 Atl. 129 (1936), the person seeking specific performance had entered into exclusive possession of the premises prior to the death of the promisor and had made many improvements. This was not the case, however, in Kacpia v. Lessig, supra, for here the promisee had merely lived in the same house as the promisor and had exercised no control over the premises.

Another important issue raised in this case is the question of the circumstances under which a court will grant an order for specific performance of
a contract for personal services. Equity generally will not specifically enforce a contract against one party which it cannot enforce against the other. In the case of Moore v. Heron, 128 Cal. App. 705, 292 Pac. 136 (1930), the court said that a lessee could not obtain specific performance of a lease which the lessors could not themselves enforce. Equity will only decree specific performance of a contract for personal services when some special skill is required to perform these services, under the theory that compensation at law is inadequate, Weeks v. Pratt, 43 F. (2d) 53 (1930); Grosso v. Santori, —— App. Div. ——, 283 N. Y. Supp. 912 (2d Dep't 1936); 3 Williston, Contracts, (1920) § 1450, and then only where there is a negative covenant to be found. If one party has the power to terminate the contract, equity will not decree specific performance. Lovelace v. Free, 140 Cal. App. 264, 35 P. (2d) 342 (1934). In the case last cited, the plaintiff and the defendant had made a contract whereby the defendant agreed to convey certain lands to the plaintiff upon death, and to continue in force a life insurance policy on the lives of both the plaintiff and the defendant, in consideration that the plaintiff would support and care for the defendant during the latter's lifetime. The court decided that this agreement could not be enforced specifically in view of the fact that it was a contract for personal services, full performance of which was dependent upon the will of the person agreeing to furnish such services. This power to terminate takes away the other party's right to specific performance and since one party has no right to specific performance, the other party has not that right. Shannon v. Cavanaugh, 12 Cal. App. 434, 107 Pac. 574 (1910); Dittenfass v. Horsley, 224 N. Y. 560, 120 N. E. 861 (1918).

The court in the principal case, having decided that the party was not entitled to the extraordinary relief of specific performance, went on to determine whether or not it could grant money damages, and held against the award on the ground that the plaintiff's remedy at law was adequate. Where a party is not entitled to specific performance at the time of filing his bill he will not be granted an award of money damages by a court of equity because he can receive adequate compensation in a court of law. Milkman v. Ordway, 106 Mass. 232 (1876). In the case of Terry v. Michalak, 319 Mo. 290, 3 S. W. (2d) 701 (1928), it was decided that purchasers who were not entitled to specific performance were not entitled to recover money damages for the withholding of the property. The rule, however, is subject to modification. In general, damages in lieu of specific performance will be granted only where the petitioner would be entitled to specific performance but for intervening facts which render the decree useless or inadequate. In Glen Manufacturing Co. v. Glatfelter, 88 Pa. Super. 303 (1926), the court held that as long as the plaintiff was entitled to specific performance he was entitled to money damages in equity if he could not obtain performance due to some hostile act by the defendant. In equity the complainant must show that the court has jurisdiction upon some established equitable right or, failing in that, he must show that some legal wrong has been committed against him for which he has no adequate redress at law. The case of McCormick v. Proprietors of Cemetery of Mt. Auburn, 285 Mass. 548, 189 N. E. 585 (1934) illustrates this point. The court held that where specific performance ought not to be given, a court of equity may, in its discretion, retain the case for assessment of damages. It went on to point out, however, that it would not assess damages unless there was no other adequate remedy for the complaining party. In the McCormick case, supra, the court did assess damages because an action at law was barred to the complaining party by the Statute of Limitations.
The decision in the principal case accords with accepted views on the
questions involved, that of the Statute of Frauds and part performance,
and that relating to retention of a bill for an award of damages, where
specific performance is not obtainable.

F. P. G., Jr.

INSURANCE—Accidental Injuries.

While the plaintiff, Westerland, was a patron in the Argonaut Grill, the
head waiter and night manager committed an unjustified assault on him
with a blackjack and put out his eye. The plaintiff recovered a judgment
for damages against the Grill. The judgment not having been paid, he
instituted garnishment proceedings against the Great American Indemnity
Co. of New York, upon a policy of indemnity insurance which was held by
the Argonaut Grill. The Indemnity Company denied liability. The policy,
in terms, covered payment of all sums imposed by law on the Grill as damages
for bodily injuries "suffered or alleged to have been suffered as a result
of accidents . . . caused by the assured's employees while engaged in the
course of their employment." The Indemnity Company appealed from a
judgment for the plaintiff in the trial court. The sole question is whether
the injury was sustained as a result of accident within the meaning of the
policy. Held, the injury was the result of accident. Westerland v. Argonaut
Grill (Great American Indemnity Co. of New York, Garnishee), —— Wash.
——, 60 P. (2d) 228 (1936).

That an injury suffered as a result of an unprovoked attack is one caused
by an accident within the meaning of indemnity insurance policies is the
majority rule. Westerland v. Argonaut Grill, supra; Georgia Casualty Co. v.
Alden Mills, 156 Miss. 853, 127 So. 555 (1930); Robinson v. United States
Fidelity & Guaranty Co., 159 Miss. 14, 131 So. 541 (1931); Harden v.
Thomasville Furniture Co., 199 N. C. 733, 155 S. E. 728 (1930); Fox Wis-
consin Corporation v. Century Indemnity Co., 219 Wis. 662, 263 N. W. 567
(1935). The courts of Illinois and Ohio take the minority view that such
injury is not caused accidentally. Briggs Hotel Co. v. The Zurich Insurance
Co., 213 Ill. App. 334 (1919); Commonwealth Casualty Co. v. Headers, 118
Ohio St. 429, 161 N. E. 278 (1928).

These two groups of courts reach contrary conclusions by applying differ-
ent tests of "accidentality". An injury may not be accidental as to the person
who intentionally delivers the blow; yet as to the victim the injury is caused
by accident, according to the majority rule. This view regards the injury
objectively from the standpoint of the injured party; the minority takes the
position that an intentional blow cannot be accidental. The reasoning of
the majority is indicated in the principal case, where the court says that the
language of the indemnity policy "does not purport to cover bodily injuries
accidentally caused by the assured's employees, but, on the contrary, it covers
bodily injuries suffered by any person not in the employ of the assured as
the result of accident caused by the assured's employees while engaged in the
course of their employment. The injury here came to the respondent
through external, unexpected force, not by his choice or provocation, and as
to him it was accidental."

In Georgia Casualty Co. v. Alden Mills, supra, two of the assured's
foremen deliberately committed an assault and battery upon the complainant
without provocation. Robinson v. United States Fidelity & Guaranty Co.,
supra, was concerned with a salesman who committed an assault upon a
customer without cause. The latter case expressly reaffirmed and followed
the former, both applying the objective standard of "accidentality".

The Illinois and Ohio courts take the minority view that a wilful assault
can in no sense be regarded as an accident. In Briggs Hotel Co. v. The Zurich
Ins. Co., supra, an action against a hotel for wilful and malicious assault, it
was held that the resulting injuries were not, as required by the insurance
contract, "bodily injuries . . . accidentally suffered. . . ." In Commonwealth Casualty Co. v. Headers, supra, a taxicab driver assaulted a passenger.
Said the court: "An injury or death does not occur by accident when it
results from wilful, intentional, personal violence inflicted by another". Commonwealth Casualty Co. v. Headers, supra at 432, 161 N. E. at 279.
That case was followed in American Casualty Co. v. Brinsky, 51 Ohio App.
298, 200 N. E. 654 (1934), which held that injuries caused by the truck
owners’ wilful and wanton negligence were not accidental, within the mean-
ing of the insurance contract, even as to an innocent victim.

It has been contended in opposition to the majority rule that it contravenes
public policy in that it tends to encourage violation of law. The courts reply,
however, that there is no direct or indirect volition on the part of the master
in these cases, and that no public policy is violated by protecting him from

The position taken by the principal case would seem the better reasoned.
It is more just both to the innocent victim of an assault and to the master
who did not authorize the harmful conduct of his servant. It is a reasonable
construction to bring such injuries within the meaning of the term "acci-
dental" as used in indemnity insurance.

A. H. M.

INTERNATIONAL LAW—Courts.

In 1917 and 1918 the Russian Soviet Government abolished certain corpo-
rations and confiscated their property. By an exchange of correspondence
between President Roosevelt and People’s Commissar for Foreign Affairs
Litvinov, the United States extended formal diplomatic recognition to the
Union of Soviet Socialist Republics. One specification of the negotiations
included the assignment to the United States of the rights of the Russian
Government to property of the abolished corporations located in the United
States. Held, that while the United States courts must now enforce titles
and rights, valid according to Russian law, with respect to property physically
located within Russian territory, the laws of a foreign government have
extra-territorial effect only by comity and the public policy of the forum
determines whether its courts will give effect to foreign legislation. The
United States, as assignee, takes no greater right than that possessed by the
assignor, despite the recognition, and the question being one of title to
property within New York State, the public policy of that state, which
does not sanction the enforcement of confiscatory decrees of a foreign gov-
ernment with respect to property within New York State, must govern.

Prior to 1918 the Petrograd Metal Works, a Russian corporation, deposited
with August Belmont in New York certain funds of the corporation. By a
decree of June 28, 1918, the Russian government confiscated the property
of the Metal Works including its account against Belmont, and thereafter
assigned the account to the United States. This decision was rendered on
an appeal by the United States from a judgment which dismissed its complaint on the ground that it failed to state facts constituting a cause of action.

Circuit Judge Swan admitted that, since recognition, the United States must give effect to the laws of the Russian government, but expressly limited the effect of such laws to property within Russian jurisdiction. "With respect to property physically located within Russian territory there can be no doubt that the decree of confiscation was effective to transfer title, and that after recognition of the Soviet government by the executive branch of our own Government, the courts of this country must enforce titles and rights valid according to Russian law with respect to such property." He immediately added, however, "Laws of foreign governments have extra-territorial effect only by comity and the public policy of the forum determines whether its courts will give effect to foreign legislation."

In so holding, the learned justice was not without precedent. Mr. Justice Clarke, in the earlier case of Oetjen v. Central Leather Company, 246 U. S. 297, 303 (1918) stated the doctrine in clear terms. "Every sovereign State is bound to respect the evidence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

Although the controversy was there on a procedural question, the court arrived at very definite conclusions in the factually identical case of United States v. Bank of New York & Trust Company, 77 F. (2d) 866 (C. C. A. 2d, 1935). In 1917 the Russian government had dissolved the Moscow Fire Insurance Company of Moscow, Russia, and confiscated all its assets. In order to do business in New York the Company had deposited certain securities with the Superintendent of Insurance of New York who, upon dissolution of the Company, had placed them with the defendant bank. The Soviet government assigned its right in this fund to the United States. The Court admitted (1) that the confiscatory decree was as valid as though passed after recognition, (2) that recognition by the United States of the Union of Socialist Soviet Republics operated to recognize the validity of the latter’s decrees within its own territory, (3) that the government of a corporation’s domicile may destroy what it has created and may confiscate property within its domiciliary state, but held (4) that the United States, as assignee, took no greater right than that possessed by the assignor.

In Vladikavkazsky Ry. Co. v. New York Trust Company, 263 N. Y. 369, 189 N. E. 456 (1934) the New York court held that the laws of foreign jurisdictions have effect extraterritorially only by comity and that the principle which determines whether that court should give effect to foreign legislation is that of public policy. "Where there is conflict between our public policy and comity, our own sense of justice and equity as embodied in our public policy must prevail." Vladikavkazsky Ry. Co. v. N. Y. Trust Co., supra at 378, 189 N. E. at 460.

Having established that the decree in the case at bar is valid and must be recognized as such when its operation is limited to Russian territory, Judge Swan proceeds to establish that the account is properly within New York State and that the public policy of the state does not permit the enforcement of confiscatory decrees.

Recognizing the plaintiff’s argument that under the maxim mobilia sequuntur personam the situs of a debt is the domicile of the creditor, the Justice holds that the maxim is not of universal application and does not have effect in New York. He quotes with approval a statement of the
"Over this intangible property [money on deposit] the state has the same
dominion that it has over tangible property". He likewise approves the
decision in Russian Bank for Foreign Exchange, [1933] 1 Ch. 745, where, in
speaking of a debt payable in London, Lord Maugham stated that: "Its
locality must be taken to be the place where the debt was in the ordinary
course recoverable."

Other cases may be found with ease which support the Justice's conclusion.
In the Vladikavkazsky case, supra, the New York court found that the
deposit was made in New York City, the home of the bank; that the contract
obligation was there created and that that is where it was by its terms
to be performed; hence, that it was entirely outside of Russian jurisdiction.

To the same effect is another New York case, In re Houdayer's Estate,
150 N. Y. 37, 44 N. E. 718 (1896), it being there held that where a non-
resident at the time of his death kept an account as trustee of an estate
in a bank in New York, in which account individual money of his own was
also deposited, his estate was subject to a transfer tax on the amount of such
individual deposits.

The Restatement of Conflict of Laws further substantiates the court's
position: "The original creation of property in an intangible thing which
exists only because it has been created by law is governed by the law of the
state which created the original intangible thing and interest therein".
Restatement, Conflict of Laws (1934) § 213.

His authorities on this point well support Judge Swan's conclusion, that
when suit is brought in New York to collect a debt, its courts have power
to determine to whom the debt is owed.

In establishing his last point, the public policy of the state, the justice
once again noted that the diplomatic recognition gave Russia the right to
enforce its decrees in our courts, but again engrafted the qualification
that their rights must be judged by the same principles that apply to other
litigants. While adhering to his opening statement that it was the public
policy of New York that must govern, he recalled to the plaintiff that the
public policy of the United States, as embodied in the Fifth Amendment,
prohibited confiscation of property within the United States.

Particularly apposite are the words of Judge Hubbs in the Vladikavkazsky
case, supra, at 378, 189 N. Y. at 460. "It is hardly necessary to state that
the arbitrary dissolution of a corporation, the confiscation of its assets, and
the repudiation of its liabilities by decrees is contrary to our public policy
and shocking to our sense of justice and equity. That the confiscation decree
in question, clearly contrary to our public policy, was enacted by a govern-
ment recognized by us, affords no controlling reason why it should be
enforced in our courts."

J. A. H.

MASTER AND SERVANT—Negligence—Liability of Servant to Master.

The plaintiff owner of an automobile being operated by his chauffeur,
the defendant, was riding on the rear seat in the exercise of due care. As a
result of the negligent operation of the car by the defendant chauffeur,
there was a collision with a truck which resulted in injuries to the plaintiff.
Held, that the chauffeur was liable to the owner for injuries resulting from

This decision illustrates one aspect of the general rule that an employee
is liable to his employer for damages recovered against the employer in an
action by third parties injured by the negligence of the employee. *Page v. Wells*, 37 Mich. 415 (1877). The rule, however, has not been frequently applied under circumstances similar to those of the instant case. Indeed, the court admits that there is a paucity of precedents in point.

Since no other relation existed between plaintiff and defendant than that of owner and chauffeur, the defendant contended that the general rule stated above was inapplicable, because that rule applied only to domestic servants. He argued that the relationship which existed between owner and chauffeur was more intimate than that ordinarily found between an employer and his domestic servants, and therefore the case did not fall within the rule regarding master and servant.

But the court rejected this contention and held that the relationship did not create an exception to the rule. In support of its decision, the court relied on *Ledgerwood v. Ledgerwood*, 114 Cal. App. 538, 300 Pac. 144 (1931). In that case recovery was allowed in an action by a mother against her adult son for injuries resulting from his negligent operation of an automobile.

The question of imputed negligence was disposed of by the court, in the instant case, by ruling as a matter of law that the essentials of imputed negligence were not present. Negligence is imputed to the master only where third parties sue the master for the negligence of his servant. *Lucey v. John Hope & Sons*, 45 R. I. 103, 120 Atl. 62 (1923). Therefore, to bar recovery in any action involving the liability of a servant to a master, actual contributory negligence by the master must be proved.

A case strikingly similar both to the present case and the Ledgerwood case, *supra*, but not discussed by the court, is *Clark v. Farmer*, —— Ala. ——, 159 So. 47 (1935). In that case the wife of the deceased owner of an automobile was allowed to recover for the death of her husband resulting from negligent operation of an automobile by the defendant chauffeur, who was employed by her husband at the time. The case was decided upon the question of the actual negligence of the chauffeur, and no question of the imputed negligence of the deceased, who was riding on the front seat, was involved.

E. J. D.

MUNICIPAL CORPORATION—Maintenance of Public Park—Governmental Function.

On November 18, 1933, the decedents, aged 8 and 10 years, along with other children, were playing on the ice of a pond situated in one of a chain of parks included within the public park system of the city of Cleveland. In the summer this pond is kept open to the general public for boating and other water attractions, and in the winter for skating. On the day in question the ice, having become weakened as a result of rising temperature, gave way beneath the children and they were drowned. Two actions were brought by their mother, as administratrix of both estates, against the city, on the theory of negligence. Submission to the jury resulted in verdicts and judgments for plaintiff in both cases, and an appeal was taken. *Held*, that a municipality which owns and operates a municipal park for the use and benefit of the general public is performing a governmental function and is not liable for common-law negligence to a member of the general public sustaining injuries while using the park for recreational purposes. *City of Cleveland v. Walker*, —— Ohio App. ——, 3 N. E. (2d) 990 (1936).

It is an accepted doctrine of the common law that a municipality is not liable for its negligence when acting in a governmental capacity, namely,

Confusion and conflict of decision result from the difficulty of classifying municipal functions as governmental or proprietary, there being no established rule for the determination of what belongs to one or the other class. Perhaps the finest statement of the majority view is found in the decision of Chief Justice Rugg in the case of Bolster v. Lawrence, supra, at 389, 114 N. E. at 723: "The municipality, in the absence of special statute imposing liability, is not liable for the tortious acts of its officers and servants in connection with the gratuitous performance of strictly public functions imposed by mandate of the legislature, or undertaken voluntarily by its permission, from which is derived no special corporate advantage, no pecuniary profit, and no enforced contribution from individuals particularly benefited by way of compensation for use or assessments for benefits. . . . The underlying test is whether the act is for the common good of all without the element of special corporate advantage or pecuniary profit." The court accordingly held that the municipality which maintained a public bath house and its approaches under statutory authority, and made no charge for its use, was not liable for its negligence to one properly using the premises. Later decisions have approved and adopted this interpretation of the law as laid down by Chief Justice Rugg. Tillman v. District of Columbia, 58 App. D. C. 242, 29 F. (2d) 442 (1923); Emmons v. Virginia, 152 Minn. 295, 188 N. W. 561 (1922).

The principal case is in accord with the majority rule that a municipality, in the operation and maintenance of a public park or playground, is performing a governmental activity and is therefore not liable for injuries caused through negligent conditions therein. Keller v. Los Angeles, supra, (maintenance of summer camp by city through board of playground commissioners); Cornelisen v. Atlanta, 146 Ga. 416, 91 S. E. 415 (1917) (maintenance of public park); Love v. Glencoe Park Dist., 270 Ill. App. 117 (1933); Hibbard v. Atlanta, 98 Kan. 498, 159 Pac. 399 (1916) (maintenance of zoological park); Board of Park Commissioners of City of Louisville v. Prinz, 127 Ky. 460, 105 S. W. 948 (1909) (maintenance of public park); Baltimore v. State, 168 Md. 619, 179 Atl. 169 (1935) (city held not liable for death in park stream due to its alleged negligence); Bolster v. Lawrence, supra, (maintenance of public bathhouse on river shore); Heino v. Grand Rapids, 202 Mich. 363, 168 N. W. 512 (1918) (maintenance of park and swimming pool); Emmons v. Virginia, supra, (injuries sustained on slide maintained in public park); Caughlan v. Omaha, 108 Neb. 726, 174 N. W. 220 (1919) (maintenance of public park and municipal beach); Bisbing v. Asbury Park, supra, (waterfront property held as place of resort and recreation); Blair v. Granger, 24 R. I. 17, 51 Atl. 1042 (1902) (accident on parkway occasioned by negligence of city); Nashville v. Burns, 131 Tenn. 281, 174 S. W. 1111 (1915) (municipally owned park and play-
ground); Nelson v. Spokane, 104 Wash. 219, 176 Pac. 149 (1918) (damage to property occasioned by erecting dam in municipal park); Bernstein v. Milwaukee, 158 Wis. 576, 149 N. W. 382 (1914) (maintenance of public playground).

The minority view is that a municipality, when engaging in such activities, is performing a proprietary function, and must exercise reasonable care for the safety of those using the premises. Van Dyke v. Utica, 203 App. Div. 26, 196 N. Y. Supp. 277 (4th Dep't 1922). A city, acting under legislative authority, opened a playground for children, and placed therein appliances for recreational purposes. A child was injured because of a defect existing in a slide. The municipality was held liable in damages therefor. The court distinguished between the exercise of sovereign power through municipal police, health, and fire departments for the benefit of all citizens; and the exercise of these duties, mandatory and permissive, which are adopted by the municipality and relate to the convenience, pleasure, and welfare of the individual citizen. The latter were held non-governmental functions and liability was founded upon an implied invitation to use the premises, and breach of the corresponding duty to protect from conditions and acts involving negligence. The New York courts are consistent in their adherence to the minority rule. Love v. Buffalo, 232 App. Div. 334, 250 N. Y. Supp. 579 (4th Dep't 1931). But cf. Cunningham v. Niagara Falls, 242 App. Div. 39, 272 N. Y. Supp. 720 (2d Dep't 1934). The courts of Pennsylvania and Delaware have followed the reasoning of the New York courts. Paraska v. Scranton, 313 Pa. 227, 169 Atl. 434 (1933) (city held liable for negligence in failing to keep public playground in reasonably safe condition for children invited to use same); Pennell v. Wilmington, 23 Del. 229, 78 Atl. 915 (1906) (recovery allowed against city for injuries resulting from defective condition in public park). In Boise Development Co. v. Boise City, 30 Idaho 675, 167 Pac. 1032 (1917), the court held the maintenance of a public park a private function, and limited governmental functions to those legal duties imposed by the state upon the municipality, which the municipality must perform at its peril.

A municipality is liable for the commission of a nuisance even though it is committed while performing a governmental function. George Washington Inn v. Consolidated Engineering Co., 64 App. D. C. 138, 75 F. (2d) 657 (1935); Oklahoma City v. Tytenicz, 171 Okla. 519, 43 P. (2d) 747 (1935). Recognizing the rule of non-liability of a municipality when acting in a governmental capacity, recovery is often sought on the theory that the existence of dangerous conditions constitutes a nuisance. Clark v. Seattle, 102 Wash. 228, 172 Pac. 1155 (1918) (injury on broken bottle in municipally-owned pool held insufficient to constitute a nuisance in the absence of proof that city had notice prior to the accident).

J. O'D.

TRIAL—Qualification of Jurors.

This action was brought by Jane Flora Hume, administratrix of the estate of James W. Hume, Jr., to recover damages for the wrongful death of the decedent. The lower court entered a verdict for the plaintiff which was reversed by the Court of Appeals on the grounds that the trial court erred in overruling objections of the defendant to questions propounded to the prospective jurors on their voir dire examination as to their interest in insurance companies. Held, that the plaintiff in the trial court had the right to interrogate a juror on his voir dire examination, as to his interest in
insurance companies, if the questioning was done in good faith according to accepted standards. *Morrow v. Hume,* — Ohio St. —, 3 N. E. (2d) 39 (1936).

There is a wide variance in the views held by courts of this country as to the right to ask jurors on their *voir dire* whether they have any interest in, or connection with, insurance companies, in actions for personal injury or wrongful death. There is some authority to the effect that this line of questioning will not be permitted in any form. *Putnam v. Pacific Monthly Co.*, 68 Ore. 54, 136 Pac. 835 (1913); *Citti v. Bava*, 204 Cal. 136, 266 Pac. 964 (1928). This seems to have been the rule in Ohio at one time. *Schmidt v. Schalm*, 2 Ohio App. 268, 20 Ohio C. C. N. S. 99 (1913). Later, however, the court ruled in *Pavilonis v. Valentine*, 120 Ohio St. 154, 165 N. E. 730 (1929) that the procedure was not erroneous where the insurance company was directly or indirectly interested in the result of the trial. This rule was modified in turn by the same court in *Vega v. Evans*, 128 Ohio St. 535, 191 N. E. 757 (1934), when it held that such an examination is erroneous unless the company is a party, or the company itself has disclosed, that it is actively and directly interested in the litigation. Ohio now takes the stand that interrogation of jurors on this point is permissible so long as done in good faith. *Dowd-Feder, Inc. v. Truesdell*, 130 Ohio St. 530, 200 N. E. 762 (1936). The case last cited was expressly approved and followed by the court in the instant case.

The overwhelming weight of authority sustains the right of counsel to interrogate prospective jurors by one form of question or another, with respect to their interest in, or connection with, insurance companies. *Eppinger & R. Co. v. Sheely*, 24 F. (2d) 153 (C. C. A. 5th, 1928); *Bashaw v. Eichenberg*, 100 N. J. L. 153, 125 Atl. 130; *Heath v. Stephens*, 144 Wash. 440, 258 Pac. 321 (1927). It has been held that the defendant's offer to prove that no juror is connected with it in any way does not preclude the plaintiff from interrogating the jurors as to this fact. *Halbrook v. Williams*, 185 Ark. 885, 50 S. W. (2d) 243 (1932). Some courts hold it reversible error to ask prospective jurors whether or not they have any connection with a particular insurance company, *Holman v. Cole*, 242 Mich. 402, 218 N. W. 795 (1928); *Robinson v. F. W. Woolworth Co.*, 80 Mont. 431, 261 Pac. 253 (1927); but the great majority of courts hold that such questions, if asked in good faith, are permissible. *Oliver v. Ashworth*, 239 Mich. 53, 214 N. W. 85 (1927); *McQueen v. Jones*, 226 Ala. 4, 145 So. 440 (1932); *Lewis v. Cox*, 187 Ark. 1163, 58 S. W. (2d) 215 (1933). The theory is that the plaintiff is entitled to know the relationship between any juror and the real party in interest, not appearing of record, *Willis v. Buchanan County Quarries Co.*, 218 Mo. App. 698, 268 S. W. 102 (1924); and may use the information thus obtained as a guide for the exercise of a peremptory challenge or one for cause. *Cripple Creek Min. Co. v. Brabant*, 37 Colo. 423, 87 Pac. 794 (1906); *Tatarsky v. Smith*, 78 Colo. 491, 242 Pac. 971 (1926). Questioning along this line must be made in good faith, *W. T. Smith Lumber Co. v. McLain*, 202 Ala. 32, 79 So. 370 (1918); and under this rule of good faith, a court has gone so far as to say that where it appeared from the examination of prospective jurors that one was the agent of several casualty companies, the plaintiff might properly ask whether any of his companies held a policy on the defendant in the case being tried. *Lidfors v. Pflaum*, 115 Ore. 148, 236 Pac. 1059 (1925). If the examination is carried on for the purpose of biasing or prejudicing the jury, however, it should not be tolerated. *Citizens Light, Heat & Power Co. v. Lee*, 182 Ala. 561, 62
This matter rests largely within the discretion of the trial judge, New Aetna Portland Cement Co. v. Hatt, 231 Fed. 611 (C. C. A. 6th, 1916); Hardy v. United States, 186 U. S. 224 (1902); and he may require the question to be changed to conform with the usual and accepted form. People v. Wheeler, 185 Mich. 164, 151 N. W. 710 (1915). It is not proper for counsel to conduct a line of questioning and make statements suggestive of a purpose to inform the jurors that the defendant is insured against liability. Baidarachi v. Leach, 44 Cal. App. 603, 186 Pac. 1060 (1919). The examination should be made by direct questions on the subject without comment from counsel which may convey improper and prejudicial information. Adams v. Cline Ice Cream Co., 101 W. Va. 35, 131 S. E. 867 (1926). When the court believes that the questioning has been done in bad faith, it should discharge the jury at the plaintiff's cost, if asked to do so. W. G. Duncan Coal Co. v. Thompson, 157 Ky. 304, 162 S. W. 1139 (1914). In Indiana, however, if the court for any reason denies the right to ask prospective jurors such questions on their voir dire, it may be held error. Goff v. Kokomo Brass Works, 43 Ind. App. 642, 88 N. E. 312 (1909). Illinois courts, although following the majority rule for the most part, do not permit a line of examination which will lead the jury to understand that the defendant is insured against liability. Mitten v. Jeffery, 259 Ill. 372, 102 N. E. 778 (1913); Kenney v. Marquette Cement Mfg. Co., 243 Ill. 396, 90 N. E. 724 (1909). Some jurisdictions where the plaintiff is allowed to interrogate the jurors as to their interest in a particular insurance company require that the plaintiff have actual knowledge that the defendant carries liability insurance with that insurance company. Fulcher v. Pine Lumber Co., 191 N. C. 408, 132 S. E. 9 (1926); Heath v. Stephens, 144 Wash. 440, 258 Pac. 321 (1927). In the case of Campbell v. Polk, — Mo. App. —-—, 297 S. W. 719 (1927), the court held that if the case is a close one on the facts, it is always reversible error to allow plaintiff to interrogate the jurors with regard to their interest in liability insurance companies, unless facts are proved which show good reason for asking such questions. The Minnesota courts have evolved a rule allowing the plaintiff's attorney to call the attorney for the defendant as a witness, to prove that the defendant carries insurance. This extraordinary measure must be invoked in good faith. Grammus v. Croxton Min. Co., 102 Minn. 325, 113 N. W. 693 (1907); Archer v. Skahen, 137 Minn. 432, 163 N. W. 784 (1917). It has been suggested that the questions should be framed in such a way as to leave out direct references to insurance companies. Pierce v. United Gas & E. Co., 161 Cal. 176, 118 Pac. 700 (1911); Holman v. Cole, supra; but if the answers are not satisfactory to the plaintiff's attorney, it has been held that he may then inquire whether the jurors are interested in insurance companies. Ryan v. Noble, 95 Fla. 830, 116 So. 766 (1928).

It may, then, be concluded that courts in general agree upon the propriety of questioning prospective jurors with reference to their interest in insurance companies, but that there is a conflict as to the form such questions should take. No general rule has been or can be formulated with respect to this because much depends on the good faith of the attorney questioning, and the circumstances of the particular case.

A. E. B.

WILLS—Animus Testandi—Requisite Form.

The will of Martha Kemp, deceased, was offered for probate by the Sussex Trust Co., and a caveat was filed. From a decree of the Register of Wills...
admitting the will to probate the caveator appealed. The facts show that Martha Kemp, a widow, stated to the cashier of a trust company that she wanted to make a will. The cashier made notes of her wishes, which contemplated a disposition of her property. She was told to give the matter more thought. One week later she returned and confirmed the notes and insisted upon signing the paper. She signed the memorandum which was on two thin yellow sheets and written in pencil and had the cashier and another bank employee witness the signing. Held, the situation clearly shows an animus testandi. In re Kemp's Will, — Del. —, 186 Atl. 890 (1936).

The courts have universally held that in order to make a valid will the testator must have had an animus testandi, that is, it must have been his own free conclusion and wish to adopt the particular last will offered for probate. Farr v. Thompson, 1 Speer's 93, (S. C. 1842). No particular language or form is necessary to constitute a valid will, and surrounding circumstances are admissible to explain the intention of a testator. While a person may execute a paper with every formality known to the law, purporting to dispose of all his property, unless he intends it to take effect as a will, it is no will. Clark v. Hugo, 130 Va. 99, 107 S. E. 730 (1921).

As the court pointed out in the case of In re Major's Estate, 264 Cal. 238, 264 Pac. 542 (1928): "Where there is doubt as to whether an instrument is a will, the test is whether the maker executed the document animo testandi." However, no particular words are necessary to show a testamentary intent. Mitchell v. Donohue, 100 Cal. 202, 34 Pac. 614 (1893); Estate of Spitzer, 196 Cal. 301, 237 Pac. 739 (1925).

In determining whether a paper is testamentary or not, the court will look, not only to the language of the instrument, but to the situation of the maker and his intention. Milam v. Stanley, 33 Ky. Law 783, 111 S. W. 296 (1908). The courts have not spared effort to give effect to any instrument that was intended by the maker to be testamentary. Sullivan's Estate, 130 Pa. 342, 18 Atl. 1120 (1889); Barney v. Hayes, 11 Mont. 571, 29 Pac. 282 (1892). Rice v. Freeland, 131 Va. 298, 109 S. E. 186 (1921); Lyles v. Lyles, 2 Nott & McCord 531, (S. C. 1820). The act of the testator in calling a paper a will signed and executed by him establishes animus testandi, In re Mittnacht's Will, 146 N. Y. Supp. 171 (Surr. Ct. 1914). An instrument with language in futuro and disposing of property in case of death was held to be a valid will. In re White's Estate, 209 Iowa 1210, 229 N. W. 705 (1930).

The size, texture, and quality of paper used in preparing a will are no evidence of the testator's intention in its execution and do not affect its validity. In re Brackenridge's Estate, 245 S. W. 786 (Tex. Civ. App. 1922); In re Fouche's Estate, 147 Pa. 395, 23 Atl. 547 (1892).

No particular form is required for a will. No particular language, technical or otherwise need be used, if the writing is properly executed according to the statute; only the intention present in the mind of the maker of the instrument being material. In re Anderson's Estate, 173 Cal. 235, 159 Pac. 426 (1916); Bond v. Bunting, 78 Pa. 210 (1875). A valid will may be made in the form of a deed of bargain and sale, where the form of the statute has been observed, and it clearly expresses on its face that it is not to take effect until death of the maker. Noble v. Fiches, 230 Ill. 594, 82 N. E. 950 (1907). So an instrument in the form of a bond may be testamentary in character and be construed as a will. Johnson v. Yancey, 20 Ga. 707 (1856). A writing not in the form of a will but reciting, "A few little
things I would love to have done”, and addressed to no one by name, is sufficient to be admitted as a will of the maker. In re Knox's Estate, 131 Pa. 220, 18 Atl. 1021 (1890). Contra: In re Perry's Will, 193 N. C. 397, 137 S. E. 145 (1927). In form the writing may be an indorsement on the back of a promissory note, Hunt v. Hunt, 4 N. H. 434 (1828); or an entry in a diary, Regan v. Stanley, 79 Tenn. 316 (1883); or a mere letter to a donee, Byers v. Hoppe, 61 Md. 207 (1883). In re Cook's Estate, 173 Cal. 465, 160 Pac. 553 (1916); Webster v. Lowe, 107 Ky. 293, 53 S. W. 1080 (1899).

In a letter written on the day of his death to his two sons, the deceased discussed several matters and closed with the statement that he had some valuable papers which he wished them to keep so that if “anything happens”, they would get his property. The letter was signed, “Father”. Held, since the letter exhibited a testamentary intent and was properly signed, it was a valid will. In re Kimmel's Estate, 278 Pa. 435, 123 Atl. 405 (1924). The same court in the case of In re Brennan's Estate, 244 Pa. 574, 91 Atl. 220 (1914), held that a letter signed “Your miserable Father” was not sufficient for probate.

A will need not dispose of all the decendant's property, Wilson v. Hayes, 109 Ky. 321, 58 S. W. 773 (1900), nor appoint an executor. In the case of McBride v. McBride, 26 Gratt. 476, 481 (Va. 1875), Staples, J. in his opinion said: “It is necessary, however, that the instrument, whatever it may be, whether a note, settlement, or a deed, should have been designed to operate as a disposition of the testator's property. The identical paper must have been intended to take effect in some form. It must have been written animo testandi.” The word “disposition” suggests the purpose and intention, technically termed the animus testandi. The transaction cannot operate as a disposition unless a disposition was intended. Alter's Appeal, 67 Pa. 341 (1871); Nelson v. McDonald, 61 Hun 406, 16 N. Y. Supp. 273 (1891); Coffman v. Coffman, 85 Va. 459, 8 S. E. 672 (1888).

Of course an instrument cannot be given effect as a will unless it complies with the statutes of the state as to signing, witnesses, publication, etc. Where the probate law requires a will to be attested, the absence of an attestation may be sufficient to prevent a letter from being a will. Orth v. Orth, 145 Ind. 184, 42 N. E. 277 (1895).

R. P. N.

WILLS—Survivorship—Construction.

James Hood died leaving all his real and personal property to his four children in equal shares. In case any should predecease him the share of the deceased child was to be divided among his children or their issue, excepting and providing that one-half of the share of Mary Virginia Gigon should be held by the executors in trust to pay over the net income to her during her life, and on her death to pay over the principal to her issue or to their surviving children and issue in equal shares per stirpes. Of the four children surviving the testator only one survived Mary Virginia Gigon, who died without surviving issue. From a decree of distribution dividing the trust equally among the surviving child and the legal representatives of the two other children, one of whom died leaving two daughters, the testator's surviving child and the two granddaughters appeal. Held, that the death of the testator did not determine the heirs to the trust estate but gave only a contingent remainder, which vested on the death of Mary Virginia Gigon, and that an award of one-half of the estate should be made to the testator's
surviving child and one-fourth each to the two granddaughters. In re Hood's Estate, —— Pa. ——, 186 Atl. 740 (1936).

The general rule regarding the vesting of legacies is that the time for fixing the membership in a class of legatees is the death of the testator. Hepburn v. Winthrop, 83 F. (2d) 566 (C. C. A. 4th, 1936); Powell v. McKinney, 172 N. C. 466, 108 S. E. 231 (1921). This general rule is not to be followed where it defeats the testator's intention as manifested in his will. White v. Underwood, 215 Mass. 299, 102 N. E. 426 (1913); Carr v. New England Anti-Vivisection Society, 234 Mass. 217, 125 N. E. 159 (1919). The heirs are those in existence at the time of testator's death unless a contrary intention appears, Weberspal v. Jenney, 300 Ill. 145, 133 N. E. 62 (1921); Carver v. Wright, 119 Me. 185, 109 Atl. 896 (1920); In re Fretheim's Estate, 156 Minn. 366, 194 N. W. 766 (1923); Schlater v. Lee, 117 Miss. 701, 78 So. 700 (1918); Rady v. Staiares, 160 Va. 373, 168 S. E. 452 (1933); in the absence of a contrary intention, Hartford-Connecticut Trust Co. v. Lawrence, 106 Conn. 178, 138 Atl. 159 (1927); or unless a different intent is manifested. Way v. Geiss, 280 Ill. 152, 117 N. E. 443 (1917); Dorrance v. Green, 41 R. I. 444, 104 Atl. 12 (1918).

It is well to note at this point the doctrine exemplified in the case of Welsh v. Howard, 227 Mass. 242, 116 N. E. 492 (1917). The general rule, that in case of any ultimate limitation to the testator's heirs at law, the persons to take are those who answer the description at the time of the testator's death, Whall v. Converse, 146 Mass. 345, 15 N. E. 660 (1888), is subject to the cardinal rule that the intention of the testator shall prevail, provided it is consistent with rules of law. Sears v. Russell, 8 Gray 86 (Mass. 1857); Heard v. Read, 169 Mass. 216, 47 N. E. 778 (1897).

It is a canon of construction that a gift contained only in the direction to pay the principal of a trust fund at the expiration of a trust raises a presumption, at least, that the legacy is contingent. Scofield v. Olcott, 120 Ill. 362, 11 N. E. 351 (1887); O'Hare v. Johnson, 273 Ill. 458, 113 N. E. 127 (1916). Where there is no outright gift in a will except by a direction to the trustee to divide and pay at a future time, time is annexed to the substance as a condition precedent. Rudd v. Cornell, 171 N. Y. 114, 63 N. E. 823 (1902); Rosengarten v. Ashton, 228 Pa. 389, 77 Atl. 562 (1910). It appears that this doctrine was early established. McClure's Appeals, 72 Pa. 414 (1872).

Where final distribution according to a will is to be made to a class, the benefits of such a will must be confined to those persons who come within the appropriate category at the date when distribution is to be made. In re Baer, 147 N. Y. 348, 41 N. E. 702 (1895); In re Pulis, 220 N. Y. 196, 115 N. E. 519 (1917). While the various jurisdictions often disagree as to the application of the “divide and pay over” rule, it is almost universally held that when a gift arises only from a direction for a future payment by the trustees to an undesignated class, the prior estate will postpone the vesting of the ulterior estates. Martin v. Cooke, 129 Md. 195, 98 Atl. 489 (1916). Where the direction in a will for the division of an estate is made to take place at a future time for the benefit of a class, rather than to specific persons, only those belonging to the class at the time of distribution have a vested interest.

JARMAN, WILLS (7th ed. 1930) 1642-1647.

The “divide and pay over” rule has many qualifications. U. S. Trust Co. v. Perry et al., 193 App. Div. 158, 183 N. Y. Supp. 426 (1st Dep't 1920), aff'd, 232 N. Y. 609, 134 N. E. 591 (1922). The two main exceptions to the rule are: First, where postponement of payment is for the purpose of letting
in an intermediate estate, *Loder v. Hatfield*, 71 N. Y. 92 (1877); *In re Crane*, 164 N. Y. 71, 58 N. E. 47 (1000); and second, where there are words in the will aside from a direction of the trustee to pay over, which import a gift vested prior to the time of payment. *Manice v. Manice*, 43 N. Y. 303 (1871); *In re Crane*, supra. In applying these exceptions we must observe what Finch, J. said in *Tienken v. Tienken*, 131 N. Y. 391, 409, 30 N. E. 109, 112 (1892): "We have heretofore said that the rule of construction founded upon a gift flowing only from a direction to divide has many exceptions, and is to be used as an aid to ascertain the intention, and not as a force to pervert it."

Caution must be used in applying the "divide and pay over" rule. The words of the will must be carefully interpreted and where the language employed has the effect of an express devise or bequest, it cannot be construed so as to change vested into contingent remainders. *In re Brown's Estate*, 289 Pa. 101, 137 Atl. 132 (1927); *In re Raw's Estate*, 254 Pa. 464, 98 Atl. 1068 (1916). A mere direction to divide after a life estate does not prevent a postponement of vesture beyond the death of the testator. *In re Griffiths' Will*, 172 Wis. 630, 179 N. W. 768 (1920); *Patton v. Ludington*, 103 Wis. 629, 79 N. W. 1073 (1899).

It is to be noted in establishing the "divide and pay over" rule that the doctrine that the law favors the early vesting of legacies has not been overlooked. *In re Woodward's Estate*, 84 Minn. 161, 86 N. W. 1004 (1901); *In re Savela*, 138 Minn. 93, 163 N. W. 1029 (1917).

J. H. R.
BOOK REVIEWS


Writing a book on the subject of private corporations necessarily presents numerous problems of selection of case material, arrangement of subjects, and of topical condensation. A comparison of relative space allotted specific subjects with other authoritative texts leaves no room for fair criticism.

The volume consists of 860 pages of textual matter and is divided into twenty-three chapters, the longest of which, fifty-six, pages, deals with ultra vires. Chapters 16 and 17, Directors and Officers, extend altogether to one hundred pages. The chapter on the Rights and Remedies of Creditors is twenty-four pages.

The book has a table of contents, a table of cases, and an index. It is, perhaps, regrettable that a list of articles in legal periodicals, referred to by the author, is not appended.

The book is written from a distinct point of view. In connection with the statement of rules of law, as evidenced by the decisions, the author often and incisively sets forth his views in polemical form respecting the grounds upon which decisions are made. He adopts what he calls the "realistic conception" of a corporation as distinguished from the customary view of the courts that the corporation is an entity, separate and distinct from its stockholders. He entertains the view concerning the true nature of a corporation that it is an aggregation of individuals which has achieved, through complying with certain statutory formalities, limited liability in behalf of its membership. The author regards the corporate entity concept as a figure of speech which is to be used, not as a reason for a decision, but as expressing a conclusion reached for practical reasons.\(^1\) This thesis the author maintains throughout by critical reference to decided cases. In the discussion of the cases on ultra vires, promoter's liability, directors and officials and their meetings, shareholders' control, etc., the author's view on this point is constantly set in contrast with the judicial theory, in the light of which certain cases in these fields have been decided. He repeatedly—and correctly—points out that decisions in these enumerated and other fields which the courts put on the basis that a corporation is an entity apart from its stockholders, could, more correctly and more consistently with the realities, be rested upon different and more satisfactory grounds.

\(^1\) C. 1.
Chapter 12 deals with dividends. The section discussing “directors’ discretion in declaring dividends” appears to this reviewer not wholly satisfactory. The analysis here is not so full or so penetrating, nor are the generalizations so convincing as in most other instances in this excellent volume. The author states, in substance, that shareholders may sometimes be able “to compel the declaration of a dividend” when the action of the board is taken “without proper consideration of the interests of the shareholders.” He then quotes from Morawetz, “the power of deciding this question should not be taken from the directors and assumed by the courts unless it is clear that the directors have a mistaken view of their legal duties, or have acted in bad faith.” It is submitted that the text statement on this subject is too brief and too generalized to be of real value as a guide to the student.

Again, in discussing the subject of where meetings of shareholders and directors may be held for the performance of corporate acts, it seems to this reviewer that certain statements are legitimately open to question. Referring to Miller v. Ewer, which held, among other things, that shareholders could not meet outside the state and accept the corporate (special) charter, or to do corporate acts, it is stated that “such technical reasoning is obviously outmoded and rejected by the generally accepted view that corporate meetings may be held outside as well as inside the state of incorporation.” If the author means that this is the view generally accepted by the courts in the absence of statute, it is not believed that the statement is wholly accurate. The numerical weight of judicial authority seems to be the other way. On the other hand, if the author means that text writers generally accept the indicated view, no fault can be found with the statement. The context seems to suggest that the author is here stating the generally accepted judicial view, but the cases have been collected, and show the general rule to be that “corporate acts” cannot be performed at meetings outside the state of creation.

It is to be hoped that the courts will make use of this handbook. The author has successfully demonstrated that in probably the

\[ \text{References:} \\
\text{2 P. 389.} \\
\text{3 Morawetz, A Treatise on Law of Private Corporations (2d Ed. 1886) § 460.} \\
\text{4 P. 482.} \\
\text{5 27 Me. 509, 46 Am. Dec. 619 (1847).} \\
\text{6 P. 482.} \\
\text{7 A few decisions are cited in a brief comment in Richards, Cases on Private Corporations (3d ed. 1936) 71.} \\
\text{8 14 C. J. 886.} \]
The great majority of cases decisions can be put upon other grounds with much less likelihood of confusion and seeming conflict.

The theory expounded in this text is perhaps only superficially out of harmony with the statement by Justice Holmes in Donnell v. Herring-Hall-Marvin Safe Company. Professor Stevens does not deny that recognition may properly be accorded the entity concept—or its substantial equivalent—in certain cases and for certain purposes. Justice Holmes said: “Philosophy may have gained by the attempts in recent years to look through the fiction of the fact and to generalize corporations, partnerships and other groups into a single conception. But to generalize is to omit, and in this instance to omit one characteristic of the complete corporation, as called into being under modern statutes, that is most important in business and law. A leading purpose of such statutes and of those who act under them is to interpose a nonconductor through which in matters of contract it is impossible to see the men behind.”

In any event, it is true that actually the courts have refused always to apply the dictum that “it is impossible to see the men behind”. What the author has done in this work is to point out how it is legally and logically possible “to see the men behind” the corporation and to decide accordingly without resorting to an abstraction which, in itself, explains nothing.

The book will be useful to students, teachers, lawyers and judges alike, and represents a scholarly and valuable contribution to the literature of the law.

Sveinbjorn Johnson.*


This book has defied brave attempts adequately to summarize its content in the limited space of a review. It is an encyclopedic exposition of “the institution of property” beginning with the prototypes and “strains” of property in prehistoric, pre-legal and “pre-property” eras. The evolution of property is elaborately traced through Roman society and the English federal system, it is examined in the light of the Modern Juristic Analysis of Property, and its status depicted and analyzed as it appears in “the practical law of today in the United States”.

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1 P. 285.
of these studies the author ventures a summation and restatement of the Substance and the Structure of Property with diagrammatic presentation of the network of the "institution" and a new nomenclature.

Mr. Noyes avowedly restricts his study to the "structure" of the "institution", as distinct from its "functioning"—to the "anatomy rather than the physiology".

The author's research and analysis in his first three chapters, depicting the prototypes and early "strains" of the idea of property are both brilliant and appalling—brilliant and appalling for their comprehensive scope and the thoroughness with which he marshalls his authorities upon the details of his theses.

While the author relies heavily upon the devices of an etymologist in reconstructing this ancient climate as to the property-idea, his own admonitions of the hazards of semantics promote confidence in the integrity of the author's methods as well as of his conclusions.

In his concluding chapters upon the Substance and Structure of Property, the author goes "economist", undertakes to "define" many things with seemingly little provocation, and by process of defining makes some simple things difficult and abstruse. Thus, the author undertakes the burdens of defining "credit-debts" and of distinguishing them from "all other contractual rights," as follows:

"It seems that the term 'credit-debt' should be limited to cases of unilateral contracts where a property right, arising from a promise, express or implied, comes to exist, which should result in the transfer by the promisor, or promisors, of an ascertained or readily ascertainable sum of money, or other property of determined value, equivalent to the disequilibrium created by the failure of the promisor to perform, and due at a time certain or on demand; or to cases of bilateral contracts, after full or part performance by one promisor, where a property right, arising from a promise, express or implied, comes to exist which should result in the transfer of an equivalent pro tanto, measured by the disequilibrium due to the deficiency in performance by the other promisor or promisors, in the form of a readily ascertainable sum of money or other property of determined value and due under above conditions; or of imposed, or quasi-contractual, obligations assimilable to the foregoing." ²

And property under one of his definitions is as follows:

"Property is any protected right or bundle of rights (interest, or 'thing') with direct or indirect regard to any external object (i.e., other than the person himself) which is material or quasi-material (i.e., a protected process) and which the then and there organization

² Pp. 332-333.
of society permits to be made the object of that form of control, either
private or public, which is connoted by the legal concepts of occupying,
possessing or using.”

But these represent the author at his worst.

The book should be read by all law school instructors and
administrators not only for its exposition of “property”, but
also for a very real side light which is of significance to them
in connection with certain promotions now in process in legal
education. I rely heavily upon the fact that the author fully
qualifies by his brilliant work as an expert authority on “econo-
mists”, (especially many of those who live around the corners at
University Place). His first chapter is sufficient authority as to
how narrow and inconsequential “economists” have made their
“science of economics”. The author forsakes his traditional
brethren and aligns himself with the faith of “institutional eco-
nomics”—which has “first become self-conscious in the twentieth
century”. Economics is part of the science of human behavior,
the economic organization of society is an institutional constituent
of the social institutional constitution, and the institution of prop-
erty is the vital institution and framework of economic organiza-
tion. Hence knowledge of the institution of property is vital to
an adequate science of economics. But “economists” have never
studied this institution either as to its “structure” or its “func-
tioning”; they know little or nothing about it—and seem to care
little about it. In short the “major school of economic thought”
is and has been comparable to the physiological chemist, who puts
aside “the factor called life and examines the whole subject in
its physical (including mechanical) and chemical aspects; as a
system of levers, pumps and fluids; as a system of energy, heat,
and perhaps electricity”. The “economics” of our prevailing
texts is summarized by the author, as follows:

“For the first part of the subject it [classical economics] has merely
assumed a lay figure—the homo economicus—to fulfill the need of a
foil for the attributed and very simple set of wants, efforts and satis-
factions which it has required as putative motive power for the mecha-
nism—a mere catch-all concept like that of ‘force’ in physics. For the
second part it has been content with a simple functional analysis—of
the order of air, fire, water, earth—which originated in a landlord-
farmer agricultural economy, and therefore contained three elements,
land, labour and capital; and to which has been added, in order to offer
some concession to the realities of the last century, the fourth function
of enterprise. But the part of the subject to which classical economics
has largely devoted its attention and that in which its successes lie, is

3 P. 436.
the mechanical. It has produced a mechanics of production—dealing with the processes by which the various chemical (or alchemical) compounds are produced from this air, fire, water and earth; a mechanics of exchange—dealing with the processes by which the resulting compounds interact upon each other; and finally an over-simplified rationale of distribution—the beginnings of a scientific approach to the subject of economic metabolism."  

And so it is that, in 1936, this author undertakes to labor with "economists" and to vitalize to them the social and economic significance of property and their professional obligations to know about it. In the A B C's of "economists" language, he tells them that they should understand the institution of property as comprehending more than merely "the concrete persons and the concrete objects" with which they have been content to be concerned in the past in the prosecution of their "science" of economics: that the institution of property must be recognized as including the "social abstractions which lie between" concrete persons and objects; that these abstract relations "deposit the relata from their pre-eminence as facts"; that these relations are the realities of the business and financial structure, "as they have long been of the law". In short, the author adroitly urges upon his brother "economists", what has long been elementary to lawyers, that

"The chips in the economic game today are not so much the physical goods and actual services that are almost exclusively considered in economic textbooks, as they are that elaboration of legal relations which we call property."  

Such is the elementary epistle of a learned man to "economists"—written A. D. 1936! And there is a moral for legal education in all of this. There is no little commotion among law professors and deans about the "correlation" of "law" and "economics". It is proposed to have "economists" do their stunts in "economics" in an amalgamation with the instructors of "law". The pressure has become so acute at times that one would have lacked prestige and efficacy in attempting to take up with a class in law school the searching qualities of demurrers or the distinctions as to "frivolousness" and "sham" in motions to strike, unless one had at least " a plan" whereby an "economist" might participate in the work. The passion for "correlating" has become so intense and promiscuous that any old economist will do. It is hoped that legal education may be saved from the limitations of "the major school of economic thought", and saved from the
burdens of educing its victims from those limitations. The author, unwittingly in part perhaps, makes a genuine contribution to legal education by making manifest, if not the airpockets in the impending flight of legal education to "economics", the character and qualities of the landing.

WESLEY A. STURGES.*


This little volume, the second of Professor Warren's 1 contributions in 1935, is an amplification of the lectures delivered by the author at the Law School of Northwestern University, in November, 1934, on the Julius Rosenthal Foundation. No claim is made that it is a history of bankruptcy in the United States. As the publisher's note states, the author has examined each of our previous periods of economic depression by way of the vigorous debates on bankruptcy that have stirred the various Congresses at such times, and has found that one of the striking features of them all has been the increase in the scope of the demands for relief through the exercise by Congress of its power under the bankruptcy clause of the Constitution.

Professor Warren has divided his material into three parts, as follows: I, The Period of the Creditor, 1789-1827; II, The Period of the Debtor, 1827-1861; and III, The Period of National Interest, 1861-1935. Throughout these periods, he finds that four things stand out. These are, in his words,

"first, that every bankruptcy law has been the product of some financial crisis or business depression; second, that from the outset the divisions in Congress over such laws have been largely sectional; third, that there has been a persistent and continuous opposition to a compulsory or involuntary bankruptcy law; and fourth, that, until the decision on May 27, 1935, in the Frazier-Lemke Act case, no decision under the Bankruptcy Clause of the Constitution has ever failed of support by the Supreme Court." 2

In the development of his material, Mr. Warren, unfortunately, has seen fit to pay but scant attention to what has actually happened under the bankruptcy laws. Rather he views the subject in

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2 P. 9.
the light of prejudiced and partisan congressional debate, of in-
accurate reports in the public prints of the times, and of oratory
fully equal, at times, to the best efforts of the late Huey Long.
Needless to say, the result makes good reading, and unquestion-
ably gave Mr. Warren's auditors many interesting classroom
hours. And despite its limitations, if such they be, the book amply
supports the author's points that "it presents striking illustra-
tions of the fact that history has often repeated itself in this
country" 3 and that "he who is inclined to despond may be en-
couraged to believe in the adequacy of his own generation and of
the Federal Constitution to meet the conditions of the day".4

Of the comparatively little in the book which is the author's
very own, two statements challenge the lawyer of today engaged
in bankruptcy practice. The first of these is that the law of
bankruptcy is dry and discouraging, and the second is that the
legal disrepute of debates in construing statutes is to be attributed
to judicial lack of realism.

With respect to the first statement, we suggest to the author a
perusal of any of the standard services dealing with Sections
77 and 77B of the Bankruptcy Act, but we warn him that he'll
probably "take" to the subject with the enthusiasm of the public
for Gone with the Wind.

With respect to the second statement of the author, we think his
book abounds with sparkling evidences of why the courts have
been reluctant to accept the debates in Congress in construing
statutes. To determine the objects or purposes of statutory pro-
visions or the meaning of the words by which these provisions
are set forth, the courts have resorted to the journals of Congress,
preliminary drafts of bills, petitions to Congress, communications
from administrative officers, memoranda and briefs prepared for
committees, titles of statutes, committee hearings, reports of
standing and special committees, conference reports and some-
times statements of committee chairmen.5 The views of individual
members in debate, however, have been consistently excluded,
and the reason therefor cannot be better stated than in the words
of Mr. Justice Story, in Mitchell v. Great Works Milling, etc.
Co.: 6

"At the threshold of the argument we are met with the suggestion
that when the act was before Congress the opposite doctrine was then

3 Foreword.
4 Foreword.
5 See Miller, The Value of Legislative History of Federal Statutes (1925)
73 U. of PA. L. REV. 158.
maintained in the House of Representatives, and it was confidently stated that no such jurisdiction was conferred by the act as is now insisted on. What passed in Congress upon the discussion of a bill can hardly become a matter of strict judicial inquiry; and if it were, it could scarcely be affirmed that the opinions of a few members, expressed either way, are to be considered as the judgment of the whole house, or even of a majority. But in truth, little reliance can or ought to be placed upon such sources of interpretation of a statute. The questions can be, and rarely are, there debated upon strictly legal grounds, with a full mastery of the subjects and of the rules of interpretation. . . . Nor have there been wanting illustrious instances of great minds which, after they had, as legislators or commentators, reposed upon a short and hasty opinion, have deliberately withdrawn from their first impressions when they came upon the judgment seat to reexamine the statute or law in its full bearings."

DONALD L. STUMPF.*


The announcement of an extended work upon neutrality is of more than unusual significance at the present time, when so much attention is being paid to the subject both in and out of Congress, when so many writers and speakers have been urging that in a "changing world" the regime and even the concept of neutrality is played out. The exact title embraces what are doubtless the three essential elements for the understanding of neutrality: its history, economics, and law. In the first volume of the series, Professors Jessup and Déak examined the beginnings and development of neutrality to the period of the American and French Revolutions. Throughout that volume, the emphasis was laid upon the origin and development of what may be called the legal concepts and practices. The history was largely that of the legal phases of the subject as evidenced by treaty arrangements, international practices, and court decisions largely British, the general setting being naturally economic.

It is to be regretted that the excellent plan of the first volume was not more closely followed in the second, which covers the Napoleonic period from the French Revolution to the Peace of Paris. Professor Phillips is well known as a historian, and Mr. Reed shows competence in handling statistics and other economic source materials. Neither, however, displays in the present work

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¹ VOLUME I: THE ORIGINS was reviewed in (1935) 24 GEORGETOWN LAW JOURNAL 771; reviews of volumes III and IV post pp. 505, 508.
any special interest in the legal aspects of neutrality. Professor Phillips gives an excellent narrative account of the conflicts of policy as among the various belligerents during those years and of their repercussions upon the interest and policies of the neutral powers, principally, of course, the United States. But it is almost impossible to determine what his ideas are as to the international law involved in, or emerging from, the various situations described, if indeed he considers that there was any international law in the matter. The author states:

"If International Law be rightly defined by Mahan as the common consent of the nations, it can hardly be said that it had any effective existence at the time of the outbreak of the Revolutionary Wars. According to Sorel, indeed, it had never had any existence at all, or if it existed, had been known only 'through the declamations of publicists and its violation by the Governments.' "

The propagandist of sea power and the pessimistic philosopher of the Reflections on Violence do not readily occur to one's mind as authorities upon international law. Professor Phillips' anti-legal and exclusively political major premise is as follows:

"The truth is that the laws governing the rights of neutrals and belligerents at sea were like all laws [sic] determined by those who had the power to enforce them."  

With such a major premise, it is not to be wondered at that the author has found few conclusions worthy of consideration from the standpoint of international law. His conclusion of fact can hardly be gainsaid: After the United States became a belligerent, there were no more effective neutrals. But what about the American contribution to the law of neutrality as set forth in state papers, the concept of neutral duties as embraced in federal statute; what of the legal value of Lord Stowell's decisions, or of Marshall's; and where, indeed, are to be placed writings upon the law of neutrality, proceeding from the Continent, of Lampredi, of Schlegel, and others? What effect in subsequent international practice had the declarations of the armed neutralities of 1780 and 1800?

Mr. Reede's essay on the effect of the wars upon neutrality, commerce, and industry is an interesting and valuable contribution based upon statistics admittedly fragmentary. The effect upon the United States has always been a matter of major inquiry and discussion, but American readers will find the descriptions

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2 P. 10.
3 P. 17.
of the situations in the Scandinavian countries and Germany of great interest. In conclusion, the volume may be described as an excellent contribution to a discussion of the policies and practices of belligerent and neutral states. Except negatively, it does little to clarify the important problem as to what law emerged from the period, unless, indeed, as has been indicated, one assumes that there was no law to begin with, that none developed during the period, and that none persisted after the period had ended.

JESSE S. REEVES.

NEUTRALITY, ITS HISTORY, ECONOMICS AND LAW: VOLUME III:

This is the third of a comprehensive four-volume study of neutrality, of which the first two trace the problem from the fifteenth century through the Napoleonic period, while the fourth provides an analysis of developments since the World War and an examination of the present and future status of neutrality. Mr. Turlington's work is remarkable in several respects. It is the first general study of importance that covers the problems of the European neutrals as well as those of the United States. It is conceived and written in a spirit of complete objectivity, which is much to be desired but frequently lacking in books that deal with the World War. It is fully documented and will serve admirably not merely as a brief book of reference but as a guide to further more detailed research by World War historians.

Mr. Turlington's book is not, on the other hand, concerned with political motives and only incidentally with diplomatic issues or judicial problems. He rigidly and wisely spurns all temptation to enter the debate as to why we entered the war or how we might have stayed out. Necessarily he embarks upon the difficult task of explaining the technical devices utilized by the belligerents to control trade, a task which he fulfils with extraordinary success. But his primary purpose is to study the effects of war upon the life of neutrals, more especially to analyze the causes, character, and extent of neutral losses in the economic sense. These he sets before the reader in three main sections: losses through measures relating to contraband; losses through blockades and analogous measures; losses through interferences by sovereign right. He then analyzes the kinds and the extent of the offsets and mitiga-

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† See supra p. 503, note 1.
tions of neutral losses. Any estimate of the volume and economic importance of losses to neutrals must be inevitably conjectural, but the author’s conclusions as to the character of the losses are based upon reliable evidence and are of unquestionable importance.

Belligerent interference with neutral trade through measures relating to contraband did not, in Mr. Turlington’s opinion, materially reduce the volume or value of that trade, but rather affected its character and direction. The commercial decline occurring after 1915 resulted, he shows, from blockades and from interferences by sovereign right. Under the former category he includes blockades of the traditional type, mine areas, submarine zones, the Allied “pseudo-blockade” of March 11, 1915; under the latter category he includes export and import embargoes, bunker control, restrictions on trading with the enemy, black lists, the financial blockade, interference with communications of neutrals, requisition of neutral tonnage.

From measures relating to contraband neutral losses Mr. Turlington estimates that there resulted damages to the neutrals of approximately 350 million dollars. But such losses were largely offset by insurance and special profits. Through blockades and analogous measures the neutrals lost ships and cargoes worth more than 700 millions, together with 200 millions more from the deviations and delays incident to the Allied pseudo-blockade. Many rich profits, the value of which cannot be estimated, were doubtless foregone through apprehension and the suspension of sailings. It is much more difficult to estimate the amount of damage through belligerent interference by sovereign right, but there can be no question of the enormous loss incurred. The author emphasizes the effectiveness of this means of pressure upon neutrals and he cites numerous figures illustrating the decline in neutral commerce resulting from it. Against the embargoes and black lists decreed by the belligerents, neutrals had little hope of adequate economic defence. “It seems safe to say”, the author concludes, “that belligerent interferences by sovereign right were far more prejudicial to the economic life of the neutrals in the World War than were all the other forms of belligerent interference”.¹

For at least some portions of the neutral populations, compensation might be found for the loss of the freedom of the seas in enhanced values of ships and goods; moreover, certain measures of protection could be taken by the neutral governments designed

¹ P. 151.
to minimize the economic consequences of belligerent measures. Insurance institutions were set up, and efforts were made to control the export, import, and distribution of commodities. Through these measures of control the neutrals acquired powers of bargaining with the belligerents. Such efforts on the part of the northern European neutrals, Switzerland and the United States, are described in the fifth chapter of Mr. Turlington's book. The results were of a varying character. Norway proved less capable of defending her national economy than Sweden or Denmark. Switzerland seems actually to have derived more economic advantage than disadvantage from the war situation. In the United States, any estimates of the balance of our economic losses and offsets are blurred by the effects of our belligerency after 1917. In all the neutral states it appears that commercial, shipping, and industrial interests found adequate compensation through insurance and frequently vastly increased profits through rising values. The non-commercial classes paid the price in the increased cost of living, and if they could not pay it suffered hardship. Even the consuming classes, however, were on the whole better fed and clothed than the peoples of the warring nations.

Mr. Turlington notes that the neutral nations learned, or might have learned, a double lesson from their experience in the World War. In the first place they discovered that the extent to which they could continue their normal economic life "depended chiefly on the degree to which they were economically self-sufficient or to which they possessed resources useful to the belligerents". Thus the war, on the one hand, gave a decided impetus to the development of economic nationalism among the neutrals. On the other hand, it provided numerous illustrations of the utilization of economic devices as means of diplomatic pressure and protection and thus fostered the idea of economic sanctions as a method of international control. Unfortunately the two lessons tend to lead in opposite directions: the one toward national isolation, the other toward international cooperation. Each tendency has been apparent in the movement that has produced our contemporary neutrality legislation in the United States. It is not yet clear that any attempt to reconcile in a continuous policy such contradictory forces can ever prove practicable.

Charles Seymour.*

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NEUTRALITY, ITS HISTORY, ECONOMICS AND LAW: VOLUME IV:
TODAY AND TOMORROW—by Philip C. Jessup. Columbia University

This is the fourth and last volume of a study of neutrality,
under the Columbia University Committee for Research in the
Social Sciences. The set provides a much needed, thorough and
scientific study of a subject now much in discussion, a proper
background for consideration of the most important issue of for-
eign policy now facing the United States. In this last volume,
Dr. Jessup applies the results of the research to the present
situation and presents his conclusions in non-technical style, for
the benefit of the general reader. If the first three volumes are
indispensable to international lawyers, the last one is also of
importance to all who are interested in the foreign policy of the
United States. Such readers should bear in mind that it is pos-
sible to arrive at different conclusions from the same set of facts.

Neutrality, Mr. Jessup begins, means keeping out of war, in
popular thought; but since it involves rights and duties, it im-
plies a technical legal status. The neutrality policy of the United
States was part and parcel of the general idea of avoiding en-
taglement in European affairs, but the American Government
was forced to shift its emphasis to the matter of protecting neu-
tral rights; while we did not go to war in 1812 and 1917 solely
to defend neutral rights, we should have been able to stay out of
those wars had there been no interference with American ship-
ning. The law of neutrality has suffered because "when a state
found itself fighting with its back to the wall, it preferred life
to the observance of its promises". But neutrals are not helpless,
and could do much more for themselves if they would act in
unison.

Chapter II is headed Neutrality: A Euphemism for Economic
War. Trade has always been the backbone of the struggle. Je-
ferson thought that the neutral ought to be undisturbed by war;
this might have been realized had the neutral been content with
normal economic life ¹ and had not sought to profiteer.

The reviewer regrets to say that he remains unconvinced by
the exposition, in Chapter III, of the belief that there is "no new
thing under the sun" in neutrality. Mr. Jessup admits the weak-
ness of the law of neutrality, due to the fact that states refuse to
be bound by solemn promises when urgent self-interest dictates

† See supra p. 503, note 1.
¹ Pp. 23-34.
a contrary course; he says that this is also the weakness of the League of Nations. Both statements are true; but surely the proper conclusion therefrom is that something should be done about it—not merely to continue it because there is nothing new about it. The things which have not changed in the law of neutrality are examination at port rather than at sea; falsifying papers; duplicate papers; and such matters. With such details we need not quarrel. Nor need we quarrel with the assertion that few citizens of either belligerent country are able to apply the test of absolute right or wrong—though one might derive from such a situation the need of a community judgment to make such decisions, rather than allowing each state to be its own judge. Even the League of Nations is not new; in this sense, nothing is new, for all political institutions have some roots in the past.

But nothing is said in this chapter, or in the book, concerning the effects of other changes. The submarine receives only incidental mention. Modern interdependence makes it impossible for a belligerent to carry on war without aid from the outside, and impossible for a neutral to be impartial; the consequences of this upon the practice of neutrality are not noted. In modern war, the distinction between combatant and non-combatant has practically disappeared; the effect of this upon the large part of the law of neutrality based upon this distinction is disregarded. Mention is made of the fact that war can no longer be isolated, and that it is a matter of vital interest to all members of the community; this has been legally recognized, but no consideration is here given to its effects upon the principle of neutrality. An international organization is in existence, for the first time in history, based upon the principle of collective responsibility, which is at the least not in harmony with the principle of neutrality; the book gives much scattered attention to this organization, but only for the purpose of showing that it has not entirely destroyed neutrality.

This, of course, leads into the League of Nations, which is discussed in Chapter IV. In this chapter there is a very useful study of the interpretation given by the League of Nations to its sanctions; Mr. Jessup concludes—correctly—that neutrality may be practiced even by Members of the League, in certain circumstances. The final words of the chapter seem to imply that, while Members of the League have been able to abandon neutrality by treaty, the United States can not do so except by resort to reprisals. It is a strange doctrine, if this interprets it correctly;

2 P. 64.
3 P. 82.
4 Pp. 122-123.
but if correct, perhaps the United States could get rid of neutrality by joining the League of Nations!

In Chapter V the present effort in the United States to abandon traditional neutrality is taken up. That effort has made strange bed-fellows: to find such nationalists as Hiram Johnson and such traditionalists as Judge Moore agreeing with supporters of the League of Nations that just rights should be maintained, and to find on the other hand such isolationists as Senator Nye and such pacifists as Frederick J. Libby agreeing that rights should not be maintained, is all most confusing. Mr. Jessup, however, is not concerned with rights; he is concerned merely to show that the current neutrality legislation is not a practicable solution to the problem of war. Such methods have not worked in the past; he doubts—and with much justice—that American public opinion would uphold for long so complete a surrender of trade rights. Also, he remarks, it would not help circumscribe or terminate a war.

Having found no solution in this form of neutrality, he arrives at the point to which all thinkers on the problem of war must arrive, the idea of collective security. The unanimous adoption of such a plan would register great progress toward the organization of peace; "but the hard facts are that it has not been unanimously adopted." It is not to be denied that the participation of the United States would greatly strengthen the collective system; but it would not bring perfection. Here, apparently, is the stumbling block for Mr. Jessup, as for many other Americans: the League must be perfect before we will share in it. But it cannot be perfect until we are in it; so comes the vicious circle. This, of course, is defeatism, for human institutions are never perfect. If it is a hard fact that the League of Nations is not universal, it is also a hard fact that we still have war. The conclusion would seem to be that the League should be made universal and stronger; Mr. Jessup seems inclined to agree; his words connote always "almost thou persuadest me". But, he says, we must not expect too much—"leg over leg the dog went to Dover." To do this, the dog had to lift a leg, and this is more than the United States has been willing to do. Nor does Mr. Jessup encourage any such exertion; the most he can say is that the League is of enormous importance "and the United States should do nothing to prevent its success." De nihilo nihil.

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5 P. 148.
6 P. 150.
7 P. 151.
8 P. 154.
Chapter VI is devoted to the possibility of combining neutral efforts.

"Why is it not possible to have a united neutral front... against any two belligerents when judgment has not yet been reached as to which, if either, is the guilty party?" 9

This is an idea which deserves consideration, though its application would require an international authority. He sums up: 10 the probability of being drawn into a major war is real enough to justify great effort to avoid it, which calls for some burden and loss; such loss can be minimized by cooperation with other neutrals, as contemplated in the Argentine Anti-War Treaty, which envisages common use of economic means; such combination need not be hostile to the League of Nations, and should not interfere with it. This implies an embargo system which will cut off the sinews of war from both belligerents and thus shorten its duration and restrict its spread. It is to be noted that all this is "from the viewpoint of the United States as a 'traditional' neutral"; and on the concluding page of the book, Mr. Jessup says that "the primary objective of a neutrality policy is to keep out of war." 11 Yet, "war anywhere is the concern and misfortune of peoples everywhere." Then why not try to get rid of war?

Mr. Jessup starts from the assumption that neutrality is to be maintained. Within this circumscription, he has written an excellent book, profound at times, provoking much thought, and leading into many byways of speculation. The reviewer, on the other hand, starts from the viewpoint of getting rid of war; he is therefore inclined to regard neutral action as no more than palliatives, which shirk the main problem. As to the principle of neutrality, and whether it ought to be maintained, Mr. Jessup is entirely non-committal. He seems inclined to think that collective action would be better, but is unwilling to do anything about it. He carefully skirts round the moral questions involved—which is doubtless a proper attitude in this sophisticated age. But the result is that the reader is left thirsting for an answer to the really important questions—questions which deal with the principle, rather than with the practice, of neutrality.

Clyde Eagleton.*

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9 P. 179.
10 Pp. 204-205.
11 P. 237.

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This election year it is particularly interesting to have a book in which the author says that “the greatest single factor in the establishment of spendthrift trusts in the United States” was a “dictum” in a case in the Supreme Court of the United States, which “dictum”, this author states, has no foundation in law, nor in logic, and “is patently fallacious”.

This is a notable pioneer attempt to consider the multitudinous and multifarious cases involving restraints on the alienation of equitable interests, and, from them, to distil a handbook on spendthrift trusts. The author is a professor at Harvard who was in Washington just a few years ago in the Department of Justice, and who served as one of the advisers on the Restatement of Trusts sponsored by the American Law Institute. His preface indicates that all the cases have been examined. And the subject-matter has been expanded, analyzed, subdivided and weighed to such extent that there would seem to be no possibility of any analogy, question or problem that has not been here considered. The language is remarkable for its opaque clearness and fulsome simplicity. It is noteworthy that one who has scoured the sources and reflected upon the materials to the degree here evident, should

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1 See, from Table of Cases, all references to Nichols, assignee, v. Eaton et al, 91 U. S. 716, 21 L. ed. 254 (1875). Settlor provided that the interest of any beneficiary should cease upon his bankruptcy, but that thereafter the trustees, in their sole discretion, could pay the bankrupt a share of the trust income. The assignee in bankruptcy of one “beneficiary” attempted to reach his “interest” and argued that said provisions were fraudulent and void. The court denied recovery. The opinion shows that the English Chancery Court had denied recovery in like cases of “cessor” and of “discretionary trusts” on the ground the “beneficiary” then had nothing to seize; but that (in any case where the beneficiary’s interest was not thus severed) said English Chancery Court would allow an assignee or attaching creditor to recover, despite an expressed restraint on alienation attached to an equitable life estate, holding such restraint illegal and invalid. The Supreme Court opinion also disavows adherence to or recognition of this latter English limitation, and instead places its decision denying the assignee any recovery, upon the ground first indicated above, but also upon the second ground that spendthrift trusts are, in America, legal and valid, and constitute a bar to claims of assignees and creditors. This second part of the opinion occasioned a study published in 1883 by John Chipman Gray, entitled Restraint on the Alienation of Property, wherein this “dictum” is the subject of a searching, scathing, brilliant criticism. Notwithstanding this attack, the courts have followed the “dictum”. See, also, the criticism in Note, Trust Determinable on Bankruptcy—Discretionary Trust (1876) 10 AM. LAW REV. 591; and the defense in 50 ALBANY L. J. 6.
still keep the perspective necessary to write upon this abstruse and perplexing subject-matter in such simple style.

But the subject-matter does not admit of exact definition, nor yield to a really unified treatment.\textsuperscript{2} The title \textit{Spendthrift Trusts} is used and the preface indicates spendthrift trusts were the object of the study. But in stating the subject to be considered, the Introduction uses the longer sub-title,\textsuperscript{3} and roughly half the word content concerns devices which are restraints on the alienation of equitable interests, but which Professor Griswold distinguishes from spendthrift trusts.\textsuperscript{4} The elaborateness of treatment is shown by a fifteen-page table of contents, followed by seventy pages of tables.\textsuperscript{5} The work itself begins with a general introduction of thirty-five pages, replete with history and statistics, which, like every subsequent chapter, has its own table of contents. And each chapter, and every major subdivision of a chapter, begins with a paragraph of introduction. Analysis, division, classification—these characteristics rival in prominence the criticism and the distinctions through which the author undertakes to bring order out of the chaos and to convert the cases into a treatise.

There are but few typographical errors.\textsuperscript{6} In only one instance does the author’s terminology lack the precision otherwise uniformly evident.\textsuperscript{7} Once, also, the author apparently forsakes his

\textsuperscript{2} Professor Griswold’s running comments on the “dictum” in Nichols \textit{v. Eaton} constitute a minor but interesting unifying factor.

\textsuperscript{3} “Restrains on the Alienation of Equitable Interests Imposed by the Terms of the Trust or by Statute.”

\textsuperscript{4} There is continuous need to distinguish cessor, discretionary trusts and trusts for support from spendthrift trusts. For a definition and similar distinctions see \textit{Bogert, Trusts and Trustees} (1935) 715, 740, 752; 3 \textit{Bouvier Law Dictionary} 3111; Lynch \textit{v. Lynch}, 161 S. C. 170, 80 A. L. R. 997 (1931).

\textsuperscript{5} There is a fifteen page résumé of state statutes respecting life insurance proceeds. There are twenty-six pages of forms and thirty-eight pages of index. The third chapter is a survey of cases by states in one hundred ten pages.

\textsuperscript{6} Apparently the word “not” was omitted from the last sentence on p. 400. The date of Nichols \textit{v. Eaton} is given in the note, p. 463 as 1875, and elsewhere as 1876. Jones \textit{v. Harrison} is cited 7 F. (2d) on p. 244, and on p. 245 as 17 F. (2d). Brahmey \textit{v. Collins} is evidently referred to but is not cited, p. 63; \textit{cf.} table of cases. The exceptional clarity of language elsewhere makes the first sentence of \textit{§} 60 an anomaly. The index, opposite, Spendthrift Trust, defined, refers to p. 2, omits p. 364.

\textsuperscript{7} Professor Griswold refers at p. 395, to cases involving conditions dependent upon “the happening of some external event”. Apparently he means some event external to the trustee (\textit{cf.} p. 365); but then trusts for support,
own premise. The beneficiary of a valid spendthrift trust has no power to make a valid present assignment of his interest. Considering whether such beneficiary can nevertheless make an enforceable contract to assign the income from the trust, when received, the author first says: "The question is essentially one of policy, of the extent to which the restraint on the power of the beneficiary to control his interest is to be extended." Three sentences later, he states dogmatically that the "creator of a trust cannot deprive his beneficiary of capacity to contract", adding, "and if a contract is made by the beneficiary, it should be enforced". And he criticizes Bixby v. St. Louis Trust Company, where the contrary result was reached, saying that the opinion there "assumes the issue by declaring that a contract to assign is the same thing as an assignment".

To clinch his point, he quotes from the opinion; which says that the distinction "is a distinction without a difference. . . . So far as the terms of trust are concerned, the legal effect of the agreement and the assignment is the same". This language is too broad. As Professor Griswold points out, the contract (if held valid) gives no right against the Trustee, and breach of the contract would give the plaintiff suing on it only a money judgment. But the problem confronting the court was not whether contracts and assignments are identical; but whether these contracts would, if validated, produce the same result so far as the trust is concerned, as an assignment. The court need not anticipate and determine its course upon the legal consequence of non-performance. If legalized, such contracts (presumably, usually) would be performed. And, assuming performance, the result of the contract (if held valid) and the assignment (if held valid) would be the same; either would defeat the object of the spendthrift trust, and nullify it.

The reasoning of Bursch v. Bursch, which Professor Griswold prefers, may adhere more closely to the legal analogies he presents, logically expended. It does not follow that Bixby v.

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in the prior grouping, are not distinguished. And from the beneficiary's standpoint, his reform, sobriety, competence, or the payment of his debts are not things that "happen", and primarily they are not "external events".

8 P. 337. If the settlor can deprive the beneficiary of power to convey—why not of power to contract, respecting his interest in the trust property? See infra note 13.

9 323 Mo. 1030, 22 S. W. (2d) 813 (1929).
10 P. 340.
12 P. 337.
St. Louis Trust Company is demonstrably wrong; but rather that Professor Griswold's own premise is correct, namely, that "the question is essentially one of policy".  

Professor Griswold repeatedly attributes the opinion by Mr. Justice Miller in Nichols v. Eaton to Mr. Justice Field, who wrote no opinion; and at one point he expatiates upon the "philosophy behind Mr. Justice Field's opinion", citing a biography of Justice Field, "one of the foremost of the pioneers". He implies that the pioneer judges erred in that case through undue regard for the wishes of property owners. He asks whether the court should not have considered "the broader implications involved in allowing spendthrift trusts and made the intention of the donor less all-important". And, with characteristic circumspection in his use of language, he adds: "There is room to consider whether the ownership of property should not as a matter of course carry with it corresponding responsibilities." 

Later, criticizing the same case, in the same tenor, Professor Griswold says: "A person who owns property, it was said, may give it as hepleases" and (using as connectives, "This reasoning" and "The same line of argument"), he comes to the broadside: "The difficulty is that the major premise—that the owner of property may dispose of it as he desires—is patently fallacious." There is nothing so broad as that premise in Nichols v. Eaton! Professor Griswold found the words "as he pleases" in Ashhurst v. Given, from which he quotes. The opinion in Nichols v. Eaton says: "We concede that there are limitations which public policy or general statute impose upon all dispositions of property. ..." Professor Griswold weakens his argument by overstatement.

By contrast to his observations upon the "dictum" in Nichols v. Eaton, it is interesting to note his comments upon the words of

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13 This view accords with his own ideas as to the validity of these trusts: "The whole question of the validity of spendthrift trusts is one of policy, not one of logical deduction from the terms of the gifts in trust." P. 92. "There is no syllogistic basis for the spendthrift trust. If such trusts are valid it is ... because the particular restriction in question is not contrary to public policy." P. 467. See, also, "as may be required by sound policy". P. 474. Consider the prevalence today of the doctrine enunciated in the "dictum" of Nichols v. Eaton, despite the principles urged by Professor Gray. And, see Gray, RESTRAINTS ON ALIENATION (1883) 168, 169, 170.


16 5 Watts & Serg. (Pa.) 323 (1843).

17 91 U. S. 716, 725.
the court in the recent and important case of Brahmey v. Rollins. The proceeding was a creditor's bill to obtain payment from the defendant's interest in a spendthrift trust. On procedural grounds, the court dismissed the bill! Yet Professor Griswold reports:

"This decision [sic] is almost the first substantial break in more than fifty years of the law of spendthrift trusts. . . . The proceeding in Brahmey v. Rollins had been brought as a creditor's bill, and the Court held that under the statute this must be dismissed. This brought small comfort to the defendant, however, as the Court continued with the holding [sic] that 'the bill may be amended into an action at law with trustee process, which may be granted as a new attachment. Pub. Laws, c. 332 Par. 58. Trustee process is available to reach funds of the debtor in a fiduciary's possession.'"

Thus, although Professor Griswold has no patience with the "dictum" in Nichols v. Eaton (which the court itself made a concomitant basis of its decision), he hails the verbosity of this equity court (which dismisses a creditor's bill with gratuitous advice to counsel about seeking a remedy at law) as being a "careful opinion". He says this Court "rejected the doctrine of spendthrift trusts after a thorough consideration of the question". He says the "Court allowed recovery, holding the restraint invalid". He says the "decision" is "significant". He seems to be blissfully oblivious to the fact that all the words he deems significant are dictum.

This book breaks new ground; and these animadversions are not intended to detract from the general excellence of an exhaustive and erudite treatise. With this basic work done, Professor Griswold should now expand his comments upon the social

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19 P. 187.
20 91 U. S. 716, 729. See the statement of the holding in this case as given in 3 Pomeroy, Equity (4th ed. 19) 2154.
21 P. 47.
22 P. 472.
23 P. 186.
24 Id.
25 The error of expecting the "dictum" of one case to become the decision of the next one is pointedly shown by Professor Gray. He says that after Marbury v. Madison, 1 Cranch 137 (1803), there were, prior to Nichols v. Eaton, but two instances in the Supreme Court of "elaborate statements confessedly uncalled for to determine a cause and confessedly made to forestall opinion on a matter not in judgment". Gray, op. cit. supra note 1. He cites the Dred Scott Case, 17 How. 393 (1857), and Ex parte Christe, 3 Howard 292, 322 (1845), and its sequel, Peck v. Jenness, 7 Howard 612 (1849).
aspect of this legal form, and find means to obtain for them wider distribution than can be expected through this technical book.

VICTOR S. MERSCH.*


This book is arresting, informing and surprisingly readable. It is well planned and well executed. It constitutes a clear exposition of modern English Local Government in its historical, territorial, juristic and statutory settings. Yet only a few more than 360 pages are required. The chapter titles show the logical plan of the book. They are as follows:

I—The Essentials of Local Government.
II—The Elected Element.
III—The Official Element.
IV—The Central Control.
V—Local Government Areas.
VI—Council Procedure.
VII—The Financial Basis.
VIII—Local Government Services.
IX—Extension of Powers.
X—The Future of Local Government.

It is not a "dry as dust" book. The reader will be intrigued by some of the page headings. Consider these:


Professor Hayes has recently termed this era one of disillusionment.¹ This book bears the mark of its generation.

"A generation ago those who professed to speak with authority on matters of Government were, with few exceptions, inclined to take an extremely cheerful view of all the existing British institutions. Their outlook was not so much optimistic as complacent. English History had slowly worked itself up to a climax, the climax having arrived just before the period in which they lived; Britannia, supported on the solid pillars of Democracy, Free Trade, Universal Free Education, the Factory Acts, and the Empire on which the Sun never sets, could afford at last to sit down—in a very dignified manner, of course—on her throne, and put on a pair of rose-coloured spectacles. Everything was for the best in this best of all possible worlds. Those who write and speak today are not nearly so self-satisfied. It is not so much the Great War that has shattered the complacency of statesmen and publicists, though many who had believed a serious war between civilized nations to be no longer

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¹ 2 Hayes, Political and Cultural History of Modern Europe, p. 1090.
possible received a violent shock from the mere event of the war taking place at all. Events since the War have suggested that those things which were generally considered the firmest foundations of the modern world are not so stable, or even so desirable as they seemed in the early days of the twentieth century. Democracy has become a butt for contemptuous abuse in countries where it appeared to be firmly grounded. Free Trade, which it was believed would never under any circumstances be abandoned by the country that had produced Cobden and Peel, has slipped quietly out of the British fiscal system. Serious doubts are being cast on the effects of our elementary educational system. The Factory Acts have not made a happy and contented working class. And the Empire on which the Sun never sets has on several occasions since the War suggested that not quite everything is for the best, whether the world we have is the best possible one or not.”

In contrast to an American work on municipal government, one finds minimum space devoted to reforms in organization. The short ballot, the city manager plan, proportional representation, are not mentioned. England seems satisfied with the ancient, simple type of local government. In this country, we would classify it as the councilmanic form. Councillors are elected by popular vote. They choose from their number a chairman who becomes the mayor. One unusual feature is that of co-option under which unpaid administrators are chosen by the elected councillors. The largest element in the co-optive section of unpaid administrators consists of aldermen. Merit is claimed for the institution. The council selects the paid administrators whose functions are necessarily very similar to those in American cities. The author berates the electorate and has no words of praise for the elected element. On the contrary, he commends highly the permanent paid officials. They are “career” men and enter the service through civil service by which they are protected from political removal.

In 1933, the acts relating to local government were consolidated in what is known as the Local Government Act of 1933. This act covers all the constitutional legislation relating to the normal local government units with the exception of London. It follows that the wide variation in municipal organization found in America is not existent in England. This eliminates the necessity of discussing problems of charter drafting which we would confidently expect to find in an American book.

Practically all adults are qualified to vote for councillors. Persons who have received poor relief during the preceding 12

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3 23 and 24 Geo. V, Chap. 51.
months are disqualified. The author laments the ignorance and apathy of the electorate. Upon their shoulders, he places the blame for the election of weak and ignorant councillors.

The relation between central government and the local units has been a continuing difficult problem. It has been complicated with the problem of finances. On the one hand, the local unit resists the extension of national control; on the other, it has sought financial assistance from the central government. In view of the growing national interest in the services rendered by local units,—education, roads, sanitation, police,—the control of the central government has steadily increased in spite of the fact that zealous champions of local sovereignty have arisen from time to time. Certain phases of the problem of power distribution have been resolved by the courts. Home rule is evidently not the fetish in England that it has been in America.

"The powers of local government in England are very strictly limited. With the ordinary citizen, it may be presumed that the law allows him to do anything he likes except what it specifically forbids him to do. However morally bad a man's conduct may be, however much undeserved suffering he may inflict on other people, he cannot be punished by the courts unless it can be proved that he has either done some specific thing which the law has forbidden or omitted to do some specific thing which the law has ordered should be done. But the reverse idea applies to local government in this country, namely, that a local government authority may not do anything at all except what is specifically permitted by the law."  

The New York Court of Appeals recently held that an act submitting to the voters of certain cities whether the 3-platoon system for members and officers of the Fire Department shall be adopted was a local act and not a general one and, therefore, violative of the home rule provision of the New York State Constitution and invalid. The court pointed out that the zone between the two fields of State and municipality was obscure and found the controlling point in historical custom and practice.  

The extension of local government service in England parallels the development in America. The principal local services are police, highways, poor relief, public health, including maternity and child welfare, housing and town planning and education. Of course, these are all services with which an American is familiar. In England, as in America, a severe controversy has raged over the subject of municipal trading.

"There are three main controversies regarding municipal trading today; the first is a continuation of the old struggle between indi-
vidualism and all forms of municipal trading, the second concerns the advisability of the monopoly principle in municipal enterprise, the third concerns the application of the profits of trading."  

In the State of New York, the Court of Appeals recently held that a village, in fixing a rate for service by a village owned electric plant, might include a profit upon the reasonable value of the property used in addition to an amount to cover necessary operating expenses, reserves and depreciation.  

Women have entered municipal life to a considerable extent in England. Several thousand women are now councillors. The author's estimate deserves quotation.

"Women councillors are, generally speaking—the humorist will omit the comma—of a higher average capacity than the men councillors. This is due mainly to the fact that few women will take the trouble to enter municipal life unless they feel that they have a real mission to strive for the good government of their district. Those who have reached the dignity of the mayoralty have certainly carried out the duties of their office with conspicuous success."  

In conclusion, the author returns the responsibility to the electorate:

"The mills of God grind very slowly in old England, in spite of the general speeding-up effected by the Industrial Revolution. But, as always, they grind exceeding small. Taking a long view, there are two roads open before English Local Government. The long arm of 'the new despotism' may reach out to the local authorities, tightening the grip of Whitehall until the Municipal Service becomes a branch of the Civil Service, whilst the local Councils become dignified little social clubs whose members amuse themselves by playing at government. Alternatively, education—in the broader sense—may create a sufficiently intelligent interest in Local Government to lead the civic pride of the electorate to demand efficiency in its rulers, a demand which may be met by the readiness of many citizens to devote their time and energies to the interesting and important work of local administration. A worthy cleric of bygone days, after listening patiently to a lengthy denunciation of the shortcomings of the clergy, replied with a sigh: 'Yes, the clergy are doubtless a bad lot, but, unfortunately, when they want to make a new priest they've only got the laity to draw from.' Before condemning his local Council, the ratepayer might profitably ask himself if he, personally, really deserves a better government. 'Tommy', said the irate parent, 'you're a little pig. And you know what a pig is, don't you?' 'Yes,' replied the incorrigible, 'a pig is a hog's little boy.'"  

GLENN W. WOODIN.*

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6 P. 317.
8 P. 210.
9 Pp. 359-360.

This book is the work of many intelligent minds, including the author's own, for which I have great respect. I am genuinely sorry, therefore that I cannot praise it with more than damning faintness. With a detailed table of contents it would become a useful work of reference for well-selected notions, each having its several interest—opinions of a vast number of noted thinkers. Some of the expositions and criticisms are elusive. Others are definite and acute. Taken as a whole the book is evidence against a famous theory of evolution—Herbert Spencer's—which it quotes without approval. Its own evolution is not "an integration of matter". Its matter does not pass "from an incoherent homogeneity to a coherent heterogeneity". Last as first, its heterogeneity is incoherent. A single or double object is, to be sure, kept always before the reader's eyes—discovery of what the social sciences contribute to "advance juristic understanding", or to "assist in legal development" on the assumption "that the present legal order contains many desirable features for social life as we know it today and that it also contains many undesirable features which we would do well to eliminate". But if this, or either, object could have been made unifying, it was not.

The upshot of the book is simply this: that five social sciences have sundry non-negligible, though still inconsiderable, "possible contributions to the legal process". The five sciences are Anthropology, Economics, Sociology, Psychology and Political Theory, as represented by some of the most revered of their respective priests. Their possible contributions are miscellaneous grains threshed from encasing chaff. These are some samples:

The Occupation (Kant, Westermarck) and Labour (Locke) theories of property, though contrary to much fact in advanced societies and "fatally defective" for not justifying or explaining the necessity of property, both have "social worth"—the first as a support for legal protection of possession; the second because it tends to the encouragement of labour. The Functional Theory (Mill, Tawney) that the justification of property depends upon whether it fulfills a socially useful purpose could be a valuable basis for legal discriminations among sorts of property.

Davy's studies of specific legal institutions (of which we are told only that the potlach preceded marriage as a form of contract) show that fundamental legal categories "represent progressive acquisitions of

1 P. 264.
2 Pp. 61-69.
3 Pp. 74-78.
civilization" and are (if one can believe it without knowing why) "perhaps the highwater mark of sociological-legal synthesis". 4

Though Maclver's distinction between law and primitive custom is unsubstantial, his showing that the social structure is sustained by norms of conduct, "representing the accommodation of the group as a whole to the necessities of common living," is a "significant contribution to legal thought" whose "further elaboration by sociologists...will require lawyers to take a greater account of the social setting of law". 5

Psychology contributes chiefly by correcting lawyers' assumptions; for instance, its definition of action as "any muscular or glandular change which results from motor nerve impulse" is superior to Holmes's "an act is always a voluntary muscular contraction, and nothing else". 6

Legal adoption of the view that the concept of sovereignty is now a dangerous anachronism blocking "progress" would be "a real gain". Questions of the suable-ness of States, for example, if cleared of the cloudy metaphysics of sovereignty, would more easily get decided practically on their merits. 7

These samples fairly, I think, illustrate the content, and their collocation (though it is not the author's) the unsynthetic eclecticism of the book.

Mr. Cairns honorably disclaims scientific accuracy for the process by which he selects social scientific "contributions" towards "legal development". For his task, he says, "there is no 'scientific method' which the worker can apply mechanically". With that, underscoring mechanically, I agree. He says also: "In large part, each investigator will discover relations...from what, in the final analysis, is a purely personal outlook." With this too I should agree were it intended only to describe how most persons, even when called scientists, seem likely to keep on behaving when they deal with questions of value for human ends. But Mr. Cairns seems to mean in addition that genuinely scientific dealing with such questions is impossible. Here I dissent.

I grant indeed that questions of value cannot be dealt with scientifically when both they and science are conceived as in this book. But suppose the social scientist, who always lacks a laboratory, applies to experience, all of which is history, to find the value, under defined conditions, of defined things for defined ends of defined persons or classes. May he not, notwithstanding predilections for and against the things, conditions, ends and persons, hunt scientific truth with as much detachment as a law-loving criminal lawyer hunting loop-holes for a guilty client? The hard-

6 Pp. 172-176.
'est problems may long remain as much too much for him as those of aviation would have been for Adam. But if he and his fellows and successors collect and weigh evidence as scrupulously as physicists, and with as much openness to conviction of their errors, it is fair to expect that their reach will be as much extended. It will surely extend to hypotheses of value for generality of satisfactory living more promising than the best guesses benevolent statesmen hitherto have had to rest on. It is possible that some of these hypotheses may prove as true as scientific truths can be. But since no scientific truth is surely more than seeming, perhaps only for the time being, to persons who seem for the time being to be the best and best equipped observers, the danger is that they may be considered truer. There is no graver obstacle to scientific progress than assumption that science, through fallible human agents, can attain infallibility. Unless always fought down, that assumption may touch even the most intelligent and learned. Mr. Cairns, for instance, though aware that the basic truths of science are inferences from observation of recurrent sequences which further observation may correct, hints no challenge to the ideal which scientists inherited from religion—discovery of scientific laws; and seems indeed to believe that economists, at least, have found some.

Mr. Cairns's conclusion hints a prayer, in which I join with all my heart, that the social sciences may become a social science. He also expresses a hope for "methodized cooperation between law and the social sciences". That seems to me impossible. Law is the creature and instrument of far too many other forces than those for scientific truth. But I agree with him that the social sciences have been agents in a "subtle transformation of legal outlook" which is probably "far more important than the positive contributions discussed in the preceding chapters". I don't pretend to know whether its importance is for good or ill, by any standard. Its goodness for things that Mr. Cairns and I would agree were good for things we want may depend upon whether the several social sciences give way to a real science of human affairs whose understanding extends to law—which I suspect is what he was after when he hoped for "methodized cooperation". If so he may join me, later if not now, in belief that what Maitland said of one social science is true for all of them, if they want to become scientific; their choice is "between becoming History and becoming nothing".

WALTER NELLES.*

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LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS—

As in all else, the price of progress in the law is complication. The theory of the earlier common law that he who did his neighbor damage should pay, regardless of fault, may have been crude; it was also simple of administration. The principle of liability based upon fault is said to be the heart of our modern law of torts. Its introduction may have made our modern law superior, but it would be a better analogy to say that the principle has become the nervous system of the law, and a nervous system of high and rare complications.

Not the least of these complications is the doctrine of contributory negligence. The notion that one who is indifferent of his own safety ought not to be heard to complain of another's indifference, at least so long as his indifference contributes to his damage, partakes of simple justice, and its original translation into the law was simple: A negligent plaintiff, whose negligence is a proximate cause of his injury, may not recover at all. So simple a doctrine must have its shortcomings, and judges (aided and abetted by juries, and more rarely, by legislatures), concentrating on the shortcomings, have sacrificed simplicity completely by inventing counter-doctrines of comparative wrongdoing, last clear chance, and a bag-full of frills of lesser importance.

Indictments of the status quo of the law of contributory negligence have been frequent and damning.¹ Much less frequently has the prosecution been pushed beyond the indictment stage. Where verdict and judgment have been reached, the criminal has sometimes been sentenced to capital punishment. Complete junking of the doctrine has been urged by some impatient of hope that any good is to be found in it. And with the junking of the corollary the theorem of negligence must also be junked. Which returns us to the days of liability without fault, unless we are willing to go further than we have gone (that is, about as far as workmen's compensation laws) in the way of the more seeming socialistic idea of liability based upon ability to pay.²

¹ See Lowndes, Contributory Negligence (1934) 22 Georgetown Law Journal 674.
² See the Report of the Committee to Study Compensation for Automobile Accidents, made to the Columbia University Council for Research in the Social Sciences (1932). See also, Fegan, Presumption versus Proof in Automobile Highway Accidents (1934) 22 Georgetown Law Journal 750.
The author of *Legislative Loss Distribution in Negligence Actions* does not share the pessimism of this extremist school. He believes there is something of the doctrine of contributory negligence that is definitely worth saving, or that is, at least, definitely worthy of an attempted salvage. His indictment of the doctrine as it stands today is as scathing as any that have yet been made, but his analysis of the shortcomings is more penetrating, and the solution he offers for them incomparably more elaborate. He has not been content to raise the problem, nor even content to suggest a possible answer. He has shown an extreme awareness of the necessity of making real the solution of a real problem by making it approximate practicality before idealism. In the first place, he expands the scope of his thesis so as to make it embrace not only the distribution of loss between a negligent defendant and a contributorily negligent plaintiff, but also the distribution of the burden of satisfying a loss between joint tortfeasors. The implications of change in existing adjective law necessitated by a plan seeking to adjust in one action the distribution of loss among all parties involved are appreciated by the author, who proceeds to demonstrate how best such changes might be effected. He proposes the following as the tenth section of a model loss distribution statute:

"Sec. 10. (a) When any party against whom damages are claimed believes that some person not already a party to the action contributed by his negligence to such damage or to any damage suffered by such party himself, such party may add such person as a third party defendant and may file and litigate in that action a cross-claim for contribution or damages or for both.

"(b) The original claimant may amend his complaint to include as a codefendant any third party defendant added under the previous paragraph and may take judgment against such third party as if he had been originally sued.

"(c) Any person not a party to the action who wishes to litigate a claim arising out of the same transaction or accident giving rise to the action may, upon seasonable application to the court, be added as a party defendant and file any such claim or claims against any other parties and may add any third parties under paragraph (a) of this section.

"(d) Any party to the action, appearing in any manner, may file and litigate a claim or claims for damages or contribution or for both against any other party or parties to the action, no matter how such parties claimed against have appeared in the action."  

Changes in the substantive law involve, of course, the abolition of the defense of contributory negligence, with it the counter-defense of last clear chance, and also so much of voluntary as-

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umption of risk as overlaps the doctrine of contributory negligence. The proposed statute would express the legislative will in these matters as follows:

"Sec. 14. (a) All common-law doctrines of contributory negligence or of loss distribution in negligence cases at variance with the spirit of this statute are hereby abolished, including specifically the doctrine of 'last clear chance' or ultimate negligence.

"(b) Whenever in the opinion of the court a claimant's voluntary assumption of risk would not have prevented his recovery at common law unless his encounter with such risk was negligently executed, and in any event with respect to third parties not creating the risk assumed, the defense shall be treated as contributory negligence for the purposes of this statute.

"(c) A breach of statute creating liability for inadvertently inflicted damages or constituting a defense for damages inflicted by negligence shall be treated as negligence for the purposes of this statute."

The plan of loss distribution which is offered to substitute for existing doctrines thus abolished is not set forth in any one of the seventeen sections of the proposed statute, but extends through several of them, of which the following may be quoted:

"Sec. 1. Contributory negligence as a defense to a claim for damages is hereby abolished, and it will operate henceforth only to diminish the amount of recovery on such claim in accordance with the degrees of negligence of the parties thereto pursuant to the following sections."

* * * *

"Sec. 3. In any action brought under this statute the triers of fact shall render a special verdict or make special findings in which shall be determined (1) the loss in money actually sustained by each claimant for damages; (2) the proportionate negligence or fault of each party to the action expressed in percentages and determined by a method of comparison stipulated in other sections of this statute; (3) whose negligence or fault contributed to what or whose damages. The trial court may in its discretion order to be made or make, as the case may be, any other special findings it may deem necessary to a just disposal of the action.

"Sec. 4. Where the fault or negligence of each negligent party to an action contributes to all the damage claimed for and found in the action, including his own, and each negligent party is claimed against for part or all of such damage, excluding his own, the entire negligence shall be apportioned among the negligent parties and the total loss shall be apportioned in accordance with their respective degrees of negligence. If the amount of loss allocated to a party exceeds the actual loss sustained by him, he shall pay the difference into court; and if the amount of loss allocated to a party is less than the actual loss sustained by him he shall be paid the difference as damages from the fund so paid into court."

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4 P. 170.
5 P. 157.
6 P. 158.
7 P. 160.
If from the foregoing excerpts of the proposed statute there is obtained an impression of doubt as to the workability of the plan, the validity of the impression ought in fairness be tested against the author's complete exposition. The reader will find most interesting Chapter XI, dealing with the mechanics of comparing and apportioning negligences to losses, and the three appendixes, setting forth the Statute of Ontario (the most forward legislative step yet taken in the direction under discussion), and the decisions interpreting Canadian contributory negligence acts. From the latter the obvious lesson is made more obvious, that whatever legislative plan is drafted, it is never so much what the legislature says that matters, as what the courts interpret the legislature to have said. And this is the nub of the whole case. The workability of this or any other plan depends altogether on the cooperation and efficiency of the court and the jury. The contemplation of a jury working out proportions of negligences and percentages of losses, and assigning them off one against the other, may be too much for one skeptic of the jury's efficiency in most damage problems. Yet none can gainsay Professor Gregory's position that the present situation can scarcely be made worse, and it is now so bad that the chance of improvement from change, be it ever so slight, is well worth taking.

F. C. Nash.*


Common law copyright goes back to times before our revolution. Statutory copyright in America goes back before our Constitution. Noah Webster, whose spelling books educated the nation for over fifty years, wrote his first spelling book just after the revolution but he refused to publish it until he could obtain copyright protection. Through him twelve of the thirteen colonies passed laws providing for copyright. The first Congress of the United States included copyrights in the first Patent Act passed in 1790. The number of copyrights registered is enormous. In the last five years nearly three quarters of a million copyrights have been registered. The subjects of copyright are not merely books, but include such things as maps, pictures, statuary, photographs, music, plays, motion pictures and the like. In view of this it is rather surprising to find that the number of decided copyright cases is relatively small. The present book purports to include

* Professor of Law, Georgetown University Law School; former Editor of this Journal.
all American copyright decisions and the number is only a little over five hundred. With such a small bulk of reported cases it is easily possible for their substance to be incorporated in a single volume, and an effort has been made by the author to do that.

The book is prepared on an interesting scheme which results in substantially a mosaic of sayings of the courts. Apparently the author has made an outline of copyright law, setting out each proposition in a sentence or two of his own composition. This having been done, he has examined the reported cases to find support for his statement. Having found such support he gives *verbatim* a sentence, or a few paragraphs, of the supporting decision or decisions. In some instances he is unable to find copyright cases supporting his proposition; he then quotes decisions on patents or trade marks and the like, saying that the same principles are applicable to copyrights. In some instances apparently unable to find any court decisions, he quotes rules of the Register of copyrights. Many different propositions of law may be urged about the different rules, and have different aspects, consequently there are repetitions in the book under different headings. In addition to this the author has been careful to cross-reference in the text analogous subjects in a helpful way. Unfortunately the form of the book is such that it is sometimes difficult to ascertain definitely what is said by the court and what is said by the author, to know what court is being quoted. But this can readily be straightened out by reading the reporters. Because the quotations from the cases are almost always short and directed to a single point it generally is impossible to gather what were the facts before the court and it is also impossible to ascertain definitely whether the quotation is a holding of the court or is *obiter dicta*.

The book is divided into two parts, one relating to substantive copyright law and the other to copyright litigation. The author endeavors to consider the nature and characteristics of copyrights and to distinguish common law copyright from statutory copyright. He indicates what is copyrightable subject matter, how and by whom copyright is procured. He indicates the character of monopoly which is granted by copyright and distinguishes infringement from fair use. He also elucidates various problems relating to title involved in assignments, licenses and the like. The second part of the book is substantially a book of practice indicating the courts in which copyright litigation may be conducted, the proper parties to the litigation, the pleadings, methods of trial and the results of the trial, including injunctions, recovery of profits, damages and destruction of infringing material. He
points out that by statute in copyright litigation the costs generally include an attorney's fees, which is rather unusual in American litigation and which in a recent case amounted to twenty-five thousand dollars. Forms for a bill and for an answer are given section by section in such a way that a pleader should be able to select what he needs and put them together to make his pleading. The book ends with a table of cases which unfortunately gives a single citation and does not list the cases by defendants. There is an adequate and helpful index and the author has avoided duplication by listing the sections of the statutes and rules which he quotes in the text and following that with a reprint of all the sections of the present Copyright Act of 1909 \(^1\) which are not quoted in the text.

Patents and copyrights are frequently looked upon together. They are based on the same clause in our Constitution. It is interesting to note, therefore, that the refusal to register a copyright by the Copyright Office is final; no appeal may be taken, although the refusal to grant a patent is subject to one appeal within the Patent Office and a second appeal to a court, or even to filing an Equity suit to force the Commissioner of Patents to issue the patent. Strangely enough this appellate procedure with respect to copyrights seems not to be demanded by those dealing with copyrights. By statute the Commissioner of Patents retains in the Patent Office a copy of every patent granted, and will furnish certified copies to any applicant therefore. By Statute the Register of Copyrights is allowed to return, dispose of, or destroy the copyright matter deposited with him. There is no permanent record kept. Literally thousands of copyrighted articles are missing from the files and it sometimes is impossible to prove just what was copyrighted under a certain certificate. This seems to have caused very little actual trouble, however, as very few cases turn upon this issue. This and other matters of current interest with respect to copyrights are not referred to by the author. For a good many years there have been hearings in every Congress on bills proposing to make the United States a member of the International Copyright Union but no reference to that fact or to the Union itself is made by the author. Indeed, the attempt by the author has been to state the law as it is. He very seldom gives any argument or explanation or philosophical reasoning as to how or why the law is what he finds it to be. This probably is a real defect in the book for anyone who wishes to establish a phase of the law which is not treated. Nevertheless,

the book will be very useful to the lawyer who wishes to know what is the law of copyrights and also very useful to the lawyer who has a definite copyright problem or litigation before him.

Karl Fenning.*


In 1911, Wisconsin enacted the first of the modern American statutes conferring power upon an administrative agency to make and enforce rules, with the force and effect of law, for the safety and health of industrial workers while at work. Now some thirty states have laws dealing with this subject. The Secretary of the American Association for Labor Legislation in this book surveys the twenty-five years of experience in this field. The research and learning which the book demonstrates are enriched by the author's personal familiarity with the drafting and execution of the laws and his personal acquaintance with the officers who administer them.

This is a useful book to lawyers and administrators and its value is not confined to those who are concerned only with labor law. The problems discussed and the suggestions made are common to those fields of law where the most successful law-making function the legislature can perform is to enact a few guiding principles, establish an expert agency, and empower it to formulate and enforce the necessary flexible and technical rules. Regulation of utility rates, prescription of commercial standards, elimination of unfair competition, control of motor vehicle traffic, and adjustment of tariff rates are a few familiar examples.

Mr. Andrews, convincingly enough, defends the constitutionality of delegating legislative power to make safety rules and advocates the utilization of the device as the only successful method of applying such a law in a changing and highly complex society. But his book is more impressive and perhaps more important by reason of several other aspects.

First, a summary of the state and federal laws on the subject and the rules made under them is set forth. No such comprehensive survey is available elsewhere. The statutes and rules are well indexed. It is striking how much more executive-made law there is than legislature-made law.

Second, the author shows that in those states where a well-drawn statute has been enacted and administration has been reasonable and wise, very considerable progress has been made

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in accomplishing the necessary objective of safety for laboring men without undue friction or dislocation of industry—not perhaps enough to confirm the hopes of the 1911 optimist but enough to justify continuation with improvements learned from experience.

Third, Mr. Andrews criticizes the policy and administration of several of the statutes. Here defects in procedure for the formulation of the rules, their publication, and enforcement are analyzed. Most of these defects are attributable to the legislatures' failure to lay down intelligible standards, confer adequate power, and impose necessary limitations on the exercise of the power. Thus the statutes are deficient in their failure sometimes even to give the force and effect of law to the rules but more frequently in their lack of provision for notice and hearing to interested parties or for representation of employees as well as employers on the committees engaged in preliminary formulation of the rules. Further, where notice and hearing are provided for, publicity of what is the rule which is the subject for the hearing is not required. Again provision is not made for publication of the rule when it is effective. Fortunately, intelligent administration has in many cases supplied features which the statute lacked. But administration, too, has not always been perfect. Delay in formulation, failure to publish orders, failure to modify them as needed, and capitulation to political pressure have existed.

Fourth, the book offers concrete suggestions for improvement of the statutes and their administration. These suggestions are helpful in many other fields. The author urges that the administration of such laws be vested in a board composed of several members rather than a one-man agency and that the board have no other function than that of execution of safety and allied labor laws. He also advocates that statutory provision be made for the fullest hearing, after due publicity has been given, on a preliminary order in the drafting of which representatives of the board and of employers and employees have participated. As the author points out, by such a method of formulation, a better rule will be formulated, greater cooperation from the groups affected will be secured, and constitutional requirements with respect to procedure will be respected. He also makes the valuable suggestion that rules be given at least as honorable a position as the statutes of the state by publication in the Session Laws and that some central agency, such as the Department of Labor of the United States, publish the rules annually so that people may know what the law is.
A perhaps unduly verbose model statute and a model rule embody the suggestions urged.

JOHN O'BRIEN.*


It is not so long ago that that masterpiece of criminal investigation, Prof. Hans Gross’s System der Kriminalistik ¹ was made available to Anglo-American police investigators through the translation and adaptation of the classic by J. Collyer Adam. Since then, other European handbooks of scientific detection and identification, including Edmond Locard’s able little volume, Manuel de Technique Policière,² have been brought to the attention of American police officers interested in the utilization of the physical, chemical and psychologic laboratory in the detection of crime and identification and apprehension of criminals.

On a visit to the chief police departments of the Continent some ten or twelve years ago, the reviewer was greatly impressed with the general acceptance of the work of the laboratory technician as indispensable to efficient police activity. Here in America, this radical modification of the traditional techniques of the detective was at the time not very popular or widespread. A few farsighted leaders of police administration, such as August Vollmer, had long been acquainted with the work of the Grosses, the Locards, the De Rechters and others. But on the whole, it is only in very recent years, with the establishment of the scientific crime detection laboratory in connection with the Northwestern University School of Law and the developments in the New York, Federal and a few other outstanding police systems, that American police officials have begun to take seriously the aid that the scientist can give the detective.

The dramatic instances of scientific crime detection in the Hauptmann, Titterton and other recently publicized cases have served to bring this new development forcefully to the attention of the public; and it may be hoped that one of the desirable consequences of the journalistically-tainted causes célèbres will be the rapid spread of scientific laboratories as indispensable adjuncts not only to metropolitan police systems but to smaller and

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¹ Gross, Criminal Investigation (Kendal-Adam ed. 1934).

² Locard, Manuel de Technique Policière (Paris, 1923).
even rural organizations, the latter being serviced by district laboratories.

A number of technical handbooks in this field by American authors have appeared in recent years. The contribution by Dr. Harry Söderman and Deputy Chief Inspector John J. O'Connell of the New York City Police Department deserves a high place both in the American and European literature on criminal investigation. Dr. Söderman was well known as a competent investigating criminologist in European centers when brought to this country by the American Swedish Foundation of Stockholm to lecture at the New York Police Academy. Deputy Chief Inspector O'Connell is a practical police officer of many years' rich experience. The collaboration of these two experts has resulted in a book that is both theoretically and practically sound, that gives ample account of police investigative work in Europe and in the United States, that shows evidence of an admirable first-hand acquaintance with the significant publications in this fascinating field, and that is written with enviable lucidity. Hence no informed teacher of Criminal Law, Criminal Procedure and Administration, Evidence or Criminology, and assuredly no up-to-date police administrator, can afford to go without a copy of this handy hand-book for frequent consultation.

The volume is organized as follows: The first chapter analyzes the place of the laboratory and of traditional detection technique. The second is a too short, though otherwise admirable, chapter on psychology in detective work, which academic psychologists, who are often so interested in the minuatae of some narrow scientific problem of investigation as not to see the wood for the trees, might well ponder as a sobering antidote and a source of suggestive hints regarding human motivation, attitude and behavior. This chapter is also recommended to the trial lawyer and teacher of Evidence. The third gives practical hints on tracing a fugitive. The fourth is a competent analysis of methods of identification, preceded by a brief historical summary of the subject. The fifth chapter gives advice on sketching the scene of a crime, again something of practical value to the trial lawyer and prosecutor. The fifth, sixth and seventh deal, respectively, with methods of photography and the taking of finger and footprints at the scene of the crime. An elaborate chapter, amply illustrated, describes methods of identifying traces of vehicles, and two subsequent ones treat, respectively, of the determination and conservation of tool and teeth traces. The entire subject of accurate observation and preparation of traces of blood, semen and other
substances is discussed in later chapters, preceded by careful analyses of identification of hair, problems of criminal ballistics and of broken windows.

The foregoing chapters deal, therefore, with specific technical problems as they arise in the entire field of detection of crime. Chapters seventeen to twenty-two deal with the investigation of specific crimes; namely, homicide, burglary, various forms of larceny, different techniques of robbery, arson and sabotage. These chapters, particularly, should provide a realistic background to students of the substantive criminal law who are very likely to get a distorted conception based on a rigid, technical analysis of the decisions of appellate tribunals. Knowledge of the actual techniques of the major crimes should illuminate a good deal of cloistered analysis of crime as a legal abstraction.

Chapter XXIII deals amply with questioned documents, although naturally the standard work of Osborn (Questioned Documents) must remain the ultimate source of consultation. The final chapter, XXIV, describes the equipment of the modern police laboratory, parts of which have incidentally been described and illustrated at appropriate places in the preceding chapters.

The mention of illustrations reminds the reviewer to call special attention to, and compliment, the work of Charles A. Harrold, who contributes many interesting and instructive drawings.

The authors are to be commended for the thoroughness of the documentation of the book. In addition to an ample bibliography, footnotes give brief "Who's whos" of, and well-drawn portraits lend reality to, the various scientists of stature whose works are referred to. There are, besides, a helpful glossary and an ample index. All instruments, chemicals and other materials used in scientific investigation are described (and frequently illustrated) with painstaking care. Suggestive questions for students' use are furnished at the end of each chapter.

This book is, of course, not the original work of a genius like Hans Gross or Alphonse Bertillon, although the authors describe certain studies and techniques which they themselves discovered. But it is, as should by now be apparent, a carefully done and very usable handbook. However, in the opinion of the reviewer a chief value of a book of this kind is to raise the police officer's esteem for his profession and its potentialities. How necessary this is might be inferred from the fact that even at this late date there are thousands of police officers performing their functions in the dynamic, complex civilization of modern America to whom a volume of this kind is a closed book if indeed they have ever heard of it. Thousands of officers still believe that a muscu-
lar physique plus political influence are and ought to be the chief qualifications of those who detect crime and pursue criminals. Not the least of the values of the re-vitalized Federal Bureau of Investigation will be to dispel such a naive notion. And when the training of patrolmen and detectives assumes the dignity and importance it ought to have in our educational scheme, books like the one under review will serve a high purpose.

But more important still, such books are of value as striking evidence of the need of introducing more scientific method and attitude throughout the processes of criminal justice. For while one kind of scientific techniques is helpful in the detection of crime, others will be useful in the trial of cases, in the sentencing procedures of the courts, in the peno-correctional treatment of various types of offenders, in probation and parole work.

Not in our generation perhaps, but also not in the too distant future, men will marvel at the clumsy, emotional, prejudiced manipulation of the human beings we call criminal by a substantive, procedural and administrative law that has lagged limply behind the onward march of science in other fields of human endeavor. So the authors can derive satisfaction in not only having contributed to the improvement of the detection of crime but having indirectly stimulated the improvement of its treatment throughout.

SHELDON GLUECK.*


The moribund state of the common law with reference to social problems was never better exemplified than by its treatment of the relationship of employer and employee. Based on an abstract conception of freedom of contract, fortified by an alleged principle of no liability without fault, the rules developed were such as to render recovery by injured workmen difficult in the extreme. The growing conviction that industry should bear the cost of injury irrespective of fault found little recognition until it was embodied in statutory law. Such was the popular demand for legislation of this type that within a relatively few years workmen's compensation acts were placed upon the books of nearly all the states. But the diversity of their provisions and the wide variance in administrative practices have resulted in an alarming lack of uniformity. Little has been known of the actual extent

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of these differences nor of the methods of administration actually employed in the various states.

Thus it is that the publication by the Commonwealth Fund of the work under discussion is most opportune. For in over eight hundred closely packed pages the statutory provisions and administrative rules and practices of many of the states are made available for comparison and discussion. It is not an encouraging picture that Mr. Dodd paints for us. In spite of the undeniable improvements which have been made, the situation of the injured worker is far from perfect. The law's delays, inadequacy of payments, the difficulty of securing impartial medical service and the danger from unscrupulous lawyers represent hazards which the employee must frequently face. Nor is the position of the employer enviable, especially in times of depression, when the tendency to malinger, the destruction of the will to work and the difficulty of providing places in industry for partially incapacitated workmen combine to increase the likelihood of overcompensation.

The sociological implications of this document, however, will not be dealt with further. From a professional standpoint the lawyer will find himself most concerned with chapters eight and nine, dealing with the relation of courts and lawyers to the administrative process. In comparison with the total number of cases determined, the controversies which necessitate resort to the courts are few indeed. The vast majority of cases, we are told, are uncontested. Contested cases, according to the author, are usually heard in the first instance by an administrative official or board, the formal parties usually being the employer and employee, but the insurance carrier being actually the party in interest rather than the employer. The proceedings are informal in character and there is a tendency to relax the common law rules of evidence. A significant point in this connection is that exclusively medical questions are involved in a large proportion of cases. In reaching a decision administrative officers frequently rely on their own knowledge and observation, thus basing their determination on evidence not in the record and creating a difficult situation for the reviewing courts. The problem of the expert medical witness is particularly acute. Lawyers are conceded to be necessary in some cases, but the evils of excessive fees and the solicitation of business are felt to be extremely prevalent.

The most generally adopted plan of judicial review is said to be a consideration of the record made before the administrative body. Jurisdictions not following this method are divided between
those such as Texas, where the administrative proceedings are wholly or largely disregarded and those in which the administrative record may be supplemented by additional evidence. As to the weight to be accorded to administrative determinations of fact the author favors the view that such determinations should be considered final if supported by evidence and makes the penetrating observation that emphasis should be placed on the improvement of administration rather than on an extension of judicial review. The function of the courts is held to be two-fold: to prevent abuses of the administrative process and to provide a uniform construction of the statutes.

These two chapters on the whole seem to be done acceptably. The undesirable character of court administration and the evils of extensive judicial review are properly emphasized. There seems, however, to be a failure to appreciate the significance of Crowell v. Benson1 in its relation to the scope of judicial review of state laws. Is it not possible that state courts may adopt the notion that the existence of the employer-employee relation is a jurisdictional fact which requires an independent determination under their constitutions? It would seem that the dangers of such a course might have been pointed out with somewhat greater clarity, especially in view of the position taken by the author in favoring the limitation of judicial control in general.

Criticism of much of this work is beyond the competence of the reviewer. It is, perhaps, sufficient to say that most of the salient problems in the field seem to have been dealt with in considerable detail. In addition to the two chapters mentioned, chapter six, dealing with the uncontested case and chapter ten, discussing the medical problem seem worthy of special commendation. A good discussion of the problem of extraterritoriality as it affects workmen’s compensation laws appears in chapter sixteen. The introductory portion dealing with the common law and statutory history of employers’ liability seems adequate. Much space might have been saved by showing the statutory provisions in tabular form. So far as one can judge without checking the sources the work is accurate, up to the minute and fairly well documented. A serviceable index is included but the addition of a table of cases would have made the book more useful to the lawyer.

The chief shortcomings of the work are inherent in the nature of the subject. The statement is made in the preface that the scope of the study was originally limited to three states

1 285 U. S. 22 (1932).
and the administration of the federal Longshoremen's and Har-
bor Workers’ Compensation Act in the New York district. One could wish that the original plan had been adhered to. In-
stead, the investigation was made much broader, with the con-
sequence that one has the feeling that it deals too much in
generalities. Also, it seems primarily descriptive in character
and to lack in some degree the analytical and critical quality
which one might hope to see in a work of this kind. However,
as the book is read, a picture emerges of a widely diverse and,
in some states, not too competent an administration of a task
the importance of which deserves something far better. Those
in authority, who have this work in their hands, will be able to
see numerous opportunities for improvement. It is to be hoped
that greater uniformity and a more earnest cooperation in the
administration of workmen's compensation will result from its
publication.

CHARLES B. NUTTING.*


Fickel’s study is vitiated by his confusion of the terms Causa
and Occasio, of the form of mind of Bodin and the practical situa-
tions and interests out of which his thought arose. If it is quite
true that Bodin’s work is saturated with the essence of life-
experience, it is equally true that his life-experience was cast in
the mold of juristic categories.

This essay is instructive as an example of anti-historical his-
toricism. Projecting into the past the schematicism of Carl
Schmitt, Fickel interprets Bodin as if he were Schmitt’s pre-
cursor. Thence results a misunderstanding of Bodin’s position
in the history of political thought.

Fickel, intending to write a study of Bodin’s political ideas, has
given us, instead, in the first two parts of his book, an account
of the cultural (i.e., political, religious, intellectual, moral, eco-
monic) premises which conditioned, or rather accompanied the
formation of Bodin’s concepts; and in the last part (especially
from page 46 to the end) an incomplete exposition of the main
times of Bodin’s thought.

In order to grasp fully Fickel’s falsification of historical per-
spective it is necessary to give a sketch of Carl Schmitt’s thesis,

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1 Pp. 3-36.
the application of which, on Fickel's part, to the \textit{facti species} of Bodin, prevents him from reaching a satisfactory view of the latter's personality and significance.

Starting from Hegel's axiom that "\textit{das Gesetz herrscht nicht, sondern die Menschen sollen es herrschend machen; diese Betätigung ist ein konkretes}" (i.e., from Hegel's concrete concept), Carl Schmitt, in one of his recent books\(^2\) expounds an old theory disguised under the new name of \textit{Dezisionismus}. Every jurist, he says, conceives of law either as a norm or as a decision. Every kind of juridical thinking is either normative or decisionistic; the only touchstone and criterion of validity of a juridical or political order is the possession, on its part, of the power of ultimate decision, the \textit{Entscheidung}; in which connection, be it observed, Schmitt conceives of \textit{Entscheidung} not only as a hallmark of judicial \textit{potestas} (this would be the platitudinous idea of the \textit{authority of last resort}), but as "\textit{Beendigung eines Konflikts, einer bestehenden Unordnung}", therefore in social and political as well as in a judicial sense. The medieval, Thomistic \textit{jusnaturalism} was "\textit{konkretes Ordnungsdenken}". It was displaced by the decisionistic theory of state and law of Hobbes, and by the normativism of the \textit{Vernunftrecht}. While Luther defended the natural institutions of family, social class and profession, against abstract normativism, we see, as early as Pufendorf, the replacement of these concrete realities by abstract, contractual sets of norms. Later, the reaction against the disintegration of the concrete \textit{Ordnungsdenken} set in: Fichte, leaving behind a \textit{jusnaturalistic}, rationalistic conception of the state, reached a concretely \textit{ordinal} view of it; Romanticism, Schelling, and the \textit{historische Schule} point in the same direction. But it was pre-eminently in Hegel that \textit{konkretes Ordnungsdenken} showed itself. The next generation, however, was unable to grasp firmly the Hegelian conception. Although still living in Lorenz von Stein and in Rudolf Gneist, the theorist of the \textit{Rechtsstaat}, the Hegelian view definitely declined. In Gierke's \textit{Verbandslehre} it does not reappear; Gierke's doctrine is merely a theory of associations.

Hobbes appears to Schmitt as the prototype of \textit{decisionism}. Fickel in his adoption of Schmitt's views constructs a fully 'Hobbesized' Bodin. How faithfully this 'Hobbesization' of Bodin corresponds to the original may be judged by comparing it with Bodin's answer to Pibrac in his letter of 1578:

"Et l'on m'accuse de favoriser l'absolutisme, moi qui ai eu le courage dans mon livre même de m'opposer aux régalistes qui ne cessent d'ampli-

\(^2\) Schmitt, \textit{Über die Drei Arten des Rechtswissenschaftlichen Denken} (1934).
fier les droits du fisc, moi qui ai maintenu contre la puissance royale les bornes du droit naturel et divin, moi enfin qui ai déclaré la levée des impôts soumise au consentement des citoyens."

It is obvious that the work of Bodin, and therefore the presuppositions of his influence on statesmen, philosophers and jurists of western and central Europe, cannot be understood unless one is well acquainted with the currents of the Zeitgeist of the period in which the République was composed. But we feel like admonishing Fickel with a medice cura te ipsum when he accuses Hancke and Landmann of having, by dint of nominalistic and logicist deductions, amputated the theory of sovereignty of Bodin from the sphere of consciousness of its age, and tries to grasp it uniquely from the viewpoint of an epoch which had small understanding of the ontologic thinking of the Middle Ages.

"With their purely juristic and nominalistic thought-training, they have attempted to dissolve the ontologic mediaeval blocks of thought into a multiplicity of juristic lemmas, free from all metajuristic components, and to thrust their bourgeois, rechtsstaatlich thought into the conceptual schemas of the Middle Ages." ³

Yet Fickel forgets that he is looking at Bodin through glasess borrowed from Hobbes and Schmitt. The professional Juristerei may have irked him, and justly; but in running away from it he overlooks the fact that, after all,

"Bodin took his starting point not from political theories (in the most general meaning of the word) derived from experience: his first orientation was that of a jurist initially criticizing the traditional schemas fashionable at his time in the schools of law. . . ." ⁴

and that

"situated half-way between Machiavelli and Grotius, the author of the République unites in a single organism two sciences which, up to his time, had grown apart: that of the legists and that of the political theorists: joining Bartolo to Machiavelli (or rather to anti-machiavelism) " ⁵

that, therefore, Hancke and Landmann may have exaggerated, but their main conception of Bodin as preponderantly a jurist is not so new-fangled, if one adds to the impression derived from direct contact with his works the corroborative statement of Grotius, who reproaches Bodin exactly for a too frequent im-

³ P. 2.
⁴ MOREAU-REIBEL, JEAN BODIN ET LE DROIT PUBLIC COMPARE (1933) 68.
⁵ MOREAU-REIBEL, op. cit. supra note 4, at 150.
mixture of juristic categories in his political constructions. Moreau-Reibel’s opinion about this point is trustworthy:

"Those, like Baudrillart, who have thought fit to despise the juridical method . . . misunderstand Bodin’s attempt—the most serious and far-reaching of his time—to utilize, in the golden epoch of jurisprudence, the results of the historical method without losing the technical acquisitions of the Glossators and of the Bartolists, and to go beyond both by setting up a new synthesis." 6

Against Fickel’s indictment of the juristic method stands the utterance of Bodin himself, against whom the dissenting opinion of a present-day interpreter weighs little.

"Ceux qui en ont escrit [i. e. of public law] à veue de pays et discouru des affaires du monde sans aucune connaissance des loix et mesnemement du droit public, qui demeure en arrière pour le profit qu’on tire du particulier, ceux-là, dis-je, ont prophane les sacrés mystères de la Philosophie politique."

To the partial exoneration of Fickel be it said, however, that while divesting Bodin of originality in respect to the “invention” of the term sovereignty, (Bodin hat keineswegs den Begriff der Souverainetät zuerst gefunden; vielmehr finden wir zuerst das Wort Souveraineté in den Costumes de Clermont; schon im Anfang der Religionskriege wird mit dem Begriff ‘summa potestas’ von allen politischen Schriftstellern—L’Hôpital, Hotman, etc.—gearbeitet), he draws attention to the irrefutable fact that “Bodin’s Verdienst ist, ihn, als erster, juristisch durchgedacht und scharf umrissen zu haben.” 7

ELIO GIANTURCO.*

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6 Moreau-Reibel, op. cit. supra note 4, at 142.
7 P. 52.
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BOOK NOTES


Dr. Schwarzenberger's work on the principle of universality in the theory and practice of the League of Nations presents a brief, well-organized study of the problems and questions facing any attempt to form an effective world peace organization. From the time when Pierre Dubois advanced what is known as the first scheme for a League of Nations, the nations of the world have been literally flooded with similar projects to insure the abolition of war and the establishment of world peace.

To date none has worked in practice. Probably the present League of Nations came nearer to solving the problem than any other but it too had weaknesses and defects that led the world from the post-war era of hope into the present period of confusion and distrust. The author clearly shows the difficulties under which the drafters of the League Covenant labored. The founders of the League, so the author states, were free to define the conditions on which membership of this universal organization should depend. That is a debatable point.

However they decided that the League should be built on the basis of homogeneous universality, i.e., that all the component nations should be communities of a certain constitutional structure. There is the first glaring defect. True the Allies had won the war and democracy apparently was saved, but upon what grounds could the authors of a world peace organization hope to exclude nations of unsimilar government structure. Was it to be a peace preserved by force (exerted by the Allies) or by the cooperation of all nations? The World War was still too great a stark reality for the founders to believe in the successful cooperation of all nations, so they chose the course of peace by force. It was not long until this mistake was easily perceptible and a policy of heterogeneous universality adopted. Germany and the U. S. S. R. were factors too powerful to remain outside of the League.

Dr. Schwarzenberger reviews these facts and cites cases where the League was forced from its theoretical intention to another policy that would work in practice. The book is of great value to a student of international affairs who desires to learn why the League was unable to carry out its original program, but only in the last two pages will he find any attempt to suggest what should be done (and this very meager) to rectify the mistakes in the organization of the League.

There are ten pages of bibliography but the interested observer will be greatly hampered if he attempts to use it as the place of publication and the publishing company are omitted. This makes the author's copious footnotes of little value to anyone desiring to continue research on the same line. The book contains no index making it nearly worthless as a reference work, although the table of contents contains chapter subheadings.

MARLIN S. REICHLEY.

The author undertakes to point out the evils and vices of the present economic order, to unravel the causes of depressions, and last but by no means least, sets out a proposed plan of reformation and substantially claims . . . it to be a panacea for all existing evils. The book is slightly larger than pocket size and consists of 137 pages. It seems superfluous to remark that treatment of the subject is necessarily superficial.

There is a revealing chapter on The Corporate Institution, Graft, and Speculation. The disclosures here, for those who have not given the subject very much consideration, will be most interesting and possibly appalling. The proposed plan is based largely on a correction of these evils. Surprisingly, there is no mention made of the Securities Act of 1933, and one is left to conjecture wherein that enactment falls short of correcting the alleged evils. But perhaps the author considers that matter too obvious to treat.

Without detailing here the proposed plan, suffice it to say that it contemplates voluntary federal incorporation, with, among other conditions precedent to doing business under federal incorporation, representation of labor, government and stockholders on the board of directors of each corporation. The results claimed for the proposed plan are perhaps best stated in the words of the author: "Assuming that this plan was honestly and zealously adhered to by all corporations what would be its effect upon our economic order? The result would be a substantial reduction of prices to consumers, an increase of wages and salaries of workers and the legitimate income of management and the dividends of the stockholders should grow progressively and average more than under the present system." Utopia!

The book closes with a chapter on Needed Governmental Changes. Herein the doctrine of the separation of powers of government into legislative, executive, and judicial, with its checks and balances is sweepingly indicted as the cause of much encroachment upon the liberty of the individual and as being adopted into our Constitution by reason of historical error. The Supreme Court of the United States is pointedly accused of usurpation of power, "by distorting the clause 'due process of law' to cover matters of substance and not merely matters of procedure as was originally intended". The suggested changes would make Congress a puppet of the President and curtail or eliminate judicial review of legislation.

It is difficult, if not impossible for a fundamentalist to agree with the thought content and to some the frankness of expression might be offensive. It will no doubt appeal to those more forward looking individuals of this generation.

J. V. D.

The author's preface to The Sale of Food and Drink states, in substance, that the purpose of the volume is to provide the busy practitioner with a convenient, time-saving guide, calculated to present "the material parts of the most important of the pertinent decisions of the courts in England and the United States on the various phases of the subject." The need for such a work is obvious, and it has been satisfied in large measure by this treatise.

After an historical review of the early conceptions of the liability of the purveyors of foodstuffs in England, Mr. Melick discusses on a background of the common law, the present law of the United States under the Uniform Sales Act and similar statutes. Of the thirteen chapters (varying in length from four to 102 pages) into which the book is divided, that entitled Liability of Keepers of Restaurants, Hotels and Inns, is by far the most thoroughly developed. Aspects of the law in seventeen states and the District of Columbia are presented and the author's comments thereon do much to reconcile the conflicting views of the courts. Elsewhere much more emphasis is placed on the law of New York, which may be a fault or a blessing, depending on the geographical location of the reader.

The book has been capably indexed, and there is a Table of Texts, a somewhat unusual feature in a work of this nature. It is in reality a bibliography, and it might perhaps have been better to use that title as being more accurate, since leading articles in law reviews, encyclopedic references, and reports are listed.

A word of adverse criticism must be added, though the points be minor, and directed more to the editorial staff of the publisher than to the author. The usefulness of the book as a reference tool is greatly impaired by the failure to give full citations. In some cases, no official reporter is cited, and, in many cases, the date is omitted, although there seems to have been an attempt to give that important information generally. Subsequent editions will no doubt offer opportunity to remedy these technical defects.

M. P. S.


Realizing that the essential flaw of contemporary biography lies in its tendency to glorify its subject, one approaches with some misgivings a book into the introduction of which is written the statement that "the life and views of this man will profoundly affect the future destiny of the human race." The author of his latest biography was a contemporary of William Jennings Bryan, and admittedly has come under the spell of the Great Commoner. Mr. Williams sees in Bryan one whose ideals were eventually to be realized; one who was, for better or worse, a sign and a portent, a precursor of things to come. Some of his
views have been enacted into our permanent statute law, others have been accepted and later cast into discard, and still others have never become a part of the legislative or traditional policy of the nation. According to Mr. Williams this is because the generation that followed Bryan is not yet remote enough to appreciate the significance of his influence, and to share fully in the fundamental soundness of his vision. The author's main thesis, which would test a man's worth by the extent of the adoption of his ideas by his contemporary political foes, is that "Bryan is the supreme political leader of his time, for he has had more vindications of his own views and principles than any other American active in the political life of the nation (during his own life time) has ever known". Others of Bryan's contemporaries, such as the consistently conservative Boston Herald, accepted as a fact the broad scope of Bryan's influence, but insisted that he was an opportunist, "one of the least intelligent leaders of American opinion", and that as a skilful politician he created new issues upon the realization that the old were outmoded, and by that process could not avoid striking popular veins which later ripened into national policies. Be that as it may, Bryan's influence upon American emotion was tremendous. There might well be a quarrel with the author's conclusion of the inevitability of "Bryanalia" in the future, as it has been quarreled with in the past. From neither viewpoint does national prohibition, for example, seem to have been inescapable or necessary. The author unfolds his theme in an interesting manner, though he is hampered on occasion by a style in which the classic and journalistic modes of expression are sometimes unevenly blended. His enthusiasm for his topic infrequently frustrates his obvious desire to be at all times objective and unprejudiced. Withal, he has covered ably one of the most historically fruitful periods in the brief life of our nation, and has given the reader a painstaking and accurate survey of the abundant career of the silver-tongued Nebraskan.

E. C. R. and J. N. S., Jr.


This latest volume from the pen of James Truslow Adams cannot be classed as another biography of Thomas Jefferson, nor as a politician's handbook of Jeffersonian principles. It traces in a readable, sparkling manner the three-century struggle of America to solve that age-burning question as to whether man can govern himself or has to be governed by presenting the evolution of Jefferson's great ideals of freedom for the common man with a sprinkling of Hamilton for contrast and emphasis. Mr. Adams points out in the preface that the names of Hamilton and Jefferson are constantly on the lips of politicians.

Upon a background of the early political struggle between Hooker and Winthrop in Massachusetts as to whether the people
could and should rule or were incapable of it and must be ruled, young Jefferson is introduced. In rapid succession follows his early school training, his entrance into public life as a member of the Virginia House of Delegates and the Continental Congress, and as Governor of Virginia. Of particular interest is the detailed presentation of Jefferson's plan to revise his state's laws and his sponsored measures to abolish entail estates, to secure religious freedom, for the divorcement of state and church, for the abolition of slavery and his plan for a complete state educational system.

The crystallization, if any, of Jefferson's liberal tendency and his ideas for the development of common man are presented through a portrayal of his thoughts and actions as Minister to France, Secretary of State, Vice-President and President. The author points out that Jefferson enumerated in his first inaugural address the principles which ought to shape the administration of government as: "Equal and exact justice to all men, of whatever state or persuasion, religious or political... Peace, commerce, and honest friendship with all nations... The support of the state governments in all their rights, as the most competent administration of our domestic concerns, and the surest bulwarks against anti-republican tendencies... The preservation of the General government, in its whole constitutional vigor, as the sheet anchor of our peace at home, and safety abroad... The diffusion and arraignment of all abuses at the bar of public reason... Freedom of Religion, freedom of the press, freedom of person under the protection of the Habeas Corpus; and trial by juries, impartially selected."

The period from the death of Jefferson to 1936, is surveyed under the heading of Pulse Beats of Democracy, the outbursting of the desire of common man to rule. The author concludes with a discussion and evaluation of present-day tendencies and conditions in our government in the light of Jeffersonian principles. No person interested in the fundamental principles of life, liberty and the pursuit of happiness can afford to miss this penetrating and thought-provoking volume.

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BOOKS RECEIVED

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


PAMPHLETS AND PERIODICALS


